UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DEBORAH ANNE DEMPERIO — CASE NO. 98-66701

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed May 6, 1999, by Deborah A. Demperio ("Debtor"), through her counsel, requesting that the Court hold Respondents Edward T. Dumas ("Dumas"), and Charles McGowen ("McGowen"), as Director of Child Support Services, County of Onondaga Department of Social Services, in civil contempt for violation of the automatic stay

provisions of 11 U.S.C. § 362(a), and awarding the Debtor costs, damages, and attorney's fees as a result of their allegedly contemptuous actions.[1] On June 8, 1999, the Court heard arguments with regard to Debtor's instant motion and the hearing was thereafter adjourned to June 22, 1999, and finally to August 24, 1999, at which point the Court took the motion under submission. All parties have submitted memoranda of law.[2]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this motion pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1), and (2)(O).

FINDINGS OF FACT

On August 2, 1996, by virtue of an order of the Family Court of the State of New York, County of Onondaga, Debtor was required to pay Dumas $57.80 per week in child support. *See* Debtor's Notice of Motion, filed May 6, 1999, at Exhibit A (Child Support Order). This order

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[1] While the instant Motion is somewhat confusing as to the identity of the actual Respondents other than Dumas, the Court concludes that it will consider the additional Respondents as McGowen and the County of Onondaga Department of Social Services ("OCDSS"). In reaching this conclusion, the Court notes that it is including the Child Support Services ("CSS"), the Child Support Enforcement Bureau ("CSEB"), and the Support Collection Unit ("SCU") as subunits of OCDSS.

[2] After the deadline to submit memoranda of law had passed, counsel for the Debtor and Respondents submitted additional papers without requesting an extension of the above deadline. The Court has not considered any of these submissions in ruling on this motion.

directed that all child support payments were to be made to the SCU. *Id.* As a result of a 1990 change in New York law, when payments are directed to be paid through the SCU, the SCU must issue an immediate income execution. *Id.* Consequently, the SCU executed on Debtor's income as a result of the Child Support Order in the sum of $115.60 biweekly. *Id.*

On October 16, 1998, the Debtor filed a voluntary petition for relief pursuant to Chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") and associated schedules ("Chapter 13 Petition"). After filing the Chapter 13 Petition, on October 20, 1998, counsel for Debtor personally delivered a time stamped copy of the Chapter 13 Petition to the Comptroller of the County of Onondaga, apparently in an effort to stay the continuation of the income execution of Debtor's wages. *See* Debtor's Motion to Determine Contempt, filed May 6, 1999 ("Debtor's Motion"), at ¶ 6. Following the delivery of the Chapter 13 Petition, Debtor's counsel had numerous contacts with counsel for OCDSS.[3] Despite the efforts of Debtor's counsel to stop the income execution, OCDSS continued to execute on Debtor's income. The final income execution took place on November 27, 1998, in the amount of $215.60. See attachments to letter by Fortuna Habib, Esq., Respondents' counsel, received by the Court, pursuant to its request, on October 12, 1999 ("Habib Letter").[4]

Although the final execution on Debtor's income was November 27, 1998, on or about January 22, 1999, Debtor received the first notice from SCU that it would be notifying the

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[3] The Court notes that all of the Respondents, with the exception of Dumas, have appeared by a single attorney, Fortuna S. Habib, Esq., whose title is attorney for the CSEB. The Court will refer to Ms. Habib as counsel for all of the Respondents with the exception of Dumas.

[4] Debtor's counsel contends that the income execution did not terminate until December 18, 1998. (*See* Debtor's Motion at ¶ 9). Since both dates are well after Debtor filed her Chapter 13 petition, the actual date is not critical.

Department of Motor Vehicles to suspend her driver's license due to her failure to pay child support. Debtor's Motion at Exhibit E. In response to this notice, Debtor's counsel allegedly spoke to a representative of OCDSS at the end of January. *See* Debtor's Motion at ¶ 9. After a brief discussion, the representative allegedly made a series of entries into her computer and assured Debtor's counsel that the notices would stop. *Id.* Despite those assurances, Debtor allegedly received a second notice on or about February 19, 1999. *Id.* at ¶ 10. Finally, on or about April 26, 1999, Debtor received a notice from the Commissioner of Motor Vehicles, dated April 23, 1999, that her license would actually be suspended effective May 7, 1999. *Id.* at ¶ 11 and Exhibit G. In a final effort to resolve this matter, the Debtor, herself, allegedly spoke to the Commissioner of Social Services, complaining of the actions of the OCDSS. *See id.* at ¶ 13. It is alleged that during that meeting, Debtor was advised, "you have a lawyer, have him do something about it." *Id.*

In order to compel Debtor to resume support payments, Dumas filed a motion for relief from the automatic stay. On February 4, 1999, this Court signed an Order granting that motion with regard to postpetition support obligations. The Order also lifted the stay with respect to prepetition arrears "unless such claims are included in a plan which shall be confirmed by the Court." On March 5, 1999, OCDSS, again, executed on the Debtor's income in the amount of $215.60. Subsequently, OCDSS reduced the amount of the execution to $115.60.

On June 21, 1999, the Debtor's Chapter 13 plan was confirmed by this Court. Debtor's confirmed plan provides for distribution to Dumas on account of past due child support in the amount of $155.12 per month for fifty-nine months of the sixty month plan.

ARGUMENTS

Debtor argues that despite both constructive and actual notice of the filing of her Chapter 13 Petition, OCDSS and McGowen continued to deduct child support payments from Debtor's wages and sent two letters threatening to notify the Department of Motor Vehicles to suspend her driver's license because of her failure to pay support. Debtor contends these actions constituted a violation of the automatic stay to such an extent as to warrant a finding of civil contempt against OCDSS.

In response to the Debtor's allegations, OCDSS claims that it neither sent nor caused to be sent any notices pertaining to the Debtor's driver's license. Alternatively, OCDSS argues that, even if it was responsible for sending out the notices, the act of sending those notices was not a violation of the automatic stay because they were seeking suspension of the Debtor's driver's license which is not property of the estate. Finally, even if suspension of the Debtor's driver's license was a violation of the automatic stay, OCDSS contends that it is immune from suit by virtue of the Eleventh Amendment to the U.S. Constitution.

In addition to its allegations against OCDSS and McGowen, Debtor argues that Dumas should also be held liable for the alleged violations of the stay by OCDSS and McGowen. Debtor contends that OCDSS and McGowen were agents for Dumas. Further, as a principal, Dumas should be responsible for the acts of its agent, OCDSS and McGowen, and should also be held liable.

In response to the Debtor's allegations against Dumas, Dumas argues that he obtained relief from the automatic stay on February 4, 1999. As a result of that relief, he contends that he did not violate the stay because any payments he received were covered by that final Order. In addition, Dumas asserts that there is no allegation of fact to support the contention that OCDSS was acting as his agent.

DISCUSSION

Upon filing a bankruptcy petition, Code § 362(a) provides for an automatic stay against any attempts to enforce or collect any prepetition claims from any property of the estate. Property of the estate is defined in Code § 541(a), which delineates seven categories of property interest. For debtors who file petitions under Chapter 13, Code § 1306 specifically notes that in addition to those categories of property identified in Code § 541, the following is included as property of the estate:

> (a)(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.
>
> (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

Once a Chapter 13 plan is confirmed, all property of the estate revests in the debtor. 11 U.S.C. §§ 362(c)(1) and 1327(b).

Code § 362(h) allows individual debtors to recover damages, costs and attorneys fees that

accrue as a result of a willful violation of the automatic stay.[5] In determining whether to impose sanctions against a creditor pursuant to Code § 362(h), the Court uses the standard set by the Second Circuit in *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.),* 902 F.2d 1098, 1105 (2d Cir. 1990). There, the court held "any deliberate act taken in violation of the stay, which the violator knows to be in existence, justifies an award of actual damages." *Id.* In addition to actual damages, punitive damages may be imposed if there is a finding that the offending creditor "acted with maliciousness or bad faith." *Id.*

In the case at bar, Debtor seeks sanctions against, Dumas, McGowen, and OCDSS for violating the automatic stay. With respect to Dumas, Debtor alleges that he, as a principal, is liable for the actions of OCDSS taken as his agent. In order to have an agency relationship, there must be an agreement between the principal and the agent as to the existence of the principal-agent relationship and a clear showing of intent by both parties. *See In re Zacoum's Estate,* 115 N.Y.S.2d 42 (N.Y. Sur. Ct. 1952) (holding an agent can be appointed only at the will and by the act of the principal); *Boro Associates, Inc. v. Levy,* 44 Misc. 2d 269, 253 N.Y.S.2d 592 (N.Y. Civ. Ct. 1964) (holding consent of both principal and agent is necessary to create an agency relationship).

Although Debtor asserts that there existed an agency relationship between Dumas and OCDSS, Dumas simply received the checks sent to him by OCDSS. There is no evidence that Dumas colluded with OCDSS as a principal to have them collect support payments from Debtor postpetition. Debtor has asserted no facts which show the establishment of a postpetition agency

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[5] Though Debtor's motion papers make no specific reference to Code § 362(h), the Court deems that this section is applicable to these facts. It is noted that contempt is not included as a sanction within Code § 362(h).

relationship between Dumas and OCDSS. Debtor has failed to identify any affirmative action on the part of Dumas to create such an agency relationship. In fact, the relationship between Dumas, and OCDSS was created involuntarily pursuant to New York State law. *See* Child Support Order. The Court finds no intention or action on the part of Dumas to create an agency relationship with OCDSS. Therefore, the Court finds Dumas cannot be held in contempt or sanctioned for the actions of OCDSS on the basis of a principal-agent relationship.

In addition to Dumas, Debtor seeks to sanction McGowen, and OCDSS for alleged willful violations of the automatic stay. According to Debtor's Motion, Debtor informed OCDSS of her Chapter 13 filing by numerous methods. Debtor's counsel personally met with case workers at OCDSS on several occasions and corresponded with counsel for OCDSS. After each contact, Debtor was assured that the income execution would stop. However, the income execution did not stop until after the final income execution on November 27, 1998. This was over thirty days after Debtor's counsel personally delivered a copy of the Chapter 13 Petition to the County Comptroller's office.

Moreover, during that thirty day period, it appears that OCDSS executed on Debtor's income for an amount that was approximately $100 more than the Child Support Order required her to pay. OCDSS collected the following amounts prior to Dumas obtaining an order of relief from the automatic stay: October 30, 1998 – $215.60; November 13, 1998 – $215.60; November 27, 1998 – $215.60. The total of the foregoing collection activities amounts to $746.80.[6]

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[6] In addition to collecting the above amounts, on March 5, 1999, OCDSS collected $215.60 from Debtor after Dumas obtained relief from the automatic stay. Although the Court did not specifically award relief from the automatic stay to OCDSS, pursuant to New York State law, Dumas could only receive his support payments through the SCU. After Dumas was awarded relief from the automatic stay, OCDSS executed on Debtor's income for $215.60 instead

OCDSS also argues that they are not in violation of the automatic stay in seeking suspension of the Debtor's driver's license because they allege that the license was not property of the estate. OCDSS relies upon Code § 362 (b)(2)(B), which provides that the filing of a petition does not stay the collection of alimony, maintenance, or support from property that is not property of the estate. Prior to confirmation of a Chapter 13 plan, however, there are no non-estate assets and even matrimonial creditors are stayed from enforcing their claims by Code § 362. *See Sak v. Sak (In re Sak)*, 21 B.R. 305, 307 (Bankr. E.D.N.Y. 1982). While OCDSS asserts that Debtor's driver's license is not property of the preconfirmation estate, its own memorandum of law points out that such a view is clearly in the minority. *See* OCDSS Memorandum of Law, filed August 16, 1999 ("OCDSS Memorandum of Law") at 23-29.

Further, OCDSS's claim that it may recommend suspension of the Debtor's driver's license because it is not property of the estate is irrelevant. OCDSS was clearly attempting to use the threatened suspension of the Debtor's driver's license to coerce her to satisfy a prepetition debt. This is a violation of Code § 362(a)(6). Because OCDSS attempted to collect on a prepetition debt in this manner, this Court finds that OCDSS was in violation of Code § 362(a)(6). Based upon the violations of Code § 362(a)(6) and the fact that OCDSS had actual knowledge of the bankruptcy filing at the time it took these actions, the Court finds these actions were willful.

OCDSS argues, even assuming its acts were contemptuous or otherwise sanctionable, it is immune from prosecution pursuant to the Eleventh Amendment of the U.S. Constitution. The

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of the $115.60 permitted by the Child Support Order. This amount was $100 more than the Child Support Order required Debtor to pay. As OCDSS has provided no other explanation for this extra $100, the Court is compelled to find that this was dedicated to prepetition arrears.

Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state." U.S. CONST. amend. XI. "As interpreted, the Eleventh Amendment prohibits suits in federal courts against state governments in law, equity, or admiralty by a state's own citizens, by citizens of another state, or by citizens of foreign countries." *See* Erwin Chemerinsky, FEDERAL JURISDICTION § 7.1 (3d ed. 1999). This protection extends to states and state officials in appropriate circumstances but generally does not extend to counties and similar municipal corporations. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). However, if a county entity can prove that it is "an arm of the state," it will be afforded the protection given to the state by the Eleventh Amendment. *Id.* As OCDSS is not a state entity, it must demonstrate that it is "an arm of the state" in order for the protection afforded by the Eleventh Amendment to apply. *Id.*

To determine whether a municipal or county agency is "an arm of the state," the Court considers six factors ("Feeney factors") enumerated in *Feeney v. Port Authority Trans-Hudson Corp.,* 873 F.2d 628 (2d Cir. 1989) *aff'd on other grounds,* 495 U.S. 299 (1990). These factors are derived from the Supreme Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). They require a court to examine:

> (i) how the entity is referred to in the documents that created it; (ii) how the governing members are appointed; (iii) how the entity is funded; (iv) whether the entity's function is traditionally one of local or state government; (v) whether the state has veto power over the entity's actions; and (vi) whether the entity's obligations are binding upon the state.

Feeney, 873 F.2d at 630-631.

If analysis of the Feeney factors presents an inconclusive result as to whether the municipal

agency is "an arm of the state," the Court may then rely on two additional inquiries: "(a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk?" *See Mancuso v. N.Y. State Thruway Auth.,* 86 F.3d 289, 293 (2d Cir. 1996). Of these two inquiries, it is most important to consider the risk to the state treasury. *See id.* (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)).

The first Feeney factor the Court will consider is how the entity is referred to in the documents that created it. N.Y. Social Services Law § 111-h governs the establishment of SCU as the collection division of a social services district and states in relevant part:

> 1. Each social services district shall establish a support collection unit in accordance with regulations of the department to collect, account for and disburse funds paid pursuant to any order of child support or child and spousal support issued under the provisions of section two hundred thirty six or two hundred forty of the domestic relations law, or article four, five, five-A or five-B of the family court act...

N.Y. Social Services Law § 111-h (McKinney Supp. 1999).

Recently, this Court, in an opinion by the Honorable Robert E. Littlefield, Jr., discussed the identical issue in *In re Durant,* 239 B.R. 859 (Bankr. N.D.N.Y. 1999). In that case, the debtor, Jeffrey Durant ("Durant"), paid child support in the amount of $35 per week pursuant to a family court order. *See id.* at 861. Two years after the family court order had been entered, Durant filed for protection pursuant to Chapter 12 of the Code. Thereafter, Jefferson County Department of Social Services ("JCDSS") continued to levy on Durant's income. On April 17, 1997, the Court ordered JCDSS to stop all income levies and executions. *Id.* In response to these continued levies, debtor filed a motion for contempt against JCDSS. In opposition to debtor's motion for contempt, JCDSS claimed that they were protected under the Eleventh Amendment.

In ruling on the first Feeney factor which addresses how the entity is referred to in the applicable sections of the statute, Judge Littlefield concluded that the facts weighed against immunity:

> because the support collection unit is created by the county [Social Services Department]...[t]he state department delegates the duty of establishing the support collection unit to the county [Social Services Department] and the responsibility of the county [Social Services Department]'s activities in assisting the state in enforcement and collection of support, to the organizational unit established by the county [Social Services Department].

Id. at 866.

Anticipating that this Court would look to *Durant* for guidance on this factor, counsel for OCDSS claims that Judge Littlefield misinterpreted the word "establish." Counsel asserts that according to Webster's New World Dictionary, the word "establish" means, not to create, but to "make stable, to settle, order, ordain or to set up." *See* OCDSS Memorandum of Law at 11. Moreover, OCDSS alleges that the department of social services is created by New York State law and is set up by local acts. *Id.* OCDSS alleges that this common usage of the term "establish" is further supported by its use in the Establishment Clause of the First Amendment of the U.S. Constitution. OCDSS relies on *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 67 S.Ct. 504 (1947) in support of its contention. In that case, the Supreme Court defined the "establishment of religion clause" to mean at least the following:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in

the affairs of any religious organizations or groups or vice versa."

Everson, 330 U.S. at 15-16, 67 S.Ct. at 511-512 (citations omitted).

OCDSS's reliance on *Everson* is misplaced. The "establishment" of a pre-existing religion is not the same as the establishment of a new division of the department of social services. In *Everson*, the Supreme Court defined the limitations of federal and state governments with regard to the Establishment Clause but did not define the word "establish" in every context. This Court agrees with Judge Littlefield and holds SCU is established by the OCDSS in accordance with state regulations. Thus, the first factor weighs against a finding that OCDSS is protected under the Eleventh Amendment.

The second Feeney factor is how the governing members of the entity are appointed. In New York, there is a commissioner of public welfare in each county who administers public assistance for his/her own county. *See* N.Y. Social Services Law § 65 (McKinney 1992). The commissioner of each county is appointed by the county body or officer for a term of five years. *See* N.Y. Social Services Law § 116. Although OCDSS is established by the county, the state department supervises various activities of the OCDSS and the commissioner. *See* N.Y. Social Services Law §§ 111-b and 111-c (McKinney 1992). Therefore, because the county commissioner and various activities of the OCDSS are supervised by the state, the second Feeney factor weighs in favor of immunity.

The third Feeney factor pertains to how the entity is funded. The funding structure of OCDSS is described by N.Y. Social Services Law § 111-d which states that after deducting any federal funding, the county is responsible for fifty percent of the expenditures relating to OCDSS. N.Y. Social Services Law § 111-d (McKinney Supp. 1999). OCDSS asserts that in Onondaga

County sixty-six percent of OCDSS's funding is derived from federal funds. After deducting that amount, exactly one half of the remaining budget or seventeen percent is state funded and ½ or seventeen percent is funded by the county. *See* OCDSS Memorandum of Law at 13. OCDSS claims that "funding and percentages of funding is a measure to determine where control lies." *See id.* It goes on to assert that it is "[t]he state that controls the power of management, policy and appointment of directors." *Id.* at 14. This argument is one more appropriately made in connection with the second Feeney factor. The bottom line is that the state provides only seventeen percent of OCDSS's budget.

In *Holley v. Lavine*, 605 F.2d 638 (2d Cir. 1979) the Court of Appeals for the Second Circuit clarified the intent inherent in the third Feeney factor. The Second Circuit rejected the argument that the county needed Eleventh Amendment protection as an "arm of the state" where "New York State would only bear *25 percent* of the total liability." *See Holley* 605 F.2d at 644. (emphasis added). In this case, only *17 percent* of the total budget is state funded. *See* OCDSS Memorandum of Law at 13. If, as in *Holley*, the Second Circuit has concluded that a contribution by the state to the potential liability of the entity of *25 percent* was insufficient to afford the county protection under the Eleventh Amendment, surely the *17 percent* the state contributes to OCDSS's budget is insufficient to justify that protection.

Based on *Holley,* the Court concludes that the third Feeney factor, used to measure the extent of the financial burden the state would bear if judgment were awarded against OCDSS, weighs against awarding Eleventh Amendment immunity. Moreover, this rationale is consistent with the concept of protecting the state treasury. Thus, the third Feeney factor weighs against awarding immunity in this instance.

The fourth Feeney factor is whether the entity's function is traditionally one of local or state government. As stated above, the SCU is established by the county social services department. *See* NY Social Services Law § 111-h(1). It is operated by the county social services department and its officials are under state supervision in accordance with state regulations. *See Durant,* 239 B.R. at 867 (citing N.Y. Social Services Law §§ 111-c and 111-h (McKinney Supp. 1999)). In *Durant*, because no further information was offered by JCDSS to help determine whether support collection is traditionally a county or a state function, Judge Littlefield held this factor to be inconclusive. *See id.*

To rectify what was a lack of information in *Durant*, OCDSS directs the Court's attention to the N.Y. Constitution. OCDSS argues that "nothing in the [N.Y. State] Constitution shall prevent the legislature from providing for health and welfare services for all children or for the aid, care and support of neglected and dependent children." *See* OCDSS Memorandum of Law at 14 and N.Y. Constitution Article VII § 8(2). Article VII of the N.Y. Constitution addresses itself to "State Finances." Section 8 identifies exceptions to the prohibition against gift or loan of state credit or money to or in aid of "any private corporation or association or private undertaking..." *See* N.Y. Constitution Article VII § 8(1). This section addresses the ability of the legislature to provide state funding in support of the health and welfare of children either directly or through a subdivision of the state. It says nothing about providing the services themselves as being a state function. The Court finds that OCDSS's argument is unpersuasive and that the fourth Feeney factor does not warrant a finding of immunity.

The fifth Feeney factor involves whether or not the state has veto power over the entity's actions. As discussed in *Durant*, the relevant part of the Social Services Law is § 20(2). This

section discusses the role of the state social services department with regard to the collection unit:

> (b) [the state department of social services shall] supervise all social services work, as the same may be administered by any local unit of government and the social services officials thereof within the state, advise them in performance of their official duties and regulate the financial assistance granted by the state in connection with said work.

N.Y. Social Services Law § 20(2)(b) (McKinney 1992). Subsection (3) of § 20 authorizes the state department of social services:

> (a) to supervise local social services departments and in exercising such supervision the department shall approve or disapprove rules, regulations and procedures made by local social services officials within thirty days after filing of same with the commissioner.

N.Y. Social Services Law § 20(3)(a) (McKinney 1992). N.Y. Social Services Law § 20(3) also authorizes the state department to withhold reimbursements. *See* N.Y. Social Services Law § 20(3) (McKinney 1992) and *Durant,* 239 B.R. at 867-868.

Counsel for OCDSS argues that because the information regarding the functions of income execution and generation of notices to collect child support is gathered and electronically sent to a mainframe computer located at the state capitol in Albany, New York, which computer generates the notices and income executions based on thresholds set by state law, that the State of New York is the sole decision maker and has veto power. *See* OCDSS Memorandum of Law at 16.

All of the definitions of "veto" contained in Webster's Third New International Dictionary reference an affirmative act made by some authority with the power to prohibit an action. For example, "an authoritative prohibition or negative; an act or instance of forbidding something proposed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2548 (1981). Receiving information into a mainframe computer to enable the computer to either mechanically

generate a letter or not cannot be considered a veto. The authority to act on the income execution came from OCDSS when that entity sent the information to the mainframe computer in Albany. In response to that information, the New York State Department of Social Services mechanically inputs the information into the computer. There is no procedure or authority to review the decisions of OCDSS. Moreover, there is no statute which specifically grants the New York State Department of Social Services the power to veto the decisions made by OCDSS. Therefore the Court finds the fifth Feeney factor weighs against granting immunity.

Finally, the sixth Feeney factor is whether the entity's obligations are binding on the state. In *Mancuso*, the Second Circuit, in considering this factor, focused on whether the State of New York would be legally required to pay the entity's debts and whether a judgment against that entity would practically require the State of New York to make payments. *See Mancuso,* 86 F.3d at 296. In order for the Court to consider whether the State of New York would be required to pay OCDSS's debts, the Court must consider the statutory relationship between Onondoga County, as the ultimate authority over OCDSS, and the State of New York.

The New York State courts have defined that relationship as follows:

> Erie County is a duly established social services district (Social Services Law §§ 52, 61(3)). As such it bears ultimate responsibility for the administration of public assistance and care for its residents although it may share this responsibility, under certain circumstances, with other municipalities located within its territorial boundaries (Social Services Law, § 69). An important element of this responsibility is the mandatory duty of the of the County's board of supervisors ' to make adequate appropriations...to provide the public assistance and care required by ... (the Social Services Law)' (Social Services Law § 88). Additionally, the County is specifically obligated to make deficiency appropriations, should the need arise, to fulfill its public assistance responsibilities with regard to both home relief (Social Services Law, § 93(3), (6)) and the federally-aided programs of aid to dependent children and medical assistance (Social Services Law, § 92(1)(a), (c)). The Social Services Law does provide for reimbursement by the State for fifty percent of the nonfederally

> reimbursed cost of these programs, including day care (Social Services Law, §§ 153(1)(d), (e), 368-a(1)(d), 410-c(1)(a)). Further the statute places the power over the administration and regulation of this system of public assistance and care largely in the hands of the State Department of Social Services and its Commissioner (Social Services Law, §§§ 17, 20, 34).

See Holley, 464 F.Supp. at 723-724 (quoting *Toia v. Regan,* 387 N.Y.S.2d 309, 312 (1976)).

Thus, it is the ultimate responsibility of the county governments to finance public assistance payments regardless of whether higher levels of government refuse to reimburse the county. *See Holley,* 464 F.Supp. at 724. Moreover, "[a]lthough in most cases state and federal funding may be available for reimbursement, there is no clear rule requiring the state to indemnify the counties for judgments entered against them." *Id.*

Because there is no clear rule regarding indemnification, OCDSS alleges that there is a second part to the analysis under the sixth Feeney factor: "does the state treasury benefit from the same work that has the potential to expose the state treasury to harm." *See* OCDSS Memorandum of Law at 15. OCDSS's contention that there is a second question pertaining to how the state benefits from the work is incorrect. The sixth Feeney factor does not focus on the benefit to the State of New York. Rather, this factor considers the financial responsibility of the State of New York in the event that a court rendered a judgment against the County of Onondaga. As OCDSS has failed to assert any evidence that the obligations of OCDSS are binding on the state, the Court is uncertain as to the extent of the relationship between OCDSS and the State of New York with regard to the obligations of OCDSS. As a result, the Court finds that OCDSS has failed to prove that the obligations of OCDSS are binding on the state.

Because the six factors do not unanimously support immunity or lack thereof, the Court must consider two additional factors: whether allowing the entity to be sued in federal court will

threaten the integrity of the state and whether it will expose the state treasury to risk. *See Mancuso*, 86 F.3d at 293. As discussed above, the state only contributes seventeen percent to OCDSS's total budget. As the state treasury would, at most, be exposed to seventeen percent of the total judgment, the state treasury would be at minimal risk by a judgment against OCDSS.

Thus, the sole remaining issue to be determined is that of whether a suit against OCDSS in a federal court will threaten the integrity of the state. The state has no direct involvement in defending this motion against OCDSS. The state has filed no papers and has not appeared to protect the interests of OCDSS. Thus, the integrity of the state would not be in jeopardy. For the reasons stated above, the Court concludes that OCDSS is not immune under the Eleventh Amendment.

With regard to Respondent McGowen, the Court finds that as McGowen makes no argument to distinguish himself from Respondent OCDSS, the Court must consider his liability for those violations of the automatic stay. In *Durant, supra,* Respondent Amy Farmer, a clerk for JCDSS, argued that she should not be held liable based on the doctrine of *respondeat superior. See Durant,* 239 B.R. at 869. As the Executive Director of CSEB, McGowen could not possibly make a similar argument. As a result, because McGowen makes no argument to distinguish himself from OCDSS and because as the Executive Director of CSEB, he could not have made an argument based on the doctrine of *respondeat superior,* the Court finds that McGowen is also liable for the violations of Code § 362(a)(6) discussed above and that those violations were willful. As the Court has found that OCDSS is not entitled to Eleventh Amendment immunity, the Court finds McGowen is likewise not entitled to Eleventh Amendment immunity.

In response to Debtor's Motion, Dumas requests that this Court award sanctions against the Debtor. In order to determine if these sanctions are appropriate, the Court must determine the nature of the contempt alleged and determine if the correct procedures have been followed. *See Dorsagno v. Cooley,* No. 95-cv-201, 1996 WL 312180 at * 3 (N.D.N.Y. May 31, 1996).

Rule 9020 of the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P.") provides in relevant part:

> Contempt committed in a case or proceeding pending before a bankruptcy judge...may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing ...

See Fed. R. Bankr. P. 9020.

Thus, in order for a motion for contempt to be considered by the court, the complainant must serve a notice that states the essential facts relevant to the contemptible conduct and describe the contempt as civil or criminal.

In applying these requirements to the instant motion, Dumas, in his Answering Memorandum, asserts that his being named in Debtor's motion was malicious and intended to make enforcement of his rights so costly that he would abandon them. *See* Answering Memorandum of Dumas, dated August 17, 1999, at 3. Moreover, Dumas states, "Naming [Dumas] as respondent was willful and reckless and has been extremely upsetting, painful, and costly to me." *See* Answering Affidavit of Edward T. Dumas sworn to May 27, 1999, ("Dumas Affidavit") at 3. Assuming the above comments would be sufficient for the notice requirement of Fed. R. Bankr. P. 9020, Dumas fails to allege any facts constituting the contempt charged or to describe the contempt as criminal or civil contempt. As a result, the Court will not hold the

Debtor in contempt.

Based on the foregoing it is hereby

ORDERED that Debtor's Motion as to OCDSS and McGowen is granted and OCDSS and McGowen will reimburse the estate in the amount of $ 646.80 which represents the income collected by OCDSS and McGowen subsequent to the filing of the Chapter 13 case, but prior to this Court's order for relief from the automatic stay, and it is further

ORDERED that OCDSS and McGowen will reimburse the estate in the amount of $100 which represents the income collected by OCDSS and McGowen after this Court's order for relief from the automatic stay, but in excess of the amount the Child Support Order authorized the SCU to deduct from Debtor's income, and it is further

ORDERED that OCDSS and McGowen will compensate Debtor's counsel for reasonable fees and costs associated with the filing and arguing of this motion. Debtor's counsel will submit time records to the Court and serve same upon OCDSS and McGowen within 30 days of the date of this Order so that the Court may assess the fees and costs associated with this motion.

Dated at Utica, New York

this 6th day of January 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge