NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
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December 23, 1988

Eugene Doyle,
Executive Director
P.O.O.R.
102-12 164th Avenue
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Dear Mr Doyle:

Thank you for your comments on the recodification of 18 NYCRR Part 358 which was published in the New York State Register on December 30, 1987. As you can see from the attached "Assessment of Public Comment", we received many comments from advocate groups and local social services districts as well as a great deal of input from an advisory committee consisting of legal advocate groups, local district legal staff and Department legal staff. The final version of the recodification reflects changes for clarity and significant changes in content as a result of the comments we received.

The recodification was filed on December 23, 1988 and is effective on January 15, 1989.

Attached is a final copy of the recodification as well as the "Assessment of Public Comments".

Very truly yours,

Susan V. Demers

Susan V. Demers

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Assessment of Public Comments

Written comments were received from four advocate groups and eight social services districts. In addition, appropriate legal staff of the Department had a number of meetings with an advisory committee comprising legal advocates and local agency attorneys, which provided extensive comments and aided substantially in the development of the final regulation. All comments were carefully reviewed and many changes were made in response to the comments. This assessment describes the most significant comments.

I. Subpart 358-2 - Definitions.

Advocate groups suggested the inclusion of more detail in notices sent by social services districts to applicants for and recipients of assistance and benefits. They suggested that more specificity be required in stating the reasons for the agency action and that the documents relied upon in making the determination be listed. In addition, a group requested that such additional information as the right to subpoena witnesses, a toll free number to request a fair hearing, and names, addresses and telephone numbers of advocate groups available to represent appellants be included in the notice.

Local social services districts were concerned that the requirements for adequate notice were excessive. However, most of the requirements for the contents of the notice are based on federal regulations or on the outcome of litigation. Therefore, most of the requirements are not new. What is new is the consolidation of all of the notice requirements in one place.

The Department is working to develop a better telephone system. In Albany, a computerized telephone switching system has been implemented. Calls enter a queue and are answered as soon as a line becomes available. The computer provides information to supervisory staff to determine whether additional persons are required to cover the telephones at any given time based on the wait in the queue. The situation in New York City is under review to determine what steps should be taken there to improve response to clients there. Interim measures have already been implemented to shift some of the calls to Albany.

With respect to a request that notices list names, addresses and telephone numbers of advocate groups available to assist appellants, many upstate districts do this already. However, in major metropolitan areas, the groups available to assist appellants are too numerous to list on a notice. Advocate groups in the metropolitan areas are encouraged to work with social services districts in their areas to develop resource lists which can be attached to the notices or included in an informational pamphlet handed out at the time of application and recertification. There are too many organizations to be included in statewide notices in any meaningful way.

In response to the comments we received, specific notice requirements have been added to certain types of actions. To the extent possible, the amendments make notice requirements uniform among all programs covered by

the regulations. The amendments clarify that notices are required for all types of case actions, including an increase in assistance or benefits. This requirement is not new; however, implementation for various programs among the different districts has not been uniform.

In response to one advocate group's comments, a notice to a recipient will be required if there is a change in any item which is part of the calculation of a benefit, despite the fact that a change in that item does not result in a net increase or reduction in the benefit at the current time. In addition, definitions have been added for food stamp adverse action and expiration notices.

Notification of the right to subpoena witnesses has not been added. This will be addressed more appropriately in an informational pamphlet on hearing procedures.

Advocate groups suggested that five days should be added to the current 10 days for timely notice, to allow for delays in mail and difficulty in telephoning in a request for a hearing. Although this comment was considered, no changes were made to the proposed regulations because we did not ascertain that there is a significant problem in this area. Also, we are improving telephone access for requesting hearings. As drafted, the regulations meet federal requirements.

The proposed definition of hearing officer elicited a large number of comments. As published, the proposed regulations did not require that a hearing officer be an attorney. In response to these comments, the requirement that a hearing officer be an attorney has been restored.

II. Subparts 358-3 - Rights and Obligations of Applicants and Recipients and Sponsors of Aliens; 358-4 - Rights and Obligations of Social Services Agencies.

The most significant comments concerned the right to a fair hearing, the type of notice required, and the right to access and to copies of the client's case record.

Subsequent to publication, Subpart 358-3 was redrafted to clarify when a client is entitled to a notice and has a right to a fair hearing. Although social services districts expressed concern about having to provide notices for increases in benefits, due process rights require that the client be informed whenever there is any change in benefits. It is critical that the client receive information sufficient to ascertain that benefits are computed properly, even if the action being taken is not one which has an adverse affect on the client.

An advocate group's suggestion that recipients be given the right to a hearing in cases of overpayment and fraud is being reviewed separately from this recodification, since it has implications for other divisions of this Department and other sections of law and regulations may be affected.

Advocate groups objected to limitations on hearings involving liens, restitution and child support pass-through payments. The first two issues are more appropriately resolved by the courts and remedies are adequately addressed by other bodies of law. The third issue is currently in litigation. Accordingly, no changes were made in this area.

In certain limited situations a social services district may take certain actions without providing prior notice; i.e., when the client provided the information upon which the action is being taken and the client provides a written statement indicating that the client understood what action was being taken. One advocate group suggested that additional limitations be placed on taking actions without prior notice. The regulations conform with federal requirements. The protections that additional limitations would offer clients would be outweighed by the burden such further limitations would place on social services districts. Therefore, additional changes have not been made.

The provisions which engendered the most comment were those concerning access to records. Advocate groups objected to the new requirement that documents to be presented into evidence be provided only upon request as being a diminution of due process rights of appellants. In addition, they suggested that if an agency fails to provide documentation prior to the hearing, such documentation should be excluded from evidence.

Under current regulatory requirements, within 72 hours of a hearing request involving a discontinuance, reduction or suspension of benefits, a social services agency must provide the appellant with copies of the documents which the agency intends to present at the hearing. The present requirements have proven problematic for a number of reasons. The current regulations only require that documents be provided to persons whose cases involve a discontinuance, reduction or suspension. There is no requirement covering denials and adequacy cases which constitute approximately 50 percent of the 160,000 hearing requests a year. Additionally, the current regulations place a heavy burden upon social services districts by requiring them to needlessly generate a substantial number of copies of documentation for the approximately 80,000 hearing requests covered by the current regulation when only about 35,000 of these cases ever proceed to a hearing. Besides placing a heavy burden on districts, the current 72 hour requirement ignores the needs of half of the persons requesting hearings based on the case action involved.

The new provisions apply the document requirements to all types of hearings. However, districts will be required to provide documents only upon the request of an appellant. Documents will have to be provided within three working days in most cases. By limiting the provision of documents to

those clients who request copies and by giving districts additional time to gather the documentation, districts should be able to better focus on those cases where the client needs the documentation. The materials provided will be more complete and the rights of clients better protected. Better prepared packages of information coupled with improved notices should enable clients and districts to settle a greater percentage of differences prior to the hearing date. It should be noted that clients still have an unfettered right at all times to access their case record, even in situations where they have not requested a fair hearing.

With respect to the comment that documents not provided prior to the hearing be automatically excluded, language has been added giving the hearing officer the authority to rule on the admissibility of evidence. In addition, we have clarified the powers of the hearing officer to reschedule cases where there would be substantial prejudice to due process rights if the hearing proceeded prior to the availability of documents.

Social services districts objected to the requirement that they provide the client with documents in addition to those the districts intended to present into evidence at the hearing. Some districts wanted to charge for all copies and others only to provide a reasonable volume of material at no charge. Access to records and to copies of materials is a fundamental aspect of an appellant's due process rights. Accordingly, no limitations on free access to records will be imposed.

Language concerning reimbursement for travel, child care and other expenses has been amended to clarify that "necessary expenses" are not limited to expenses for appellant's attendance at the fair hearing. As proposed, the regulatory language was not intended to preclude reimbursement for reasonable travel costs for witnesses and representatives.

Advocates commented that a five day period for restoring reduced or discontinued benefits is too long in most situations when an appellant is entitled to aid continuing. One district requested that the period be changed to 10 days and another stated that five days was too short. The amendments have been redrafted to provide that benefits must be restored as soon as possible, but in no event later than five days after the social services agency is informed that the appellant is entitled to aid continuing or to reinstatement of aid.

One advocate group opposed agency conferences on the ground that unrepresented clients would be pressured at conferences to withdraw their hearing requests. The advocate group suggested that conferences be limited to represented clients and that conferences be presided over by persons not involved with the original decisions who have authority to reverse decisions. These suggestions have not been adopted. Conferences can be very helpful to the client in resolving differences sooner by establishing a dialogue between client and agency in a less stressful environment than the hearing room, often at a location closer to the client's home. It should be noted that in settling the 1980 federal lawsuit of Gossom v. Toia (USDC/WDNY), advocate groups strongly urged that conferencing be used. The Department notes that where conferencing is used regularly, many more issues are resolved without the need for hearings.

One advocate group alleged that mediation deprives appellants of hearing rights. The social services district currently involved in the mediation project recommended that mediation be discontinued. If continued, it recommended that the agency not be required to produce the case record. We have analyzed the mediation process and have determined that it is of limited value. Therefore, mediation has been deleted from the recodification.

In response to comments from advocates, the proposed regulations have been amended to provide that once an appellant advises the Department of an authorized representative, all correspondence relating to the conference and hearing must be sent both to the appellant and to the appellant's representative.

Subpart 358-5 The Fair Hearing Process.

There was a comment that language concerning the hearing officer's obligation to question witnesses was contradictory. The language has been revised to clarify that the hearing officer has an obligation to question parties and witnesses, particularly where the appellant demonstrates difficulty with or inability to question witnesses.

One advocate group recommended that hearings not be adjourned at the request of a social services agency. A social services district advocated that appellants be limited to one adjournment where the appellant was receiving aid continuing. No changes have been made as a result of these comments. Due process rights of all parties, as well as this Department's own administrative needs, require that there be flexibility in the granting of adjournments.

One advocate group believed that if a hearing officer's findings of credibility were amended by the Commissioner's designee, the reasons for rejecting any findings of credibility should be stated in the decision. Findings of credibility are rarely changed. Any such change is based upon the hearing officer's own review of the hearing record. No changes were made as a result of the comment.

One advocate group argued that the requirement that a fair hearing decision be supported by substantial evidence was inappropriate in a de novo hearing and that the standard should be preponderance of the evidence. Section 306(1) of the State Administrative Procedure Act states that "No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence." Both federal and State courts have upheld application of this standard at the hearing level as well as at the judicial level. Foresta v. New York State Policemen's and Firemen's Retirement System, 95 A.D.2d 893 (3d Dept., 1983); Martinez v. Blum, 624 F.2d 1 (2nd Cir., 1980).

Advocate groups argued that time frames should be established for issuance of decisions in expedited fair hearings. The Department has substantially increased the number of hearings for which it gives priority in scheduling based on the needs of appellants for expedited processing. The Department has substantially reduced the time it takes to hold an expedited hearing and issue a decision. With the complete implementation of the Fair Hearing Decision Management System (FHDMS) in the near future, it is expected that there will be further improvements in the time frames for issuance of decisions. The Department has the capability to hear and issue a decision the same day and does so where circumstances warrant. It should be noted that any significant increase in the number of cases receiving priority in scheduling will result in a longer period of time to process other cases. The Department must maintain the administrative flexibility to balance the need for expedited processing with the need for timely processing and issuance of all decisions. Procedures for priority scheduling of hearings currently are under review. Pending such review, the recodification has been amended to provide for priority scheduling of hearings involving denials of Emergency Assistance to Adults and Emergency Assistance to Families, hearings involving food stamp benefits where the food stamp household expects to move away from the social services district before the fair hearing decision would normally be issued, and denials of assistance or benefits where expedited determination of eligibility otherwise is required by the Department.

There were a number of comments concerning admission of the media to hearings. Generally, social services districts opposed media access on the ground of confidentiality, not only of the appellant but others whose names might be mentioned during the hearing. In response to these comments language has been added to protect the confidentiality of those persons for whom the appellant cannot waive the right to confidentiality.

Social services districts opposed proposed section 358-5.10 which would have permitted the issuance of certain directives by the Commissioner prior to the hearing and prior to a hearing decision. This section has been deleted from the regulations. This authority is intrinsic to the powers of the Commissioner under Sections 20 and 34 of the Social Services Law; it is not necessary to be in regulation.

Subpart 358-6 Decision and Compliance.

Advocate groups wanted the decision to contain rulings on rejection of evidence, on the issuance of subpoenas and on the adequacy of the agency notice which is the basis for the fair hearing. Language has been added to allow the hearing officer to address violations of 18 NYCRR Part 358 in the decision and to fashion appropriate remedies.

The regulations were cited by an advocate group as deficient in the area of compliance. The proposed regulations were cited as weakening the Department's obligation to assist clients in obtaining compliance and ensure the restoration or provision of benefits as quickly as possible. The published draft was criticized for not including language which required the

Department to assist appellants in obtaining compliance if compliance did not occur within 10 days of the decision. This language was not included because it gave appellants the impression that they could not seek help unless 10 days had passed when there are situations where clients should seek help in much shorter periods.

One advocate group suggested that compliance procedures would be strengthened by requiring the Department to obtain immediate implementation of a decision where compliance has not occurred within five days of issuance of the decision. It was suggested that specific steps be enumerated which the Department would be required to take, as well as the time frames within which such steps must be taken. The regulations relating to compliance as drafted are in accord with federal requirements that decisions not only be issued but also be complied with within federally mandated time periods. Language has been added to require that compliance be prompt but in no event later than the federally mandated time frames.

In addition, it was suggested that a compliance sheet be completed by each social services agency and sent to the appellant and to the Department. Requiring the Department to take affirmative steps to determine whether there has been compliance with over 75,000 decisions is not administratively feasible and would have a negative effect upon Department efforts in areas where there are compliance problems. Computerized tracking of compliance requests has been implemented. It is expected that such system will improve Department effectiveness in monitoring compliance problems.

A number of comments were received concerning the procedures for issuing a decision without a hearing. This Department has always taken the position that the determination to issue a decision without an evidentiary hearing rests within the discretion of the Commissioner. One advocate group wanted the decision without a hearing process to be mandatory when there was no dispute as to facts. A social services district wanted the decision that no factual issue exists to be agreed to between the social services district and the appellant before there was a determination that a decision would be issued without a hearing. The language in this section has been clarified so that the election to issue a decision without a hearing rests solely within the discretion of the Commissioner. The recommendation that there be specific agreement by a district that no factual issue exists has been rejected because there are many instances where districts fail to respond to the Department's request for an answer to the original application for a decision without a hearing.

One district was totally against the policy of issuing directives in similar cases. The district believed that the fair hearing process is individualized and if there is a misapplication of law, regulation or policy it should be brought to the district's attention through program staff of the Department and not through the fair hearing process.

One advocate group complained that the directive to review similar cases was no longer in the letter transmitting the decision to the district. The complaint was that by distinguishing between directives given in the letter and those given in the decision, the proposed regulatory language was more limiting than the language relating to direction in similar cases currently found in sections 358.21 and 358.23. In response to the comment we have decided to maintain the language currently found in sections 358.21 and 358.23.