NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE
OFFICE OF ADMINISTRATIVE HEARINGS

TO: All Administrative Law Judges and Professional Staff

DATE: June 26, 2009

FROM: Jim Ryan

SUBJECT: Re-issuance of Transmittal No. 92-OAH-FH-4 Chatfield v. Bane: Right to Confront and Cross Examine Witnesses at Fair Hearings

---

Attached is Transmittal No. 92-OAH-FH-4, "Chatfield v. Bane: Right to Confront and Cross Examine Witnesses at Fair Hearings", which was originally issued by Russell Hanks, Deputy General Counsel, on December 15, 1992. This Transmittal is being re-issued as part of a Stipulation of Settlement and Order of Discontinuance in the case of Merced v. Albany County Department of Social Services et. al. (07-CV-1348) filed in the Northern District of New York and so ordered by the Hon. Gary L. Sharpe on June 19, 2009. OTDA and DOH were parties to this litigation, which concerned the discontinuance, change or reduction in services under the Medicaid Aids Long Term Home Health Care Program (ALTHHCP). A copy of the Stipulation (excluding the exhibits) is attached.

Paragraph 5 of the Stipulation directed OTDA to re-issue this transmittal to all Hearing Officers and relevant staff. Paragraph 5 also makes reference to a proposed directive from the Department of Health regarding notices and fair hearing rights for Medicaid Aids Long Term Home Health Care Services. As soon as this directive is issued by DOH, and received by OAH, it will be distributed to you.

The transmittal provides instructions to the Hearing Officers about the requirements in federal regulations to provide the Appellant, or their representative, an adequate opportunity to question or refute any testimony or evidence and to confront and cross-examine adverse witnesses. Specifically, the transmittal discusses the situation where an adverse witness' statement is submitted in the form of a document or testimony from another witness and the individual is not present at the hearing for purposes of cross-examination.

Attachments

Transmittal No. 92-OAH-FH-4
Stipulation and Order in Merced v. Albany County Department of Social Services

Transmittal No. 92-OAH-FH-4

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS

TO: All Administrative Law Judges and Professional Staff

DATE: December 15, 1992

FROM: Russell J. Hanks
RJH

SUBJECT: Chatfield v. Bane: Right to Confront and Cross Examine Witnesses at Fair Hearings

---

As part of the stipulation and settlement in Chatfield v. Bane (USDC/WDNY), the Department agreed to provide instructions to its hearing officer staff concerning the provisions of 45 CFR 205.10(a)(13)(vi). The following instructions satisfy the Department's responsibilities under the stipulation.

INSTRUCTIONS

45 CFR 205.10(a)(13)(vi), 7 CFR 273.15(p)(5), and 42 CFR 431.242(e), provide that the appellant, or the appellant's representative, shall have adequate opportunity to:

> "... question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses."

The attached decisions address an appellant's opportunity to confront and cross-examine adverse witnesses. These decisions specifically address the opportunity to confront and cross-examine an adverse witness when the witness' statement is submitted at the the hearing (in the form of a document or testimony from another witness) and the declarant is not present. Please pay particular attention to Ortiz v. Eichler, 794 F.2d 889, at key notes 5, 6, and 7, beginning on page 895, and at footnote 6 on page 896.

If a pro se appellant or an appellant represented by someone other than an attorney or law firm expresses an interest in questioning the declarant, the ALJ should determine the relevance of the statement offered into evidence in relation to the issues under review. If not relevant, no action to secure the declarant's presence is necessary. If the statement is relevant, and not otherwise admissible, the ALJ must seek the presence of the declarant, either through agency cooperation or subpoena, or exclude the statement.

If appellant's counsel is interested in an opportunity to confront and cross-examine the declarant, counsel should be reminded of her/his power to subpoena the witness. An adjournment should be offered in order to afford counsel that opportunity.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CARMEN MERCED,

Plaintiff,

-against-

The ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES; DAVID KIRCHER, individually and in his official capacity as Deputy Commissioner of the ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES; MARY BETH RUTOWSKI, individually and in her official capacity as Vice President/Director of Patient Services at the THE EDDY VISITING NURSE ASSOCIATION; the EDDY VISITING NURSE ASSOCIATION; RICHARD F DAINES, in his official capacity as Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH; THE NEW YORK STATE DEPARTMENT OF HEALTH; DAVID A HANSELL, in his official capacity as Commissioner of the NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE; and the NEW YORK STATE OFFICE OF TEMPORARY and DISABILITY ASSISTANCE,

Defendants.

STIPULATION OF SETTLEMENT AND ORDER OF DISCONTINUANCE PURSUANT TO RULE 41(A)

07-CV-1348

GLS/DRH

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, the attorneys for Plaintiff and Defendants Richard F. Daines in his official capacity as Commissioner of the New York State Department of Health, the New York State Department of Health ("NYSDOH"), David A. Hansell in his official capacity as Commissioner of the New York State Office of Temporary and Disability Assistance, and the New York State Office of Temporary and Disability Assistance ("OTDA") (collectively " Defendants"), parties to the above entitled-action, that, whereas no party hereto is an infant or incompetent person for whom a committee has been

appointed, and no person not a party has an interest in the subject matter of the action, the above-entitled action be and the same hereby is settled on the particular circumstances of this case, on the following terms and conditions:

1. Plaintiff discontinues this action with prejudice and without damages, costs, interest or attorneys fees, and discharges and releases Defendants, including their agencies, subdivisions, employees, private contractors or assignees, of any and all claims, demands, or causes of actions, known or unknown, now existing or hereafter arising, whether presently asserted or not, which relate in any way to the subject matter of this action, and further agrees to discontinue and/or not to commence or to pursue in any court, arbitration or administrative proceeding, any litigation or claims against the defendants and others released hereby pertaining to the underlying facts, circumstances or incidents that gave rise to the aforementioned action, or any results of the aforementioned facts, circumstances or incidents.

2. This action is hereby discontinued with prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

3. The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in the action.

4. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of this action is limited to the circumstances in this case alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future except as specifically provided in paragraph 5 of this Stipulation of Settlement and Order.

5. Following the execution of this stipulation, and its being ordered by the Court and in resolution of the Plaintiff's claims regarding Plaintiff's receipt and the reduction, change, and discontinuance of her Medicaid AIDS Long Term Home Health Care (ALTHHCP) Services, Defendant NYSDOH will issue the directive, or a substantially similar directive that is appended to this stipulation as Exhibit A. Defendant NYSDOH will issue such document to all Social Services Districts and AIDS Home Care Program providers. Defendant NYSDOH will also post such document on the NYSDOH website, or make its best efforts to do so. Defendant OTDA will distribute transmittal No. 92-OAH-FH-4, appended as Exhibit B, to its Hearing officers and relevant staff. Such actions will be completed within one hundred and twenty (120) days from when the Court approves this settlement.

6. Counsel for the Plaintiff herein affirmatively states that at the time of execution of the instant stipulation, Plaintiff is competent to settle this matter. Plaintiff has discussed with her Counsel the ramifications of settling this lawsuit and any or all related claims arising in this or any other forum. Plaintiff understands the impact of this settlement on the Plaintiff's respective rights and obligations, if any, and the respective rights and obligations of the Defendants, if any, arising out of the transactions and occurrences set forth in the Complaint. Plaintiff agrees to the terms and conditions embodied in this stipulation.

7. The Court shall retain jurisdiction over this action for the purposes of enforcing this stipulation for a period of four (4) months after it is "so-ordered" by the Court. In the event of an alleged breach of the terms of this Stipulation, Plaintiff's counsel shall give 30 days prior written notice to defendants' counsel before making any application before the Court to enforce the terms of this Stipulation.

8. It is acknowledged by the Plaintiff and Defendants that the action against the defendants Eddy Visiting Nurse Association and Mary Beth Rutkowski has been settled by stipulation which has been filed with the court on May 14, 2009.

9. It is also acknowledged by Plaintiff and Defendants that the action against defendant Albany County Department of Social Services and David Kircher has been settled by stipulation which has been filed with the court on May 20, 2009.

10. The foregoing constitutes the entire agreement between the Plaintiff and the Defendants.

Dated: Albany, New York

June 16 2009

Joseph M. Connors, Esq., BRN 103892
Albany Law School Clinic
Attorney for Plaintiff
80 New Scotland Avenue
Albany, NY 12208

Dated: Albany, New York
June 18th, 2009

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Defendants Richard F. Daines, NYS Department of Health, David A. Hansell and NYS Office of Temporary and Disability Assistance
The Capitol
Albany, New York 12224-0341

By: _____
Dean J. Higgins
Assistant Attorney General, of Counsel
Bar Roll No. 505663

Dated: Albany, New York
June 19, 2009

SO ORDERED:

_____
HON. GARY L. SHARPE
UNITED STATES DISTRICT COURT JUDGE