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In the Matter of the Appeal of

:

S B

DECISION  
: AFTER  
FAIR  
HEARING

from a determination by the New York City  
Department of Social Services

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JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on November 19, 2002, and on January 29, 2003, in New York City, before Peter K. Zaret, Administrative Law Judge, and in the facility where the Appellant resides on May 22, 2003 and on September 4, 2003 before Edward Shalfi, Administrative Law Judge. The following persons appeared at the hearing on November 19, 2002:

For the Appellant

Lawrence Morgenstein, Representative

For the Social Services Agency

Glynis Jerome, Fair Hearing Representative

The following persons appeared at the hearing on January 29, 2003:

For the Appellant

Lawrence Morgenstein, Representative

For the Social Services Agency

Pamela Jones, Fair Hearing Representative

The following persons appeared at the hearing on May 22, 2003:

For the Appellant

S B , Appellant  
Lawrence Morgenstein, Representative  
Jacqueline Graham, witness

For the Agency

No Appearance

The following persons appeared at the hearing on September 4, 2003:

For the Appellant

S B , Appellant  
Lawrence Morgenstein, Representative  
Jacqueline Graham, witness  
Donna Zuccarelle, witness  
Dr. Sharon Greene, witness (by speakerphone)

For the Agency

No Appearance

ISSUES

Was the Appellant's request for a fair hearing to review the Agency determination to discontinue the Appellant's Medical Assistance benefits timely?

Assuming the request was timely, was the Agency's determination to discontinue the Appellant's Medical Assistance benefits correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. As a result of the matter of Varshavsky v. Perales, this fair hearing was rescheduled to be heard in the facility where the Appellant resides.
2. The Appellant, now age 60, has been in receipt of Medical Assistance benefits.
3. On January 30, 1998, the Agency determined to discontinue the Appellant's Medical Assistance benefits, effective February 12, 1998, because he did not return a mail-in recertification statement.
4. On April 12, 2002, the Appellant's Representative requested a fair hearing to appeal the discontinuance of the Appellant's Medical Assistance without notice. At the hearing, the issue was amended, without objection by the parties, to specifically review the correctness of the Agency's determination of January 30, 1998, effective February 12, 1998, to discontinue the Appellant's Medical Assistance benefits.
5. A fair hearing was scheduled pursuant to that request and held on November 19, 2002, and January 29, 2003, in New York City, in the facility where the Appellant resides on May 22, 2003. Decision After Fair Hearing

#3702080P was issued on June 10, 2003.

6. Thereafter, the Appellant's representative requested reopening of fair hearing #3702080P on the grounds that the audio transcript of the home hearing on May 22, 2003 was blank.

7. On July 24, 2003, the home hearing portion of the fair hearing was reopened under fair hearing #3948887P, and was scheduled for September 4, 2003.

8. Decision After Fair Hearing #3702080P is hereby vacated and this Decision substituted in its stead.

#### APPLICABLE LAW

Section 22 of the Social Services Law provides that applicants for and recipients of Public Assistance, Emergency Assistance to Needy Families with Children, Emergency Assistance for Aged, Blind and Disabled Persons, Veteran Assistance, Medical Assistance and for any services authorized or required to be made available in the geographic area where the person resides must request a fair hearing within sixty days after the date of the action or failure to act complained of.

Section 360-2.2(f) of the Regulations requires that a personal interview be conducted with all applicants for Medical Assistance. Such personal interview shall be conducted before a decision on Medical Assistance eligibility is authorized or reauthorized. The Agency may grant a waiver of the personal interview requirement for recertification of aged, certified blind or certified disabled recipients when the Agency demonstrates that alternative procedures have been established to verify that recipients continue to meet all eligibility requirements for Medical Assistance. Section 360-2.3 of the Regulations provides that the Medical Assistance applicant and recipient has a continuing obligation to provide accurate and complete information on income, resources and other factors which affect eligibility. An applicant or recipient is the primary source of eligibility information. However, the Agency must make collateral investigation when the recipient is unable to provide verification. The applicant's or recipient's failure or refusal to cooperate in providing necessary information is a ground for denying an application for a Medical Assistance Authorization or for discontinuing such benefits.

#### DISCUSSION

The Agency submitted a copy of a Notice of Intent dated January 30, 1998, effective February 12, 1998, setting forth the Agency's determination to discontinue the Appellant's Medical Assistance benefits because he failed to return a recertification statement to the Agency. The Appellant through his representative, requested this fair hearing on April 12, 2003. Although a fair hearing must be requested within sixty days of the date of an Agency notice, the Appellant failed to request this fair hearing until April 12, 2002, which was more than four years after the Agency's determination. However, at the hearing, the Appellant offered evidence that the Appellant did not receive the discontinuance notice dated January 30, 1998. The

Agency failed to provide evidence that the discontinuance notice had in fact been mailed, or otherwise provided, to the Appellant. It did not produce anyone with personal knowledge that the notice had been sent or any evidence that it had followed an established routine in sending such notice. In the absence of competent proof that the discontinuance notice of January 30, 1998 had been properly sent to the Appellant, the Statute of Limitations should be tolled.

At the hearing, it was the Appellant's evidence that the Appellant also did not receive a recertification statement from the Agency for the Appellant to complete and return. The Agency failed to provide evidence that it advised Appellant to complete and return a recertification statement. Therefore, the determination of the Agency to discontinue the Appellant's Medical Assistance cannot be sustained.

DECISION AND ORDER

The Agency's determination to discontinue the Appellant's Medical Assistance was not correct and is reversed.

1. The Agency is directed to cancel its determination of January 30, 1998 and restore the Appellant's Medical Assistance Authorization retroactive to the effective date of discontinuance.

As required by Regulations at 18 NYCRR 358-6.4, the Agency must comply immediately with the directive set forth above.

DATED: Albany, New York  
October 6, 2003

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

  
Commissioner's Designee