

M E M O R A N D U M
DSS-524EL

TO: All Hearing Officers
and Professional Staff

DATE: May 1, 1991

FROM: Russell J. Hanks
RJH

SUBJECT: Policy Clarifications

The purpose of this memorandum is to set forth Office of Administrative Hearings' (OAH) policy on social services districts' failures to comply with Part 358 of the Department's regulations, and the resulting difficulties hearing officers have in making specific directives. Inadequate notices, the failure to provide documents to appellants before hearings, and unavailable case files at hearings violate appellants' due process rights and undermine the hearing process. Frequently, hearing officers are unable to ascertain adequate information to make decisions that provide specific relief to appellants.

The Department's supervisory responsibilities over social services districts encompass ensuring compliance with Department regulations, including regulations pertaining to fair hearings. The OAH is responsible for reviewing the propriety of social services district actions and ensuring appellants are afforded due process protections. Where social services districts fail to meet regulatory requirements, the OAH must assure that such failures do not interfere with appellants' due process rights.

The clarification of OAH responsibilities set forth in this memorandum is intended to ensure Statewide consistency and, in conjunction with other efforts, to result in an improvement in social services district compliance with Part 358. In a series of meetings, the General Counsel and OAH management discussed the issues described above and developed ways to reduce their detrimental impact on hearings and deter their future occurrence. These issues have also been discussed with social services districts and representatives of advocacy groups. Specific areas of concern are inadequate notices and the failure to provide requested documents before hearings and case files at hearings.

INADEQUATE NOTICES

The content requirements for notices of intent set forth in Part 358 reflect concern for appellants' due process rights. In every hearing involving a notice of intent, the sufficiency of the notice is a threshold issue. Raising the issue is not an affirmative responsibility of the appellant. Where a hearing involves a notice of intent, it is the responsibility of the social services district to appear with a copy of the notice of intent. If the social services district cannot present the notice of intent, it must withdraw its intended action. When the social services

district does present the notice of intent, the hearing officer must review the sufficiency of the notice to assess whether it complies with regulatory requirements and whether any deficiencies in the notice impinge on the appellant's due process rights. This assessment must include consideration of the notice's deficiencies, the issues for review, the appellant's circumstances, and the need to direct specific relief. This assessment should be conducted on the record and, where appropriate, reflected in the decision. The hearing officer must determine whether to find a notice void, require the social services district to provide additional documentation, or grant a recess or adjournment on the appellant's behalf.

In evaluating the adequacy of a notice, the hearing officer should consider if the appropriate notice was sent and if the explanation of the district's intended action is understandable by the particular appellant. Where the social services district's determination was based on a budget computation, a copy of the budget or the basis for the computation must be provided in or with the notice as required by 18 NYCRR Section 358-2.2n. Failure to meet this regulatory requirement makes a notice of intent void. A notice that fails to provide any reason or explanation for an intended action is void. A notice that cites the wrong regulation as justification for the intended action, while deficient, may not be void. In every case involving a deficient notice, the hearing officer must ensure that the deficiency does not result in harm to the appellant.

Pursuant to Section 22 (4) of the Social Services Law, fair hearings must be requested within 60 days (90 days for food stamps) of the date of the action or failure to act by a social services district which is being appealed. Where a hearing involves a notice of intent, any defect in the notice tolls the statute of limitations (Bryant). When the statute of limitations is tolled, the underlying merits of the case must be addressed unless it is determined that the defects in the notice are so serious that the notice is void. This kind of determination must be made on a case by case basis as described above.

The implementation of WMS generated notices of intent (scheduled for early 1993) should greatly improve the quality and consistency of notices. Until such improvements occur, hearing officers must scrutinize notices of intent for sufficiency, ensure appellants are not disadvantaged by notice defects, and void seriously deficient notices.

FAILURE TO PROVIDE REQUESTED DOCUMENTS BEFORE HEARINGS

18 NYCRR Section 358-4.2(c) requires a social services district, upon request, to "provide to the appellant or appellant's representative copies of the documents to be presented at the fair hearing." Subsection (d) imposes a similar requirement for "copies of any documents from appellant's case file which the appellant requests for purposes of hearing preparation." Social services districts were reminded of their obligations in this regard in 89 LCM-215. When a social services district fails to comply with 18 NYCRR Section 358-4.2, the hearing officer must ensure that the appellant is not disadvantaged. This means not only requiring the district to provide the appropriate documents but also giving the appellant

time to review them. The hearing officer can order a short or long recess or an adjournment and direct the social services district to obtain the requested documents. In appropriate circumstances, the hearing officer should preclude the district from submitting the documents into evidence.

FAILURE TO PROVIDE CASE FILES AT HEARINGS

18 NYCRR Section 358-4.3 requires that "a representative of the social services agency must appear at the hearing along with the case record." Violations of Section 358-4.3 not only compromise appellants' due process rights, they also frequently impede the hearing officer's ability to develop a full record and make specific directives.

In New York City, for public assistance and medical assistance cases arising out of notices of intent, settlements in two federal lawsuits (Rodriguez and Annunziata) require the Human Resources Administration (HRA) to withdraw the underlying notices whenever complete, relevant and legible case records are not available at hearings. For all other situations in New York City and for all hearings outside of New York City, the following guidelines apply:

For violations of 18 NYCRR Section 358-4.3, a recess or adjournment may be provided to enable the district to obtain the case record and the appellant to review it. This approach is only appropriate when there is a strong expectation that the district will obtain the case record and that the appellant will not be harmed by the delay. Multiple adjournments are not justifiable for this purpose. When the relevant case file materials are available, the hearing officer must ensure that the social services district provides the appellant or the appellant's representative with copies of the documentary evidence upon which it intends to rely, as required by 18 NYCRR Section 358-4.3(a).

When a recess or adjournment is not appropriate (e.g., emergency assistance issues, certain non-aid-continuing cases), the hearing officer must elicit the appellant's testimony and other evidence and, to the extent possible, make specific directives in the decision. The hearing officer must rely on the appellant's credible testimony and direct specific relief consistent with this evidence. In those cases in which it is necessary to remand to the social services district for reconsideration or other action, the hearing officer must direct the district to act within a limited, specified time period (e.g., recompute eligibility and send appropriate notice within 10 days).

OTHER CONCERNS

Hearing officers must always demonstrate appropriate demeanor and maintain, and appear to maintain, their impartiality prior to, during, and after hearings. This includes avoiding ex-parte conversations and suggesting to the parties how the case will be decided. Hearing officers should make all required opening statements. Where an aid-continuing issue arises, the hearing officer has the authority to direct the social services district to continue, discontinue or restore aid when appropriate.

In some cases, an appellant will provide evidence for the first time during a hearing which was not provided to the social services district at the time the original determination was made. Where the evidence demonstrates that a determination in the appellant's favor is now appropriate, the decision should indicate that the determination of the district was correct when it was made but that new evidence now requires a different result.

For a social services district that routinely fails to meet regulatory requirements, a directive in similar cases (18 NYCRR Section 358-6.3) should be issued requiring the district to review other cases for conformity with the principles and findings in the decision.

These statements of policy are only a part of our overall effort to improve the hearing process. On-going meetings are being held with HRA to resolve problems in New York City hearings. We are assisting HRA in developing appropriate materials and training for its workers. We are also encouraging the use of conferences to resolve disputes without hearings. A pilot test of center specific calendars is in progress. Legislation has been proposed to strengthen our enforcement authority through sanctions of social services districts for failures to comply with law, regulations, policy or hearing decisions. Added computer capability is being provided to social services districts to improve access to and accuracy of hearing information.

These actions should help to reduce the number of hearings, improve the quality of hearings and permit more specific directives to be made in hearing decisions. The efforts of hearing officers and supervising hearing officers to address social services districts' violations of regulations and to direct specific relief in hearing decisions are essential aspects of this undertaking.

RJH:mh

cc: Susan V. Demers
Anne Grace