

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.