

At an I.A.S. Part 31 of the Supreme Court of the State of New York, at the Courthouse located at the Civic Center in the County of New York, State of New York, on the 5<sup>th</sup> day of March, 1992

P R E S E N T :

HON. BEVERLY S. COHEN  
JUSTICE OF THE SUPREME COURT

-----X  
BASYA VARSHAVSKY, BARBARA SCOTT, :  
JANE DOE, and EMILY HEMMERLING on : Index No. 91-40767  
behalf of themselves and all others : (Cohen, J.)  
similarly situated, :  
 :  
 Plaintiffs, : ORDER GRANTING INTER-  
 : VENTION, CLASS CERTIFI-  
 : CATION AND PRELIMINARY  
 : INJUNCTIVE RELIEF  
 -and- :  
 ESTELLE GELLER, SYLVIA LEWIS and :  
 FLORENCE FINK, ANNA GRZESLO, DONALD :  
 KELLER, THOMASINA WHEELER, DOROTHEA :  
 PERLEY, DOROTHY NAZINITSKY and AGNES :  
 TRINKWALDER, on behalf of themselves :  
 and all others similarly situated, :  
 :  
 Proposed Plaintiff-Intervenors, :  
 :  
 -against- :  
 :  
 CESAR PERALES, as Commissioner of the :  
 New York State Department of Social :  
 Services, and MARK LACIVITA, as Acting :  
 Assistant Director, New York State :  
 Department of Social Services, Office :  
 of Fair Hearing Administration :  
 Administration, :  
 :  
 Defendants. :  
 :  
 -----X

Plaintiffs having moved for an Order (1) preliminarily enjoining defendants from canceling their program of providing hearings at the home or institutional setting of "homebound"

appellants, (2) certifying a class of all applicants and recipients of public assistance benefits residing in New York State who have requested or will request fair hearings and who, because of mental or physical disabilities, cannot travel to a central fair hearing location without substantial hardship or medical detriment, and (3) granting leave to intervene and temporary restraining orders for various individual plaintiffs; and

Upon reading and filing:

Plaintiffs' order to show cause for class certification and preliminary injunction dated March 12, 1991; plaintiffs' memorandum of law in support of class certification, preliminary injunction and intervention dated March 18, 1991; the order to show cause to intervene Anna Grzeslo and for other relief, dated June 24, 1991; defendants' memorandum of law in opposition to the motion for class certification and preliminary injunction dated July 15, 1991; plaintiffs' reply memorandum of law in support of the motion for intervention class certification and preliminary injunction dated July 31, 1991; the reply affirmation of Valerie Bogart in support of plaintiffs' motion for intervention, class certification and preliminary injunction, verified July 31, 1991; the order to show cause for intervention of Thomasina Wheeler, dated August 1, 1991; defendants' supplemental memorandum of law in opposition to the motion for class certification and preliminary injunction dated August 22, 1991; the affidavit of Henry Pedicone submitted by defendants, verified August 22, 1991;

plaintiffs' supplemental reply memorandum of law in support of the motion for class certification and preliminary injunction dated August 28, 1991; the second reply affirmation of Valerie Bogart in support of plaintiffs' request for class certification and preliminary injunction verified August 29, 1991; the supplemental affidavit of Henry Pedicone dated August 28, 1991; the notice of motion for intervention of Dorothy Nazinitsky, Dorothea Perley and Agnes Trinkwalder; and all other papers and proceedings heretofore had in this action, and

Interim or Temporary Restraining Orders having been entered March 15, 1991, May 9, 1991, June 24, 1991, August 1, 1991 and September 12, 1991 and November 1, 1991; and

UPON oral argument on August 1, 1991, August 29, 1991, and September 30, 1991 by Legal Services for the Elderly, Valerie Bogart, of counsel for plaintiffs, and Brooklyn Legal Services Corporation B, Marc Cohan, of counsel for plaintiffs, and by Robert Abrams, Attorney General of the State of New York, Andrea Osborne, for defendants, and due deliberation having been had, and the Court having issued an opinion dated November 20, 1991 and

SUFFICIENT CAUSE APPEARING THEREFORE, it is hereby ORDERED, that proposed plaintiff intervenors ESTELLE GELLER, SYLVIA LEWIS, FLORENCE FINK, ANA GRZESLO, THOMASINA WHEELER, DOROTHEA PERLEY, DOROTHY NAZINITSKY, and AGNES TRINKWALDER are permitted to intervene in this action and shall be representative of the plaintiff class; and it is further

ORDERED, that a class is certified pursuant to Article 9 of the C.P.L.R., consisting of all applicants for and recipients of public assistance benefits residing in New York State:

a) who have requested or will request administrative hearings, or who would request or would have requested administrative hearings but for transportation difficulties; and

b) who, because of mental or physical disabilities, could not or cannot travel to or participate in an administrative hearing at a central hearing location without substantial hardship or medical detriment; and

c) whose hearing either had not been held on or before November 1, 1990, or whose hearing has been held on or after November 1, 1989 and did not result in a fully favorable decision or fully favorable outcome upon remand by defendants to the local agency before, during, or after the hearing; and it is further

ORDERED, plaintiffs' motion for a preliminary injunction is granted, and defendants are enjoined from holding hearings for members of the certified plaintiff class except to the extent set forth in.

**Hearings Without Aid-Continuing Status**

(1) Within 20 days of the date of this order defendants shall identify all hearings requested by those members of the plaintiff class:

(a) for which the plaintiff or his or her representative made a "request for home hearing;"

(i) As used in this Order "home" refers to

any site where the appellant is staying or living, permanently or temporarily, including but not limited to the home of the appellant or of a relative or friend, a hospital, nursing home, adult home or any other institution or location. As used herein "home hearing" refers to a hearing held at any such location.

(ii) As used in this Order, "requests for home hearings" include oral or written requests made with the original hearing request, with an amendment to a pending hearing request, with a request for adjournment made prior to or at a regularly scheduled hearing, or with a request to re-open or vacate a default;

and

(b) which were requested or are hereafter requested:

(i) to contest the termination, suspension or reduction in benefits or services, where the appellant does not or will not have "aid continuing" status because she or he requested the hearing more than 10 days after the date of the notice, or

(ii) to contest the denial of an application for or an increase in benefits, services, equipment or supplies, or for any other issue for which "aid continuing" status would not be provided pursuant to 18 NYCRR § 358-3.6.

and

(c) which had not been held before November 1, 1990.

(2) For all home hearing requests described in paragraph (1), defendants shall hold a home hearing on or before March 31, 1992 or within 45 days of the request for such hearing, whichever date is later, unless prior to that date:

(a) defendants have assigned full "aid continuing" status effective beginning 45 days after the date of the hearing request or on September 30, 1991, whichever date is later, or

(b) each of the issue(s) for which the hearing was requested has (have) been or is (are) resolved fully in the plaintiff class member's favor by any of the following:

(i) after conference or redetermination by the local agency on remand from defendants before the requested hearing is held or decided, or

(ii) by defendants' decision without a hearing, or

(iii) by decision after a "speaker-phone hearing" in accordance with paragraph (5) herein.

(c) For purposes of this order, a decision after speaker-phone hearing which reverses the contested agency determination and remands any issue of the hearing to the local agency for redetermination, conference, or additional investigation is not "fully favorable" unless the outcome after remand is fully favorable on all issues. Defendant shall retain jurisdiction over such decisions and monitor the outcome on remand. If the outcome is less than fully favorable, defendant

shall schedule a home hearing without requiring the class member to request another hearing to contest the less than fully favorable outcome on remand

(d) Defendant shall retain jurisdiction over any hearing which it remands in whole or part to the local agency for conference or redetermination before the hearing and monitor the outcome. If the outcome is less than fully favorable, defendant shall schedule a speaker-phone hearing without requiring the class member to request another hearing to contest the less than fully favorable outcome on remand.

(3) Defendants shall reopen those hearings described in paragraph (1) which have been held since November 1, 1990, but which did not result in a fully favorable hearing decision or fully favorable outcome upon remand before, during or after the hearing. Defendants shall schedule home hearings in these cases according to the procedures in paragraph (2), (4) and (5) of this Order.

(4) For all home hearing requests described in paragraph (1) where the appellant is entitled to priority in scheduling pursuant to 18 N.Y.C.R.R. § 358-3.2(b), defendants shall schedule the speaker-phone hearing, and if required by this Order the home hearing, on a priority basis pursuant to 18 N.Y.C.R.R. § 358-3.2(b) and 358-5.2.

(5) A "speaker-phone hearing" is a hearing at which the Administrative Law Judge and agency representative participate in person at the central hearing site, the appellant

participates by speaker-phone from his or her home, and the appellant's representative, if any, participates at his or her choice of the central hearing site or the appellant's home.

(a) Notice. At least ten days prior to any speaker-phone and/or home hearing, defendants shall send notice of the hearing to the plaintiff and his or her representative, if any. Said notice shall include notice of the date and time of the hearing, and shall explain procedures for the hearing including how to introduce evidence at the hearing. Said notice shall also explain that a home hearing will be or is being scheduled if the phone hearing cannot be held or because it could not be held, or because the phone hearing does or did not result in a fully favorable outcome whether by decision or after remand.

(b) Defendants shall ensure that appellants at speaker-phone hearings have a meaningful opportunity to exercise all procedural rights accorded to any hearing appellant by law or regulation including but not limited to those listed in paragraph (8).

(6) Implied home hearing requests. Within 30 days of the date of this order defendants shall identify all hearings requested by those members of the plaintiff class which meet all of the criteria specified in paragraph (1) except that a home hearing was not expressly requested, but instead an oral or written statement was made by or on behalf of the plaintiff to any of defendant's employees indicating that the plaintiff could not travel to the hearing due to physical or mental impairment.



(a) For those hearings identified pursuant to paragraph (6) which have been held and resulted in a decision which is less than fully favorable, defendants shall reopen the decisions.

(b) Defendants shall schedule a "home" hearing for every plaintiff class member whose hearing is reopened pursuant to paragraph (6)(a) and for every class member identified in paragraph (6) whose hearing has not been held as of the date of this Order. Said home hearings shall be held according to the same procedures described in paragraphs (2) - (5) except that the time limit for defendants to hold these hearings shall be extended to April 30, 1992 or within 45 days of the request for such hearing, whichever date is later.

#### Hearings with Aid-Continuing Status

(7) Within 20 days of the date of this order defendants shall identify all hearings requested by those members of the plaintiff class:

(a) which had not been held before November 1, 1990; and

(b) for which the plaintiff or his or her representative made a "request for home hearing" as defined in paragraph (1)(a) herein; and

(c) for which the plaintiff has been assigned "aid continuing" status.

(8) Within thirty days of the date of this Order, defendants shall develop and submit to counsel for the plaintiff

class and to the Court proposed procedures for conducting "speaker-phone hearings." Plaintiffs shall file a response to the proposed procedures within 15 days, after which the Court will approve or modify the procedures. These procedures shall include, but are not limited to:

(a) Provisions assuring that case records and/or hearing files are provided to appellants prior to the hearing.

(b) Provisions assuring that appellants receive, in advance of the hearing, copies of all exhibits to be submitted by the local agency at the hearing.

(c) Provisions assuring that unrepresented appellants have an opportunity to submit documents for inclusion in the hearing record at or after the hearing by mail or in any other manner.

(d) Provisions assuring that appellants receive adequate Notice of speaker-phone hearings setting forth the date and time, and explaining the procedures for the "speaker-phone" hearing.

(e) Provisions assuring that phone hearings be provided only to appellants who can communicate by telephone from their home, considering hearing, physical and speech impairments.

(f) Provisions assuring that the hearing is fully recorded on tape.

(g) Provisions assuring that all speakers are identified to the appellant and that appellant can hear each speaker.

(h) Provisions assuring that the appellant can confer with his or attorney privately, and that discussions off the record can be held.

(i) Provisions assuring that interpreters will translate the testimony of and proceedings for non-English speaking appellants.

(j) Provisions assuring that if appellants do not answer the phone, that the phone hearing will be rescheduled.

(k) Provisions assuring that the preliminary statement of the appellant's rights given by the Administrative Law Judge at all hearings is adapted to the special circumstances of the speaker-phone hearing.

(l) Provisions assuring that "speaker-phone" equipment is available at each hearing site and has been tested, and that the use and function of this equipment will be monitored systematically.

(9) Defendants are enjoined from scheduling, holding, or dismissing any hearing as abandoned, or terminating the "aid-continuing" status of any hearing for plaintiffs identified pursuant to paragraph (7) at a site other than the appellant's home except as provided in this paragraph.

(a) After the Court has approved the procedures developed pursuant to paragraph (7), defendants may hold hearings in accordance with the procedures described in paragraphs (2), (4) and (5) of this order pertaining to "speaker-phone" and "home" hearings, except that the time limits set forth in

paragraph (2) do not apply to hearings with "aid continuing" status.

(b) Defendants shall reopen those hearings described in paragraph (7) which have been held since November 1, 1990 and did not result in a fully favorable decision or fully favorable outcome after remand before, during or after the hearing, and restore aid-continuing status. Defendants shall schedule home hearings in these cases according to the procedures in paragraphs (2), (4) and (5).

(c) For all hearings held pursuant to this paragraph defendants shall order that "aid continuing" status continue through:

(i) decision rendered after a home hearing, if a decision after a "speaker-phone" hearing is less than "fully favorable" as defined in paragraph (1)(c) herein, or if the speaker-phone hearing is not or cannot be held for any reason including but not limited to the appellant's lack of a telephone or inability to communicate by phone; or

(ii) confirmation that a remand of any hearing issue by defendants to the local agency, whether before the phone hearing or by decision after the phone hearing, resulted in a fully favorable outcome.

**Defendants to Provide Information Regarding  
Availability of Phone and Home Hearings to Class  
Members who Request Hearings**

(10) Defendants shall ask every person who calls to request a hearing or adjournment whether the appellant is able to

travel to the hearing by public transportation. If the person requesting the hearing states that the appellant cannot travel by public transportation, defendants shall advise the caller of the following:

(a) That the appellant is entitled to reimbursement or, if necessary, advance payment for travel by taxi, car service, ambulette or other appropriate means;

(b) The procedures for obtaining such reimbursement or advance payment;

(c) The procedures for arranging travel by special transportation including Access-A-Ride;

(d) The availability of a speaker-phone hearing if the appellant is unable to travel;

(e) The availability of a home hearing if a speaker-phone hearing is not feasible or if the speaker-phone hearing results in an adverse decision.

(11) Defendants shall call or write every person who submits a written request for hearing or adjournment indicating that the appellant is unable to travel to the hearing or requesting a home hearing. The defendants shall advise the appellant and his or her representative of the following:

(a) That the appellant is entitled to reimbursement or, if necessary, advance payment for travel by taxi, car service, ambulette or other appropriate means;

(b) The procedures for obtaining such reimbursement or advance payment;

(c) The procedures for arranging travel by special transportation including Access-A-Ride;

(d) The availability of a speaker-phone hearing if the appellant is unable to travel;

(e) The availability of a home hearing if a speaker-phone hearing is not feasible or if the speaker-phone hearing results in an adverse decision.

**Notice to Counsel for Plaintiff Class**

(12) Within 30 days of the date of this Order, defendants shall provide counsel for the plaintiff class copies of the following information for all hearings and class members described in paragraphs (1), (6) and (7) of this Order:

(a) Copy of the hearing request form(s) and/or the following information:

(i) the name, address, phone number and case number of the appellant and of any representative;

(ii) the date of the hearing request;

(iii) the date of the home hearing request, if different, and if the home hearing request was implied rather than express as described in paragraph (6), the form of the request;

(iv) the fair hearing number;

(v) the issue of the hearing and type of benefit;

(vi) the aid continuing status.

(b) Documents verifying the status and outcome of

the hearing or remand, including:

(i) the date(s) of any hearings scheduled or held and type of hearing (speaker-phone/home),

(ii) a copy of any speaker-phone hearing decision which defendant claims is "favorable" so that no home hearing is required.

(iii) a copy of any determination on pre- or post-hearing remand, if defendant claims that any hearing issue(s) was or were resolved on remand so that no speaker-phone or home hearing on the issue(s) is or are required.

(13) Defendants are ordered to notify counsel for plaintiffs in writing at intervals of 60 days of the date of this Order of:

(a) any new home hearing requests received or identified which defendants had not reported, including all information listed in par. (12);

(b) the current hearing and aid-continuing status of each case reported pursuant to par. (12) and (13)(a);

(c) the outcome of any speaker-phone hearing, decision without hearing, home hearing, or remand to the local agency before, during or after the hearing for each case reported pursuant to par. (12) and (13)(a);

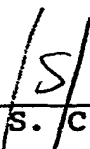
(d) all steps taken to comply with the provisions of this Order, including all written materials issued in conjunction with compliance with this Order. Such written materials shall include but are not limited to internal

memoranda, instructions, training materials, manual or manual sections, and copies of any forms and form letters.

(14) Notice to Class Members. Except as provided in this Order, notice to class members is not required.

(15) Nothing herein shall be construed by defendants to limit or reduce plaintiffs' fair hearing rights conferred by federal and state law and regulations, or to preclude individual members of the plaintiff class from seeking relief other than that provided herein on alternate grounds.

S O O R D E R E D

  
J. S. / C.