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In the Matter of the Appeal of  
[REDACTED]

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

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**DECISION  
AFTER  
FAIR  
HEARING**

**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 March 31, 2011, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Social Services Agency

Clinton Eubanks, Esq., Tanza Pettiford, Fair Hearing Representatives; Stacey Sundar, RN, Witness

**ISSUE**

Was the Appellant's request for a fair hearing to review the Agency determination to deny the Appellant's application for personal care services timely?

**FINDINGS OF FACT**

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 held in the Appellant's home.

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2. On September 22, 2009, the Appellant, age 73, applied for Medical Assistance benefits. On the application, the Appellant notified the Agency that her primary language is Spanish and that she preferred notices to be sent to her in English and Spanish.

3. By notice dated September 30, 2009, the Agency advised the Appellant of its determination to deny the Appellant's application for personal care services because the Appellant has no unmet personal care services needs. The notice was in English only.

4. The notice advised the Appellant that a fair hearing must be requested within 60 days of the date of the Agency's action concerning personal care services.

5. The Agency mailed the notice to the Appellant's address as contained in the Appellant's case record.

6. On February 8, 2010, the Appellant requested a fair hearing for review of the Agency's determination.

7. On August 5, 2010, a prior Decision After Fair Hearing was issued which reversed the Agency's September 30, 2009 determination to deny the Appellant's application for personal care services and directed the Agency to authorize the Appellant to receive Level I personal care services in the amount of 8 hours weekly. Subsequently, on November 8, 2010, the Agency requested reconsideration of the Decision on the grounds that the issue regarding the applicability of the statute of limitations was not addressed in the Decision, although it was raised at the May 14, 2010 fair hearing. Therefore, the Appellant's representative was afforded the opportunity to respond to the Agency's request. The Office of Administrative Hearings reviewed the matter and determined to reopen the fair hearing for the limited purpose of determining whether there was and is a sufficient basis to toll the statute of limitations. Accordingly, the August 5, 2010 Decision has been vacated and this Decision After Reopened Fair Hearing is being substituted therefor.

### **APPLICABLE LAW**

Section 22.4 of the Social Services Law provides that, for actions other those concerning food stamp benefits, a request for a fair hearing to review an Agency's determination must be made within sixty days of the date of the Agency's action or failure to act.

In general, a recipient of Public Assistance, Medical Assistance or Services (including child care and supportive services) has a right to a timely and adequate notice when the Agency proposes to discontinue, suspend, reduce or change the manner of payment of such benefits. An adequate, though not timely, notice is required where the Agency has accepted or denied an application for Public Assistance, Medical Assistance or Services; or has increased the Public Assistance grant; or has determined to change the amount of one of the items used in the calculation of a Public Assistance grant or Medical Assistance spenddown; or has determined that an individual is not eligible for an exemption from work requirements. 18 NYCRR 358-3.3(a). In addition, pursuant to 18 NYCRR 358-3.3(d), an adequate, though not timely, notice is

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required for a Public Assistance or Medical Assistance recipient when, for example, the Agency has factual information confirming the death of the recipient; the Agency has received a clear written statement from the recipient that he or she no longer wishes to receive Public Assistance or Medical Assistance; the Agency has reliable information that the recipient has been admitted to an institution or prison; the recipient's whereabouts are unknown and mail has been returned to the Agency; or the recipient has been accepted for Public Assistance or Medical Assistance in another district.

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth the action that the Agency proposes to take or is taking, and if a single notice is used for all affected assistance, benefits or services, the effect of such action, if any, on a recipient's other assistance, benefits or services. In addition, the notice must contain:

- o for reductions, the previous and new amounts of assistance or benefits provided;
- o the effective date of the action;
- o the specific reasons for the action;
- o the specific laws and/or regulations upon which the action is based;
- o the recipient's right to request an agency conference and fair hearing;
- o the procedure for requesting an agency conference or fair hearing, including an address and telephone number where a request for a fair hearing may be made and the time limits within which the request for a fair hearing must be made;
- o an explanation that a request for a conference is not a request for a fair hearing and that a separate request for a fair hearing must be made;
- o a statement that a request for a conference does not entitle one to aid continuing and that a right to aid continuing only arises pursuant to a request for a fair hearing;
- o the circumstances under which public assistance, medical assistance, food stamp benefits or services will be continued or reinstated until the fair hearing decision is issued;
- o a statement that a fair hearing must be requested separately from a conference;
- o a statement that when only an agency conference is requested and there is no specific request for a fair hearing, there is no right to continued public assistance, medical assistance, food stamp benefits or services;
- o a statement that participation in an agency conference does not affect the right to request a fair hearing;

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- o the right of the recipient to review the case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the recipient to prepare for the fair hearing at no cost;
- o an address and telephone number where the recipient can obtain additional information about the recipient's case, how to request a fair hearing, access to the case file, and/or obtaining copies of documents;
- o the right to representation by legal counsel, a relative, friend or other person or to represent oneself, and the right to bring witnesses to the fair hearing and to question witnesses at the hearing;
- o the right to present written and oral evidence at the hearing;
- o the liability, if any, to repay continued or reinstated assistance and benefits, if the recipient loses the fair hearing;
- o information concerning the availability of community legal services to assist a recipient at the conference and fair hearing; and
- o a copy of the budget or the basis for the computation, in instances where the social services agency's determination is based upon a budget computation.

18 NYCRR 358-2.2

### **DISCUSSION**

On August 5, 2010, a prior Decision After Fair Hearing was issued which reversed the September 30, 2009, determination of the New York City Medical Insurance and Community Services Administration (MICSA), Office of Home Care Services to deny the Appellant's application for personal care services on the grounds that she had no medical need for personal care services. The decision directed the Agency to authorize the Appellant to receive Level I personal care services (chore services) in the amount of 8 hours weekly. This fair hearing was reopened to a home hearing for review of whether the Appellant was barred by the sixty-day statute of limitations from a fair hearing review of the Agency determination.

At the hearing, the Appellant's representative contended that the statute of limitations should be tolled because (among other contentions) the Appellant indicated in her application for Medical Assistance benefits that she was a Spanish speaker and requested that notices from the Agency be sent to her in English and Spanish. This was confirmed by a review of the application available at the hearing. Yet the notice in evidence contained only English words. Furthermore, at the hearing, the Agency did not assert that any separate notice in Spanish about the Agency's determination was sent to the Appellant. Consequently, the record does not establish that the Appellant was properly notified that there was a sixty-day limit on her ability to

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request a fair hearing. Therefore, there is a sufficient basis to toll the statute of limitations and the Appellant's fair hearing request is deemed to have been timely made.

**DECISION AND ORDER**

The Appellant's fair hearing request is deemed to have been timely made.

The Agency's determination to deny the Appellant's application for Personal Care Services was not correct and is reversed.

1. The Agency is directed to continue to authorize the Appellant to receive Level I personal care services in the amount of 8 hours weekly.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is requested, the Appellant must provide it to the Agency promptly to facilitate such compliance.

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

DATED: Albany, New York  
05/06/2011

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink that reads "Sebastian Adolamo". The signature is written in a cursive style with a large initial 'S'.

Commissioner's Designee