

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

REQUEST 03/15/88
CASE #
CENTER # Suffolk
FH # 1194883P

In the Matter of the Appeal of :

R O , JR.

DECISION
: AFTER
FAIR
HEARING

from a determination by the Suffolk County
Department of Social Services :

JURISDICTION

This appeal is from a determination by the local Social Services Agency to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits, and the adequacy of Adult Protective Services (APS).

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on July 20, 1988, October 3, 1988, October 25, 1988, November 30, 1988, July 20, 1989 and September 27, 1989, in Suffolk County, before Benedict Schiraldi, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

R O , Jr., Appellant
Peter Vollmer, Attorney
Etta Taichman, M.S.W.
Douglas Ruff, Attorney

For the Local Social Services Agency

Christine Milazzo, Representative
Carlo Colavito, Supervisor, Fair Hearings
L. McMahon, Supervisor, Eligibility, CORAM
Andrew Krupski, Suffolk County Department of Labor (SCDOL)
Janet Linden, SCDOL

FACT FINDINGS

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:

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1. The Appellant was in receipt of Public Assistance, Medical Assistance and Food Stamp benefits.
2. On April 7, 1986, the Appellant applied for Public Assistance, Medical Assistance and Food Stamp benefits.
3. On April 28, 1986, the Agency determined to deny the Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits, because he failed to report to the Public Works Project.
4. On October 29, 1987, the Agency sent a Notice of Intent to the Appellant setting forth its intention to discontinue the Appellant's Public Assistance, Medical Assistance and Food Stamp benefits because Appellant failed to report to the Public Works Project.
5. On January 25, 1988, the Appellant applied for Public Assistance, Medical Assistance and Food Stamp benefits.
6. On March 14, 1988, the Agency determined to deny Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits on the grounds that the Appellant failed to comply with the Public Works Project.
7. On May 17, 1988, the Appellant reapplied for Public Assistance, Medical Assistance and Food Stamp benefits.
8. On June ;27, 1988, the Agency accepted the Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits, and provided a grant of Public Assistance and Medical Assistance retroactively to June 1, 1988, and Food Stamp benefits retroactive to May 17, 1988.
9. On April 21, 1988, the Appellant was evaluated by a psychologist, who diagnosed Appellant as mentally retarded, with an I.Q. of 62. The psychologist stated in his report that the Appellant is totally illiterate and cannot read anything but the letters of the alphabet. The psychologist concluded that the Appellant is not capable of working in any capacity. The psychologist further recommended that the Appellant be referred to a rehabilitation agency.
10. Nassau/Suffolk Law Services arranged and paid for Appellant's April 21, 1988 psychological evaluation, in the amount of \$120.00.
11. On August 5, 1975, a psychological evaluation of the Appellant was made by a psychologist, and he was diagnosed to be in the mildly mentally retarded range, with an I.Q. of 64.
12. At the request of the Agency, on August 4, 1988, a psychological evaluation of the Appellant was made by a staff psychologist of the Suffolk County Department of Health Services. The psychologist in his report concluded that the Appellant is not a candidate for competitive work employment and that for all intents and purposes, he is considered to be illiterate and manifests poor reasoning and judgment. The psychologist further stated that the Appellant functions on a mildly retarded level.

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13. On December 2, 1987, the Appellant applied for Supplemental Security Income benefits.

14. On February 1, 1988, the Social Security Administration (SSA) denied Appellant's application for Supplemental Security Income benefits.

15. On April 18, 1988, Appellant requested reconsideration of his denial of Supplemental Security Income benefits from the SSA.

16. On January 19, 1989, the SSA issued a Notice of Favorable Decision in Appellant's case. The decision states that the Appellant has been severely impaired by mental retardation and that he is "disabled" under the provisions of the Social Security Act.

17. On February 17, 1987, Ettie Taichman, Director of Social Work at Nassau/Suffolk Law Services (hereinafter Law Services) telephoned the Agency's APS concerning the Appellant and his parents. The Agency did not open an ongoing APS case for the Appellant.

18. On May 12, 1987, Ms. Taichman again telephoned the APS Bureau to advise them that the Appellant had been sanctioned for failure to comply with the work rules, and that he required assistance with his Public Assistance benefits and potential Supplemental Security Income benefits.

19. The APS Bureau assigned a worker to the referral, who visited the Appellant's household, and determined that Appellant was not listed as part of his parents' service case.

20. The APS Bureau took no further action on Law Services' request for APS for Appellant.

21. On January 5, 1988, Ms. Taichman referred Appellant to the APS Bureau, in order to assess Appellant's employability, and to lift Appellant's sanction, thereby enabling Appellant to secure a psychological evaluation to support his Supplemental Security Income application and to verify his unemployability.

22. The APS Bureau did not open an ongoing APS case for Appellant.

23. On January 22, 1988, and again on January 28, 1988, Ms. Taichman wrote to APS to determine whether or not an APS case had been in fact opened for Appellant, and whether APS will be assisting Appellant in pursuing his Supplemental Security Income application.

24. The APS Bureau took no action on the request for services at that time.

25. On March 15, 1988, April 15, 1988 and May 25, 1988, the Appellant requested this fair hearing to review the following Agency determinations:

- (A) The April 28, 1986 denial of Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits.

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- (B) The October 24, 1987 discontinuance of Appellant's Public Assistance, Medical Assistance and Food Stamp benefits.
- (C) The March 4, 1988 denial of Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits.
- (D) The failure of the Agency to reimburse Law Services for the costs of Appellant's April 18, 1988 psychological evaluations.
- (E) The adequacy of APS, in that the Agency failed to identify, evaluate and assess Appellant's needs for APS on February 17, 1987 and January 5, 1988, and failed to open an APS case for the Appellant on those dates.

ISSUES

Was the Appellant's request for a fair hearing to review the Agency's April 28, 1986 determination to deny Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits timely?

Assuming the request was timely, was the Agency's April 28, 1986 determination to deny Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits correct?

Was the Appellant's request for a fair hearing to review the Agency's October 29, 1987 determination to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits timely?

Assuming the request was timely, was the Agency's October 29, 1987 determination to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits correct?

Was the Agency's determination of March 14, 1988 to deny Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits correct?

Was the Agency's determination not to reimburse Appellant for the cost of his April 18, 1988 psychological evaluation correct?

Was the Agency's determination as to the adequacy of APS provided to Appellant correct?

APPLICABLE LAW

Section 22 of the Social Services Law provides that 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.

The Food Stamp Program is a federal program regulated by the United States Department of Agriculture Food and Nutrition Service. Program regulations are set forth in the Code of Federal Regulations (7 CFR).

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Section 273.15 of 7 CFR requires that a state must provide a fair hearing to any household aggrieved by an action which affects the household's participation in the Food Stamp Program. New York Department of Social Services Regulations at 18 NYCRR 358-3.1 set forth the situations in which an applicant or recipient has a right to a fair hearing.

A person is allowed to request a fair hearing on any action of a local social services agency relating to food stamp benefits or loss of food stamp benefits which occurred in the ninety days preceding the request for a hearing. Such action includes a denial of a request for restoration of any benefits lost more than ninety days but less than a year prior to the request. In addition, at any time within the period for which a person is certified to receive food stamp benefits, such person may request a fair hearing to dispute the current level of benefits. Social Services Law Section 22.4(b), 18 NYCRR 358-3.1, 18 NYCRR 358-3.5, 7 CFR 273.15.

Section 164 of the Social Services Law and Section 385.5(d) of the Regulations of the State Department of Social Services provide that as a condition of eligibility for assistance, employable recipients of Home Relief are required to participate in public works projects which are intended to restore such persons to a condition of self-support or self-care. Section 385.14(e) of the Department Regulations provide that a person who without good cause fails or refuses to comply with employment requirements shall be disqualified from receiving Home Relief for at least thirty days and until such time as the recipient is willing to comply with the employment requirements. In case of a second violation within three years of the first instance of willful noncompliance without good cause such person is disqualified from receiving Home Relief for sixty days and until such time as the recipient is willing to comply with the requirements. There is a ninety day disqualification for the third and all subsequent violations within a three year period beginning with the date of the most recent instance of willful noncompliance without good cause.

The Regulations further provide that a person shall be deemed to have willfully refused employment services if such person fails to report to or continue in employment training or work relief.

Social Services Law Section 131.5 and Section 385.14(c) of the Department's Regulations requires the Agency to comply with certain procedures prior to disqualifying an employable recipient for receiving assistance. The Agency must issue a Notice of Intent at least ten days prior to a proposed discontinuance or reduction of assistance, informing the recipient that the discontinuance or reduction of assistance will become effective unless the recipient contacts the Agency within ten days to explain the recipient's failure to comply with the employment requirements. It is the recipient's responsibility to give reasons for such non-compliance. If the recipient responds to such notice within the ten day period, the Agency must determine whether the recipient's reasons satisfactorily explain the recipient's non-compliance.

If the Agency determines that the facts as presented show that the non-compliance was not willful or was for good cause, the initial ten day Notice of Intent to discontinue or reduce assistance must be cancelled.

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If the Agency determines that such facts do not satisfactorily explain the recipient's refusal or failure to comply with employment requirements, the Agency must issue a new ten day Notice of Intent to discontinue or reduce assistance which includes the reasons for such determination. This second notice must advise the recipient of his/her right to challenge the Agency's determination to discontinue or reduce assistance. At the hearing, it is the responsibility of the recipient to give reasons for his/her non-compliance.

Under section 366 of the Social Services Law a person who requires Medical Assistance is eligible for such assistance where such person:

- (a) is receiving or is eligible for Home Relief or Aid to Dependent Children or Supplemental Security Income;
- (b) although not receiving or in need of public assistance or care, has not sufficient income and resources to meet all the costs of medical care and services available under the Medical Assistance Program and such person is:
 - (i) under the age of 21; or
 - (ii) 65 years of age or older; or
 - (iii) the spouse of a cash Public Assistance recipient living with him/her and essential or necessary to his/her welfare and whose needs are taken into account in determining his/her cash payments; or
 - (iv) for reasons other than income or resources, is eligible for Aid to Dependent Children or Supplemental Security Income and/or additional state payments.
- (c) is at least 21 years of age but under the age of 65 and is not receiving or eligible to receive home relief or aid to dependent children and:
 - (i) who is the parent of a dependent child under the age of 21; and
 - (ii) who lives with such child; and
 - (iii) whose net income, without deducting the amount of any incurred medical expenses, does not exceed the net income exemption set forth in section 366.2(a)(8) of the Social Services Law.

Department Regulations at 18 NYCRR 360-2.2(d) provide that for a person who does not meet the criteria set forth above, other than financial, eligibility for Medical Assistance must be determined on the basis of that person's eligibility for Home Relief in accordance with the requirements of 18 NYCRR Part 352 and Part 370.

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Social Services Law Section 131 provides that as a condition of eligibility for Public Assistance, all employable Public Assistance applicants and recipients must participate in various employment programs which are intended to restore such persons to a condition of self-support or self-care.

Section 385.2(a) of the Regulations of the State Department of Social Services provides that each Public Assistance applicant or recipient will be determined employable unless such applicant or recipient is:

incapacitated, when it has been determined by a physician or licensed or certified psychologist that a physical or mental impairment, by itself or in conjunction with age, prevents the applicant/recipient from engaging in employment or training when such impairment is expected to exist for a continuous period of at least 30 days;

Section 352.31(f) of the Regulations provides:

Correction of underpayments to current recipients.
Local Social Services districts shall correct any underpayments to current recipients, and to those who would be current recipients if the error causing the underpayment had not occurred, by making appropriate payments in each case within thirty days after discovery of the underpayments.

Federal Regulations at 7 CFR 273.7(b) and Departmental Regulations at 18 NYCRR 387.13(a) provide that each household member who is not exempt from the work registration requirements of the Food Stamp Program must register for employment.

To be exempt from the work registration requirements a person must be:

physically or mentally unfit for employment;

applicants for both Supplemental Security Income (SSI) and Food Stamps under joint processing provisions of State or Federal Regulations until such time as they are determined to be eligible for SSI and thereby are exempt from work registration; or determined to be ineligible for SSI and a subsequent redetermination of their work registration status is made.

7 CFR 273.7(b); 18 NYCRR 387.13(b)(1).

< Where Food Stamp benefits are lost due to an error by the Agency, the Agency is required to restore lost benefits. However, lost benefits shall be restored for not more than twelve months prior to whichever of the following occurred first:

1. The date the Agency received a request for restoration from a household; or

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2. The date the Agency is notified or otherwise becomes aware that a loss to a household has occurred.

7 CFR 273.17; 18 NYCRR 387.18 and Department of Social Services Food Stamp Source Book, Section X-H-1.

Section 360-5.5 of the Regulations provides:

Examination. The cost of examinations, consultations, completion of medical forms, and tests requested by Medical Assistance-only disability review teams must be paid by the local Agency. Reimbursement is available for those services as an administrative expense in accordance with Section 593.3(b) of this Title.

Section 457.1(a), (b) and (c) of the Regulations provides:

(a) Protective services for adults is a State-mandated service. The provisions of Parts 400 through 407 of this Title apply in general to this service. The following factors relate specifically to protective services for adults, hereinafter referred to as PSA.

(b) **Client characteristics.** Protective services for adults are provided to individuals eighteen years of age or older who, because of mental or physical impairments:

(1) are unable to meet their essential needs for food, shelter, clothing or medical care, secure entitlements due them or protect themselves from physical or mental injury, neglect, maltreatment or financial exploitation; and

(2) are in need of protection from actual or threatened harm, neglect or hazardous conditions caused by the action or inaction of either themselves or other individuals; and

(3) have no one available who is willing and able to assist them responsibly.

(c) **Services.** PSA services are limited as appropriate to:

(1) identifying such adults who need assistance or who have no one willing and able to assist them responsibly;

(2) providing prompt response and investigation upon request of adults at risk or other persons acting on their behalf. At the time of referral, the local district shall make a determination as to whether a life-threatening situation exists. If a situation is

designated as life-threatening, the district shall commence an investigation as soon as possible but no later than twenty-four hours after receipt of the referral. For potential PSA cases not designated as life-threatening situations, the district shall commence an investigation within seventy-two hours of receipt of the referral and shall make a visit to the client within three working days of the referral. For the purposes of this Part, a referral is defined as any written or verbal information provided to a district in which a specific person is identified as apparently in need of PSA, or any verbal or written information provided to a district on behalf of an adult for whom the district determines that a PSA investigation and assessment is necessary;

(3) assessing the individual's situation and service needs;

(4) providing counseling to such adults, their families, other responsible persons or to fiduciaries such as representative payees, on handling the affairs of such adults;

(5) arranging for appropriate alternative living arrangements in the community or in an institution providing room and board as an integral but subordinate part of the provision of PSA for a period not to exceed thirty days;

(6) assisting in the location of Social Services medial care or other resources in the community, including arrangement for day care in a protective setting;

(7) arranging for guardianship, conservatorship, commitment or other protective placements as needed;

(8) providing advocacy and assistance in arranging for legal services to assure receipt of rights and entitlements due to adults at risk;

(9) functioning as a conservator, representative payee, or protective payee where it is determined such services are needed and there is no one else available or capable of acting in this capacity.

DISCUSSION

On April 28, 1986, the Agency notified the Appellant that it had determined to deny Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits.

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Although the Agency's notice advised the Appellant that a fair hearing must be requested within sixty days of its action, the Appellant failed to request this hearing until May 25, 1988 which was more than sixty days after the Agency's determination as to Public Assistance and Medical Assistance, and more than ninety days after the Agency's determination as to Food Stamp benefits.

On October 29, 1987, the Agency notified the Appellant that it had determined to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits.

Although the Agency's notice advised the Appellant that a fair hearing must be requested within sixty days of its action, the Appellant failed to request this hearing until May 25, 1988, which was more than sixty days after the Agency's determination as to Public Assistance and Medical Assistance, and more than ninety days after the Agency's determination as to Food Stamp benefits.

The evidence in this case establishes that the Appellant is illiterate and mentally retarded. The determination of the Appellant's mental disability was made by at least three psychologists, and on at least three separate occasions, August 5, 1975, April 21, 1988, and by the Suffolk County Department of Health Services on August 4, 1988. The Social Security Administration on January 19, 1989, determined that the Appellant has been severely impaired by mental retardation, that he is disabled, and that he is eligible for Supplemental Security Income benefits.

The Agency contends that Appellant is time barred under the Statute of Limitations as to its notice of April 28, 1986, to deny Appellant's application for assistance, and the Agency's notice of October 29, 1987, to discontinue Appellant's assistance.

The Agency further contends that the Appellant was capable of handling his affairs because he had made prior fair hearing requests. Furthermore, the Agency contends that Appellant had requested a fair hearing to review the Agency's determination of October 10, 1986 to discontinue Appellant's Public Assistance and that he represented himself at the hearing on January 8, 1987. The Agency's contentions are without merit. The Agency presented no evidence to support its contention that the Appellant had requested any fair hearings. The Appellant credibly testified that his

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sister did everything for him and his family, including filing applications for assistance. He further stated that he does not recall calling Albany for a fair hearing or attending a fair hearing. It is noted that in the psychological examination conducted on April 21, 1988, the psychologist states with regard to the Appellant, "his memory is extremely poor and he is unable to pay attention very well."

Etta Taichman, Nassau/Suffolk Law Services' Director of Social Work testified that she met the Appellant on December 1, 1987. Prior to that date she had only telephone contacts. She further stated that she saw her function as assisting the Appellant in getting his Public Assistance case opened, to obtain assistance for the Appellant from the Agency's APS and to assist Appellant in applying for Supplemental Security Income and Social Security Disability benefits. Ms. Taichman did not refer Appellant's case to the legal section of Nassau/Suffolk Law Services until April 15, 1988 with respect to this fair hearing.

It has been established that the Appellant is mentally retarded and illiterate. Under these circumstances, the Statute of Limitations may not be imposed to deprive the Appellant of a fair hearing.

The record establishes a sufficient basis for tolling the sixty day Statute of Limitations as to Public Assistance and Medical Assistance, and the ninety day limit as to Food Stamp benefits.

Since the Appellant is mentally retarded and illiterate, and not capable of employment, he is exempt from employment requirements. The aforesaid Section 385.2(a) of the Regulations, with respect to eligibility for Public Assistance, and the aforesaid Section 387.13(b)(1) of the Regulations with respect to eligibility for Food Stamp benefits, both provide that when a mental impairment prevents an applicant or recipient from engaging in employment, such applicant or recipient is exempt from employment requirements.

The evidence further establishes that the Appellant incurred \$120.00 for the cost of his psychological evaluation on April 21, 1988. The aforesaid Section 360-5.5 of the Regulations provides that the Agency is required to

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pay for the cost of examinations and consultations necessary to determine disability. The psychological evaluation was paid on behalf of the Appellant by the Nassau/Suffolk Law Services, and reimbursement shall be made directly to Law Services.

The Agency contends that underpayments of Public Assistance may only be made to current recipients of Public Assistance, and cited as its authority Section 352.31(f) of the Regulations. The Agency's contention is without merit. The Appellant, in this case, requested a fair hearing on March 15, 1988, and on April 15, 1988, and again amended his fair hearing request on May 25, 1988. The Appellant, during the pendency of this hearing, was in receipt of Public Assistance. Due to scheduling problems, which were not the fault of the Appellant nor his representatives, this hearing was not concluded until September 27, 1989, which is more than eighteen months after the initial request. The Appellant may not be denied underpayments of Public Assistance resulting from the aforementioned circumstances and the Agency's wrongful actions.

With respect to the issue of the adequacy of APS provided to the Appellant by the Agency, the evidence in this case establishes that the Agency's APS Bureau failed to comply with the provisions of Section 457.1(a) of the Regulations. Nassau/Suffolk Law Services' Ettie Taichman, Director of Social Work, contacted the Agency's APS on February 17, 1987, January 22, 1988 and January 28, 1988, requesting services for the Appellant. Upon receiving no assistance from the Agency's APS Bureau, Ms. Taichman determined to have the Appellant evaluated by a psychologist, and assisted Appellant in requesting a reconsideration of his denial of Supplemental Security Income benefits. Ms. Taichman's actions resulted in obtaining a favorable determination as to Appellant's eligibility for Supplemental Security Income benefits, and securing Public Assistance benefits upon the Agency's denial of Appellant's application for assistance on March 14, 1988.

The Agency presented no evidence to support its determination as to the failure to comply with the provisions of Section 457.1(a) of the Regulations.

Section 457.1(a) of the Regulations provides that Protective Services for Adults are provided to individuals eighteen years of age or older who because of mental impairments are unable to meet their essential needs, and to secure entitlements due them. The Agency's APS Bureau failed to provide prompt response and investigation upon request of Appellant's representative, failed to assess the Appellant's situation and service needs, and to provide advocacy and assistance in arranging for legal services to assure receipt of rights and entitlements and assist in the location of Social Services, medical care and other services in the community.

It is noted that pursuant to the aforementioned Section 387.18 of the Regulations, Food Stamp benefits lost due to an error by the Agency shall be restored for not more than twelve months prior to either the date the Agency received a request for restoration or the date the Agency is notified that a loss has occurred, whichever occurs first. In this case, the Agency was advised on May 25, 1988, as to the April 28, 1986 denial of Food Stamp

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benefits. Therefore, Food Stamp benefits cannot be restored prior to May 1, 1987, which is twelve months prior to May 5, 1988.

DECISION AND ORDER

The Agency's determination of April 28, 1986, to deny the Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits is not correct and is reversed.

1. The Agency is directed to accept the Appellant's application for Public Assistance effective April 7, 1986, and to provide benefits retroactive to that date, and to accept Appellant's application for Food Stamp benefits retroactive to May 1, 1987, subject to verified degree of need

The Agency's determination of October 29, 1987, to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits is not correct and is reversed.

1. The Agency is directed to restore all lost Public Assistance, Medical Assistance and Food Stamp benefits retroactive to October 29, 1987, the date of discontinuance.

The Agency's determination of March 4, 1988, to deny the Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits is not correct and is reversed.

1. The Agency is directed to accept the Appellant's application for Public Assistance, Medical Assistance and Food Stamp benefits effective January 25, 1988, and to provide benefits retroactive to that date, subject to verified degree of need.

The Agency's determination not to reimburse the Appellant for the costs of Appellant's psychological evaluation is not correct and is reversed.

1. The Agency is directed to issue a check for \$120.00 to Nassau/Suffolk Law Services for the costs of Appellant's psychological evaluation.

The Agency's determination as to the adequacy of APS provided to Appellant is not correct and is reversed.

1. The Agency is directed to comply with the provisions of Part 457 of the Regulations to assess and evaluate Appellant's needs for APS.

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

DATED: Albany, New York

CESAR A. PERALES,
COMMISSIONER

By 
Commissioner's Designee

MAR 21 1988