



## Connecticut Legal Services

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### Testimony of Randi Faith Mezzy Before the Judiciary Committee on March 24, 2006 Regarding SB 432, An Act Establishing a Demonstration Project for an Office of Administrative Hearings

**Recommended Action: Support bill to ensure independent hearings  
Include DSS in demonstration project**

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My name is Randi Faith Mezzy. I am an attorney for Connecticut Legal Services, a non-profit agency representing poor people. I have represented my clients in countless administrative appeals, challenging Department of Social Services denials of subsistence-level benefits and medical coverage. These hearings, required by federal law, are known as "Fair Hearings," but here in Connecticut, they are anything but fair.

A few years ago, the Department added a team of its own lawyers, representing the Commissioner, to the office of fair hearings, calling it the Office of Legal Counsel, Regulations and Administrative Hearings. The attorneys who advise the Commissioner on the legality of proposed regulations and who advise the Commissioner on the legality of her interpretations of federal and state law share an office, a common phone number and a fax number with the hearing officers, who are supposed to remain impartial when deciding appeals where DSS is on one side, and a DSS client is on the other.

Naturally, the hearings in which I represent clients almost always concern a difference of opinion about DSS's internal rules, or its interpretation of a regulation or a law. The hearing officers are supposed to make their decisions "based EXCLUSIVELY on the evidence introduced at the hearing," 42 C.F.R. §231.244(a). That is part of the design to make the hearings "fair."

But in recent years, hearing officers, in the middle of hearings, have turned off the tape recorder, left the room, and sought advice from "supervisors" in their office. Then they will return to the hearing, go back on the record, and issue the preliminary ruling the supervisor told them to issue. This can be about an evidentiary question, a procedural matter, or any number of crucial aspects of the hearing process.

With such blatant deviation from the rules requiring the hearing officers to consider only what is presented at the hearing, it occurred to me that perhaps this practice continued after the hearing was over, but before the decision was issued -- in other words, back at the office shared by both the hearing officers and the attorneys for DSS.

Of course, I had no way of finding out if that was true, until I represented a colleague who filed an appeal, with the Freedom of Information Commission, of the denial of her request for documents pertaining to communications between the hearing officers and the DSS attorneys. DSS refused to provide these documents but produced a "privilege log," describing the documents in general terms.



This log proved that DSS staff attorneys gave advice to the hearing officers regarding their draft decisions, and even rewrote parts of the draft decisions for the hearing officers.

Remember, these are the attorneys **whose client is the Commissioner** -- the adverse party in every one of my clients' appeals! That means counsel for one party has input into the resulting decision, while counsel for the other party doesn't. Counsel for one party has the opportunity to chat freely with the so-called impartial hearing officer, without even telling counsel for the other party that this conversation is taking place.

In one such appeal, my client, a child, was fighting a DSS denial of dental services, under the part of the Medicaid program that has been outsourced by DSS to four HMOs. The attorney for the HMO defended the decision to deny services, and I opposed it.

The hearing officer found in favor of the Department and the HMO. However, in writing the decision, she concluded that "no evidence was presented to support the child's need for these services." I filed a motion for contempt with the Superior Court, which had jurisdiction over this matter pursuant to a previous appeal. The judge had ordered the hearing officer to consider **all of the evidence presented in the previous appeal**. It seemed clear that that order had been ignored, because the hearing officer said "no evidence" was presented. Yet voluminous evidence *from the previous appeal* was ordered to be made part of the record, and was therefore presented.

Before my motion could be heard, counsel for the HMO, the WINNING PARTY, requested reconsideration of the decision in which his client's denial was UPHELD. Why? Because he wanted the hearing officer to REWRITE her decision and CHANGE the words "no evidence" to "insufficient evidence," so that her decision would survive my contempt motion and likely appeal.

This attorney called his request to change the words merely a "clarification," but there are few words more clear than the words "**no evidence was presented**." My opponent claimed that he knew that the hearing officer REALLY meant to write "**insufficient evidence was presented**." He did not reveal his method for divining the hearing officer's true intent. This was an experienced hearing officer who had found evidence to be **insufficient** in many other hearings. She was quite familiar with the difference in the terms.

His written request for reconsideration dictated precisely the language he wanted the hearing officer to use when she re-crafted her decision. She did exactly as he instructed, word for word. The *result* was the same – upholding the DSS and HMO's denial – but the fact remains that the HMO's lawyer was permitted to change words in a written legal decision so that it would better satisfy his winning client's needs. Upholding the HMOs is obviously in DSS's interest, and OLCRAH hearing officers, rather than being impartial, seem to be in lock step with what DSS wants to accomplish.

That is just one example of the way in which the lack of independence of the hearing officers in the Office of Legal Counsel, Regulations and Administrative Hearings results in repeated denials of due process of the law for DSS clients. Another example is this one: 42 C.F.R. § 431.223 states that there are only 2 occasions when a hearing may be denied or dismissed: one is if the client withdraws the hearing in writing, and the other is if the client fails to

appear at a scheduled hearing without good cause.

DSS's Uniform Policy Manual goes even further. It states, at UPM § 1570.15.A., "If the Department resolves the requester's dispute prior to holding of the Fair Hearing, the Department **still holds the Fair Hearing unless the request is withdrawn in writing.**" This is really powerful language, telling the hearing officers that it is so important to provide DSS clients with their opportunity to be heard that a hearing must go forward under almost any circumstances.

But the Office of Legal Counsel, Regulations and Administrative Hearings routinely cancels hearings when it hears **from a DSS worker** that a matter has been resolved, even though the client would disagree if anyone at OLCRAH asked her. But that doesn't happen. Instead, OLCRAH relies on the word of one of the parties to a dispute to dismiss the other party's hearing request. Where is the client's written withdrawal of the hearing request? It does not exist, yet the right to a hearing is gone.

42 C.F.R. § 431.221(b) states "[t]he agency may not limit or interfere with the applicant's or recipient's freedom to make a request for a hearing," yet OLCRAH routinely sends letters to clients, telling them they have missed the deadline for requesting a hearing, and therefore no hearing will be held. No one asks the clients if there was good cause for missing the deadline, or if a mistake has been made. How many unrepresented clients know that they can fight this? How many clients know that a notice lost in the mail may be good cause for their delay?

Even when a client is represented, it's an uphill battle. I had a case where my opponent notified the hearing officer, without telling me, that my client missed the deadline for appealing. The hearing officer, without asking me what happened or why, sent me a letter abruptly canceling the hearing.

I responded that the client had good cause for being late, and could prove it, but she needed to be heard in order to do so. Very reluctantly, the hearing officer scheduled a hearing confined only to the issue of what date my client received actual notice of the denial. Luckily, her reason for being late – the fact that her mailbox was routinely stolen and she heard of her denial from her doctor, not through a written notice sent to her home – was sufficient good cause to allow a full evidentiary hearing on the merits to go forward. Of course, the need for two hearings further delayed justice for my client.

This continuing, blatant disregard of federal and state due process protections is, in a word, horrifying. The vast majority of hearings are requested by people without attorneys. Imagine how difficult it must be to be a public benefits recipient, fighting against the State of Connecticut, with your DSS worker sitting across the table from you, without knowing the law, without being educated, without speaking English. People do this every day because their family's life and health depend on their willingness to do this very scary thing. Why would the State of Connecticut want to make it harder for them?

Somehow the mission of the Department of Social Services has been lost and turned into an "us against them" battle. Helping people get the benefits they need and deserve is supposed to be DSS's mission. Instead, DSS has infiltrated the OLCRAH process so thoroughly that the hearing officers no longer have the requisite independence to give people a fair shake. The worst part is that the clients have no idea this is happening to

them or how to fight it.

There is only one way to help all of DSS's clients gain access to a truly FAIR hearing. That is to set up an independent statewide office of administrative hearings, including DSS as part of the demonstration project. For that reason, I strongly support Senate Bill 432.