



CONNECTICUT LEGAL SERVICES

A PRIVATE NONPROFIT CORPORATION
85 CENTRAL AVE., WATERBURY, CT 06702
TELEPHONE (203) 756-8074 - 1-800-413-7797
FAX (203) 754-0504
E-MAIL WATERBURY@CONNLEGALESERVICES.ORG

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Testimony on March 16, 2007 of Randi Faith Mezzy Before the Committee on Judiciary Committee Regarding SB 1431 *An Act Establishing a Demonstration Project for an Office of Administrative Hearings*

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 merged the office of fair hearings with that of 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. These attorneys share a common phone number and fax number with the hearing officers.

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 what is supposed 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! So 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 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 used the words "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 probable 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." 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. My opponent claimed that he knew what she REALLY meant to write was "**insufficient evidence** was presented." He did not reveal his method for divining the hearing officer's true intent.

His request for reconsideration was contained in a letter to the hearing officer, in which he dictated precisely the language she should use to re-craft 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 HMO's lawyer asked this so-called impartial agency to change a written decision so that would better satisfy his winning client's needs, and he got it.

That is just one example of the way in which due process matters have run amok at the Office of Legal Counsel, Regulations and Administrative Hearings. Here is another example: 7 CFR §246.9, pertaining to Food Stamps, 45 CFR § 205.10, pertaining to Temporary Family Assistance and 42 C.F.R. § 431.223, referring to Medicaid, state that there are only 2 occasions when a hearing may be denied or dismissed: one is if the requester **withdraws the hearing in writing**, and the other is if the requester 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.

Such is its arrogance that, in January 2007, OLCRAH proposed a change in its regulations to allow certain hearings to be withdrawn orally, rather than in writing, in defiance of federal regulations. This change, which is being vigorously opposed by the legal services organizations, may impact on Connecticut's ability to receive federal funding for some of its benefit programs, since it is obligated to follow federal rules in order to qualify for that funding.

Because 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 may disagree, this proposed change serves to eliminate any paper trail proving that the client did not truly request that the hearing be canceled. It transfers the burden of proof onto the client to prove she did NOT orally cancel her hearing and requires her to prove a negative, again in contradiction to DSS's own regulations.

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 DSS client is represented by counsel, 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, based solely on the defendant's assertion that my client's request was untimely.

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, this further delayed justice for my client. Had she not been represented by counsel, she would never have had an opportunity to be heard, and would never have had even delayed justice.

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 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 their mission. Instead, the use of tricks, bullying and illegal procedure has become the order of the day at OLCRAH.

There is only one way to help my clients and all benefits recipients 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 the establishment of an independent office of administrative hearings. I would also strongly suggest that language incorporating the DSS be included in the implementation of this bill.