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**Testimony Before The Judiciary Committee In Support Of Bill 1431, Establishing A
Demonstration Project for an Independent State Hearings Office**

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Good afternoon, committee members. I am a staff attorney with New Haven Legal Assistance Association. I regularly represent individuals seeking administrative hearings before the Department of Social Services ("DSS"). I am here to testify in support of section 30 of Bill 1431, which would require the chief administrative law judge of the new independent administrative hearings office to develop a plan for taking over appeals from DSS. This bill would address a serious issue of ethics in state government, in that access to a fair appeals process is now effectively blocked for thousands of low-income individuals denied or cut off of subsistence and medical benefits by DSS. While I would strongly prefer that DSS hearings be taken over immediately, this provision at least gets us going down the road of addressing this intolerable situation involving the systematic denial of due process.

The Problem:

For several years, DSS' "Office of Legal Counsel, Regulations and Administrative Hearings" has taken increasing control over the decisions issued by its hearing officers in appeals of agency actions. It now effectively prevents the hearing officers from acting impartially whenever there is a DSS position involved that the agency wants to have furthered. Its practices of interfering with hearings, and effectively writing the hearing decisions so as to favor the agency, make a mockery of the fundamental constitutional due process right to an "impartial" hearing officer, as held by the United States Supreme Court to be required in administrative appeals of welfare agency action. (*Goldberg v. Kelly*, 397 U.S. 254 (1970)). That right is in fact now codified in both state and federal regulations governing the benefit programs administered by DSS, *see, e.g.*, 42 C.F.R. §§ 431.205(d) and 431.240(a)(3), and is also reflected in the state statute barring state hearing officers from having "ex parte" communications with parties in contested matters before them, C.G.S. § 4-181.

The manner in which DSS has distorted the hearing process is quite straightforward: We have now confirmed in several cases that:

1. The hearing officers routinely consult with their supervisors on decisions before the decisions are finalized. Those supervisors, who were not present at the hearing, sometimes rewrite and even reverse the hearing officer's draft decision.
2. In turn, these supervisors routinely consult either with their boss, the head of the "Office of Legal Counsel, Regulations and Administrative Hearings," who **also** is the Department's chief in-

house counsel, or with other DSS attorneys directly under her, who sometimes even represent DSS before these hearing officers, before giving guidance to the hearing officer on how to rule.

3. Hearing officers also sometimes directly consult with DSS attorneys for “guidance” on how to rule on procedural matters, such as whether to grant essential health benefits to individual claimants pending the outcome of a decision (“aid pending”). Attorneys “instruct” the hearing officer how to rule.

All of this communication occurs without notice to the individual claimant, usually unrepresented, who has requested the hearing, even to advise them that such communication has occurred.

That this is occurring on a regular basis was first confirmed in a March 2, 2005 letter I received from a DSS hearing supervisor. In that letter, a copy of which is attached, the hearing supervisor wrote in response to my letter to a hearing officer, which had confirmed that the hearing officer agreed to provide notice if he or his supervisor consulted with a DSS attorney regarding the case before him. In her response letter, the supervisor disagreed that any such promise by the hearing officer had been made, but, more importantly, stated:

“[Hearing Officer] Linton is under no legal obligation to notify you of communications either of us has with attorneys in this office who provide Hearing Officers with legal advice relating to this case or any other case. Please be advised, therefore, that *you will not be notified if either Mr. Linton or I communicate with Brenda Farrell [now Parrella] or any of the other agency attorneys to seek legal advice in this case or any other case.*” (emphasis added).

The same March 2, 2005 letter attempted to defend this practice by noting that, “when a hearing officer or a supervisor seeks legal advice from an agency attorney concerning issues that arise during a hearing, the Hearing Officer or supervisor is careful not to consult with an agency attorney who advised the Department regarding the eligibility determination *for that case.*” (emphasis added).

Since then, the pattern of direct influence over DSS hearing officers’ decisions by DSS attorneys, with no notice of such communications to the affected claimants, was confirmed in correspondence I had directly with the chief attorney for DSS. In a September 29, 2006 letter to me (attached) responding to concerns I had expressed about improper attempted communications with a hearing officer, the DSS chief counsel, Brenda Parrella, wrote:

I disagree with your position that legal advice provided to hearing officers must be done on the record. There is nothing in state law that limits a hearing officer’s ability to receive legal advice prior to rendering a decision, and there is nothing in the law that requires such legal advice to be on the record.

Beyond this, DSS’s chief counsel confirmed that this off-the-record “legal advice” to hearing officers could be provided by the Department’s **own attorneys**, who, as with the hearing officers themselves, report to her, and that this practice would continue unabated:

Accordingly, supervisors will continue to provide supervision to hearing officers, as necessary, and, when hearing officers need legal advice, an attorney from this unit who is not advising the Department on the issue before the hearing officer will provide such advice.

After I wrote back on October 5, 2006, objecting to this practice as a gross violation of the due process of indigent claimants, the chief counsel responded with a November 6, 2006 letter containing the indefensible conclusion that “[t]he fact that hearing officers, when necessary, may receive legal advice from Department attorneys on a point of law does nothing to impugn the impartial hearing process.” (Letters attached).

The attempted defense for this unsavory practice based on the DSS attorney not simultaneously advising the Department “for that case” ignores basic concepts of due process as well as the reality that often two cases, while involving different individual claimants, involve the identical **legal** issue. It is not possible for the lawyer to split his or her head in two in such circumstances. Moreover, as the Connecticut Supreme Court said in Martone v. Lensink, 207 A.2d 296, 303 (1988), the state statutory prohibition on *ex parte* communications applies not only to the facts in a case but precludes “*ex parte* discussion *of the law* with the party or his representative.” (emphasis added).

And, of course, all of the players involved here ultimately report to the chief counsel for the Department, charged with furthering the Department’s positions. Accordingly, given their primary allegiance to their DSS counsel boss, any hope of receiving impartial legal advice from these Department attorneys is a fantasy.

Some Illustrations of the Problem:

Thus, not surprisingly, claimants at DSS hearings inevitably lose when a DSS interpretation of a statute or regulation against the claimant is involved. It is the inherent structure of the office which creates this opportunity to compromise the hearing process. As long as hearing officers report to the same agency official who is responsible for supporting decisions that are being reviewed by the hearing officers, there will continue to be improper interference with the right to a fair hearing process. This reality is painfully demonstrated in each of the four examples attached to my testimony.

The Solution:

Given the dysfunctional state of affairs as reflected in the attached examples, I am pleased to see that bill 1431 will create an independent hearings office and that Section 30 of the bill will require a plan for finally putting an end to this denial of fundamental due process rights by requiring administrative hearings involving DSS to be taken over by that office. Following the lead of a majority of states, the bill will make the essential change of taking supervision of hearing officers away from an agency which unfortunately has demonstrated itself to be incapable of providing hearings that provide basic fairness.

Myths About Independent Hearing Offices:

There are some common myths perpetuated by opponents of creating a central hearings panel: that it will cost more, create another bureaucracy, compromise "expertise" among hearing officers. However, the actual experience of the other states which have gone to central panels rebuts all of these myths. As fully explained in an article from John Hardwicke and Thomas Ewing ("The Central Panel: A Response to Critics," August 4, 2004), the latter of whom was the chief administrative law judge in Oregon, which went to a central panel in 1999 over agency objections, when the Oregon legislature was considering making the central panel permanent in 2003, **not one agency objected.**

The Hardwicke/Ewing article also fully rebuts the cost concerns, noting "[e]xperience has shown that a central panel is inherently more cost-effective than separate, independent hearings units. There are two reasons: economies of scale and flexibility in case assignment." By allowing the same hearing officers to continue to be housed in agencies, at least initially, Oregon also found that the **start-up costs were a mere \$92,000**, before even factoring in the economies that soon were realized. Oregon's experience was hardly unique:

"Maryland went from a total of 90 [hearing officers] prior to the establishment of its central panel in 1991 to 53 by 1993; there was a corresponding reduction in operational staff. By the second year of its existence, the OAH saved the state of Maryland almost \$828,000. ... Without the panel, New Jersey would have spent \$20 million on hearings;... it spent only \$7.5 million."

Thus, it is not surprising that **not one state that has gone to a central hearings panel has chosen to return to the system of having the agency which issued the decision hear the appeal from it.**

Need for Action This Year:

I have testified before this committee two years previously urging that you take action to put an end to the denial of impartial justice at DSS, and so far nothing has been passed, all the while the agency has been emboldened to continue putting its thumb on the scales. Its chief counsel has now even confirmed in writing the systematic denial of due process we had suspected all along-- and declares there is nothing wrong with it. Of course, the fact that this agency is so adamant about keeping the hearings under its control is all the confirmation you need that the only solution is to take the hearings away from it.

We have recently learned the hard way that, if we don't address unethical conduct at the outset, we end up paying more down the road-- both in actual out of pocket outlays and in lost faith in the government. We urge you to include DSS in this demonstration project now, but, at a bare minimum, to retain the language in section 30 of §1431 requiring the chief ALJ to submit a specific plan for bringing DSS appeals into the jurisdiction of the independent hearings office.

Thank you for the opportunity to speak with you this afternoon.

FOUR EXAMPLES OF IMPROPER AGENCY ATTORNEY INTERFERENCE IN DSS HEARING OFFICER DECISION-MAKING

1. Vasquez

In this case, a quadriplegic individual was denied Medicaid coverage for equipment needed to remain in the community. As is often the case, I was advised of the pendency of a hearing late in the game but did attend to represent him. At the beginning of the hearing, held on January 30, 2002, the DSS representative demanded a continuance because it wanted to bring a lawyer since the claimant was represented by counsel. I strenuously objected to this continuance since my client would be prejudiced by the delay and both Mr. Vasquez and DSS had every opportunity to bring an attorney, but DSS chose not to. The hearing officer, hearing the dispute, then went off the record and called someone; she returned and reported on the record that the continuance would be granted. I asked who she had spoken to and the answer was Phyllis Hyman, an attorney for the Department who reports to Brenda Farrell (now Parella). The Hearing Officer, Laura Gangi, who is now a hearing officer supervisor, stated, at page 8 of the transcript:

“And after consulting with my supervisor, my manager, and an attorney from my office, I have been instructed to grant a postponement of this hearing due to the fact that the Department was not on notice that Attorney Toubman was representing the appellant, and therefore the Department would not have the benefit of having their counsel cross-examine the appellant’s witnesses who are here today.” (emphasis added).

2. Mokbil

This client sought a hearing when access to a prescription medication was blocked when Medicaid would no longer pay for it. She requested a hearing but her right to a hearing was denied. I intervened to get her the hearing but, at the beginning of the hearing held on November 13, 2003, the Department again raised the claim that my client had no right to a hearing. The hearing officer then went off the record and consulted with a supervisor. She acknowledged that during the break she consulted with her supervisor and that the supervisor may have consulted with a DSS attorney (Hearing Transcript, page 28). The hearing then proceeded but, four days later, an attorney in the same office as the hearing officer, DSS Principal Attorney Patricia McCooey, who, like the supervisor, reports to Attorney Farrell (now Parrella), submitted a request to dismiss the hearing. This request was then summarily granted by the hearing officer.

3. Pelletier I

In this case, a paralyzed wheelchair-user with a degenerative neuromuscular disease sought transportation for a medical appointment, which was denied based on the fact that, although the type of provider was covered by Medicaid, the particular provider did not work in a clinic setting and therefore could not be reimbursed under Medicaid. At the time of the scheduled hearing, a colleague of mine had obtained a ruling from a Connecticut Superior Court that this precise position of the Department violated state regulations.

When I went to the hearing on September 9, 2005 to represent Ms. Pelletier in her appeal of the denial of transportation, the Department, as in the Vasquez case, demanded a continuance so that

they could bring their own attorney to the hearing. When I objected, the hearing officer went off the record and made a telephone call. When he returned, he stated that an attorney in his office, Phyllis Hyman, had “instructed” him to grant the Department’s request for a continuance, over my objection. This was despite the fact that I wanted the hearing to proceed at least on my client’s claim that she was entitled to “aid pending” in the way of transportation to this provider pending the outcome of the decision, since transportation had been provided previously. The transcript of the conversation that followed, at pages 6-7, confirms direct DSS attorney intervention on an important procedural ruling which resulted in denial of medical transportation to my client:

“Mr. Toubman: And you will not even consider aid pending?”

The Hearing Officer: That is correct

* * *

Mr. Toubman: What’s confusing about it is that you said **you were instructed by Ms. Hyman to grant the continuance?**

The Hearing Officer: She said it was entirely appropriate to grant it.

Mr. Toubman: **And did she basically tell you you had to? Was that her instruction to you?**

The Hearing Officer: In so many words, yes.”

4. Pelletier II

After this hearing, the hearing was rescheduled with a different hearing officer for October 28, 2005. At that hearing, I again asked for aid pending the outcome of the hearing, in the form of medical transportation. In response, the hearing officer acknowledged that his supervisor reviews his decisions and sometimes overrules them, even on fact-based procedural questions like the right to aid pending. The transcript of that hearing, at pages 174-75, makes this clear:

“Mr. Toubman: I was talking about the aid pending issue. I’m sorry. Even on that?”

The Hearing Officer: Even on that I would probably go to her.

* * *

The Hearing Officer: She’ll do whatever she feels is necessary for her to give me a sound decision that I can put out here. And I don’t know what form that may take or who she may go to to draw from in providing me with her decision.

Mr. Toubman: But just to end this conversation, **what you’re saying is it’s possible that your supervisor could basically overrule your view on something like –**

The Hearing Officer: Oh, by all means. Oh most definitely.”

Although the hearing officer indicated he would rule promptly on the aid pending issue, he proceeded to take weeks to rule even on this issue, at which time he ruled against my client.