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**TESTIMONY OF SHELDON TOUBMAN BEFORE THE GENERAL
ADMINISTRATION AND ELECTIONS COMMITTEE IN SUPPORT OF SB 1188
(AN ACT ESTABLISHING THE DSS DIVISION OF ADMINISTRATIVE HEARINGS)**

March 21, 2011

Good afternoon, committee members. I am a staff attorney with New Haven Legal Assistance Association. I represent individuals before, or seeking administrative hearings before, the Department of Social Services ("DSS"). I am here to testify in support of SB 1188, which would create an independent administrative hearings division of the Department of Administrative Services. This bill would address a serious issue concerning ethics in state government, and could address a persistent pattern of deprivation of constitutional rights at DSS, if amended to require its hearings to be transferred to this new division.

First, I have to be candid that this is an issue on which I have testified before this Committee and the Judiciary Committee for several years now. Despite the testimony of many about problems with the provision of constitutionally-required impartial hearing officers for hearings in several state agencies, no legislation has yet been passed addressing this problem, using a model that a majority of other states use: a central panel of independent, impartial hearing officers capable of hearing appeals from a variety of state agencies, and protected from improper influence by officials of the state agency from which the appeal is being taken. Unfortunately, in the interim, things have only gotten worse. Access to a fair appeal process is now effectively blocked for many low-income individuals denied or cut off of essential benefits by DSS.

The Problem:

For several years, DSS' "Office of Legal Counsel, Regulations and Administrative Appeals" (OLCRAH) 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 practice of interfering with hearings, and effectively writing the hearing decisions so as to favor the agency, trample on the fundamental constitutional due process right to an "impartial" hearing officer, as held by the Supreme Court to be required in administrative appeals of welfare agency action. (*Goldberg v. Kelly*, 397 U.S. 254 (1970)). That right is codified in 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 also is 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. As stated in the federal Medicaid regulations, the hearing must be conducted "[b]y one or more impartial officials or other individuals who have not been directly involved in the initial determination of the action in question". 42 C.F.R. § 231.240(a)(3).

The manner in which DSS has compromised the hearing process in violation of these requirements is quite straightforward: We have now confirmed in several cases that DSS hearing

officers sometimes directly consult with DSS attorneys for "guidance" on how to rule on both substantive issues as well as procedural matters. Attorneys then "instruct" the hearing officer how to rule. These attorneys in turn report to the head of OLCRAH, who also is the Department's chief in-house counsel responsible for pursuing and defending the Department's positions and legal interpretations.

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

That this is occurring on a regular basis was confirmed in a September 29, 2006 letter I received from Brenda Parrella, DSS's general counsel (copy attached). That letter was responding to my letter objecting to this pattern of interference with Medicaid clients' due process rights, as reflected in a March 2, 2005 letter from her office (also attached) attempting 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).

This practice 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 (Uniform Administrative Procedures Act) 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).

Nevertheless, in her September 2006 letter to me, the DSS general counsel stated:

It is clear, therefore, that the UAPA allows for access by hearing officers, not only to agency expertise and supervision, but also to legal advice, without notice and opportunity for all parties to participate. Conn. Gen. Stat. § 4-181 only restricts communications regarding issues of law between the hearing officers and parties or their representatives without notice to all parties, while allowing the hearing officer to consult with his own attorney without notice to the parties. 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.

Given this position, not surprisingly, claimants at DSS hearings inevitably lose when a DSS interpretation of a statute or regulation against the claimant is involved and the hearing officer is advised by a DSS attorney. 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 pursuing and defending DSS positions that are being reviewed by those hearing officers, DSS' lawyers will inevitably be able to improperly interfere in the hearing process.

Unfortunately, because no legislation correcting this deprivation of the right to an impartial hearing officer at DSS has been adopted, matters have deteriorated since the September 2006 correspondence, to the point that even the commitment that, “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,” is now being disregarded. While the attorney in the case is understandably fearful of testifying before you about this pending matter, I just learned of a Medicaid case in which a DSS attorney who has been arguing for several years the Department’s position on a Medicaid substantive issue involved in the case not only was advising the hearing officer - she was actually appointed to *be the hearing officer*. Thus, that DSS attorney acted as the “impartial hearing officer” reviewing her own legal interpretation, making a mockery of the DSS assertion that state law “only restricts communications regarding issues of law between the hearing officers and parties or their representatives,” here, the party effectively got herself appointed as the hearing officer, assuring the claimant could not possibly win the appeal.

The Solution

Given this dysfunctional state of affairs, I urge you to pass favorably on SB 1188, and to include DSS in the agencies whose hearings will be transferred to the new division of DAS created to ensure independent and impartial hearing officers. I urge you to follow the majority of states in creating a central panel to hear these appeals.

Thank you for the opportunity to speak with you today.



STATE OF CONNECTICUT

DEPARTMENT OF SOCIAL SERVICES

OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
25 SIGOURNEY STREET • HARTFORD, CONNECTICUT 06106-5033

September 29, 2006

Sheldon V. Toubman, Esq.
New Haven Legal Assistance Association, Inc.
426 State Street
New Haven, CT 06510-2018

Dear Mr. Toubman,

Thank you for your letter of September 20, 2006. We certainly share an interest in the Department's clients having access to properly conducted administrative hearings. I am always interested in working with you and your colleagues to ensure our clients' needs are well met by this office. As you recognize, we have been making a concerted effort to reinforce for Department staff the requirements of the administrative hearing process.

I don't agree, however, with some of the conclusions you have reached regarding what is lawful communication between hearing officers, supervisors and attorneys in this unit. As I know this is a concern you have consistently expressed, I will take this opportunity to address the issue.

As a matter of law, the Department is not a party to the hearings that it holds. In section 4-166(8) of the Connecticut General Statutes, it states the following:

"Party" means each *person* (A) whose legal rights, duties or privileges are required by statute to be determined by an agency proceeding and who is named or admitted as a party; (B) who is required by law to be a party in an agency proceeding or (C) who is granted status as a party under subsection (a) of section 4-177a, (emphasis added).

A "person" is defined in this section as "any individual, partnership, corporation, limited liability company, association, governmental subdivision, agency or public private organization of any character, *but does not include the agency conducting the proceeding.*" Conn. Gen Stat. § 4-166(9) (emphasis added). In accordance with this statute, therefore, because the hearing officers are employees of the Department and they are conducting the proceedings, the Department cannot be a "person," and if the Department cannot be a "person," the Department cannot be a party. Note that this also precludes the Department from appealing any decisions that are made by hearing officers. See Conn. Gen. Stat. § 4-183(a) ("*A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to this Superior Court as provided in this section*") (emphasis added).

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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.

As you well know, judges use law clerks to assist them in their research. The law clerks locate case law, statutes, and other sources of law, and present their findings to the judges, sometime in the form of legal memoranda. Often, the law clerks have discussions with the judges concerning legal analysis. None of this communication between law clerks and judges is placed on the record. There is no opportunity for the parties to respond to the law clerks' research or recommendations to the judges.

In the same way that judges may benefit from the expertise of their law clerks, the state Uniform Administrative Procedure Act ("UAPA") provides that "the agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence." Conn. Gen. Stat. 4-178 (8). The UAPA's prohibition on ex parte communication does not prohibit communication between agency staff, including supervisors and attorneys, and hearing officers. Hearing officers are prohibited from communicating, "directly or indirectly in connection with an issue of fact, with a person or party, or, in connection with any issue of law, with any party or the parties representative, without notice and opportunity for all parties to participate," Conn. Gen. Stat. § 4-181(a), however hearing officers "may communicate with other members of the agency regarding a matter pending before the agency, and . . . hearing officer[s] may receive the aid and advice of members, employees, or agents of the agency if those members, employees, or agents have not received communications" that are prohibited by subsection (a). Conn. Gen. Stat. § 4-181(b).

It is clear, therefore, that the UAPA allows for access by hearing officers, not only to agency expertise and supervision, but also to legal advice, without notice and opportunity for all parties to participate. Conn. Gen. Stat. § 4-181 only restricts communications regarding issues of law between the hearing officers and parties or their representatives without notice to all parties, while allowing the hearing officer to consult with his own attorney without notice to the parties. 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.

As to your concerns in the case of Linda Siebert, I was consulted on two issues. First, I was approached by Laura Gangi, Fair Hearing Supervisor, and William Revill, Program Manager, to consider how to best handle the ex parte email that had been sent by a regional worker to Anne Popolizio, Hearing Officer in the case. We agreed to notify you of the communication and the steps taken to shield Ms. Popolizio from the communication, and to offer you the option of a new hearing with a different hearing officer.

Later in the day, I returned a phone call from Ron Roberts. He asked whether a hearing officer had the authority to issue a verbal order in the course of a hearing. He had been under the impression that an order must be in writing to be binding. I understood that this question arose after Linda Siebert's hearing during which the hearing officer had ordered that Ms. Siebert's benefits be continued pending a decision on eligibility. I advised Mr. Roberts that such an order was entirely proper. At this time, no other attorney in this office has been involved in Ms. Siebert's case and no legal advice has been sought by Ms. Popolizio. If, however, Ms. Popolizio later in the case requests legal advice, she may seek such advice from an attorney in this unit without providing you notice and the opportunity for participation.

Thank you for your interest in our process. I appreciate hearing of problems you may have so that I may address them. I look forward to continuing to work with you.

Sincerely,



Brenda Parrella
Director

Cc: Anne Popolizio, Hearing Officer
Laura Gangi, Hearings Supervisor
William Revill, Program Manager
Ronald Roberts, Regional Administrator



STATE OF CONNECTICUT

DEPARTMENT OF SOCIAL SERVICES

OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS

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March 2, 2005

MAR 07 2005

Sheldon V. Toubman
Attorney At Law
New Haven Legal Assistance Association, Inc.
426 State Street
New Haven, CT 06510-2018

Re: Helen DeSorbo's Fair Hearing

Dear Attorney Toubman:

Hearing Officer Hernold Linton shared with me a copy of the letter you wrote to him, dated February 18, 2005, in which you thanked him for agreeing to your request that he not discuss the above-referenced case with any attorneys in this office, including Brenda Farrell, without first advising you of his intention to do so. You also thanked him for his agreement to convey this same request to me.

This is to inform you that, based both on Mr. Linton's assurances to me that he had not agreed to notify you of his intentions to speak with any of the agency's attorneys, and my own independent review of the tape recording of the hearing, I conclude that your characterization of what Mr. Linton agreed to is incorrect.

My review of the tape recording of the hearing reveals that Mr. Linton told you that he had not had any discussions about the case with anyone prior to the hearing on February 9, 2005. But, as to the future, he said, in part: "I want to reserve the right, if necessary, to consult with someone that may be more authoritative in such field if necessary. Now, I'm not saying that I'm going to do it here, but there is a possibility." Additionally, near the end of the hearing, when you specifically requested that Mr. Linton provide you with notice of his or my intention to communicate with any lawyer in his office about this case, Mr. Linton responded thusly: "If I were to consult with my supervisor on this, I will make your request [to provide you with notice] known ..., all right?" You then responded, "I would very much appreciate that," and Mr. Linton said, "No problem."

Both Mr. Linton's understanding of what occurred at the hearing, and the tape recording itself confirm that Mr. Linton did not agree to notify you of his or my communications with any of the attorneys in this office about this case. Moreover, Mr. 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 to any other case. Please be advised, therefore, that you will not be notified if either Mr. Linton or I

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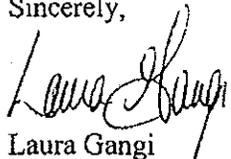
Sheldon V. Toubman,
Attorney At Law
New Haven Legal Assistance Association Inc.
February 28, 2005
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communicate with Brenda Farrell or any of the other agency attorneys to seek legal advice in this case or any other case.

Let me assure you 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. The agency attorneys, in turn, are extremely diligent about not speaking with each other about a case where one attorney represents the Hearing Officer and another attorney has advised the Department.

Should you have any other concerns or questions regarding this matter, please correspond directly with Brenda Farrell.

Sincerely,



Laura Gangi
Fair Hearing Supervisor
Office of Legal Counsel, Regulations and Administrative Hearings
Department of Social Services

C: Brenda Farrell, Director, OLCRAH
Srinivas Bangalore, DSS Medical Operations
Hernold Linton, Hearing Officer, OLCRAH