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D R A F T

Testimony of Shelley White Before the Human Services Committee in Support of SB 250, AAC Fair Hearings

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Good afternoon, Senator Slossberg, Rep. Abecrombie and Committee Members. I am Shelley White, the Litigation Director at New Haven Legal Assistance Association. We regularly represent individuals seeking administrative hearings before the Department of Social Services ("DSS"). I am here to support SB 250, which will:

1. Create a completely separate hearings office within DSS, whose director will report to the Commissioner of Social Services, independent of the department's legal counsel.
2. Prohibit any communications between any DSS attorneys and hearing officers pertaining to any pending cases except on the record with all interested parties involved receiving the same communication.
3. Address the common problem of individuals being unable to effectively present their cases to hearing officers seen and heard only through a computer screen, by providing a readily-available exception process. This process will enable persons with good cause to request an in-person hearing with the hearing officer.

The Problem:

The problem with the hearings conducted by DSS is structural: As the name correctly implies, DSS' "Office of Legal Counsel, Regulations and Administrative Hearings" conducts hearings -- which are required by both state and federal law to be conducted by *impartial* hearing officers -- and represents and advises DSS officials and staff in pursuit of the Department's legal positions before those same hearing officers. All of the hearing officers, either directly or through their supervisors, report to the chief counsel for DSS charged with pursuing those positions, who also is the supervisor of all DSS in-house attorneys.

The hearing officers, either directly or through their supervisor, often consult with DSS' in house attorneys who give guidance to the hearing officers on legal issues and interpretations. These hearing officers, their supervisors, and the in-house attorneys, are all part of a single office in which everyone directly reports to the Department's chief counsel.

Significantly, this communication occurs ex parte, without notice to the individual

claimant, usually unrepresented, who has requested the hearing, even to advise them that such communication has occurred.

In written communication with my office, DSS' chief counsel has taken the position that legal advice provided to hearing officers is not required be done on the record. Her position is that nothing in state law limits a hearing officer's ability to receive legal advice from the in house attorneys in the unit, prior to rendering a decision, and there is nothing in the law that requires such legal advice to be on the record. The only exception is if the in house attorney is representing the Department in the *particular case* before the hearing officer.

The structure of OLCRAH, combined with the practice of allowing *ex-parte* communications between hearing officers and DSS in-house attorneys, is completely at odds with the fundamental constitutional due process right of indigent welfare recipients 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 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.

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). In the *Martone* case, as here, the state agency conducting the hearing also was the agency whose position was before the hearing officer, and the Supreme Court found the prohibition on such *ex parte* communications to apply. Even after *Martone*, DSS attorneys have continued to have ex parte communications with hearing officers about pending cases where the department is directly interested, completely off the record. This confirms the need for a legislative fix in DSS.

The Solution:

The solution can be achieved by returning the structure of the DSS hearings office to how it has been administered in the past. Several years ago, there was an independent DSS hearings office administered by an individual who directly reported to the Commissioner. That person did not report to any lawyers in the agency and, as far as we know, none of those lawyers engaged in improper *ex parte* communications of the type at issue today.

Additionally, any hearing officer who believes he or she needs some input on any legal matter can contact all of the interested parties in writing, including any DSS attorney, providing them with the opportunity to provide input on the issue in question in writing or at the recorded hearing. That way, the DSS in house attorney has no ability to influence the result any more than the *pro se* claimant or his or her counsel does—they can only influence the decision-maker the **right** way: by making a logical argument on the record, which is subject to rebuttal by the other side. By separating the hearing officers from supervisory oversight by the very attorneys providing this advice, the independence of the hearing officers is preserved. This is the essence of the right to an impartial hearing officer announced in *Goldberg v. Kelly*.

All Connecticut residents deserve a hearing officer not biased in favor of upholding the state agency's decision -- or worse, with the current DSS practice, subject to his or her decision literally being rewritten by the agency's lawyer. Given the importance of the essential benefits administered by DSS, prohibiting such conduct is important in the case of that agency. SB 250 enshrines what has always been the standard procedure in state agencies, consistent with state and federal due process requirements, by restoring the separation of the hearings office necessary to ensure the integrity of its hearing decisions.

Thank you for the opportunity to speak with you today.