

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
TYETTA MEACHEM, MARIA CALDERON,  
NERY ROSADO, ALEJANDRO URENA,  
ANTHONY YOUNG, ROBERT COOPER,  
OKSANA YAKUBOVA, and BELLA GUROK  
on their own behalf and on behalf  
of all others similarly situated,

Plaintiffs,

99 Civ. 4630 (PKC)

-against-

BRIAN J. WING, as Commissioner of the  
New York State Office of Temporary  
and Disability Assistance; ANTONIA  
NOVELLO, as Commissioner of the New  
York State Department of Health; and  
JAMES M. MCGOWAN, as Commissioner of  
the New York State Department of Labor,

Defendants.

-----X  
STIPULATION AND ORDER OF SETTLEMENT

WHEREAS, plaintiffs bring this action pursuant to 42  
U.S.C. § 1983 on behalf of themselves and a class of similarly  
situated public assistance, food stamps and medical assistance  
("Medicaid") recipients (hereinafter, collectively, "public  
assistance recipients" and "public assistance benefits"), to  
challenge, under federal statutes and implementing regulations  
and the Due Process Clause of the Fourteenth Amendment to the  
United States Constitution, the fairness of the procedures  
employed at fair hearings addressing the City of New York Human  
Resources Administration's ("HRA") determinations to discontinue  
or reduce recipients' public assistance benefits for failure to  
respond to a prior letter, notice or any other mailing from HRA

where the class member claims that he or she did not receive the letter, notice or mailing in question;

WHEREAS, defendants deny all wrongdoing alleged in this action and any liability whatsoever to plaintiffs, and further assert that they have meritorious defenses to the action and that they enter into this Stipulation and Order of Settlement solely for the purposes of resolving this litigation;

WHEREAS, the defendants, through defendants Office of Temporary and Disability Assistance's ("OTDA") Office of Administrative Hearings ("OAH") will undertake to train and supervise their hearing officers concerning issues identified in this action and have drafted a memorandum to hearing officers outlining the general principles of the training (annexed hereto as Exhibit A); and

WHEREAS, the parties believe that the best interests of the parties will be advanced by the settlement of this action;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the parties herein, as follows:

**I. CLASS CERTIFICATION**

A. There shall be certified, for purposes of settlement only, a plaintiff class consisting of:

Any person who (a) is or has been or will be a recipient of public assistance, food stamps and/or Medicaid from the City of New York and (b) is or has been or will be the subject of a determination by the City of New York's Human Resources Administration ("HRA") to discontinue or reduce his or her public

assistance, food stamps, and/or Medicaid for failing to respond to a prior letter, notice, or any other mailing from HRA scheduling an appointment or otherwise requiring some other action by the recipient; and (c) challenges, has challenged, or will challenge said determination of HRA at a fair hearing on the ground that he or she did not receive the letter, notice or mailing to which he or she is alleged not to have responded, or did not receive a notice of intent concerning the determination by HRA to terminate or reduce his or her public assistance, food stamps, and/or Medicaid for failing to respond to a prior letter, notice, or any other mailing from HRA scheduling an appointment or otherwise requiring some other action by the recipient. This class shall dissolve and no member thereto shall be bound by it after the expiration of the term of this Stipulation.

B. For purposes of this Stipulation and Order of Settlement ("Stipulation"), the phrase "Fair Hearing of a Class Member" (or its plural form) shall include only those fair hearings had by a class member at which said class member, inter alia, has challenged, challenges or seeks to challenge a determination by HRA, to discontinue or reduce public assistance, food stamps, and/or Medicaid for failure to respond to a prior letter, notice or any other mailing from HRA, on the ground that the class member did not receive the letter, notice or mailing in question or a notice of intent. The phrase shall not be deemed to refer to any other fair hearing had by a class member that does not meet that definition.

## II. TRAINING, CODING AND SAMPLING

### A. Training

Defendants shall develop a training module to be used in training, and shall train all OAH hearing officers in New York City who are or will be employed to conduct a Fair Hearing of a Class Member, for the purpose of further promoting the goal of assuring the provision of due process of law at Fair Hearings of Class Members. The form and content of such training module and such training shall be determined solely by defendants in the exercise of their good-faith judgment.

**B. Tracking Code**

Defendants shall designate a tracking code to be assigned to the Fair Hearings of Class Members on or after the tracking code's implementation, for the remainder of the term of this Stipulation. Such code shall be assigned to the hearing by (a) the hearing officer at the conclusion of the hearing; (b) the hearing officer's supervisor upon review of the hearing record; or (c) the commissioner's designee prior to issuance of the Decision After Fair Hearing. Such code shall be assigned if an appellant indicates at or before the hearing that the appellant failed to receive a letter, notice or any other mailing to which he or she is alleged not to have responded, or did not receive a notice of intent. Such code shall be utilized as soon as practicable, but not later than on or about May 31, 2005.

**C. Notice of Completion of Training and Coding**

Defendants shall cause to be mailed a written notice, addressed to the person designated by plaintiffs' counsel in

Section IV.C of this Stipulation for receipt of notices hereunder, advising of the completion and implementation of the training and coding identified in Sections II.A and B above, promptly following such implementation.

**D. Sampling/Record Production**

1. The first six full calendar month period commencing after the date of the mailing of the notice described in Section II.C hereof shall be defined as the "First Sampling Period." A list identifying those Fair Hearings of Class Members that were both (i) conducted and decided during the First Sampling Period and (ii) designated with a mailing case tracking code, shall be provided by defendants to plaintiffs' counsel no later than forty-five days following the last day of the First Sampling Period. A case shall be considered decided if (a) the appellant appeared at a fair hearing conducted by a hearing officer; (b) the fair hearing was conducted on the record; and (c) a decision, other than a stipulation of settlement ("SOS") decision, is issued following the completion of the hearing. From said list of fair hearings, defendants shall cause a random sample to be drawn (the "First Sample") of 500 cases. No later than forty-five days following the last day of the First Sampling Period, defendants shall also provide plaintiffs' counsel's designee with a list of the cases randomly drawn to compose the First Sample and a copy of the full fair hearing record, as defined in 18 NYCRR § 358-5.11(a), which shall include the recording of the

hearing, the Form 1962 - Official Report of Fair Hearing (aka the "green sheet") and any continuation sheets, and the Form 1891 concerning the hearing, for each case in the First Sample. In addition, from the set of fair hearings that were (i) conducted and decided in New York City during the same time period as the First Sampling Period, but (ii) not designated with a mailing case tracking code, defendants shall randomly select one hundred such cases and provide the designee of plaintiffs' counsel with the fair hearing record, without the transcript or recording of the fair hearing, for each of these one hundred cases. Such records shall be provided to plaintiff's counsel's designee at the same time as the fair hearing records of the First Sample.

2. The same procedures set forth in subparagraph 1 of Section II.D of this Stipulation shall be observed by defendants with respect to the two consecutive six full month periods that follow the First Sampling Period, and shall result in the drawing of a Second Sample (for the six full month period immediately following the First Sampling Period, referred to as the "Second Sampling Period"), and a Third Sample (for the six full month period immediately following the Second Sampling Period). The same type of fair hearing records in relation to such Second and Third Samples shall be produced to plaintiffs' counsel as are required to be produced for the First Sample and within the same relative time frames.

3. Following completion of the Third Sample,

defendants' counsel, promptly upon being advised by defendants that defendants have provided to plaintiffs' counsel the fair hearing records that are required to be produced pursuant to the preceding subparagraph (2) of this Section II.D of this Stipulation, shall deliver notice to plaintiffs' counsel of such event, and upon the delivery of such notice, the obligations of defendants under Section II of this Stipulation shall cease and the term of the Stipulation shall end. Notwithstanding the foregoing, the remaining provisions of this Stipulation shall survive the end of the term.

4. Defendants shall not destroy any records or recordings of fair hearings conducted in New York City that are conducted during the period that commences upon the date of the notice that is given pursuant to Section II.C of this Stipulation and ends upon the date of the notice that is given under Section II.D.3 of this Stipulation, except upon prior written consent of plaintiffs' counsel or an order of the Court (the "Preservation Period"). Defendants shall not purge any data from their Fair Hearing Information System concerning fair hearings in New York City conducted during the Preservation Period, except upon prior written consent of plaintiffs' counsel or an order of the Court. This provision shall not prohibit defendants from destroying paper records that have been converted to electronic media, or purging Fair Hearing Information System data that have been converted to an alternative retention system. This paragraph

shall be deemed to supercede any and all orders previously issued by the court regarding the retention of records.

**E. Individual Relief**

1. Within 60 days after notification of the completion of training addressed in Section II.C of this Stipulation, Tyetta Meachem, Maria Calderon, Nery Rosado, Alejandro Urena, Anthony Young, Robert Cooper, Oksana Yakubova, Bella Gurok, Kiyokie Cortes, Angel L. Ivel, Arlene Edelstein, and Catalina Cruz each shall be entitled to notify defendants, in a writing provided to defendants' counsel, that he or she wishes to reopen the fair hearing identified in the pleadings at which he or she asserted non-receipt of a mailing, in order that he or she be afforded a new fair hearing. Within 60 days of receipt of such a written request, defendants shall cause to be scheduled a new hearing in such proceeding. In no event shall defendants be required to provide any remedial or retroactive relief to any class member under this Stipulation other than set forth in Section III.E of this Stipulation.

2. Nothing in this Stipulation shall preclude class members from utilizing the procedures currently set forth in 18 NYCRR § 358-6.6. Defendants shall make their best efforts to process such requests of class members for relief under 18 NYCRR § 358-6.6 in an expedited manner.

**III. DISMISSAL OF ACTION; RELEASE OF DEFENDANTS; ENFORCEMENT  
DURING TERM OF STIPULATION**

**A. Dismissal of Action**

Subject to Sections III.D, III.E and III.F, effective upon the Court's approval of this Stipulation pursuant to Rule 23(e), this action shall be deemed dismissed with prejudice.

**B. Class Releases**

Upon the Court's approval of this Stipulation as fair, reasonable and adequate, plaintiffs, individually and on behalf of each member of the class, and on behalf of the respective heirs, executors, administrators, personal representatives, successors and assigns of each of themselves and each of the members of the class, hereby jointly and severally release and forever discharge, on the merits with prejudice the State of New York, the New York State Office of Temporary and Disability Assistance, the New York State Department of Health, the New York State Department of Labor, the Governor of the State of New York and the commissioners of such agencies, and all past and present officials, employees, departments, representatives, directors and agents, their successors and assigns and their respective heirs, executors, administrators, personal representatives, and transferees (collectively the "Releasees") and each of them, of and from any and all manner of equitable claims, actions, costs, expenses and attorneys' and expert fees (except as provided in

Section V) whether known or unknown, foreseen or unforeseen, matured or unmatured, accrued or not accrued, direct or indirect, from the beginning of time through the date of Court approval of this Stipulation, that the named plaintiffs and the members of the class, and each of them, ever had, now has or have, or can, shall or may hereafter have against the Releasees or any of them, either alone or in any combination with others, for, by reason of, involving, concerning, arising from or in any way relating to any claim which is or could have been stated against the Releasees concerning the conduct challenged in the Complaint and any Amended Complaint filed in this action, except as provided for in Section III.C.

**C. No Further Actions during Term/Election of Remedies**

Plaintiffs, the members of the class, and their undersigned counsel, during the term of this Stipulation, shall not institute any legal action or proceeding, nor pursue any existing legal action or proceeding, that seeks to impose upon defendants or their agents or employees any declaratory or injunctive relief concerning the manner by which defendants conduct Fair Hearings of Class Members that are subject to this settlement during the term of this Stipulation; provided, that (i) this Stipulation and Order of Settlement shall not be construed to infringe upon such rights, if any, that an individual class member may otherwise have, to seek review by

means of an Article 78 proceeding commenced in state court of a decision after fair hearing resulting from a Fair Hearing of a Class Member during the term of this Stipulation, and provided, further, that (ii) no class member, nor counsel for this class, shall cite this Stipulation other than the document annexed hereto as Exhibit A, or any provision of this Stipulation other than those of Exhibit A, as a ground for, or as evidence in support of a ground for, vacating or reversing such decision after fair hearing.

**D. Jurisdiction Retained to Enforce Provisions**

The Court shall retain jurisdiction solely to enforce compliance with the terms of this Stipulation, pursuant to Section III.E hereof, or for purposes of reinstatement of the action pursuant to Section III.F hereof.

**E. Enforcement Motions and Standards**

1. In the event counsel for plaintiffs or defendants contend that the opposing party is not substantially complying with any term of this Stipulation, prior to seeking judicial intervention to enforce the terms of the Stipulation, counsel for the party seeking to enforce the terms of the Stipulation shall, within 45 days after ascertaining such purported non-compliance, provide opposing counsel with written notice of the purported non-compliance and any facts then apprehended upon which is predicated such claim of purported non-

compliance.

2. Counsel for the parties shall thereafter promptly attempt in good faith to resolve the matter without the need for judicial intervention.

3. In the event the matter is not resolved by such efforts within thirty days of opposing counsel's receipt of such notice of purported non-compliance, then the party giving such notice may move the Court to enforce the terms of this Stipulation upon the ground that the opposing party has not substantially complied with the terms of this Stipulation.

4. In any such motion, the movant shall bear the burden of proving by a preponderance of the evidence that the other party has not complied substantially with its obligations under the Stipulation.

#### **F. Reinstatement of Action**

This action may be reinstated solely in accordance with and subject to the terms and conditions of Section III. F of this Stipulation.

1. Upon the end of the term of this Stipulation (as defined in Section II.D.3), in the event counsel for the plaintiff class has determined to the best of counsel's knowledge, information and belief, formed after reasonable inquiry, that defendants, during or after the First Sampling Period, have maintained or followed policies, practices or procedures that systemically deny, at Fair Hearings of Class

Members, federal procedural rights that the class members may have which give rise to a private action under federal law (if any), then, during, and only during, a 180-day period commencing with the end of the term of this Stipulation (the "Reinstatement Window"), counsel for the plaintiff class may file and serve an amended complaint setting forth the factual allegations existing during or after the First Sampling Period in support of such a claim.

2. In the event that no such amended complaint referred to in Section IV.F.1 hereof is served and filed during the Reinstatement Window, under no circumstances may this action be reinstated. In the event such an amended complaint conforming to the requirements of Section IV.F.1 hereof is served and filed during the Reinstatement Window, the action shall proceed on the amended complaint, subject to such pleading, motion, discovery and trial schedule as the Court may determine, consistent with the Federal Rules of Civil Procedure. In proceedings had upon the amended complaint, rulings of law made prior to reinstatement of the action shall serve as law of the case to such extent as the Court may determine these prior rulings of law remain applicable to and controlling of questions of law that arise in the course of litigation of the claim(s) set forth in the amended complaint.

3. Counsel for the parties stipulate that in the event the action is reinstated by the service and filing of an amended

complaint pursuant to Section IV.F.1 hereof, alleged violations of rights at Fair Hearings of Class Members that occurred or are alleged to have occurred prior to the First Sampling Period shall not form a basis for any relief (declaratory, injunctive or otherwise) in the reinstated action, and counsel representing the plaintiffs or any certified plaintiff class in the reinstated action shall not be permitted to introduce, or otherwise rely upon, any evidence of alleged deficiencies in the conduct of Fair Hearings of Class Members with respect to fair hearings that were conducted prior to the First Sampling Period, to support any claim seeking declaratory, injunctive or other relief in such reinstated action.

#### **IV. MISCELLANEOUS PROVISIONS**

A. Notwithstanding the provisions of this Stipulation, defendants reserve the right to alter or amend the procedures and requirements of this Stipulation if required by intervening changes in federal statute or federal regulation that are inconsistent with the terms of this Stipulation. Counsel for plaintiffs reserve any right to contest such changes. Defendants agree to provide counsel for plaintiffs with written notification, by certified mail return receipt requested, at least 30 days prior to the filing of a motion to so alter or amend the Stipulation. If 30 days notice is not possible pursuant to this paragraph, defendant(s) will notify counsel for plaintiffs five business days prior to the filing of such motion.

No such alterations or amendments will be implemented pursuant to this paragraph unless and until either (1) they are agreed to by all parties in writing in advance of any implementation; or (2) the Court, upon motion of the defendants, determines in advance of any such implementation that it is required by intervening changes in federal statute or regulation.

B. The terms and conditions of this Stipulation shall be deemed effective, and the parties' obligations, rights and responsibilities hereunder shall commence, only upon an order or judgment approving this Stipulation becoming final. "Final," for purposes of the order or judgment approving this Stipulation, shall mean (i) the thirty-first day after such order or judgment is entered (such order or judgment having followed prior notice to the settlement class and the scheduling and conclusion of a fairness hearing in accordance with the requirements of Rule 23 of the Federal Rules of Civil Procedure), if no notice of appeal is timely filed; or (ii) if any such notice of appeal is timely filed, then the first day on which the order or judgment is not subject to further judicial review or appeal, either by reason of affirmance by a court of last resort or by reason of lapse of time, provided that this Stipulation or order approving this Stipulation is not reversed or modified upon such judicial review or appeal. In the event an order or judgment is not entered approving of this Stipulation within 120 days of the date of its execution by counsel for the parties hereto, or in the event an

order or judgment approving this Stipulation is reversed or modified upon judicial review or appeal, this Stipulation shall be voidable by election of counsel for either the plaintiff class or for defendants, which election shall be provided to opposing counsel and the Court in writing. In such event, the matter shall be restored to the Court's trial calendar.

C. All notices and mailings required to be sent by counsel for plaintiffs by this Stipulation shall be sent certified mail, return receipt requested, to the New York City Office of the Attorney General of the State of New York (Attention George Alvarez) and to the Office of General Counsel, Commissioner of the New York State OTDA in Albany, New York. In this Stipulation, any requirement that a notice or other materials be sent by the defendants to plaintiffs or to counsel for plaintiffs shall be sent to the Welfare Law Center.

D. Nothing contained in this Stipulation shall be deemed to be a finding or an admission that defendants have in any manner violated plaintiffs' rights nor be construed to be an admission or concession of liability by defendants or their respective State agencies or employees regarding any of the allegations made by plaintiffs in the Complaint or Amended Complaint(s) herein.

E. This Stipulation shall have no precedential value or effect whatsoever and shall not be admissible in any other action or proceeding as evidence or for any purpose, except in an action

or proceeding to enforce a provision of this Stipulation of Settlement.

F. Plaintiffs agree to maintain for all time the confidentiality of all confidential information, pursuant to the terms of the Confidentiality Agreement so ordered by the court on August 1, 2000, obtained by plaintiffs in the course of this litigation and during the term of the Stipulation and shall not disclose such information to any individual, other than defendants and any individual whose case is involved, except to the extent necessary in any proceeding brought before any court to enforce any right under this Stipulation. Nothing in this paragraph shall preclude any person from utilizing, for any purpose, any non-confidential information obtained by plaintiffs in the course of this litigation and during the term of this Stipulation. Nothing in this paragraph shall interfere with or diminish the rights of plaintiffs to enforce this Stipulation.

G. If any time period specified in this Stipulation requires that a party take any action at the expiration thereof, and such time period ends on a Saturday, Sunday or National or New York State holiday, the time period will be deemed to expire on the next business day following the expiration of such time period, and any action taken by any party on such next business day shall be deemed timely.

**V. ATTORNEY'S FEES**

A. Upon this Stipulation becoming Final, defendants agree to pay to counsel for plaintiffs the sum of One Million Three Hundred Thousand Dollars (\$1,300,000.00) in respect of attorneys' fees, costs and disbursements (the "Fee Payment").

B. The Fee Payment shall be accepted in full settlement of any claims for attorneys' fees, costs and disbursements that plaintiffs or the settlement class had, have or may in the future have against the defendants arising from the claims in this action or arising from any activities of counsel for the class in connection with this action or this Stipulation. Counsel for plaintiffs shall not seek any order from the Court awarding to the class, to plaintiffs or plaintiffs' counsel fees and expenses in this action or for any work undertaken by counsel for plaintiffs in relation to this Stipulation, beyond the sum provided for in paragraph A above, provided that:

- (i) notwithstanding the foregoing, the parties agree that counsel for plaintiffs may seek to recover reasonable attorneys fees and costs incurred after this Stipulation becomes Final, in bringing any motion to enforce the terms of this settlement in accordance with the terms of Section III.E hereof, in the event plaintiffs obtain an order of this Court enforcing the terms of this Stipulation against defendants as a result of the bringing of

such motion; and

(ii) notwithstanding the foregoing, in the event that an amended complaint that results in reinstatement of this action is filed by plaintiffs in accordance with Section III.F. hereof, the parties agree that counsel for plaintiffs, in the further event the plaintiffs prevail in such reinstated action, may seek to recover reasonable attorneys fees and costs incurred by counsel for plaintiffs in such reinstated action, but in no event shall plaintiffs seek an award in excess of \$50,000 with respect to those fees and costs incurred by plaintiffs' counsel or their agents during any time period preceding the filing of the amended complaint.

C. Payment of the Fee Amount shall be made by checks issued in the amounts that follow, made payable to the following entities, and at the addresses shown in the signature block of this Stipulation:

<u>Organization</u>	<u>Amount</u>
Urban Justice Center	\$ 80,697.81
NYLAG	\$129,700.96
Dewey Ballantine	\$139,226.01
Legal Aid Society	\$647,779.48
Welfare Law Center	\$302,595.74.

D. Payment of the Fee Amount is subject to the approval of

all appropriate New York State officials in accordance with the provisions for indemnification under New York Public Officers Law § 17. In the event such approvals are not obtained within 120 days of the date that this Stipulation becomes Final, then, notwithstanding any limitation set forth in Section V.B to the contrary, plaintiffs shall have the right to apply to the Court for an award of reasonable fees and expenses pursuant to 42 U.S.C. Section 1988, with respect to fees and expenses incurred by plaintiffs in the prosecution of this action.

E. Interest shall accrue upon the amount of the Fee Payment to be made pursuant to Section V.A of this Stipulation in the event the Fee Payment is not made within one hundred twenty (120) days of the date that the Stipulation becomes Final. In such event, interest shall accrue on the Fee Payment at the rate set forth in 28 U.S.C. § 1961, beginning on the one hundred twenty first (121<sup>st</sup>) day after the date that the Stipulation becomes Final. Nothing herein shall preclude plaintiffs or their counsel from moving to compel payment in the event that the Fee Payment is not made within said 120-day period.

Dated: New York, New York  
December 22, 2004

WELFARE LAW CENTER  
275 Seventh Avenue, Suite 1205  
New York, NY 10001-6708  
(212) 633-6967

By:

  
\_\_\_\_\_  
MARC COHAN

Dated: New York, New York  
December 22, 2004

THE LEGAL AID SOCIETY  
199 Water Street, 3<sup>rd</sup> Floor

New York, NY 10038  
IAN F. FELDMAN, Assistant  
Attorney-in-Charge, Bronx  
Neighborhood Office  
SCOTT A. ROSENBERG, Director  
of Litigation, Civil Division  
Richard Blum, of counsel  
Esperanza Colon, of counsel  
Anne Callagy, of counsel  
Steven Godeski, of counsel  
Kenneth Stephens, of counsel  
Susan Welber, of counsel  
(212) 577-3648

By:

  
RICHARD BLUM

Dated: New York, New York  
December 23, 2004

NEW YORK LEGAL ASSISTANCE  
GROUP, INC.  
YISROEL SCHULMAN, ESQ.  
450 West 33<sup>rd</sup> Street, 11<sup>th</sup> Floor  
New York, New York 10001-2603  
(212) 613-5030

By:

  
CONSTANCE CARDEN

Dated: New York, New York  
December 23, 2004

THE URBAN JUSTICE CENTER  
666 Broadway, 10<sup>th</sup> Floor  
New York, New York 10012  
(646) 602-5640

By:

  
WENDY A. BACH

Dated: New York, New York  
December 22, 2004

DEWEY BALLANTINE LLP  
Paul J. Bschorr, of counsel  
Henry J. Ricardo, of counsel  
1301 Avenue of the Americas  
New York, NY 10019-6092  
(212) 259-7114

By:

  
HENRY J. RICARDO

Attorneys for the Plaintiffs

Dated: New York, New York  
December 22, 2004

ELIOT SPITZER  
ATTORNEY GENERAL OF THE STATE  
OF NEW YORK  
120 Broadway, 24<sup>th</sup> Floor  
New York, NY 10271  
(212) 416-8656

By:



---

VINCENT LEONG  
Assistant Attorney General

Attorneys for the Defendants

SO ORDERED:

Dated: New York, New York

---

HON. P. KEVIN CASTEL  
UNITED STATE DISTRICT JUDGE



of document mailed, and determine whether the presumption of mailing the document was established in the appellant's case. To that end, the evidence presented should correspond with the process described in the affidavit. The hearing officer should also evaluate whether the agency has the appellant's correct address in its records, and, if not, whether the appellant ever properly and timely notified the agency of the his/her correct address.

In sum, the hearing officer should examine and consider all the documents and other evidence in the record in order to determine whether or not the mailing procedure alleged in the affidavit(s) was used for the mailing in question.

- Developing the hearing record

The hearing officer's duties include the responsibility to elicit evidence, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness (See 18 NYCRR §358-5.6(b)(3)), but not to the extent of acting as an appellant's representative.

The recording equipment should be on during the entire hearing. If there is any conversation between the hearing officer and the parties, or between the parties before the recording equipment is turned on, the hearing officer should summarize the conversations on the record. If the hearing officer turns off the recording equipment during the hearing, he or she should state on the record the reason. When the recording equipment is turned back on, the hearing officer should ask the parties if there was any conversation while the equipment was off and, if so, what was said.

If the appellant alleges non-receipt of a mailed document, the hearing officer should explain to both parties that the agency will first be asked to provide evidence that establishes the document was properly mailed and, if mailing is established, the appellant will have a full and fair opportunity to explain why the document at issue was not received. The hearing officer may find an appellant's uncorroborated testimony as sufficient to rebut the agency's claim that the appellant was mailed a notice. If the appellant identifies a document which appears to the hearing officer can corroborate the appellant's testimony on a material issue, the hearing officer should ask the appellant whether he or she would like an adjournment for that purpose and, if so, an adjournment should be granted. The hearing officer may issue subpoenas or take other action, pursuant to 18 NYCRR 358-5.6(b)(8), to compel production of either witnesses or documents.

- Fair Hearing Decisions

When a decision adverse to the appellant turns on the credibility of the appellant, the basis for the determination should be included in the decision. Please note that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be credible, especially where it is found to be uncontradicted or internally consistent.

I appreciate the warm reception our CLE-accredited training has received from hearing officers and the interest expressed in on-going training. We are continuing to develop and update our curricula and welcome your recommendations for additional topics of concern. As always, hearing officers can refer to the 2002 edition of the Manual For Administrative Law Judges and Hearing Officers for guidance.