

Part 434. CHILD PROTECTIVE SERVICES ADMINISTRATIVE HEARING PROCEDURE

(Statutory authority: Social Services Law, §§20, 22, 34, 390, 424-a, 427, 455, 460-d)

Historical Note

Part (§§434.1-434.11) filed July 13, 1988 eff. Aug. 3, 1988.

§ 434.2 Definitions.

Historical Note

For purposes of this Part, the following definitions apply:

- (a) Abused child means a child as defined in section 412.1 of the Social Services Law.
- (b) Appellant means (1) a subject of an indicated report of child abuse or maltreatment who has requested a hearing pursuant to section 422 of the Social Services Law to determine whether the subject has been shown by some credible evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report and whether such act or acts could be relevant and reasonably related to the appropriateness of the subject to engage in child care employment or to become an adoptive parent, a foster parent, or a day care provider, or (2) the subject of an indicated report who has requested a hearing pursuant to section 424-a of the Social Services Law to determine whether he or she has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.
- (c) Authorized agency means an agency as defined in section 371.10 of the Social Services Law.
- (d) Commissioner means the State Commissioner of Social Services.
- (e) Department means the State Department of Social Services.
- (f) Hearing means a proceeding at which (1) a subject of a report of child abuse and maltreatment may seek relief from a decision of the department to deny a request to amend an indicated report of child abuse or maltreatment maintained by the State Central Register of Child Abuse and Maltreatment, or, for reports received prior to February 12, 1996, amend or expunge an indicated report of child abuse or maltreatment maintained by the State Central Register of Child Abuse and Maltreatment, or (2) it is determined whether a subject committed the act or acts of child abuse or maltreatment giving rise to an indicated report and if so whether such act or acts are relevant and reasonably related to the appropriateness of the subject to engage in child care employment or to become an adoptive parent, foster parent or a day care provider.
- (g) Hearing officer means an attorney who is employed by the department and designated and authorized by the commissioner to preside at hearings.
- (h) Indicated report means a report of child abuse or maltreatment in which an investigation conducted by the local social services district, the department, or the Commission on the Quality of Care for the Mentally Disabled has determined that some credible evidence of the alleged child abuse or maltreatment exists.
- (i) Licensing agency means an authorized agency which has received an application to become an adoptive parent or an authorized agency which has received an application for a certificate or license to receive, board or keep any child pursuant to the provisions

of section 376 or 377 of the Social Services Law or an authorized agency which has received an application from a relative within the third degree of the parent or stepparent of a child or the child's legal guardian for approval to receive, board or keep such child or an authorized agency or State or local governmental agency which receives an application to provide day care services in a day care center, family day care home or group family day care home pursuant to the provisions of section 390 of the Social Services Law, or the Department of Health of the City of New York when such department receives an application for a certificate of approval to provide family day care pursuant to the provision of the health code of such city, or a State or local governmental official who receives an application for a permit to operate a camp which is subject to the provisions of article 13-A, 13-B or 13-C of the Public Health Law or the Division for Youth which has received an application for a certificate to receive board or keep any child at a foster family home pursuant to the provisions of section 501(7), 502, or 532-a(3) of the Executive Law.

(j) Maltreated child means a child as defined in section 412(2) of the Social Services Law.

(k) Parties to a hearing means the appellant, the State Central Register of Child Abuse and Maltreatment, the local child protective service, the Commission on Quality of Care for the Mentally Disabled, and the department.

(l) Provider agency means an authorized agency, the Division for Youth, juvenile detention facilities subject to the certification of such division, programs established pursuant to article 19-H of the Executive Law, and licensed day care centers, including head start programs which are funded pursuant to title V of the Federal Economic Opportunity Act of 1964, as amended, special act school districts as enumerated in chapter 566 of the Laws of 1967, as amended, and residential schools which are operated, supervised or approved by the Education Department.

(m) Subject of a report means any parent of, guardian of, custodian of or other person 18 years of age or older legally responsible for, as defined in section 1012(g) of the Family Court Act, a child reported to the State Central Register of Child Abuse and Maltreatment, who is allegedly responsible for causing abuse or maltreatment to such child or who allegedly allows such abuse or maltreatment to be inflicted on such child, or a director of or an operator of or employee or volunteer in a home operated or supervised by an authorized agency, the Division for Youth, or an office of the Department of Mental Hygiene or in a family day care home, a day care center, a group family day care home or a day services program, or a consultant or any person who is an employee of or a volunteer in a corporation, partnership, organization or any governmental entity which provides goods or services and has regular and substantial contact with children in residential care who is allegedly responsible for causing abuse or maltreatment or who allegedly allows such abuse or maltreatment to be inflicted on such child.

Historical Note

Sec. filed July 13, 1988; amd. filed: Sept. 30, 1992 as emergency measure; Dec. 24, 1992 as emergency measure; Feb. 17, 1993 as emergency measure; Feb. 17, 1993; Aug. 8, 1996 as emergency measure; Nov. 6, 1996 as emergency measure; Feb. 3, 1997 as emergency measure eff. Feb. 3, 1997; Feb. 4, 1997 eff. Feb. 19, 1997. Amended (f).

§ 434.3 Persons entitled to a hearing.
Historical Note

(a) A subject of a report of child abuse or maltreatment has a right to a hearing pursuant to section 422 of the Social Services Law to determine whether the record of the report in the State Central Register of Child Abuse and Maltreatment should be amended or, if the report was received by the State Central Register of Child Abuse and Maltreatment prior to February 12, 1996, amended or expunged on the grounds that it is inaccurate or is being maintained in a manner inconsistent with title 6 of article 6 of the Social Services Law. The burden of proof at such hearing is on the department, appropriate local child protective service or the Commission on Quality of Care for the Mentally Disabled, as the case may be. The issues at the hearing are: (1) whether the subject has been shown by some credible evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report, where it has been determined at the administrative review that the act or acts of child abuse or maltreatment giving rise to the indicated report would not be relevant and reasonably related to the employment of the subject by provider agencies or the approval of applications which would be submitted by the subject to licensing agencies; or (2) whether the subject has been shown by some credible evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report and, if there is a finding of some credible evidence, whether such act or acts are, based on guidelines developed by the department, relevant and reasonably related to the employment of the subject by provider agencies, or the approval or disapproval of applications which are submitted by the subject to licensing agencies.

(b) Any person who has been informed by a licensing or provider agency that he or she has been denied employment, discharged from employment, not used as a volunteer or not hired as a consultant or informed that an application for a permit or license has been denied based in whole or in part on the fact that such person is the subject of an indicated report of child abuse or maltreatment may request a hearing pursuant to section 424-a of the Social Services Law. The request for a hearing must be made within 90 days of the receipt of notice of denial of an application by a provider or licensing agency which indicates that the denial was based in whole or in part on the existence of the indicated report. Any hearing requested under this paragraph must be held within 30 days of the request unless the hearing is adjourned for good cause shown. Any subsequent adjournment for good cause shown must be granted only upon consent of the person who requested the hearing. At any such hearing, the sole question to be decided is whether the subject has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report. In such hearings the burden of proof on the issue of whether an act of child abuse or maltreatment was committed is upon the department.

Historical Note

Sec. filed July 13, 1988; amds. filed: Aug. 8, 1996 as emergency measure; Nov. 6, 1996 as emergency measure; Feb. 3, 1997 as emergency measure eff. Feb. 3, 1997; Feb. 4, 1997 eff. Feb. 19, 1997. Amended (a).

§ 434.4 Time and place of the hearing.

Historical Note

The hearing must be held at a time and place convenient to the appellant as far as practicable, taking into account circumstances such as the physical inability of the appellant to travel.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

§ 434.5 Notice of the hearing.

Historical Note

Case Notes

All hearings held pursuant to this Part will be scheduled by means of a written notice issued to the appellant and his or her representative, if known, by the department. The notice must include:

- (a) the date, time and location of the hearing and a statement informing the appellant of his or her right to a change in the date and place of the hearing where necessary;
- (b) a statement of the issues which will be decided at the hearing;
- (c) a statement of the manner in which the hearing will be conducted;
- (d) a statement of the right of the appellant to be represented by an attorney or other representative;
- (e) a statement of the right of the appellant to present evidence on his or her behalf and to produce witnesses;
- (f) a statement of the right of the appellant to cross-examine witnesses;
- (g) a statement that a verbatim record of the hearing will be maintained;
- (h) a statement of the method by which adjournments may be requested and granted; and
- (i) a statement of the right of the appellant to review the documents maintained by the State Central Register of Child Abuse and Maltreatment.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

CASE NOTES

Child reported to state Central Register of Child Abuse and Maltreatment lacked standing to challenge administrative determination that report of possible child abuse or maltreatment by his father was unfounded. *Daniel S. v. Dowling* (4 Dept. 1998) 684 N.Y.S.2d 99, 256 A.D.2d 1236, appeal dismissed 713 N.E.2d 418, 691 N.Y.S.2d 383, 93 N.Y.2d 919.

Child reported to state Central Register of Child Abuse and Maltreatment was deprived of no constitutionally protected interest as result of administrative determination that

report of his possible abuse or maltreatment by his father was unfounded, as required to implicate principles of procedural due process. *Daniel S. v. Dowling* (4 Dept. 1998) 684 N.Y.S.2d 99, 256 A.D.2d 1236, appeal dismissed 713 N.E.2d 418, 691 N.Y.S.2d 383, 93 N.Y.2d 919.

§ 434.6 Hearing officer.

Historical Note

Case Notes

(a) The hearing must be conducted by an impartial hearing officer who is employed by the department for that purpose and who has not been involved in any way with the action in question. The hearing officer has all the powers conferred by law and the regulations of the department to administer oaths, issue subpoenas, require the attendance of witnesses and the production of books and records, rule upon requests for adjournment, rule upon evidentiary matters and to otherwise regulate the hearing, preserve requirements of due process and effectuate the purpose and provisions of applicable law.

(b) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

- (i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or
- (ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or
- (iii) displayed bias or partiality to any party to the hearing.

(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

- (i) be made in good faith; and
- (ii) be made at the hearing in writing or orally on the record; and
- (iii) describe in detail the grounds for requesting that the hearing officer be removed.

(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

Historical Note

Sec. filed July 13, 1988; amd. filed May 13, 1991 eff. May 29, 1991.

CASE NOTES

Where petitioners, foster parents, were found guilty of maltreatment, under 18 NYCRR §434.6(a), it was not improper for determination to be made by person who did not preside at expungement hearing because regulation allows hearing to be conducted by impartial Hearing Officer employed by DSS for that purpose. *David C. v. New York State Dept. of Social Services* (4 Dept. 1994) 611 N.Y.S.2d 78, 203 A.D.2d 964.

§ 434.7 Persons who may be present at a hearing; authorization of representative.

Historical Note

(a) The parties to a hearing, their attorneys or representatives, their witnesses and any witness called by the hearing officer may be present at the hearing. Other persons may be admitted upon the hearing officer's discretion. Upon the hearing officer's motion, or upon the motion of either party, potential witnesses may be excluded from the hearing during the testimony of other witnesses.

(b) An individual representing the appellant must have a written authorization signed by the appellant if the appellant is not present.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

§ 434.8 Conduct of the hearing.

Historical Note

(a) A hearing officer must preside at the hearing and must make all procedural rulings. He or she may make an opening statement describing the nature of the proceedings, the issues to be decided and the manner in which the hearing will be conducted.

(b) The hearing officer must exclude testimony or other evidence which is irrelevant or unduly repetitious.

(c) All testimony must be given under oath or affirmation unless the testimony is given by a young child who is unable to understand the meaning of oath or affirmation.

(d) Each party is entitled to be represented by an attorney or other representative of his or her choice, to have witnesses give testimony and to otherwise have relevant and material evidence presented on his or her behalf, to cross-examine opposing witnesses, to offer rebuttal evidence and to examine any document or item offered into evidence.

(e) Technical rules of evidence followed in a court of law will not apply but evidence introduced must be relevant and material.

(f) Copies of the documentary evidence which a social services official, the State Central Register of Child Abuse and Maltreatment or the Commission on Quality of Care for the Mentally Disabled plan to use at the hearing must be provided, if requested, to the appellant or his or her representative who has appropriate written authorization from the appellant for the examination, at a reasonable time before the date of the hearing and at a place accessible to the appellant or the appellant's representative.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

§ 434.9 The record.

Historical Note

(a) The record of the hearing, including the recommendations of the hearing officer, is confidential, but the record may be examined by either party or their representatives at a place accessible to them and at a reasonable time.

(b) The record must include:

(1) all notices, intermediate rulings and all records maintained in the State Central Register of Child Abuse and Maltreatment;

(2) the transcript or recording of the hearing and the exhibits received into evidence;

(3) matters officially noticed;

(4) questions and offers of proof, objections thereto and rulings thereon;

(5) proposed findings and exceptions, if any;

(6) any report rendered by the hearing officer;

(7) any request for disqualification of a hearing officer; and

(8) the hearing decision.

(c) The forms and documents contained in the State Central Register of Child Abuse and Maltreatment relating to an indicated report of child abuse or maltreatment are admissible into evidence at the hearing. A certification by the director of the State Central Register of Child Abuse and Maltreatment or his or her designee that the forms and documents are true and accurate copies of the complete record of the indicated report of child abuse or maltreatment at issue, and that the State Central Register of Child Abuse and Maltreatment is required by law to receive reports of alleged child abuse and maltreatment, is prima facie evidence that such forms and documents comprise the complete record of the indicated report of child abuse or maltreatment at issue. Such forms and documents must be admitted into evidence upon the submission of the required certification to the hearing officer. The admission of such forms and documents must be for the purpose of showing that the forms and documents are those presently maintained at the State Central Register of Child Abuse and Maltreatment in relation to the indicated report of child abuse or maltreatment at issue in the hearing. The admission of such forms and documents will be without regard to the truth or falsity of the contents of any such forms and documents and no implication as to the truth or falsity of the contents of any such forms or documents may be made by the hearing

officer solely on the basis of such forms or documents having been admitted into evidence pursuant to this subdivision. Nothing in this subdivision will be construed to require the State Central Register of Child Abuse and Maltreatment to submit into evidence forms and documents not maintained by or at the State Central Register of Child Abuse and Maltreatment at the time of the hearing.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

§ 434.10 Evidence.

Historical Note

Case Notes

In any hearing under this Part:

- (a) Proof that the appellant abused or maltreated one child is admissible evidence on the issue of whether the appellant abused or maltreated any other child.
- (b) Proof of injuries sustained by a child or proof of the condition of a child which is of such a nature as would ordinarily not have occurred except by reason of the acts or omissions of the appellant is prima facie evidence that the child was abused or maltreated by the appellant.
- (c) Any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in a child abuse or maltreatment proceeding by any hospital or any other public or private agency is admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the hearing officer finds that it was made in the regular course of business of any hospital or any other public or private agency and that it was made in the regular course of such business at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.
- (d) Previous statements made by the child relating to any allegations of abuse or maltreatment are admissible in evidence. The testimony of the child during the hearing is not necessary to support a finding of abuse or maltreatment.
- (e) Proof of the impairment of emotional health or impairment of mental or emotional condition as a result of the unwillingness or inability of the appellant to exercise a minimum degree of care toward a child may include competent opinion or expert testimony and may include proof that such impairment lessened during a period when the child was in the care, custody or supervision of a person or agency other than the appellant.
- (f) A Family Court finding, in a proceeding brought pursuant to article 10 of the Family Court Act, that a child has been abused or neglected is presumptive evidence that the report of child abuse and maltreatment maintained by the State Central Register of Child Abuse and Maltreatment concerning such child is substantiated by some credible evidence if the allegations are the same; however, dismissal or withdrawal of a Family Court petition does not create a presumption that there is a lack of some credible evidence to prove that a child has been abused or maltreated for purposes of this Part.

- (g) An appellant may introduce evidence to rebut any presumptions contained in this section.
- (h) Some credible evidence is evidence that is worthy and capable of being believed.
- (i) Fair preponderance of evidence is evidence which outweighs other evidence which is offered to oppose it.
- (j) Relevant evidence is evidence having any tendency to make the existence of any fact that is at issue more or less probable than it would be without the evidence.

Historical Note

Sec. filed July 13, 1988 eff. Aug. 3, 1988.

CASE NOTES

Substantial evidence of maltreatment of foster child existed under 18 NYCRR §434.10(h) where petitioners failed to administer prednisone, asthma medication prescribed to child, failed to take child to pediatrician, missed 12 scheduled appointments at Lung Center and where child required month-long hospitalization for treatment of condition. *David C. v. New York State Dept. of Social Services* (4 Dept. 1994) 611 N.Y.S.2d 78, 203 A.D.2d 964.

§ 434.11 Decision after the hearing.

Historical Note

Case Notes

- (a) Hearing decisions must be made and issued by the commissioner or by a member of his or her staff who is designated by the commissioner to consider the record of the hearing. The decision must be based exclusively on the record of the hearing. The decision must be in writing and must describe the issues, recite the relevant facts and the pertinent provisions of law and department regulations, make appropriate findings, determine the issues, state reasons for the determination, and when appropriate, direct specific action to be taken by any of the parties to the hearing.
- (b) For hearings held pursuant to section 424-a of the Social Services Law, a copy of the decision must be mailed to the appellant and his or her attorney or other designated representative within 60 days after the record is closed.
- (c) For hearings held pursuant to section 422 of the Social Services Law, a copy of the decision must be mailed to the appellant and his or her attorney or other designated representative within 90 days after the record is closed.
- (d) The failure of the department to issue a decision within the time period specified in subdivision (b) or (c) of this section or to mail a copy of the decision to the appellant and/or his or her attorney or other designated representative within such time period will not result in the sealing or expungement of the report maintained in the State Central Register of Child Abuse and Maltreatment.

Historical Note

Sec. filed July 13, 1988; amds. filed: Aug. 8, 1996 as emergency measure; Nov. 6, 1996 as emergency measure; Feb. 3, 1997 as emergency measure eff. Feb. 3, 1997; Feb. 4, 1997 eff. Feb. 19, 1997. Amended (d).

CASE NOTES

Where petitioners, foster parents, were found guilty of maltreatment, under 18 NYCRR §434.11, factfinding determination may be reached by person who did not preside at hearing regarding petitioners' application to expunge reports. *David C. v. New York State Dept. of Social Services* (4 Dept. 1994) 611 N.Y.S.2d 78, 203 A.D.2d 964.