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| LOCAL COMMISSIONERS MEMORANDUM |
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DSS-4037EL (Rev. 9/89)

Transmittal No: 97 LCM-58

Date: October 8, 1997

Division: Services and
Community Development

TO: Local District Commissioners

SUBJECT: Matter of Walter W. Decision

ATTACHMENTS: None

The purpose of this LCM is to inform social services districts and other interested persons of a recent court decision and to outline how the Department will implement that decision. This LCM will apply to all administrative hearings held on or after April 1, 1997, irrespective of when the report of abuse or maltreatment was first made to the State Central Register of Child Abuse and Maltreatment (SCR).

The Decision

On April 1, 1997 the Court of Appeals denied the Department's Motion for Leave to Appeal the January 2, 1997 decision of the Appellate Division in Matter Of Walter W. The Matter Of Walter W. decision held that while for investigation and retention in the SCR proper evidentiary standard remains "some credible evidence", indicated cases proceeding to a hearing must be reviewed at the higher standard of "fair preponderance of the evidence." Reports failing to meet the "fair preponderance of the evidence" standard at the hearing must be expunged (or, for reports made after February 12, 1996, legally sealed).

Implementation

This decision does not alter social services districts' procedures or responsibilities in the investigation and indication of cases, inasmuch as the standard of "some credible evidence" for investigation and indication is undisturbed. At the point of a hearing, however, the Department must now apply the higher standard of "fair preponderance of the evidence."

Accordingly, requests for expungement (or amendment) made pursuant to Section 422 of the Social Services Law (SSL) will now be subject to administrative review at the SCR at the "fair preponderance of the evidence" level. Indicated cases that do not satisfy the "fair preponderance of the evidence" standard will be expunged or legally sealed. This will mark a significant departure from previous SCR procedures as set forth in 95-LCM-39. Previously, cases meeting the "some credible" but not "fair preponderance of the evidence" standard were retained in the SCR as indicated cases but not released to licensing or provider agencies pursuant to Section 424-a of the SSL.

Similarly, indicated cases which the SCR finds meet the "fair preponderance of the evidence" standard will be forwarded for an administrative hearing. If the evidence adduced at that hearing does not meet the "fair preponderance of the evidence" standard, the case will be expunged or legally sealed. Cases found to satisfy the "fair preponderance of the evidence" standard will be retained in the SCR and will be subject to dissemination to a licensing or provider agency which submits a clearance request pursuant to Section 424-a of the SSL. Implementation of Matter Of Walter W. will alter the result of the administrative hearing process, not the process itself.

Clearances

Requests for clearances submitted pursuant to Section 424-a of the SSL will be processed in a consistent manner, with one important distinction. Indicated cases for which a request for expungement (or amendment) would be time-barred (i.e., beyond the ninety days after notice of indication to the subject) will continue to be reviewed at both the "some credible" and "fair preponderance of the evidence" standards. Cases not meeting the "some credible" standard will be expunged (or amended). Cases which meet the "some credible" standard, but fail to meet the "fair preponderance of the evidence" standard will be retained in the SCR. However, the SCR will notify the provider or licensing agency submitting the clearance request that the individual cannot be identified as the subject of an indicated report. Because the time in which the subject could have requested expungement or amendment has elapsed, the subject will not be entitled to an administrative hearing to expunge or amend the report. Cases satisfying both the "some credible" and "fair preponderance of the evidence" standards will be retained in the SCR and licensing or provider agencies will be informed that the individual is the subject of an indicated report.

The Department appealed the Appellate Division's decision, in part, because of the concern that implementation of the decision might afford children less protection. Additionally, the availability of an elevated evidentiary standard at the hearing stage might increase the number of requests for hearings, thereby increasing social services district and Department workload. Given the Court of Appeals' denial of the Department's Motion for Leave to Appeal, however, the Department is compelled to implement the decision within the framework established by the court, which results in differential evidentiary standards.

One possible "solution" to this would be to seek statutory amendment of the standard that CPS workers employ to indicate a report, and raise it to a "fair preponderance of the evidence" standard. Any such statutory amendment would not be enacted until at least the 1998 Legislative Session, and there is no guarantee that such a proposal would pass. We would greatly appreciate your views on whether you would support a legislative proposal raising the evidentiary standard for investigation and indication to a "fair preponderance of the evidence" standard. Any thoughts you or staff might have concerning this possible approach can be conveyed to the Director of the Bureau of Policy Planning, Judy Gallo, via phone, (518) 474-9436, Exchange, or OFIS (0FA010).

Finally, implementation of the Matter of Walter W. is occurring while the Department is also implementing some additional requirements arising from the final settlement of the Valmonte lawsuit. In this context, we want you to be aware that there will be amendments made to the notification letters in CONNECTIONS provided to subjects when a report is indicated, requirements concerning posting 95-LCM-39 or its successor, and eventual revisions to the CPS Manual.

Rose M. Pandozy
Deputy Commissioner
Division of Services and
Community Development