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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. Justice

PART 35

Morris Lane

INDEX NO. 402701/09

MOTION DATE 6/18/10

- v -

MOTION SEQ. NO. 001

David A. Hansell

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

FILED
JUL 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the relief sought in the Petition is denied, without prejudice as premature; and it is further

ORDERED that respondents' cross-motion for an order, pursuant to CPLR Article 78, dismissing petitioner's Petition as moot, is denied; and it is further

ORDERED that pursuant to CPLR §7804(f), respondents serve and file an Answer to the Petition within thirty (30) days after service of the order with notice of entry; and it is further

ORDERED that respondents serve a copy of this order with notice of entry on petitioner within twenty (20) days of entry.

This constitutes the decision and order of this court.

Dated: 7/6/10

CAROL EDMEAD J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

x

In the Matter of the Application of

MORRIS LANE,

Petitioner,

For judgment under Article 78 of the Civil Practice Law & Rules

-against-

DAVID A. HANSELL, as Commissioner of the New York State Office of Temporary and Disability Assistance, ROBERT DOAR, as Commissioner of the New York City Human Resources Administration, and MATTHEW BRUNE, as Deputy Commissioner of the New York City HIV/AIDS Services Administration,

Respondents.

x

Index No. 402701/09

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 mandamus action, petitioner Morris Lane ("petitioner") moves for an order, *inter alia*, compelling Robert Doar, as Commissioner of the New York City Human Resources Administration ("HRA"), and Matthew Brune, as Deputy Commissioner of the New York City HIV/AIDS Services Administration ("HASA") to comply with the December 17, 2008 Decision on Stipulation After Fair Hearing (the "Stipulation"), and respondent David A. Hansell, as Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA") (collectively, "respondents") to enforce the compliance by HRA and HASA (collectively, "city respondents") with said Stipulation.

In response, respondents cross move for an order, pursuant to CPLR §3211, dismissing

the Petition on the grounds that petitioner's claim is moot, as city respondents fully complied with their non-discretionary duties, as dictated by the Social Services Law and regulations.

Factual Background

Petitioner, who suffers from HIV and chronic scoliosis, received public assistance ("Safety Net Assistance") from city respondents. On March 26, 2003, he applied for Supplemental Security Income ("SSI") benefits. According to the Petition, on March 26, 2007, the Social Security Administration awarded petitioner a lump-sum SSI payment, retroactive to the date of his application (*see* the "SSI Notice of Interim Assistance Reimbursement").[1]

On July 23, 2007, HASA intercepted the entire payment on the ground that it had spent $60,992.14 on interim benefits for petitioner between April 1, 2003 and April 30, 2007 and was, therefore, entitled to reimbursement (*see* the "July 23, 2003 Letter").

On August 9, 2007, petitioner requested a fair hearing, challenging HASA's accounting of the interim benefits. At the September 8, 2007 hearing, HASA explained that between April 2003 and February 2006, it spent an average of $314.46 per month; in March 2006, its monthly expenditures rose to $1,952.97; and between April 2006 and April 2007, its monthly expenditures rose to $3,576. The OTDA Commissioner was unsatisfied with HASA's accounting, and adjourned the hearing to November 28, 2007, so HASA could obtain a more specific record of actual payments.

As a result of the November 28, 2007 hearing, the OTDA Commissioner determined: "Although given the opportunity to explain [petitioner's] budget, and, especially, the sudden

[1]The Court notes that petitioner states that the lump-sum payment amounted to $31,571 and respondents contend that the payment amounted to $29,441.

changes in the amounts taken, the Agency failed to submit the necessary evidence. Accordingly, the determination as to the amount of [petitioner's] SSI refund check is not correct" (*see* the "January 8, 2008 Decision," p. 4). The OTDA Commissioner ordered HASA to (1) review its records to determine the amount of interim assistance provided to petitioner between April, 2003 and April, 2007, (2) verify the amounts issued to the shelters where petitioner resided, and (3) advise petitioner in writing of its determination and to refund any additional money to which petitioner is entitled (*id.*).

According to city respondents, they re-examined their expenditures, found their initial calculations were accurate, and advised petitioner of same in a series of letters dated June 27, 2008. Claiming HASA failed to comply with the January 8, 2008 Decision, petitioner requested another fair hearing.

On December 12, 2008, a third fair hearing was held, after which the presiding administrative law judge ("ALJ") issued the Stipulation, directing HASA to investigate and redetermine the actual amount of Safety Net Assistance provided during the period in question, taking into account petitioner's correct shelter expenses and allowances, notify petitioner in writing of its redetermination, and provide a breakdown distinguishing which amounts of public assistance were Federal and which were State or local.

From April 15, 2009 through June 25, 2009, petitioner contacted HASA and OTDA concerning HASA's failure to comply with the Stipulation, and after having received no response, petitioner commenced this proceeding.[2]

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[2]Specifically, on April 15, 2009, petitioner faxed a letter to HASA's Director of Fair Hearings and Eligibility, asking why HASA had failed to comply with the Stipulation (*see* the "April 15, 2009 Letter to John Maher"). On April 16, 2009, petitioner contacted HASA's Deputy Director of Field Operations, with the same

In support of his Petition, petitioner attests that he has been waiting more than two years to get his retroactive benefits, or "an adequate explanation as to what happened" (*see* "petitioner's affd.," ¶ 12). He argues that city respondents' refusal to comply with the Stipulation within 90 days constitutes a failure to perform a duty enjoined upon it by law, and is arbitrary and capricious, in violation of Social Services Law §22(9), 18 NYCRR §§358-6.1 and 358-6.4, and CPLR §§7803(1) and (3). Petitioner further argues that OTDA's failure to compel city respondents to enforce the Stipulation is similarly arbitrary and capricious. Accordingly, petitioner seeks an order and judgment: (1) declaring to be arbitrary and capricious, an abuse of discretion, and in violation of state laws and regulations, the following actions of respondents: (a) the refusal and failure of city respondents to comply with the Stipulation, and (b) the refusal and failure of OTDA to compel city respondents to comply with the Stipulation; (2) directing city respondents to comply, and OTDA to enforce compliance, with the Stipulation, which directed HASA to redetermine and notify petitioner in writing of the actual amount of Safety Net Assistance provided to Petitioner between April 2003 and April 2007, taking into account petitioner's correct shelter expenses and allowances, and distinguishing between federal and state or local Public Assistance benefits; and (3) directing city respondents to refund to petitioner the SSI lump-sum retroactive payment of $31,571, less verified local Safety Net expenditures, within 30 days.

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footnote 2 cont'd.

inquiry (*see* the "April 16, 2009 E-mail to David Piersante"). On May 4, 2009, petitioner notified the OTDA Compliance Unit of city respondents' failure to comply with the Stipulation (*see* the "May 4, 2009 Compliance Request"). On May 8, 2009, the OTDA Compliance Unit acknowledged receipt of the May 4, 2009 Compliance Request (*see* the "OTDA Acknowledgment of Complaint"). On June 25, 2009, petitioner followed up with the OTDA Compliance Unit, requesting a status update as to what actions were being taken to ensure city respondents' compliance (*see* the "June 25, 2009 Letter to OTDA Compliance Unit").

In their cross-motion and memorandum of law ("MOL"), city respondents contend that they have fully complied with the subject Stipulation. City respondents concede that, prior to petitioner's filing the instant Petition, they were unable to locate documentation demonstrating its compliance with the Stipulation. However, during the pendency of the instant proceeding, they recalculated the amount of interim assistance issued for the relevant period (city respondents' MOL, p. 7, footnote 2). After recalculating the amount of interim assistance, they sent petitioner a verified letter and accounting dated November 12, 2009, stating that the correct amount of expenditures was determined to have been $60,991.39 instead of $60,992.14, as previously reported, a difference of $0.75 (*see* the "November 12, 2009 Letter"). City respondents attribute the discrepancy to a mathematical error in tallying the February, March, and April 2007 amounts of interim assistance to petitioner.[3]

City respondents argue that they have complied with the Stipulation's order that they distinguish between Federal and State or local expenditures. The November 12, 2009 Letter includes a monthly breakdown of expenditures, captioned, "SNA [Safety Net Assistance] and other payments furnished to you with State/Local funds for basic needs calculation."

As to the sharp increase in assistance beginning March 2006, city respondents contend that "upon information and belief," beginning in February 2006, OTDA directed city respondents to include the actual cost of shelter issued on behalf of individuals receiving the benefits and services petitioner received. Thus, city respondents began including the semi-monthly amount they issued on behalf of petitioner (*see* the "Budget Results History," and "Budget History List").

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[3] City respondents wrote: "For the months of February, March and April 2004 we took $313.75; we should have taken $313.50 for each month" (November 12, 2009 Letter).

The evidence shows that no shelter issuances were documented as part of petitioner's budget prior to February 2006, though, as petitioner concedes, at all relevant times, he had been living and continues to reside in the same housing accommodations. The "Benefits History Archive Report" for the period of April 1, 2003 through April 30, 2007 demonstrates that the increase in expenditures was based on the inclusion of shelter benefits issued on petitioner's behalf. While prior to the February 2006 cycle, city respondents did not document its issuance of shelter benefits on petitioner's behalf, "it is impossible to imagine that such payments were not actually made," city respondents argue. Thereafter, city respondents began documenting its semi-monthly shelter benefits payments on behalf of petitioner, each in the approximate amount of $1,623.03.

City respondents argue that as they have provided petitioner with his requested relief, petitioner's mandamus claim is moot and should be dismissed.

Adopting city respondents' arguments and citing the November 12, 2009 Letter to petitioner, OTDA also cross moves to dismiss petitioner's Petition as moot (*see* "OTDA's cross-motion" and MOL). OTDA adds that if petitioner is displeased with city respondents' explanation, his remedy is to withdraw his Petition, request a fair hearing on the Stipulation, and permit an ALJ to make an assessment. If petitioner still disagrees with the reasoning, he can then file an Article 78 proceeding. If the Court denies respondents' cross-motion, OTDA requests permission, pursuant to CPLR §7804(f), to serve and file an Answer to the Petition within 30 days from the service of such order denying this motion, with notice of entry.

In opposition to respondents' cross-motion, petitioner argues that his Petition is not moot, because city respondents have yet to comply with directives in the Stipulation. First, petitioner argues that the deficiencies that were ordered to be corrected remain. Section 18-353-2 of the

New York City Administrative Code explains that reimbursable interim assistance means payments for basic needs made exclusively from state and/or local funds. Payments made from federal funds or for non-basic needs are not reimbursable. City respondents provide no breakdown of federal *versus* state/local assistance, and no explanation for the spike in payments from $313.75 per month in 2003 to $3,574 in April 2006, petitioner argues.

Petitioner further contends that the accounting city respondents provided in the November 12, 2009 Letter is identical to the accounting they gave at the first hearing, save a difference of $0.75. The Stipulation includes specific language indicating that city respondents agreed to provide something different from their prior accounting. Specifically computing a difference of $0.75 in total expenditures, is insufficient to comply with the Stipulation's directives, petitioner argues. Further, the boilerplate statement listed on the accounting included with the November 12, 2009 Letter does not constitute such a breakdown.

Second, petitioner argues that respondents have not provided petitioner with a credible explanation for the spike in payments after March 2006, even though petitioner has been living at the same shelter for all relevant periods. Petitioner contends that the first and only explanation of the spike in payments comes from respondents' cross-motion. However, city respondents include no affidavits or evidence to support their conclusory statement that ". . .in February 2006, [OTDA] directed [city respondents] to include the actual cost of shelter issued on behalf of individuals in receipt of benefits and services Petitioner received." Such statements also are an insufficient substitute for a direct explanation from respondents to petitioner. Until a representative of respondents qualified to provide a documented explanation notifies petitioner in writing of the explanation for the spike, accompanied by a budgetary accounting for the Safety

Net allowance spending made on petitioner's behalf, respondents have not complied with the Stipulation, petitioner argues.

On March 29, 2010, the parties participated in a conference call with the Court. Based on the discussion, the Court issued an interim order directing HRA to provide (1) a detailed breakdown of its expenditures on petitioner's behalf for the entire period at issue, distinguishing between federal and state/local funds, and (2) an explanation for the spike in safety net expenditures that began in April 2006 (*see* the "Interim Order"). The parties also agreed to a deadline for further submissions.

In their sur-reply, respondents rely on an affidavit submitted by Crissila Serapio ("Ms. Serapio"), Deputy Director of the Assistance Reimbursement Unit of HRA (*see* the "Serapio Affd."). Ms. Serapio attests that on May 27, 2010,[4] her office sent a letter to petitioner informing him that an error had been discovered in the calculation of the amount properly recoupable by city respondents from his initial SSI payment (the "May 26, 2010 Letter"). She contends that previous correspondence to petitioner from HRA had indicated that $60,992.14 in state and/or local funds had been expended on his behalf as Safety Net Assistance; therefore his entire initial SSI payment of $29,441[5] was recoupable by city respondents. Upon further review it was determined that, beginning in April 2006, rental payments made by city respondents to petitioner's landlord, Bailey House, were not paid exclusively with state and/or local funds, and

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[4]The Court notes that respondents do not provide a copy of the May 27, 2010 Letter. However, petitioner provides a copy of a letter dated May 26, 2010. Accordingly, the Court will refer to the correspondence as the "May 26, 2010 Letter."

[5]Ms. Serapio points out that although petitioner stated that his initial SSI payment was $31,571, the correct amount is $29,441.

, thus, were not properly recoupable. Therefore, all rental payments from April 2006 through April 2007, the date of petitioner's Initial SSI payment, were removed from Petitioner's Safety Net Assistance budget. With the exception of those rental payments made from April 2006 through April 2007, all other Safety Net Assistance payments previously reported as recoupable were correct and were paid exclusively with state and/or local funds, Ms. Serapio attests.

Additionally, pursuant to the representations made by city respondents on the record during the December 12, 2008 hearing, HRA explained in the May 26, 2010 Letter that, beginning in the second half of March 2006, OTDA required city respondents to begin including rental payments made on behalf of petitioner on petitioner's Public Assistance budget. Although rent had been paid by city respondents since at least 2003, when petitioner moved to Bailey House, these payments had not been reported on petitioner's Public Assistance budget and, thus, were not recoupable. This is the reason that the amount of Interim Assistance reported as recoupable increased dramatically in March 2006, Ms. Serapio attests. However, due to the use of non-state and/or local funds to pay for petitioner's rent beginning in April 2006, rental payments were again removed from petitioner's budget and not recoupable as of April 2006.

The May 27, 2010 Letter further indicates that the actual amount of Safety Net Assistance that had been paid on petitioner's behalf exclusively from state and/or local funds was $18,793.33. Therefore, petitioner was entitled to a refund of $10,647.67. On May 27, 2010, a refund check in the amount of $10,647.67, including a revised breakdown of Safety Net Assistance expenditures made exclusively with state and/or local funds, was sent to petitioner (*see* the "Check"). Ms. Serapio attests that this breakdown is "wholly accurate" and lists only those expenditures made exclusively with state and/or local funds. As a result of the foregoing,

city respondents have complied fully with all of the directives from the November 28, 2007 and December 12, 2008 hearings. Therefore, petitioner's remaining claims, if any, must be dismissed as moot, respondents argue.

In response, petitioner first argues that city respondents have yet to comply with the Stipulation's directive that HRA provide petitioner with a new breakdown, differentiating between state/local and federal funds. He further contends that recent caselaw requires respondents to provide substantial evidence of such a breakdown. While the May 26, 2010 Letter contains different dollar amounts, it fails to distinguish between which expenditures HRA made with state/local *versus* federal funds.

Second, petitioner argues that HRA also has failed to provide credible explanation for the spike in payments from $313.75 per month in 2003 to $3,574 in April 2006. While Ms. Serapio asserts that OTDA required HRA to start including rent payments on petitioner's public assistance budget in March 2006, she neither provides a copy of the OTDA directive, nor explains why HRA was not previously required to include rent payments on the budget. Instead, Ms. Serapio's explanation only raises serious concerns about the reliability of HRA's record-keeping, petitioner argues.

Petitioner further argues that Ms. Serapio's explanation is undermined by her assertion that HRA started using federal funds in April, 2006. A more reasonable explanation for the spike in payments is that HRA improperly included federal shelter allowance payments beginning in March 2006, petitioner contends. Without any substantiating evidence, Ms. Serapio's explanation is neither credible nor supported and cannot be construed as complying with the Stipulation, petitioner argues.

Finally, petitioner argues that HRA fails to provide an explanation for its $40,000 error. Instead, Ms. Serapio attests that "further review" revealed that HRA is entitled to recoup $18,793.33, rather than the previously asserted amount of $60,992.14. She goes on to state: "This [new] breakdown is wholly accurate." However, Ms. Serapio neglects to mention that HRA had made this improper $60,992.14 calculation – an accounting error in excess of $40,000 – on three prior occasions: (1) On July 23,2007, HRA determined that the amount of interim assistance provided to petitioner was $60,992.14; (2) on June 27, 2008, pursuant to a fair hearing decision, HRA reviewed its records and concluded that their initial calculation of $60,992.14 was correct; (3) on November 12, 2009, pursuant to a fair hearing decision, HRA reviewed its records one more time and determined that their calculation was off by $0.75, and the correct amount of $60,991.39. Ms. Serapio fails to acknowledge, let alone explain, how the same egregious accounting mistake could have been made on three different occasions.

Given the seriousness of HRA's persistent accounting errors and the lack of an explanation for the errors, Ms. Serapio's assertion that the new breakdown is "wholly accurate" cannot be viewed as reliable in the absence of independent documentation to support the breakdown, petitioner argues. As a result, the controversy between petitioner and respondents remains ripe, and the Court should deny respondents' cross-motion, petitioner argues.

Discussion

Respondents' cross-motion to dismiss the Petition as moot, is denied.

CPLR §7801 allows a petitioner to seek relief *via* mandamus. A mandamus action serves to compel a governmental entity to perform a ministerial act where there is a clear legal right to the relief sought (*Klostermann v Cuomo*, 61 NY2d 525, 539-541 [1984] [holding that "to the

extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties"]). Thus, the Court can "compel the State to perform a legal duty, but not direct how it should perform that duty" (*Campaign for Fiscal Equity, Inc. v State*, 29 AD3d 175, 186 [1st Dept 2006]). Further, in order to succeed in a mandamus action, the petitioner must show a clear legal right to the requested relief (McKinney's CPLR §7801, *citing Association of Surrogate and Supreme Court Reporters Within the City of New York v Bartlett*, 40 NY2d 571, 574 [1976]).

Here, defendants failed to demonstrate that petitioner has no legal right to the relief he seeks.

New York's Social Security Law provides that:

> An applicant for or recipient of safety net assistance shall be required, as a condition of eligibility for safety net assistance, to sign a written authorization allowing the secretary of the federal department of health and human services to pay to the social services district his or her initial supplemental security income payment and allowing the social services district to deduct from his or her initial payment the amount of safety net assistance granted for any month for which he or she subsequently is determined eligible to receive supplemental security income benefits.
> (Social Security Law §158[2]).

Implementing regulations further mandate that, as a condition of eligibility, an applicant for public assistance must sign a "repayment of interim assistance authorization," allowing city respondents, as the "local social services district," to recoup from the applicant's initial SSI payment all "interim assistance" expended during the period that the applicant is eligible for SSI (18 NYCRR §353.2 [b]). "Interim assistance" is defined as "payment for basic needs made exclusively from *State and/or local funds*" (18 NYCRR §353.2[a][1] [emphasis added]). The implementing regulations further provide that "[p]ayments for basic needs made exclusively

from State and/or local funds include but are not limited to costs incurred for" Safety Net Assistance, shelter care and family assistance (18 NYCRR §353.2[a][2]). An SSI-eligible recipient of Safety Net assistance receives his or her initial SSI payment *via* the local social services district, which, upon receipt of the payment, "must deduct therefrom the amount of interim assistance" (18 NYCRR §353.2[c][3]).

Further, in a recent decision, the First Department makes clear that in order for HRA to recoup interim assistance payments, the agency must identify the source of payments as exclusively state and local funds and support this assertion with "substantial evidence" (*Nesby v Hansell*, 69 AD3d 469 [1st Dept 2010]). The facts in *Nesby* are similar to those herein: The petitioner brought the Petition to challenge the amounts that state and local social services agencies retained from his first retroactive federal SSI benefit payment. The petitioner argued that the amounts were not recoverable to the extent that they were financed by federal funds. Upon reviewing the record, the First Department held:

> The decision after hearing by [OTDA] (affirmed on administrative appeal) that all the funds paid on petitioner's behalf during the three months in question were recoverable as interim assistance *is not supported by substantial evidence*. The record evidence submitted by respondents, while showing payments on petitioner's behalf, *failed to establish that the source of those payments was exclusively state and city funds, and also failed to explain the sudden dramatic increases in the amounts of benefits petitioner received during the period in issue*. We note that the computer records that respondents placed in evidence at the hearing *do not, on their face, identify the source of the funds* paid to petitioner or describe the purpose of the payments. Moreover, respondents failed to place in the administrative record any material establishing the extent to which the payments came from state and city funds.
> (*Id.* at 471) (Emphasis added).

Here, respondents failed to demonstrate, with substantial evidence, the amounts they claim are recoverable as interim assistance, and that they also have complied with the directives

ordering them to provide such evidence, so as to render the Petition moot.

The following facts are undisputed. After petitioner was awarded a lump-sum SSI payment, HASA deducted the $60,992.14 and determined that petitioner was not entitled to any balance (*see* the "July 23, 2003 Letter"). During December 12, 2008 hearing, ALJ Ona Erike instructed respondents to address why interim payments to Bailey House increased substantially after March 2006, and to provide petitioner with a breakdown of federal *versus* state or local assistance.

> Judge Erike: In other words, go through the whole period and find out why it suddenly jumped, because he was still at the same residence and I would assume the shelter costs wouldn't change so greatly from what was it $300 to $3000?
>
> ***
>
> Judge Erike: Okay. So, that's part of the review. And also to give a breakdown, which part of the public assistance benefits were federal, which the agency is not entitled to recoup, and which were state. Okay. Yes?
> (Transcript, p. 11)

Further, the Stipulation issued after the December 12, 2008 hearing ordered respondents to do the same:

> *In accordance with the Agency's agreements made at the hearing*, the Agency [*i.e.* HASA] is directed, if it has not already done so, to:
>
> 1. investigate and redetermine actual amount of Safety Net Assistance provided during the period in question, taking into account [petitioner's] correct shelter expenses and allowances; Agency to notify [petitioner] in writing of its redetermination and *providing a breakdown of Public Assistance benefits provided to [petitioner], that were Federal and those that were State or local Public Assistance benefits for the period in question.* (Stipulation, p. 2) (Emphasis added).

The Stipulation further ordered: "As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above" (*id.*).

Titled "Compliance," 18 NYCRR §358-6.4 provides in relevant part:

> (a) For all decisions, except those involving food stamp issues only, *definitive and final administrative action must be taken promptly, but in no event more than 90 days from the date of the request for a fair hearing.*
>
> ***
>
> (c) Upon receipt of a complaint that a social services agency has not complied with the fair hearing decision, the commissioner, through action coordinated by OAH, will secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case.
> (Emphasis added)

Further, Social Services Law §22(9)(a) provides: "All decisions of the commissioner pursuant to this section shall be binding upon the social services districts involved and shall be complied with by the social services officials thereof." Therefore, it is clear that respondents have a duty to comply with the Stipulation, and that petitioner has a clear right to respondents' performance in compliance with the Stipulation.

Then, in response to the Petition herein, this Court issued the Interim Order directing city respondents to serve and file further submissions containing "(1) a breakdown of Public Assistance benefits provided to the Appellant, that were Federal and those that were State or local Public Assistance benefits for the period in question, and (2) a more substantial, detailed explanation for the increase in petitioner's expenditures occurring on or about March 2006."

However, neither the November 12, 2009 Letter nor the submissions in support of respondents' cross-motion provide petitioner with a breakdown of federal and state/local benefits. Attached to the November 12, 2009 Letter is a form dated November 12, 2009 and listing "SNA [Safety Net assistance] and other payments furnished to you with State/Local funds for basic needs calculation" from April 2003 through April 2007. This same form was presented as evidence during the first hearing on November 28, 2007, and was rejected as inadequate (*see* Exhibit A to respondents' cross-motion; January 8, 2008 Decision, p. 4). None of the other

attachments to the November 12, 2009 Letter contains the required federal/state breakdown.

Respondents' sur-reply also fails to contain the requested federal/state breakdown. Instead, respondents concede, *via* the Serapio Affd., that HRA miscalculated the amount it was to recoup in interim assistance payments (despite previously insisting at three fair hearings that its calculations were correct). Attached to the Serapio Affd. is one exhibit: a copy of the Check to petitioner for $10,647.67. The March 26, 2010 Letter, included with petitioner's submissions mirrors the November 12, 2009 Letter, except that the latest letter contains revised calculations and informs petitioner that he is due a balance of $10,647.67.

Second, respondents fail to provide petitioner with a sufficient explanation for the increase in interim payments that occurred in April 2006. While the Stipulation does not specifically direct respondents to provide petitioner with such an explanation, it is undisputed that, at the second hearing, the city respondents agreed to provide one (Transcript, p. 11), and this Court directed respondents to do the same (see the Interim Order). Respondents concede that they failed to provide petitioner with such an explanation in their November 12, 2009 Letter to petitioner (city respondents' MOL, p. 9). Now, in response to the Petition, respondents contend that "upon information and belief," beginning in February 2006, "[OTDA] directed [city respondents] to include the actual cost of shelter issued on behalf of individuals receiving the benefits and services [petitioner] received" (*id.* at 8), and that the inclusion of this cost resulted the sharp increase in assistance (*id.* at 9). However, respondents provide no evidence, documentary or otherwise, of any directive by OTDA that such supports the conclusory statements in their MOL. Instead, they provide the Budget Results History and Budget History List, which only constitute evidence that such an increase occurred. Upon examination, the

Court finds that such documents fail to explain *why* the increase occurred.

The Serapio Affd. is similarly inadequate. Instead of providing a more substantial, detailed explanation for the increase in petitioner's expenditures occurring on or about March 2006, as the Court directed, Ms. Serapio refers to "representations made by City Respondents on the record during [the December 12, 2008 hearing]" and an explanation in "the letter sent by my office on May 27, 2010." First, the Stipulation made clear that respondents' "representations" during the December 12, 2008 hearing were insufficient (Transcript, p. 11). Second, respondents fail to provide a copy of the May 27, 2010 Letter. The latest letter in the record is the May 26, 2010 Letter provided by petitioner, which contains no explanation for the increase in expenditures on or about March 2006. Third, as with respondents' previous submissions, Ms. Serapio provides no evidence, documentary or otherwise, for her assertion that in March 2006, OTDA required city respondents to start including rent payments on petitioner's public assistance budget, which increased the amount of recoupable Interim Assistance (Serapio Affd., ¶ 8). The Court also notes that while Ms. Serapio attests that city respondents "have complied fully with all directives contained in the [November 28, 2007 and December 12, 2008 hearings]" (Serapio Affd., ¶ 11), she is silent as to whether city respondents complied with directives contained in the Interim Order.

Finally, it is undisputed that despite petitioner's repeated inquiries following the December 17, 2008 Stipulation,[6] respondents failed to provide petitioner with any response until *after* petitioner filed the instant Petition on October 19, 2009. Their response to petitioner, in the

[6]See petitioner's April 15, 2009 Letter to John Maher, April 16, 2009 E-mail to David Piersante, May 4, 2009 Compliance Request, and June 25, 2009 Letter to OTDA Compliance Unit.

form of the November 12, 2009 Letter, comes more than a year after petitioner requested the December 12, 2008 hearing (November 5, 2008). Further, while OTDA acknowledged petitioner's May 4, 2009 Compliance Request (*see* the OTDA Acknowledgment of Complaint), there is no evidence in the record that OTDA ever followed up with petitioner or made any effort to enforce city respondents to comply with the Stipulation. Thus, the evidence in the record demonstrates that respondents failed to timely comply with the Stipulation, in violation of 18 NYCRR §358-6.4.

As respondents have failed to demonstrate that they complied with the Stipulation or the Interim Order, they have failed to demonstrate that the instant Petition is moot. Accordingly, respondents' cross-motion is denied. Consequently, OTDA's request pursuant to CPLR §7804(f) for leave to serve and file an Answer to the Petition is granted (*see Samuel v Ortiz*, 105 AD2d 624, 626-627 [1st Dept 1984], quoting *Matter of 230 Tenants Corp. v Board of Standards and Appeals of the City of New York*, 101 AD2d 53 [1st Dept 1984] [holding that "CPLR 7804(f) is explicit that on the denial of such a motion 'the court shall permit the respondent to answer, upon such terms as may be just'"]).

In light of the above, the Petition is denied, without prejudice as premature.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the relief sought in the Petition is denied, without prejudice as premature; and it is further

ORDERED that respondents' cross-motion for an order, pursuant to CPLR Article 78, dismissing petitioner's Petition as moot, is denied; and it is further

ORDERED that pursuant to CPLR §7804(f), respondents serve and file an Answer to the Petition within thirty (30) days after service of the order with notice of entry; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon petitioner within twenty (20) days of entry.

This constitutes the decision and order of this court.

Dated: July 6, 2010

Carol Robinson Edmead, J.S.C