# California Welfare Fair Hearings: An Adequate Remedy?

## I. INTRODUCTION

Mr. Smith[1] is a mother with four minor children. Mr. Smith, her husband, left the family six months ago. As a result, Ms. Smith applied and has been receiving assistance under the Aid to Families with Dependent Children program.[2]

Yesterday Ms. Smith came into the local legal aid office. She was very upset and stated that she was going to lose her welfare check. She asked you to explain to her the meaning of the letter she received from the county welfare department stating her benefits are being terminated.

The letter to Ms. Smith is the County Notice of Action. The Notice states that Ms. Smith's A.F.D.C. grant is being terminated, effective fifteen days from the date of mailing the notice, for her failure to reasonably cooperate with the District Attorney to enforce Mr. Smith's family support obligation. The Notice cites a regulation to that effect, and states that Ms. Smith has a right to request a fair hearing to challenge the county action.

Assuming Ms. Smith requests a fair hearing with your help

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[1]Ms. Smith and her story are totally fictional and are used for purposes of discussion only.

[2]42 U.S.C. §§ 601-610 (1970) (hereinafter referred to as "A.F.D.C.").

and representation,[3] will the hearing be an adequate remedy for her and other persons dissatisfied with county welfare department actions in California? The adequacy of a fair hearing as a remedy is the broad theme of this article which analyzes: (1) Due Process issues in the United States Department of Health, Education, and Welfare (hereinafter referred to as HEW) and Manual of Policies and Procedures of the California Department of Social Welfare (hereinafter referred to as MPP) regulations since the companion cases of *Goldberg b. Kelly*[4] and *Wheeler v. Montgomery*[5] were decided; (2) the aid pending problem; and (3) specific limits on the use of fair hearings by welfare claimants.

## II. DUE PROCESS AND THE REGULATIONS

### A. INTRODUCTION

The federally supported welfare assistance programs are contained within the Social Security Act of 1935.[6] This federal statute and the corresponding California statute classify the needy into the following categories: (1) the old;[7] (2) the disabled;[8] (3) the blind;[9] and (4) the families.[10] The United States Government provides grants of money to states which choose to parti-

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[3]For an excellent description of the hearing process and of the preparation required prior to representing a claimant at a fair hearing, see Silver, *How to Handle a Welfare Case*, 4 LAW IN TRANS. Q. 87, 98-106 (1967).

[4]397 U.S. 254 (1970).

[5]397 U.S. 280 (1970). *Wheeler* involved a challenge to a California Department of Social Welfare regulation, § 44-325.43 (1970), which the court invalidated. See McCullough v. Terzian, 2 Cal. 3d 647, 470 P.2d 4, 87 Cal Rptr. 195 (1970) a post *Goldberg* and *Wheeler* decision of the California Supreme Court invalidating the same regulation and requiring the *Goldberg* prior hearing.

[6] 42 U.S.C. §§ 301-1396 (1970).

[7]OAA, Old Age Assistance, 42 U.S.C. §§ 301-306 (1970); CAL. WELF. & INST. CODE § 12000-12252 (West 1966) *as amended* (West Supp. 1972).

[8]APTD, Aid to the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-1355 (1970); CAL. WELF. & INST. CODE §§ 13500-13801 (West 1966) *as amended* (West Supp. 1972).

[9]AB, Aid to the Blind, 42 U.S.C. §§ 1201-1206 (1970); CAL. WELF. & INST. CODE §§ 1201-1206 (1970); CAL. WELF. & INST. CODE §§ 12500-12850 (West 1966) *as amended* (West Supp. 1972).

[10]AFDC, Aid to Families with Dependent Children, 42 U.S.C. §§ 601-610 (1970); CAL. WELF. & INST. CODE §§ 11200-11507 (West 1966) *as amended* (West Supp. 1972).

cipate in these categorical assistance programs. State plans for participation in these programs must be approved by the Secretary of Health, Education, and Welfare and must comply with Federal requirements.[11] In particular, states are required to give a welfare claimant an opportunity for a fair hearing before a state agency to challenge alleged erroneous action.[12] Pursuant to the Federal statute,[13] regulations have been formulated and adopted by HEW which detail the requirements of a fair hearing before a state agency.[14]

California participates in the federal categorical assistance programs. The California welfare statutes[15] require the State Department of Social Welfare (hereinafter referred to as S.D.S.W.) to supervise county administration[16] of the federal programs.[17] In addition, California statutes provide general relief for needy persons not otherwise supported.[18] General relief is locally funded and administered solely by each county board of supervisors.[19] As a consequence of local funding, the HEW fair hearing requirements do not apply to General Relief.

The California statutes provide the required fair hearing before the state agency, S.D.S.W.[20] As part of his authority to adopt regulations for the implementation of the categorical

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[11]42 U.S.C. §§ 301-302, 601-602, 1201-1202, and 1351-1352 (1970). The following Supreme Court cases hold to the effect that states must comply with federal standards: King v. Smith, 392 U.S. 309 (1968); Lewis v. Martin, 397 U.S. 552 (1970); and Rosado v. Wyman, 397 U.S. 397 (1970). In accord are the California Supreme Court decisions in California Welfare Rights Organization v. Carleson, 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971) and County of Alameda v. Carleson, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 385 (1971) U.S. *appeal pending.*

[12]42 U.S.C. §§ 302(a)(4), 602(a)(4), 1202(a)(4), 1352(a)(4).

[13]*Id.* § 1302.

[14]36 FED. REG. 3034 (1971). (N.B. this is 45 C.F.R. 205.10, but 45 C.F.R. has not been updated to include these regulations.) (hereinafter cited as F.R.)

[15]CAL. WELF. & INST. CODE §§ 10000-15205 (West 1966) *as amended* (West Supp. 1972).

[16]*Id.* § 10700 *et seq.*

[17]*Id.* § 10600.

[18]*Id.* §§ 17000-17409 (Not otherwise supported includes the person, relatives or friends, state hospitals, or other state or private institutions, § 17000).

[19]*Id.* § 17006.

[20]*Id.* §§ 10950-10965.

assistance programs,[21] the Director of S.D.S.W. has adopted fair hearing regulations.[22]

Both the HEW and the MPP regulations will be analyzed to see if they comply with due process requirements for fair hearings. As a matter of consitutional law, the touchstone is *Goldberg v. Kelly* which held that procedural due process requires an evidentiary hearing prior to termination of welfare benefits.[23] Also, MPP will be compared with HEW to see if the former complies with the latter.

## B. ANALYSIS

Ten elements of due process have been identified by Professors Burrus[24] and Fessler[25] as judicially required for an administrative hearing to be fair.[26] The ten elements are: (1) notice; (2) discovery; (3) right to counsel; (4) oral hearing; (5) confrontation, and cross-examination (analyzed together); (6) right to present evidence and make oral arguments; (7) impartial tribunal; (8) decision on the record; and (9) judicial review.[27] The Burrus and Fessler analysis as well as the due process requirements for hearings prescribed by the *Goldberg* decision will be used as the framework for the following due process analysis of California fair hearings.

### *1. NOTICE*

Notice is "... fundamental to due process of law."[28] Notice

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[21] *Id.* § 10554.

[22] CAL. ADMIN. CODE tit. 22, §§ 22-000 - 22-067 (1971) (these regulations are found in the S.D.S.W. MANUAL OF POLICIES AND PROCEDURES: ELIGIBILITY AND ASSISTANCE STANDARDS) (hereinafter cited as MPP). Note, MPP §§ 22-021 to 22-027 were revised effective March 17, 1972 in response to Yee-Litt v. Richardson, *infra* note 120.

[23] 397 U.S. 254 (1970).

[24] Burrus, Bernie R., Professor of Law, Georgetown University Law Center.

[25] Fessler, Daniel W., Acting Professor of Law, School of Law, University of California, Davis.

[26] Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 AM. U. L. REV. 199, 218 (1967) (hereinafter cited as Burrus and Fessler).

[27] *Id.* at 217-231 (In the due process section, I am indebted to Professor Fessler for materials and helpful comments).

[28] Joint Anti-Fascist Refuge Comm. v. McGrath, 341 U.S. 123, 178 (1951) (Douglas J., concurring).

must be timely and adequate. *Goldberg* requires "... that a recipient have timely and adequate notice detailing the reasons for a proposed termination."[29] Timely notice is given to an affected recipient a minimum number of days prior to the proposed action. *Goldberg* sets no specific time, but does state that fairness may require longer than seven days in some cases. Adequate notice requires that a "recipient is told the legal and factual bases for the Department's doubts."[30]

HEW requires: (1) Notice at least fifteen days prior to a proposed action; (2) a written explanation of the details of reasons for the proposed agency action; and (3) a written explanation of the right to request a fair hearing.[31] The *Goldberg* timeliness standard is met since the notice exceeds the seven days mentioned by the Court. However, HEW does not require the legal and factual bases of the decision to be included as reasons. Unless both bases can be implied from the "details of reasons" language as a matter of statutory interpretation, the notice is not constitutionally adequate. An explicit requirement of the legal and factual bases would be clearer and would comply with the *Goldberg* adequacy standard.

MPP has two notice sections.[32] The first written notice (the notice of action) must be given at least fifteen days prior to any proposed county action that will lead to a termination, reduction, or suspension of assistance. The notice must explain: (1) the type of county action; (2) the reasons for, and the statutes or regulations cited; (3) the rights to a conference, to request a fair hearing, and to aid pending a hearing (when aid pending is allowed).[33] The 15 day minimum complies with HEW and meets the *Goldberg* timeliness standard. The adequacy of the notice is less certain unless "reasons for" means the factual bases. The legal bases are the statutes and regulations cited. This is a matter of statutory interpretation, but both clarity and *Goldberg* would be better served if an explicit factual bases requirement were added.

The second written notice is the basis of action which the

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[29]397 U.S. at 267-268.
[30]*Id.* at 268.
[31]F.R., *supra* note 14 at (a) (5) (i) (a), (b).
[32]MPP, *supra* note 22, §§ 22-022.1 .13, and 22-023.2-214.
[33]*Id.* § 22-022.1-.13.

county is required to send to both the claimant and the chief referee's office of S.D.S.W. within six days after receiving notice of a fair hearing request. The basis of action is required for all fair hearing requests. The basis of action must explain: (1) the type of county action on which the request is based; (2) "a clear and understandable statement in nontechnical language of the specific reasons for the county action and of the facts which support that action;" (3) the statutes or regulations supporting the county action; and (4) whether an interpreter is needed, and whether the county will provide one.[34] The language of (2) requires the factual bases to be explained. This language should be substituted for the present language in the notice of action regulation since the basis of action language meets the *Goldberg* adequacy standard. Also, the legal bases are required by (3). Thus, the basis of action does, on its face, meet the *Goldberg* adequacy standard.

In practice, the basis of action is not totally helpful. This is because the reasons in non-technical language are sometimes not included. Also, citing regulations and statutes without the factual reasons is of little utility to claimants who will not read the regulations or statutes.[35]

As applied, the S.D.S.W. notice of action was recently held to be defective in the case of *Palladino v. Carleson.*[36] The *Palladino* court enjoined the Director of S.D.S.W. from terminating, suspending, or reducing A.F.D.C. assistance grants unless the notices sent by counties prior to such actions complied with MPP[37] and with the standards articulated in that opinion.[38] Due process requires a notice that will specifically tell "... the recipient exactly what will happen to him," and "... exactly why the proposed change will affect him."[39] By requiring S.D.S.W. to comply

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[34]*Id.* § 22-023.2-.214. Note, this basis of action is no longer required since the March, 1972 revisions of MPP §§ 22-020 -22-027.

[35]Interview with Ms. Candalaria Madril, Community Worker, and authorized representative at many fair hearings, California Rural Legal Assistance, Madera, California, On December 29, 1971.

[36]C.N.D. 48404, Memorandum Opinion and Order granting Preliminary Injunction, U.S.D.C. (N.D. Ca), Wheeler v. Montgomery Court on remand, October 18, 1971 (hereinafter cited as *Wheeler* order).

[37]MPP, *supra* note 22, §§ 22-000 to 22-067.

[38]*Wheeler* order, *supra* note 36, at 9-10.

[39]*Id.* at 6.

with its own regulations, the court is saying that due process requires no less than the notice MPP provides.

### *2. DISCOVERY*

The Supreme Court, in *Morgan v. United States*,[40] recognized that a claimant must have the opportunity ". . . to know the claims of the opposing party. ..." Here, discovery means the opportunity to know the claims of the county welfare department and the bases of those claims prior to the fair hearing. The element is closely related to notice, and is less important if there is adequate notice of the claims of the county.[41] That the *Goldberg* decision does not mention discovery is probably indicative that adequate notice will serve the same function as discovery. Where notice is not adequate, discovery is critical. However, adequate discovery will not remedy a due process violation of inadequate notice.

HEW requires that the "claimant or his authorized representative will have adequate opportunity; (i) To examine all documents and records used at the hearing at a reasonable time before the date of the hearing as well as during the hearing ..."[42] On its face, this gives the claimant an adequate opportunity to delve into the records in his file to determine the county's claims and their underlying bases.

MPP similarly requires that "The claimant or his authorized representative shall, upon request, be given the opportunity to examine at any time before and during the hearing, all evidence used by the county welfare department to support its decision and all documentary evidence that will be used at the hearing."[43] MPP thus complies with HEW and affords a claimant an adequate opportunity to determine the county's claims and their underlying bases.

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[40]304 U.S. 1, 18 (1938).

[41]Burrus and Fessler, *supra* note 26, at 219.

[42]F.R., *supra* note 14, at (a) (10) (i).

[43]MPP, *supra* note, 22 § 22-049.5; for an analysis of problems with California welfare discovery, see Packard *Fair Procedure in Welfare Hearings*, 42 S. CAL. L. REV. 600, 608-617 (1969) (hereinafter cited as Packard). See MPP § 48-013 allowing a broad right of inspection of records in their files to welfare applicants, recipients, or their authorized representatives with the exception of certain priviledged communications.

In addition, the Chief Referee or his designee has subpoena power to compel the attendance of witnesses and the introduction of material and relevant documents at the hearing.[44] This power is important to force an unwilling county to produce the records on which the proposed action is based.

### *3. RIGHT TO COUNSEL*

The *Golberg* Court recognizes this right by stating:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.[citation] We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.[45]

Note that the Court only allows the retention of counsel, but does not state that counsel must be provided in all cases.

Similarly HEW allows a claimant to have legal representation at the hearing, but does not require that counsel be provided in all cases.[46] Federal financial participation is available for states to provide that legal counsel.[47] Both MPP[48] and California statutes[49] allow, but do not require legal representation, and permit a claimant to appear at the hearing alone or with non legal representation.

It is arguable that neither *Goldberg* nor HEW and MPP effectively guarantee the right to counsel. This is because as Mr. Juice Black dissenting in *Goldberg states:*

> "...but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates.[50]

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[44]MPP, *supra* note 22, § 22-049.6.
[45]397 U.S. at 270-71.
[46]F.R., *supra* note 14, a (a) (2) (iii), (a) (10) (ii).
[47]*Id.* at (b) (4) (i).
[48]MPP, *supra* note 22, § 22-001.5.
[49]CAL. WELF. & INST. CODE § 10955 (West 1966).
[50]397 U.S. at 278-279 (Black, J., dissenting).

The very poverty which compels reliance on a welfare grant precludes the hiring of counsel for a claimant. Therefore, mandatory legal counsel paid for by the State is the only way to make the right to counsel meaningful for welfare claimants.[51] The argument for mandatory legal counsel was presented to the *Goldberg* Court.[52] However, the Court rejected the arguments.

When the fair hearing is after the county action, such as a denial of assistance, or when aid pending the hearing is denied, there is an even greater need for mandatory counsel to prosecute the appeal. This is because, as the *Goldberg* Court states about a welfare recipient, "His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy,"[53] The recipient's need to concentrate on survival precludes securing legal counsel on his own or challenging the county action by himself.

As a practical matter, legal services agencies[54] do represent welfare claimants at fair hearings. However, the amount of legal representation varies widely among the counties, and is non-existent in some counties. These agencies could be expanded to provide representation in all cases.

### *4. ORAL HEARING*

The *Goldberg* Court recognized the importance of an oral hearinb, albeit informal, by stating:

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[51]Although there is effective non-legal representation at fair hearings, these representatives usually work for or with a legal aid agency, such as the Community Workers at California Rural Legal Assistance. In addition, welfare rights organizations in California effectively represent claimants at fair hearings.

[52]Brief of *Amicus Curiae* on Behalf of Appellees, National Institute for Education in Law and Poverty, Goldberg v. Kelly, 397 U.S. 254 (1970) at 38 where *Amicus* contends that the time has come for this court to carry the lesson of Gideon v. Wainwright 372 U.S. 335 (1963), yet another limited step by declaring that in the field of public assistance administration the substantial identity of the citizen's stake in the proceedings requires a like regard for his need of legal counsel." (hereinafter cited as *Amicus*).

[53]397 U.S. at 264.

[54]On the Legal Services Programs under the Office of Economic Opportunity, see generally, Article, *Legal Assistance in the Rural Setting*, 2 U.C.D. L. REV. 237 (1970) (hereinafter cited as Legal Assistance).

> Written submissions are an unrealistic option for most recipients...[and] do not afford the flexibility of oral presentations....Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.[55]

HEW does not expressly require an oral hearing. However, an oral hearing can be implied in the following language: "The claimant, or his representative, will have adequate opportunity: ... (iv) To establish all pertinent facts and circumstances; (v) To advance any arguments without undue interference."[56] Although an explicit guarantee of an oral hearing would be clearer, *Goldberg* is satisfied by this language.

Both MPP[57] and the California statutes[58] recognize an oral hearing by providing that at the hearing "all testimony shall be submitted under oath or affirmation." In addition the statute provides "The hearing shall be conducted in an informal and impartial manner in order to encourage free and open discussion by participants."[59]

### 5. *CONFRONTATION AND CROSS EXAMINATION*

*Goldberg* requires that "Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department."[60]

HEW explicitly recognizes the claimants right either alone, or

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[55]397 U.S. at 269.

[56]F.R., *supra* note 14, at (a) (10) (iv), (v).

[57]MPP, *supra* note 22, § 22-049.2.

[58]CAL. WELF. & INST. CODE § 10955 (West 1966).

[59]*Id.*

[60]397 U.S. at 270. (here the court cited from Greene v. McElroy, 360 U.S. 474, 496-497 (1959) as pertinent to the issues in Goldberg. The McElroy quote in part is:

> We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. ... This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases. ... but also in all types of cases where administrative ... actions were under scrutiny. (citations omitted).

through his representative, "To question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witness."[61] Thus, HEW meets the *Goldberg* standard.

Neither MPP nor the California statutes guarantee the confrontation-cross-examination right to claimants. In fact, both assert that "the person [Referee at the hearing] shall not be bound by the rules or procedure or evidence applicable in court."[62] This is a clear violation of the *Goldberg* requirement which should be rectified by an explicit guarantee of this right to claimants at a fair hearing. In addition, California violates the HEW standards on this right. Thus, a statutory as well as a constitutional violation existing which needs to be rectified. However, one could imply this from the right to request subpoenas for the presence of witnesses. In practice, claimants and attorneys do cross-examine witnesses.

A additional problem is that most welfare recipients cannot effectively utilize the confrontation-cross-examination right without legal representation at the hearing. This is an additional argument for mandatory legal counsel who, in words of *Goldberg* "...can...conduct cross-examination...."[63]

### 6. *RIGHT TO PRESENT EVIDENCE AND MAKE ORAL ARGUMENT*

*Goldberg* requires that a recipient have "... an effective opportunity to defend ... by presenting his own arguments and evidence orally...."[74] As seen previously in the discussion of the oral hearing element, HEW requires this right.[65]

MPP is much less explicit. As seen in the oral hearing discussion, this right can be implied from the testimony requirement.[66] MPP also gives the referee a subpoena power to com-

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[61]F.R., *supra* note 14, at (a) (10) (vi).

[62]MPP, *supra* note 22, § 22-049.4; CAL. WELF. & INST. CODE § 10955 (West 1966). For a discussion of problems with admissions of evidence at the fair hearing, see Packard, *supra* note 43, at 620-623.

[63]397 U.S. at 270.

[64]*Id.* at 268.

[65]F.R., *supra* note 14, at (a) (10) (iv), (v).

[66]CAL. WELF. & INST. CODE § 10955 (West 1966).

pel attendance of necessary witnesses and the production of necessary documents on the request of either party to the hearing.[67] This provides sufficient additional evidence for interpreting MPP as requiring this right because there is no need for the claimant to use the subpoena power without the right to present evidence and make oral argument.

### *7. IMPARTIAL TRIBUNAL*

The referee is the decision-maker who must hear and decide a claimant's challenge impartially. *Goldberg* states that:

> an impartial decision maker is essential. [citiations] We agree with the district court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the dtermination under review.[68]

Thus, the court does not exclude hearing officers who are involved in the case, so long as the officer did not participate in the decision being challenged at the hearing.

HEW requires that the state hearing official must be impartial and "...must not have been involved in any way with the action in question."[69] If this interpreted to mean the determination under review, then the *Goldberg* standard is met.

Both MPP[70] and California statute[71] require that the hearing be conducted in an impartial manner. This meets both *Goldber's* and HEW's requirements. In addition, California referees are employees of the state of California,[72] whereas the actions challenged at hearings are determined by the employees of each county welfare department[73] with one exception.[74] Thus, a re-

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[67]MPP, *supra* note 22, § 22-049.6.

[68]397 U.S. at 271. See, Comment, *Prejudice and the Administrative Process, 59* N.W. U. L. REV. 216 (1964-65) for an excellent analysis of the important factors and standards for determining prejudice in the administrative process.

[69]F.R., *supra* note 14, at (a) (8).

[70]MPP, *supra* note 22, § 22-049.2.

[71]CAL. WELF. & INST. CODE § 10955 (West 1966).

[72]*Id.* § 10953.

[73]*Id.* § 10605.

[74]Aid to the Permanently and Totally Disabled, CAL. WELF. & INST. CODE § 13555 (West 1966) *as amended* (West Supp. 1972), which provides that the state determines eligiblity for A.P.T.D.

feree will not be involved in determining the challenged action since his job involves presiding at fair hearings and writing proposed decisions.[75]

### *8. DECISION ON THE RECORD*

*Goldberg* recognizes that the hearing decision must be based on the evidence in the record of the hearing. The court states that:

> ...the decision-maker's conclusion as to a recipients eligibility must rest solely on the legal rules and evidence adduced at the hearing. [citations] To demonstrate compliance with this elementary requirement, the decision-maker should state the reasons for his determination and indicate the evidence he relied on, [citation], though this statement need not amount to a full full opinion or even formal findings of fact and conclusions of law.[76]

HEW, complying with *Goldberg*, requires that a decision be based exclusively on evidence introduced at the hearing and that the reasons and supporting evidence for the decision must be specified.[77]

MPP requires that a decision be based exclusively on the evidence on the record of the hearing and that it state the facts, laws, and supporting reasons for the decision.[78] In addition, both MPP[79] and the California statutes[80] require the recording of the hearing proceedings to facilitate a decision on the record. Therefore MPP complies with *Goldberg* and HEW on its face.

The referee is required to write a proposed decision, and, with the approval of the chief referee of S.D.S.W., file the decision with the director of S.D.S.W. The director can adopt the proposed decision, issue an alternate decision, or order a rehearing.[81] In

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[75] *Id.* § 10958.
[76] 397 U.S. at 271.
[77] F.R., *supra* note 14, at (a)(14), (15).
[78] MPP *supra* note 22, § § 22-063.1, and 22-059.2.
[79] *Id.* § 22-049.3.
[80] CAL. WELF. & INST. CODE § 10956 (West 1966).
[81] *Id.* § § 10958-10959.

practice,the decision received by the claimant contains form language with general reasons for the decision.[82] It is questionable whether the present decision format complies with *Goldberg* or HEW.

Statistics show that there has been a sharp drop in the number and percentage of favorable (aid granted) fair hearing decisions between 1970 and 1971. The 1970 average for all programs is 46%.[83] On the other hand the average for the first six months of 1971 is 12%.[84]

It has been suggested that the drop in favorable fair hearing decisions is due to extensive use of the alternate decision power by the director of S.D.S.W.[85] These decisions also must be decided on the basis of the record of each hearing by California statute.[86] This provides a measure of protection to the parties to the hearing.

### *9. JUDICIAL REVIEW*

The *Goldberg* court sidestepped the issue of judicial review of state agency action. This is because the New York procedures challenged in that case provided a statutory fair hearing after termination for the purpose of full administrative review. The Court stated that "Thus, a complete record and comprehensive opinion, which would serve primarily to facilitate judicial review ... need not be provided at the pre-termination stage."[87]

Although the Court stated that due process does not require

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[82]Interview with an informed source in S.D.S.W., on November 23, 1971, in Sacramento, California (hereinafter cited as Interview). The source notes that S.D.S.W. is using a new "short form" for A.P.T.D. decisions which are less specific than the old form. On the short form decision issue, See Ortega v. Carleson, California Superior Court, Sacramento County, No. 216556.

[83]These figures are compiled by San Francisco Neighborhood Legal Assistance Foundation based on data contained in S.D.S.W., FORM DPA 9, and S.D.S.W., SPECIAL QUARTERLY REPORT ON FAIR HEARINGS, for quarter ending December, 1970, dated February 26, 1971.

[84]S.D.S.W., FORM DPA 9.

[85]Interview, *supra* note 82. For a case challenging issuance of alternate decisions without giving reasons, see Rogers v. Carlson, California Superior Court, Sacramento County, No. 211863. Note, Defendants motion for summary judgment in Rogers granted, April 5, 1972.

[86]CAL. WELF. & INST. CODE § 10959 (West 1966).

[87]397 U.S. at 267.

two hearings,[88] the New York procedures challenged in *Goldberg* required a post-termination statutory fair hearing which followed the *Goldberg* preliminary hearing. However, a state can forego the preliminary hearing and continue benefits until after the "fair" hearing.[89] It is not clear from the Court's opinion whether states with a one hearing procedure are required to have a complete record and comprehensive opinion for judicial review. However, in *Goldberg's* companion case, *Wheeler v. Montgomery*,[90] the court held that California's pre-termination review violated due process. The court required a pre-termination hearing opportunity without mentioning a post-termination fair hearing. Thus, it is arguable that the court did not require judicial review as a due process element of fair hearing.

Mr. Justice Black, in his *Goldberg* dissent, states that the implications of the majority's reasoning is "... a full adversary process of administrative and judicial review," in which "... termination without judicial review would be unconscionable."[91] This he finds objectionable, but notes that it is the inevitable result of the logic of the majority.[92] This would be pre-termination judicial review.

HEW only states that "the claimant will be notified of the decision, in writing, ... and, to the extent it is available to him, of his right to judicial review."[93] California provides by statute for judicial review of agency decisions. Within one year after receiving notice of the S.D.S.W. director's final decision, both parties can file a petition for a writ of mandate challenging the decision on questions of law not fact. This is the exclusive remedy from the director's final decision.[94]

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[88] *Id.* n. 14.

[89] *Id.*

[90] 397 U.S. 280 (1970).

[91] 397 U.S. at 278.

[92] *Id.*

[93] F.R., *supra* note 14, at (a) (12). On Judicial Review of administrative agency action, see generally L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[94] CAL. WELF. & INST. CODE § 10962 (West 1966) *as amended* (West Supp. 1972). In Bertch v. Social Welfare Department, 45 Cal. 2d 524, 289 P.2d 485 (1955), the California Supreme Court construed the predessor to § 10962 as requiring the "substantial evidence" test for judicial review of fair hearings. The writ of mandate is authorized in CAL. CODE OF CIV. PROC. § 1094.5 (West 1966). For an excellent treatment of petitions for mandamus under § 1094.5, see generally W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS, California Continuing Educa-

There are serious questions concerning the right to judicial reviw as a constitutional matter. For judicial review involves access to the courts to finally settle one's disputes as well as to challenge error. In *Boddie v. Connecticut*,[95] the Supreme Court held that due process requires that access to the courts for marital dissolutions cannot be denied to indigents who cannot pay filing fees or court costs.[96] Although the opinion of the Court applies only to marital dissolutions, the *Boddie* principle is much broader for as Mr. Justice Brennan, concurring in *Boddie*, stated:

> I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under Federal or state law . . . The right to be heard in some way at some time extends to all proceedings entertained by courts.[97]

Thus, due process should require on this reasoning that access to both trial and appellate courts be guaranteed to all persons without regard to their ability to pay fees or court costs.

Welfare recipients, dependent on their grant for "the very means to subsist,"[98] are unable to pay fees or court costs (e.g. costs of fair hearing transcripts). Recognition of the broader meaning of the *Boddie* principle would compel the conclusion that denial of access to the courts for judicial review of fair hearing decisions because of inability to pay violates due process of law. However, no cases have been found which accept that conclusion.

## C. CONCLUSION

One can see that MPP substantially complies with HEW and *Goldberg*. The only exceptions are the confrontation-cross-examination element and the notice element in which the factual bases of a county action are not required by the notice of action.

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tion of the Bar (1966).-Note CAL. WELF & INST. CODE § 10960 (West 1966) provides for a rehearing remedy for either party, and this is required before starting a writ of mandate proceeding.

[95]401 U.S. 371 (1971).

[96]*Id.* at 375.

[97]*Id.* at 387-88.

[98]Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

Here, an explicit guarantee in MPP of these rights are required by both HEW and *Goldberg*. Thus MPP substantially guarantees Ms. Smith a hearing that comports ostensibly with due process of law.

However, the due process guarantees of *Goldberg* can be vitiated in the administration of California's fair hearings. This can be done by discrepancies between theory and practice as discussed in the Notice section. The prior hearing required by *Goldberg* can be redndered ineffective by county and state policies which discourage claimants from seeking aid pending a hearing.[99] Thus the major changes in the administration of California fair hearings in regards to due process elements, with the noted exceptions, is in the practice and not in the regulations.

## III AID PENDING

### A. THE AID PENDING PROBLEM

A critical issue for Ms. Smith and other welfare recipients who request fair hearings to challenge erroneous county action is whether they will be granted aid pending. Aid pending is definable as the continuation of an assistance grant until the fair hearing decision is finally rendered by the Director of S.D.S.W.[100]

The need for welfare recipients to receive aid pending is critical. This is because aid pending is crucial to the survival of a recipient during the time that it takes for a fair hearing to be completed, and a decision to be rendered. That time period is at least the 60 days maximum required by MPP[101] and HEW[102] from the date of the request for fair hearing until the fair hearing decision is rendered (except when the hearing is continued). In many cases in California, the time period exceeds sixty days.[103]

The United States Supreme Court has recognized the dependence of a recipient on his or her assistance grant for survival.

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[99]Letter from Christopher N. May, Attorney, San Francisco Neighborhood Legal Assistance Foundation, dated February 10, 1972 (hereinafter cited as May letter) (on file at UCD Law Review office).

[100]MPP, *supra* note 22, § 22-022.3.

[101]*Id.* § 22-056.1

[102]F.R., *supra* note 14, at (a) (11).

[103]For a case challenging violations by S.D.S.W. of the 60 day maximum, see Taylor v. California State Department of Social Welfare, U.S.D.C. (N.D., Cal.) No. C-71584.

In *Shapiro v. Thompson*,[104] the Court stated that for the poor, welfare aid is the means "...upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." Similarly the *Goldberg* Court recognized "...that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means to live while he waits."[105] Another indication of the need for aid pending is, as the *Goldberg* Court recognizes,[106] protection against erroneous termination. The extent of the need for protection against county errors is illustrated by the percentage of cases that recipients win at the fair hearing level.[107]

An additional reason for aid pending is that denial of aid pending precludes the recipient from preparing for and pursuing "... the subsequent hearing."[108] This is recognized by the *Goldberg* Court which states that "His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."[109]

## B. THE PRESENT LAW ON AID PENDING

Both *Goldberg v. Kelly*[110] and *Wheeler v. Montgomery*[111] held that due process requires an evidentiary hearing before welfare benefits may be discontinued. This is another way of stating that assistance pending the hearing decisions must be granted to all recipients challenging erroneous terminations.

However, HEW adopted regulations subsequently to *Goldberg* which give states an option to impose additional requirements. States shall grant assistance pending the hearing,

> Unless a determination is made by the state agency, in accordance with criteria issued by the social and rehabilitation service, that the issue is one of state agency policy and not one of

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[104]394 U.S. 618, 627 (1969). See also, Dandridge v. Williams, 397 U.S. 471, 485 (1970) on the interest of welfare recipients in their benefits.
[105]397 U.S. at 264.
[106]*Id.* at 266.
[107]See discussion of Decision on the Record, *supra* at _____, and notes 83 and 84.
[108]Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967) (hereinafter cited as Note).
[109]397 U.S. at 264.
[110]*Id.*
[111]397 U.S. at 282.

> fact or judgment relating to the individual case, including a question of whether the state agency rules or policies were correctly applied to the facts of the particular case.[112]

In the alternative, states can continue resistance pending the hearing in all cases.[113]

HEW also established an advance notice period of at least fifteen days prior to the proposed action.[114] HEW gives states the option to either require that a request for fair hearing and aid pending be filed within fifteen days[115] or allow aid to be continued even if the request is filed after fifteen days.[116] HEW applies these options to all cases in which the proposed action is a reduction, suspension, or termination.[117]

California has chosen, in MPP, to require that a fair hearing request which seeks aid pending be filed within fifteen days and that a request raise an issue of fact or judgment rather than state policy for the granting of aid pending.[118] MPP also applies these requirements to reductions, suspensions, and terminations.[119]

The MPP aid pending regulation was in effect for approximately three months. On December 10, 1971, a temporary restraining order was issued by United States District Court Judge Oliver J. Carter in the case of *Yee-Litt v. Richardson*, a

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[112]F.R., *supra* note 14, at (a) (5) (iii) (a) (1).
[113]*Id.* at (a) (5) (iii) (b).
[114]*Id.* at (a) (5) (i) (a).
[115]*Id.* at (a) (5) (iii) (a).
[116]*Id.* at (a) (5) (iii) (b).
[117]*Id.* at (a) (5).
[118]MPP, *supra* note 22, § 22-022.3 which states

> Where the person affected has filed his request for a fair hearing within the 15-day period, the assistance will be continued, without change, until the fair hearing decision is rendered, unless prior thereto the Office of the Chief Referee, State Department of Social Welfare, determines that the issue involved in the fair hearing request is one of state policy and not one of fact or judgment in the individual case, including a question of whether State rules were correctly applied by the county to the facts of the case.

The March, 1972, revisions of § 22-022.3 adds to this language procedures by which the county welfare department helps the Chief Referees office determine the issues raised in a fair hearing request.
[119]*Id.* § 22-022.1.

class action.[120] This order enjoined defendant Robert B. Carleson, Director of the California Department of Social Welfare "from continuing to withhold from the named plaintiffs the welfare assistance benefits terminated by defendants pursuant to Title 22, Cal. Admin. Code, Section 22-022.3, until their fair hearing grievances have been decided." Defendant Carleson was also enjoined from reducing, suspending, or terminating benefits " . . . of that class of recipients who have made a timely written request for a fair hearing, until their fair hearing grievances have been decided."[121]

## C. THE PRESENT LAWS ON AID PENDING ARE UNCONSTITUTIONAL

Plaintiffs in *Yee-Litt* present three cogent arguments for declaring the HEW and MPP aid pending regulations unconstitutional. These arguments are: (1) due process requires the opportunity for a prior evidentiary hearing be afforded to every welfare recipient whose aid is terminated or reduced regardless of the nature of the issue raised by his fair hearing request;[122] (2) it is unconstitutional for the federal and state governments to condition a welfare recipients constitutional right to a prior evidentiary hearing on his ability to raise proper issues of fact or judgment in a written fair hearing request;[123] and (3) the standards for determining when aid must be continued pending the hearing decision are so vague and imprecise as to unconstitutionally permit the state to arbitrarily terminate assistance prior to the hearing.[124]

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[120]No. C-71-2286-OJC, U.S.D.C. (N.D. Cal.). Plaintiffs' class is all recipients of categorical assistance in California and all recipients whose assistance under these programs has been terminated or reduced pending appeal since September 3, 1971, not withstanding their timely request for a fair hearing. See Plaintiffs Complaint, at 8.

[121]*Id.* TRO was amended on December 14, 1971. Amended TRO modified on March 16, 1972.

[122]Plaintiffs' Memorandum of Points and Authorities in support of Motion for Temporary Restraining Order and for Three Judge Court, at 6 (hereinafter cited as *Yee-Litt* Memo).

[123]*Id.* at 14.

[124]*Id.* at 19.

## *1. THE PRIOR HEARING ARGUMENT*

The first argument is that due process requires the opportunity of a prior hearing be afforded to every recipient whose aid is terminated or reduced regardless of the nature of the issue raised by his fair hearing request. The touchstone here is *Goldberg v. Kelley.*[125] Although not argued in *Yee-Litt, Goldberg*[126] and other cases[127] established that welfare assistance is a matter of statutory entitlement, foreclosing the right-privilege argument as a means of defeating the attachment of due process guarantees.[128] Plaintiffs in *Yee-Litt* raise two arguments underlying the prior hearing argument. These are: (a) *Goldberg* does not preclude a prior oral hearing when issues of policy are involved;[129] and (b) adjudicative action is involved in all decisions by local welfare agencies in California, and this historically requires a hearing.[130]

### *a. The Goldberg Policy Argument*

#### *1. Policy Issues*

Although the *Goldberg* opinion dealt only with state action involving loosely issues of fact or judgment,[131] the Court did not preclude a prior hearing when issues of policy are involved. The Court stated:

> This case presents no question requiring our determination whether due process requires only an opportunity for written submission or an opportunity both for written submissions and oral arguments, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues.[132]

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[125]397 U.S. 254 (1970).

[126]*Id.* at 262. See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964) on welfare benefits as property.

[127]Shapiro v. Thompson, 394 U.S. 618, at 627 n. 6 (1969), King v. Smith, 392 U.S. 309 (1968).

[128]See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), on this issue.

[129]*Yee-Litt* memo, *supra* note 122, at 6.

[130]*Id.* at 8-9.

[131]397 U.S. at 268.

[132]*Id.* at 268 n. 15.

The alternatives are either written submissions, or oral and written submissions, not no hearing or a hearing. Implied here is a recognition that a hearing is required prior to termination in all cases.[133] Also *Goldberg's* rationale, that pre-termination hearings are required for recipient survival,[134] is circumvented by the use of denials of aid pending when an issue is deemed to be one of state policy. Therefore a recipient challenging termination, reduction, or suspension on grounds that the policy underlying the regulation affecting him is unconstitutional or contrary to statute, has a "constitutional due process right to be heard *before* any such action occurs."[135]

*2. Oral Hearing*

A side argument in *Yee-Litt* is that an oral hearing is required by due process prior to termination, reduction, or suspension of aid with fair hearing requests dealing with issues of state policy as well as issues of fact or judgment.[136] As noted previously in the discussion of the oral hearing element of due process, *Goldberg* recognizes the critical importance of an oral hearing to a recipient's right to be heard concerning his grievance.

*3. Cases*

Also, Plaintiffs argument is buttressed by the Supreme Court case of *Londoner v. Denver*.[137] This case involved a dispute concerning the determing of street assessment rates by a municipal authority. The property owners who were to be assessed were not allowed a prior oral hearing. The Court stated that:

> Due process of law requires that, at some stage of the proceeding before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. . . . But even here a hearing, in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal.[138]

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[133] *Yee-Litt* Memo, *supra* note 122, at 10.
[134] 397 U.S. at 264.
[135] *Yee-Litt* Memo, *supra* note 122, at 9.
[136] *Id.*
[137] 210 U.S. 373 (1908).
[138] *Id.* at 385-386.

In accord with the prior hearing argument enunciated by plaintiffs in *Yee-Litt* is the Supreme Court case of *Garfield v. Goldsby*.[139] Therefore the HEW and MPP regulations provide unconstitutionally for "summary termination of assistance" in all cases in which it is determined that an issue of state policy is involved in a fair hearing request.[140]

*b. The Adjudicative Action Argument*

*1. The Type of Action*

Plaintiffs argue that adjudicative action is involved in all decisions by local welfare agencies, and this historically requires a hearing.[141] Traditionally whether one has a right to a hearing to challenge an administrative action depended on the type of action taken. The two types of actions are adjudicative, and rule making or legislative.[142] Adjudicative action is "administrative action characterized by the resolution of factual issues surrounding the conduct or fitness of particular parties, and the application of legal consequences to those parties based on this determination."[143] Rule making, or legislative action is the implementation of general rules or regulations for future application.[144] The consequences for a recipient with a substantial personal interest at stake is that if adjudication is involved, there is a due process right to a prior hearing whereas with rule making there is no right to a hearing.[145]

*2. Adjudicative Agency Action*

Characteristically, plaintiffs in *Yee-Litt* argue that all county actions reducing or terminating categorical aid are adjudica-

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[139]211 U.S. 249 (1908). "The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law." *Id.* at 262. Factually Garfield is analogous to the administration of welfare benefits. *Amicus supra* note 52, at 7-8. Garfield involved the administration of distribution of money and land to specified Indians.

[140]*Yee-Litt* Memo, *supra* note 122, at 9.

[141]*Id.* at 8-9.

[142]1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, 413-414 (1958) (hereinafter cited as DAVIS).

[143]Burrus and Fessler, *supra* note 26, at 201.

[144]*Id.* at 202-204; Davis, *supra* note 142.

[145]DAVIS, *supra* note 142, at 412.

tive actions. This is because county action involves determining factual issues revolving around each recipient's personal circumstances and applying legal consequences to those determinations.[146] This is regardless of the issue raised by the recipient, since what is critical is what is done to the recipient by the county (adjudicative action), not what issue the recipient is upset about.[147] Also, by statute, the rule making power is held by the director of S.D.S.W.[148] The counties' function is only to administer the categorical programs "subject to the regulations of the department."[149] Thus, all county actions reducing or terminating categorical aid are adjudicative, and the "aggrieved recipient" must be afforded a prior hearing opportunity before "any adverse action is taken."[150]

It is arguable that the focus of the HEW and MPP aid pending regulations on what issue is raised by a fair hearing request has the proverbial cart before the horse, since the real issue is what action has the county agency undertaken. Therefore according to plaintiffs, the HEW and MPP aid pending regulation are unconstitutional. This is because they deny a prior hearing opportunity to an aggrieved recipient who is terminated, reduced, or suspended when the state determines that a fair hearing request is one of state policy.[151]

### *3. Cases*

Several cases decided subsequently to *Goldberg* support *Yee-Litt* plaintiff's adjudicative action argument.

A recent federal district court case, *Provost v. Betit*,[152] dealt with the prior hearing issue. There the Vermont Department of Social Welfare discontinued special circumstances allowances for its aid to needy children program on a statewide basis. Plain-

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[146]*Yee-Litt* Memo, *supra* note 122, at 8.

[147]Telephone conversation with Christopher N. May, member, California State Bar, Plaintiff's attorney (one of three) in *Yee-Litt*, on Dember 3, 1971.

[148]CAL. WELF. & INST. CODE §§ 10553-10554 (West 1966), *as amended* (West Supp. 1972).

[149]*Id.* § 10800.

[140]*Yee-Litt* Memo, *supra* note 122, at 8.

[151]*Id.* at 13.

[152]326 F. Supp. 920 (D. Vt. 1971).

tiffs challenged the lack of a pre-reduction hearing because their total in benefits was reduced by this action.[153]

The court in *Provost* held that no pre-reduction hearing was required in the case of a statewide reduction in a program. The court sharply distinguished between what is involved in an agency adjudicative action and agency rule making in holding that Vermont had done the latter. The Court said "We are not here dealing with a factual determination that the level of an individual's grant should be reduced because of a change in individual circumstances, but rather with a statewide social welfare policy impartially affecting all welfare recipients."[154]

The *Provost* Court characterized *Goldberg* as a case which "... does no more than to classify an administrative determination of substantial interest to an affected individual as falling into the category of an adjudicative decision requiring the basic prerequisites of due process." In contrast, the court said, "... the instant case presents a challenge to an administrative policy which seeks to revise the Vermont Social Welfare Plan not only in plaintiffs' [the recipients] case but for the benefit of all citizens." The court characterized adjudicative action as applying set standards to an individual, and rule making (or legislative) action as a change in standards that apply to a class.[155]

The court mentioned the proposed HEW regulations on fair hearings (which included the aid pending regulation) and concluded only that Vermont complied procedurally with the regulations. The utility of the *Provost* decision for upholding the constitutionality of the HEW regulations is minimal. This is because the court said that the "... federal regulations scheduled to take effect in the near future" will be examined.[156]

Plaintiffs argue that *Provost* required a prior hearing opportunity in all termination and reduction cases involving adjudicative agency action.[157] The only exception is when a ter-

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[153] *Id.* at 921.

[154] *Id.* at 922.

[155] *Id.* at 923.

[156] *Id.* at 922.

[157] Plaintiff's Supplemental Memorandum of Points and Authorities in support of motion for temporary restraining order and three judge court, Yee-Litt v. Richardson *supra* note 120 (hereinafter cited as *Yee-Litt* Supp. memo).

mination or reduction of benefits is due to an across-the-board, state-level discontinuance of all or a portion of all assistance program.[158]

Most importantly, plaintiffs argue the *Provost* Court focused not (as the HEW and MPP regulations do) on what issue a recipient raises in his request, but rather on the type of agency action involved. According to the *Provost* court, Due Process requires a prior evidentiary hearing opportunity whenever an agency acts adjudicatively by applying regulations to an individual case, regardless of the issue raised by the claimant. This is true even when a local agency applies an across-the-board state reduction to an individual case because facts unique to that recipient must be considered, and the reduced level of his aid must be decided on the basis of the facts of his prior aid level.[159]

This is *contra* the regulations which will "permit summary termination" even where the agency has acted adjudicatively, whenever the claimant does not raise "issues of fact or judgment in the individual case in his request for a hearing."[160]

*Yee-Litt* plaintiffs' argument that the HEW and MPP regulations unconstitutionally base the right to a prior evidentiary hearing on the nature of the issue raised by the claimant in his request, rather than the nature of the challenged agency action, are further supported by three cases.[161]

*State ex rel. Ellis v. Heim*[162] involved a state-wide across-the-board reduction of all AFDC grants in New Mexico from 90% of unmet budgetary need to 88% of the need.[163] Although the *Heim* Court decided that the state agency action was legislative (or rule making), and therefore no prior hearing was required, it first had to determine what type of action was involved. The Court applied the principle of determining whether the state

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[158]Plaintiffs' Memorandum of Points and Authorities in opposition to Motion to Vacate Amended Temporary Restraining Order, Yee-Litt v. Richardson, *supra* note 120, January 24, 1972, at 7. (hereinafter cited as *Yee-Litt* Opp. Memo).

[159]*Yee-Litt* Supp. Memo, *supra* note 157, at 16. (See, *Wheeler* order, *supra* note 36, at 5 n. 2 which states in part "*Provost* cannot be read to mean that no recipient could ever present a factual question regarding the application of new state law to his case.")

[160]*Id.* at 19.

[161]*Yee-Litt* Opp. Memo, *supra* note 158, at 8-13.

[162]83 N.M. 103, 488 P.2d 1207 (1971).

agency action was "adjudicative" or "legislative" to answer that question.[164] Plaintiffs in *Yee-Litt* assert that the critical distinction is that the court looked to the agency action involved, not to the issues raised by the claimants appeal.[165]

The case of *Merriweather v. Burson*[166] also supports plaintiff's argument by looking to the nature of the agency action involved. The *Merriweather* Court required that all recipients whose benefits were terminated or reduced must be afforded a prior evidentiary hearing "... where the proposed termination is based upon factual determinations relating to the eligiblity of the particular recipient for those benefits."[167]

Finally, in *Woodson v. Houston*[168] the Michigan Court of Appeals held that due process requires a prior evidentiary hearing opportunity before a recipient's Aid to the Blind grant is reduced even though he challenged only the statutory and constitutional validity of the proposed agency action. The court rejected the distinction between fact and judgment versus policy and characterized appeals challenging the validity of state rules as deal-with questions of judgment on which the recipient is entitled to be heard.[169]

Therefore, in conclusion, *Yee-Litt* plaintiffs argue that the HEW and MPP regulations on aid pending are unconstitutional because they deny a prior hearing opportunity to an aggrieved welfare recipient who is terminated or reduced when the state determines that a fair hearing request is one of state policy.[170] This is because these regulations are based on the nature of the issues raised on appeal. The correct approach, as established in the above noted cases, is to look to the nature of the agency action.[171]

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[163] *Id.*
[164] *Id.*
[165] *Yee-Litt* Opp. Memo, *supra* note 158, at 9.
[166] 325 F. Supp. 709 (N.D. Ga. 1970), *aff'd and remanded*, 439 F.2d 1092 (5th Cir. 1971).
[167] 325 F. Supp. at 711.
[168] 27 Mich. App. 239, 183 N.W.2d 465 (Mich. Ct. App. 1970).
[169] *Id.*
[170] *Yee-Litt* Memo, *supra* note 122, at 13.
[171] *Yee-Litt* Opp. Memo, *supra* note 158, at 13.

## 2. *THE UNCONSTITUTIONAL CONDITIONS ARGUMENT*

*Yee-Litt* plaintiffs' second argument is that it is unconstitutional for the federal government and California to condition a welfare recipient's constitutional right to a prior hearing on his ability to raise proper issues of fact or judgment in a written fair hearing request.[172]

Under the HEW and MPP aid pending regulations, to exercise his right to a "pre-termination evidentiary hearing," a recipient has a heavy pleading burden of initially articulating that there are issues of fact or judgment involved in his request. Failing in that, he is denied his *Goldberg* right.[173] The pleading burdens are: (a) the fact-judgment versus policy distinction is not comprehensible nor articulable by most recipients; (b) the recipients often do not learn until the hearing itself what is the county's case against them; (c) failure to adequately plead fact or judgment circumvents another purpose of the hearing, to prevent erroneous *ex parte* factual determinations; (d) fifteen days is not a sufficient time to frame a proper request; and (e) the state often exceeds the sixty days mandate for fair hearing decisions.

### *a. Fact Versus Policy*

This burden is increased because the distinction between policy and fact or judgment issues is, in most cases, not comprehensible by recipients, nor one which they, handicapped by poverty, are able to "articulate" in a written request.[174] The *Goldberg* court recognized this by stating that "written submissions are an unrealistic option for most recipients. . . ."[175] This problem is also recognized by HEW[176] and by the MPP regulations adopted in September, 1971.[177] The emphasis in California

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[172]*Yee-Litt* Memo, *supra* note 122, at 14.
[173]*Id.* at 14-15.
[174]*Id.*
[175]397 U.S. at 269.
[176]H.E.W., HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, § 6300(h) which states that: "A request for a hearing is considered as any clear expression (oral or written) by the claimant . . . to the effect that he wants an opportunity to present his case to higher authority."
[177]MPP, *supra* note 22, § 22-001.2 which states that

on helping the claimant submit and process his request and prepare his case[178] shows that the state is cognizant of these difficulties.

*b. The Hearing*

In many cases a claimant does not learn nor comprehend until the hearing itself, what is the welfare department's case against him. As the Court stated in *Goldberg* only the fair hearing gives "the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."[179] Thus *Yee-Litt* plaintiffs argue that conditioning the right of a recipient to aid pending a hearing on his ability to raise issues of facts or judgment defeats one of the prime purposes of the fair hearing, to inform the recipient of the case against him.[180]

This problem of nonunderstanding is not helped by the county's notices of action which often contain no more than citations to statutes and regulations.[181] As stated before, the notices sent out by some counties pursuant to the Welfare Reform Act of 1971 (effective October 1, 1971) were held to be defective and to violate due process standards because the notices failed to tell recipients what exactly would happen to them and why.[182]

To require this knowledge before the hearing, of which knowledge the hearing is designed to inform the recipient, "ignore[s] the realities of the welfare recipient's condition and defeat[s] the purposes and requirements of due process."[183] *Yee-Litt* plaintiffs argue that:

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a request for a fair hearing is any clear oral or written expression from a claimant, or his duly authorized representative, filed at the office of the Chief Referee, that he wants the Department to take action concerning his expressed reasons for dissatisfaction."

In accord is MPP § 22-007.1 which states that "the claimant may request a fair hearing in writing, but that request need not be in any particular form....

[178] *Id.* § 22-000.

[179] 397 U.S. at 266, quoting from the District Court opinion in *Goldberg.*

[180] *Yee-Litt* Opp. Memo, *supra* note 158, at 11.

[181] *Yee-Litt* Memo, *supra* note 122, at 16.

[182] *Wheeler* order, *supra* note 36.

[183] *Yee-Litt* Memo, *supra* note 122, at 17.

> "... it is not until the hearing itself, when the recipient has had the opportunity to obtain counsel, and the welfare agency has put on its full case against the recipient, that the recipient is well-enough informed to refute the agency's case with his own evidence and knowledge of the facts."[184]

### c. *Ex Parte Factual Determinations*

*Yee-Litt* plaintiffs unconstitutional conditions argument is further supported by another purpose of the hearing. As the court in *Merriweather v. Burson* stated "in such case the purpose of the hearing is to make certain that the assigned reason for the decision to terminate benefits has a sound basis in fact."[185] Thus, the hearing also affords an aggrieved recipient the opportunity to fully challenge and confront those factual determinations made previously on an *ex parte* basis by the county welfare agency.[186] The *Merriweather* court further noted that:

> A common sense view of the spirit of the *Goldberg* decision seems to indicate a desire to prevent a unilateral factual determination on the part of welfare officials that a particular recipient is ineligible for benefits, in view of the possibility that a determination thus made may be disputed or erroneous.[187]

Absent the fair hearing, an erroneous factual determination may pass unchallenged and a recipient terminated wrongfully.

### d. *Fifteen Day*

If a recipient does obtain adequate information concerning the proposed county action and understands that information in time to request a hearing, it is doubtful that within the fifteen day period required for aid pending requests[188] he or she could verbalize adequately to meet the burden of legal pleading re-

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[184]*Yee-Litt* Opp. Memo, *supra* note 158, at 11.
[185]325 F. Supp. at 711.
[186]*Yee-Litt* Opp. Memo, *supra* note 158, at 11.
[187]325 F. Supp. at 711.
[188]MPP, *supra* note 22, § 22-022.3.

quired by the HEW and MPP regulations, and receive aid pending the hearing.[189]

*e. Sixty Day Mandate*

The pleading burden on the recipient is heavily increased by the well known fact that S.D.S.W. takes a much longer time than the sixty days mandated by the Federal Government to decide fair hearings and issue final decisions.[190]

Therefore, plaintiffs in *Yee-Litt* conclude that the aid pending regulations place such a burden on a recipient to draft a legally precise request that the pre-termination hearing right enunciated in *Goldberg* is effectively precluded. Therefore the aid pending regulations are unconstitutional.[191]

*3. THE STANDARDS ARGUMENT*

The *Yee-Litt* plaintiffs' third argument for holding the regulations unconstitutional is that the standards for determining when aid must be continued pending the hearing decision are "so vague and imprecise as to permit the State to arbitrarily terminate assistance prior to the hearing."[192] This is because: (a) it is difficult to distinguish between adjudicative and legislative facts; and (b) recipients do not write requests with clear issues.

*a. Adjudicative Versus Legislative Facts*

The most difficult problem with the HEW and MPP aid pending regulations is that in deciding whether an aid pending request raises issues of fact or judgment as applied in the individual case, the state is determining whether adjudicative facts[193] (as opposed to legislative facts) are involved.[194]

Professor Davis concludes that determining these distinctions

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[189]*Yee-Litt* Memo, *supra* note 122, at 17.
[190]*Id.* at 18. See note 103 *supra.*
[191]*Id.*
[192]*Id.* at 19.
[193]DAVIS, *supra* note 142.
[194]*Yee-Litt* Memo, *supra* note 122, at 20.

is difficult and imprecise. In his ADMINISTRATIVE LAW TREATISE, Davis states "[making] the distinction between legislative and adjudicative facts ... the line is sometimes difficult or impossible to draw," and "In the borderland the distinction often has little or no vitality."[195] Davis further notes that even "the courts have (seldom) been articulate about the cardinal distinction between adjudicative and legislative facts."[196] Plaintiffs assert that welfare officials are not more likely than the courts to draw the line between these two types of facts with any "precision or consistency."[197]

*b. Requests*

Equally problematical is the task faced by the Chief Referee's office of S.D.S.W. to determine on the basis of a fair hearing request whether the issue is one of fact or judgment, or one of state policy.[198] Given a general lack of knowledge of regulations and limited verbal skills, it is unlikely that recipients will frame requests so that the issues stand out. It is also unlikely that on the basis of these requests, the Chief Referee's office will be able to determine the issues. This is not because of incompetence, but because the standards involved are vague and incapable of consistent application and recipients do not write requests with clear issues. The result is that the Chief Referees Office will make "arbitrary, inconsistent, and often incorrect decisions" on matters critical to the survival of these aggrieved recipients.[199]

Therefore plaintiffs assert that regulations with these standards are invalid because the actions taken pursuant to these regulations by officials bound by them are "arbitrary and capricious."[200] As the Supreme Court has stated "Arbitrary power

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[195]DAVIS, *supra* note 142, at 414.

[196]*Id.* at § 7.06, at 429.

[197]*Yee-Litt* Memo, *supra* note 122, at 21.

[198]*Id.*

[199]*Id.* at 22. For factual examples of how these standards are allegedly applied arbitrarily, see *Yee-Litt* Memo, *supra* note 122, at 21-23, and *Yee-Litt* Opp. Memo, *supra* note 158, at 14-16.

[200]*Yee-Litt* Memo at 23-24. (Note, I am indebted to Christopher N. May, Attorney, San Francisco Neighborhood Legal Assistance Foundation and one of Plaintiff's Counsels in *Yee-Litt*, for supplying the *Yee-Litt* materials to me, on which materials the preceding arguments were based.)

and the rule of the Consitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict."[201]

### *4. THE O'NEIL ANALYSIS: IS THERE A REASONABLE ALTERNATIVE?*

Robert M. O'Neil[202] has described types of conditions on welfare benefits, their purposes, and suggested a framework for assessing the consitutional validity of those conditions.[203] Assuming that assistance pending a fair hearing decision is a benefit to which a recipient is entitled,[204] is the condition of framing a fair hearing request in terms of issues of fact or judgment as opposed to issues of policy valid constitutionally? O'Neil's analysis will be used to anwer this question.

#### *a. Purposes of Conditions*

O'Neil discusses the rationale of conditions, what governmental purposes they serve.[205] One purpose is the financial interest of the state in reducing the cost of a program.[206] It is well known that states have financial interest in welfare benefits.[207] Correlative to this is the states interest in efficiently administering a welfare program.[208]

Since granting assistance pending a hearing costs money, it is in S.D.S.W.'s financial interest to limit the amount of aid

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[201]Jones v. S.E.C., 298 U.S. 1, 24 (1936).

[202]Professor of Law, Boalt Hall School of Law, University of California, Berkeley.

[203]O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54CAL. L. REV. 443 (1966) (hereinafter cited as O'Neil).

[204]*Goldberg* establishes this with regard to terminations by requiring a "pretermination evidentiary hearing," 397 U.S. 254 (1970).

[205]O'Neil, *supra* note 203, at 453.

[206]*Id.* at 454.

[207]Note, *supra* note 108, at 1240.

[208]Dami v. Department of Alcoholic Beverage Control, 176 Cal. App. 2d 144, 1 Cal. Rptr. 213 (1959) which states: "Two interests contend for acceptance here: The right of the party regulated to a full hearing as opposed to the modern administrative state's need that its various agencies function expeditiously." *Id.* at 150, 1 Cal. Rptr. at 217.

pending requests granted.[209] In fact cost is an important factor in determining whether a fair hearing request for aid pending is granted or denied.[210]

Insofar as this is the purpose of the MPP aid pending regulation, that regulation is of doubtful constitutional validity. For the *Goldberg* Court stated that "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the states interest that his payments not be erroneously terminated, clearly outweighs the states competing concern to prevent any increase in its fiscal and administrative burdens."[211] In accord is *Shapiro v. Thompson.*[212] Thus the state interest served by the condition is outweighed by the recipient's interest in the benefit (aid pending).

*b. Criteria*

O'Neil also develops several criteria which are to be balanced together to test the validity of a condition.[213] Appropriate here is the criterion, availability of alternative means to achieve the same end of the condition.[214] This involves an application of the "least onerous alternative" doctrine.[215] For O'Neil, the question is whether the condition is the "less onerous form of regulation" with the burden perhaps on the state to show that there are "no less onerous means". In the alternative, rather than terminate the conditioned benefit, one would "require that the condition be rewritten in narrow terms more appropriate to the governmental interest."[216]

*c. Alternatives*

A possible "less onerous form of regulation" would be to sub-

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[209]The extent of the fiscal interest in limiting aid pending grants is shown by the fact that for the fourth quarter for 1970, 85% of the fair hearing requests involved issues of fact or judgment, and only 15% involved issues of policy. S.D.S.W. SPECIAL QUARTERLY STATISTICAL REPORT, February 26, 1971.

[210]Interview, *supra* note 82.

[211]397 U.S. at 266 quoting from district court opinion.

[212]394 U.S. 618 (1969).

[213]O'Neil, *supra* note 203, at 463-476.

[214]*Id.* at 469.

[215]See Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-6 (1951); Schneider v. State, 308 U.S. 147 (1939).

[216]O'Neil, *supra* note 203, at 469.

stitute the MPP aid pending regulation with a regulation that granted aid pending regardless of the nature of the issue raised by the request. The only condition then would be timely filing of the fair hearing request.[217] However, the state could object that this is not really an alternative to accomplish the state's ends.[218]

*d. A Proposal*

The second alternative, to rewrite the condition more narrowly and appropriate to the governmental interest may be more feasible. A narrower proposal has been written by Daniel Wm. Fessler, Acting Professor of Law, School of Law, University of California, Davis. His draft states:

> such a prior hearing shall be accorded in all cases except where an aggrieved claimant, conceding a correct application to the facts of her case, raises a challenge as to the legality of the agency rule or regulations (either on its face or as applied) under statutory or constitutional norms.[219]

The utility of this draft, it is suggested, is that it precisely delineates the only type case in which the prior hearing requirement should not be met, that is, when the sole contention advanced asks the hearing officers to decide statutory and constitutional questions which are outside the competence of the officer.[220]

*e. Problems*

Although this draft does narrow the circumstances in which aid pending the hearing is denied because of policy issues, there

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[217]The MPP regulations prior to the September, 1971, changes did grant aid pending in all cases in which there was a timely request for a fair hearing.
[218]May letter, *supra* note 99.
[219]Letter to John D. Twiname, Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, June 25, 1970, at 5. This letter can be found in the appendix to, D. FESSLER, CONSTITUTIONAL DUE PROCESS HEARING REQUIREMENTS IN THE ADMINISTRATION OF PUBLIC ASSISTANCE: A MATURING CONCEPT, Doctoral Dissertation on file, Harvard Law Library and the Library of Congress (1969).
[220]*Id.*

are still problems with the draft. The proposal still allows the state agency to determine *ex parte* that the request of the recipient raises only issues of state policy. In addition, a very narrowly drawn regulation could be used in practice to coerce recipients into conceding the issue of policy and waiving aid pending.[221]

Another problem is that if a hearing officer is not competent to determine statutory or consitutional issues in a fair hearing, then there is no reason to have a fair hearing, before or after the action challenged on policy grounds. If so, the hearing should be bypassed and the issues determined in a court. However, this point is not settled, and some people argue that Hearing officers can hear these challenges. Also, a claimant under this draft, who concedes a correct application of the facts to his or her case, and wishes to challenge policies alone, is really challenging legislative action, and not adjudicative action. In that case, there is historically no right to a hearing.[222]

Finally, the "brutal need" of recipients, recognized in *Goldberg*,[223] for assistance pending the hearing decision is identical regardless of whether policy or factual determinations are challenged. Also, the pleading burden placed on recipients to frame issues, objected to by *Yee-Litt* plaintiffs, is not substantially lessened by this draft.

### *f. Solutions*

A possible solution to the problem of characterization of issues in a fair hearing request is illustrated by an order of the court in *Harrel v. Harder*.[224] The order modified a prior order enjoining the Connecticut Welfare Department from terminating categorical assistance and food stamp benefits without the pretermination evidentiary hearing required by *Goldberg v. Kelly*. The modified order enjoined termination of those benefits without the hearing required by the HEW regulations. The court required that a recipient's claim of misapplication of state policy or

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[221]May Letter, *supra* note 99.

[222]DAVIS, *supra* note 142; Burrus and Fessler *supra* note 143.

[223]397 U.S. at 264.

[224]C. No. 13,800, U.S.D.C. (D. Conn.) order filed September 17, 1971. Cited in COMMERCE CLEARING HOUSE, POVERTY LAW REPORTER ¶ 14,156.

law was to control over the state welfare department's claim that the issue was one of policy or law.[225] Thus the recipient's claim of factual or judgmental error is controlling. This is a much better protection for, at least, those recipients who are able to know and characterize the issues as factual or judgmental.

Those recipients unable to artculate issues of fact or judgment in a fair hearing request may be helped by placing the burden on the state to show affirmatively prior to termination of assistance that a particular request, in fact, involves only policy issues. However, the problem with this burden is that errors can go unchallenged, and thus a hearing may be required to challenge the policy issue characterization.

The far simpler approach is to grant assistance pending a hearing in all cases in which a recipient is threatened with termination, suspension, or reduction by adjudicative agency action.

## D. CONCLUSION

Plaintiffs in *Yee-Litt* raise three cogent arguments for declaring the HEW regulations, insofar as the states are given an option, and the MPP regulations on aid pending unconstitutional violations of the pre-termination hearing guarantees of *Goldberg v. Kelley*[226] and *Wheeler v. Montgomery*.[227] These arguments are: (1) due process requires the opportunity for a prior evidentiary hearing be afforded to every welfare recipient whose aid is terminated or reduced regardless of the nature of the issue raised by his fair hearing request; (2) it is unconstitutional for the federal and state governments to condition a welfare recipient's constitutional right to a prior evidentiary hearing on his or her ability to raise proper issues of fact or judgment in a written fair hearing request; and (3) the standards for determining when aid must be continued pending the hearing decision are so vague and imprecise as to unconstitutionally permit the state to arbitrarily terminate assistance prior to the hearing.

These arguments compel the conclusion that California is constitutionally required to grant the prior hearing opportunity and assistance pending the hearing in all cases, includ-

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[225] *Id.*

[226] 397 U.S. 254 (1970).

[227] 397 U.S. 280 (1970).

ing reductions, involving adjudicative agency action. This is the far simpler and more reasonable alternative to the present regulations. Then, the only situation not requiring a prior hearing would be when a state agency terminates or reduces benefits in an across-the-board state level discontinuance of all or part of an assistance program.

## IV. SPECIFIC LIMITS ON THE USE OF FAIR HEARINGS BY WELFARE CLAIMANTS

The "Fair Hearing" under the Federal and State welfare laws is a term of art confined to categorical assistance programs. This section explores the limits on the use of fair hearings by welfare claimants. These limits can be categorized into the following three groups: (a) The scope of the prior hearing guarantee; (b) the limits of the fair hearing to settle disputes; and (c) the individual and institutional limits on the use of fair hearings. Suggestions for improvements will be offered where appropriate.

### A. THE SCOPE OF THE PRIOR HEARING GUARANTEE.

*Goldberg* requires the prior hearing when assistance is "terminated,"[228] and *Wheeler* adds a prior hearing for "suspensions" of assistance.[229] Both the HEW[230] and MPP[231] regulations require a prior hearing for reductions in assistance. However, the courts have not required a prior hearing as a constitutional matter for reductions or denials of assistance. Local non-federally funded relief programs in California have not been required to afford the opportunity of a prior hearing in any situation, whether termination, reduction, or denial. These three areas will be considered in light of *Goldberg* as well as the issue of pre-termination judicial review noted previously in discussion of the judicial review element of due process.

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[228]397 U.S. at 264.
[229]397 U.S. at 282.
[230]F.R., *supra* note 14, at (a)(5).
[231]MPP, *supra* note 22, § 22-022.1.

### *1. REDUCTIONS*

Although reductions are included in the prior hearing guarantee by regulation, the constitutional question of whether the *Goldberg* rationale applies to reductions has not been decided. Mr. Chief Justice Burger, in his dissent in *Goldberg* and *Wheeler*[232] raises this question and states that the court does not answer it.[233] In *Daniel v. Goliday*,[234] the Supreme Court was faced with this issue. The court, in a *per curiam* opinion, remanded to the district court to determine "... on a record developed by the parties with specific attention to that issue," whether *Goldberg* and *Wheeler* apply to benefit reductions.[235]

Although the reduction issue is not settled, several lower federal and state courts have isolated criteria from the *Goldberg* opinion for determing whether the Supreme Court's rationale should apply to reductions.

The case of *Hunt v. Edmunds*[236] is illustrative. The Federal District Court in *Hunt* recognized that where reductions are substantial, the brutal need of the recipient is similar to a termination. Also, when a recipient has facts which can affect the proposed decision, then *Goldberg* applies and a prior hearing opportunity is required.[237] This latter criterion is close to the adjudicative action characterization of Professor Davis.[238] The *Hunt* court required a pre-reduction hearing for plaintiff welfare recipients because both criteria were shown to exist.[239]

The U.S. District Court in *Merriweather v. Burson*[240] applied both the substantial reduction[241] and the factual determination criteria to require a pre-reduction hearing in that case.[242] However, the *Merriweather* decision was remanded on the issue of the bearing of *Goldberg* to reductions.[243]

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[232]397 U.S. at 282.
[233]*Id.* at 285.
[234]398 U.S. 73 (1970).
[235]*Id.*
[236]328 F. Supp. 468 (D. Minn. 1971).
[237]*Id.* at 475-476.
[238]DAVIS, *supra* note 142.
[239]328 F. Supp. at 476.
[240]325 F. Supp. 709 (N.D. Ga. 1970).
[241]*Id.* at 710.
[242]*Id.* at 711.
[243]397 U.S. at 255; U.S. Const. Amendt. XIV § 1.

Therefore, if and when the reduction issue is finally decided by the Supreme Court, these two criteria, a substantial reduction and a factual determination, will be considered as important.[244]

### *2. DENIALS*

When an applicant for assistance is denied, there is no right to a prior hearing. This is characterized as an "unresolved issue" in *Goldberg* by Robert M. O'Neil.[245] However, the applicant is afforded a post denial hearing opportunity both by HEW[246] and MPP.[247] O'Neil argues, quite correctly, that an applicant has a greater need for a prior hearing than a recipient who receives aid pending the hearing since the latter is on aid, while the former is not.[248] The major stumbling block to extending *Goldberg* prior hearings to denials is that, unlike recipients, rejected applicants are not entitled to assistance as a matter of statutory right. However, a counter argument is that eligible applicants are entitled to assistance. Therefore those applicants erroneously denied are eligible and are entitled to aid and to a prior hearing.

Subsequent federal court decisions have interpreted *Goldberg* more expansively.[249] In *Davis v. Toledo Metropolitan Housing Authority*[250] a federal district court held on the basis of *Goldberg* and *Wheeler*, "... that those seeking to be declared eligible for public benefits may not be declared ineligible without the opportunity to have an evidentiary hearing."[251] Although the facts of the *Davis* case involved eligibility for public housing,[252] the

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[244]Other cases requiring a pre-reduction hearing on the basis of Goldberg include: (a) Morgan v. Martin, U.S.D.C. (N.D. Cal. 1970) C. No. C-70-1199, a TRO, June 11, 1970, cited in CCH POVERTY LAW REPORTER ¶ 12,113; (2) Figueroa v. Wyman, 63 Misc. 2d 610, 313 N.Y. Supp. 2d 274 (1970); and (3) Woodson v. Houston, 27 Mich. App. 239, 183 N.W.2d 465 (Mich. Ct. App., 1970).

[245]O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Case*, 1970 SUPREME COURT REVIEW 161, 176 (hereinafter cited as O'Neil II).

[246]F.R., *supra* note 14, at (a) (3).

[247]MPP, *supra* note 22, § 22-001.41. See also CAL. WELF. & INST. CODE § 10950 (West 1966).

[248]O'Neil II, *supra* note 245, at 211.

[249]*Id.* at 181-182 nn. 109, 111, and 112.

[250]311 F. Supp. 795 (N.D. Ohio, W.D. 1970).

[251]*Id.* at 796-797.

[252]*Id.*

"public benefit" language is much broader. Thus, the law is moving in the direction of requiring prior hearings with denials of applications for public housing and eventually for denials of welfare benefits.

### *3. LOCAL RELIEF PROGRAMS*

*Goldberg* applied due process to state action through the Fourteenth Amendment to the U.S. Constitution.[253] However, does *Goldberg* apply to local relief programs that are not federally funded? An affirmative answer is the result of the *Goldberg* court's characterization that the constitutional issue was the adequacy of New York regulations which applied both to the Social Security Act Programs and to New York's Home Relief Program.[254] Thus, regardless of the source of funding, where welfare benefits are "a matter of statutory entitlement."[255] a pre-termination hearing opportunity is required.

California provides, by statute, General Relief, a county funded program.[256] Recipients of General Relief are excluded by statute from the state fair hearing provided to recipients in the

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[253]397 U.S. at 255; U.S. Const. Amend t. XIV ? 1,

[254]*Id.* at 258, note 3, in which the court said "Even assuming that the constitutional question might be avoided in the context of A.F.D.C. . . . the question must be faced and decided in the context of New York's Home Relief Program . . . ."

[255]*Id.* at 262

[256]CAL. WELF. & INST. CODE, § § 17000-17409 (West, 1966). § 17000 provides:

> Every county ... shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfull resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

Several California cases support this county duty. " § 17000 imposes a mandatory duty upon the counties to support 'all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident.' " Mooney v. Picket, 4 Cal. 3d 669, 676, 484 P.2d 1231, 1235, 94 Cal. Rptr. 279, 283 (1971). In accord with this is County of Los Angeles v. Department of Social Welfare, 41 Cal. 2d 455, 260 P.2d 41 (1953) which said, "The counties alone are charged with the duty of furnishing relief to indigent residents who are not otherwise supported." Id. at 458, 260 P.2d at 43. Also in accord is County of Los Angeles v. Frisbie, 19 Cal. 2d 634, 122 P.2d 526 (1942), and City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912 (1932).

categorical assistance programs.[257] The HEW and MPP regulations governing fair hearings do not apply to General Relief since those regulations only deal with Social Security Act Programs.[258] The Boards of Supervisors of each county are responsible for the administration of General Relief, including appeals from recipients and applicants.[259] However, as noted, *Goldberg* requires a prior hearing for terminations of General Relief assistance, an evidentiary hearing meeting the due process standards articulated by the Supreme Court in that opinion. Therefore, insofar as California law does not provide an evidentiary hearing to recipients of General Relief, Fourteenth Amendment due process is violated.[260]

Presently, the county programs for General Relief vary widely.[261] It is not unreasonable to assume that county hearing practices vary accordingly and would also vary widely in the future even with each county complying with the *Goldberg* hearing requirement. As a practical matter, General Relief Hearings could be more easily administered by the California Department of Social Welfare with its established hearing machinery. Centralization would promote uniformity of hearing practices and would be more likely to ensure compliance with the procedures required by *Goldberg*.

### *4. PRE-TERMINATION JUDICIAL REVIEW*

The issue here is whether welfare assistance pending review is available to a claimant for judicial review of an adverse hearing decision. According to O'Neil this is an issue left open by the *Goldberg* court.[262] As noted previously, Mr. Justice Black in his

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[257]CAL. WELF. & INST. CODE § 10950 (West 1966) *as amended* (West Supp. 1972), which provides in part "as used in this chapter, 'recipient' means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds."

[258]F.R., *supra* note 14, at (a) (1); MPP *supra* note 22, § 22-000.

[259]CAL. WELF. & INST. CODE § 17001 (West 1966). In accord is County of Los Angeles v. Department of Social Welfare, 41 Cal. 2d 455, 260 P.2d 41 (1953).

[260]Robertson v. Born, C. 51364SW, U.S.D.C. (N.D. Calif.) is a case pending on this issue for San Francisco County.

[261]This author's own experience in a summer volunteer job for C.R.L.A. in Madera, California, involved in part comparing General Relief programs in five different California counties. The variety exhibited in the county handbooks, primarily in types and amounts of aid available, was surprising to me.

[262]O'Neil II, *supra* note 245, at 177-178.

*Goldberg* dissent sees pre-termination judicial review as logically following from the majority's reasoning. This is because the dependence of a recipient on assistance for survival is similar whether he is seeking a hearing or judicial review.[263] Although the law is moving in that direction, there is no judicial recognition to date, of the principle of pre-termination judicial review with welfare benefits.

## B. THE LIMITS OF THE FAIR HEARING TO SETTLE DISPUTES.

### *1. EXHAUSTON: CLAIMS AND PARTIES*

This section discusses when welfare recipients are required to utilize the fair hearing, and what claims are subject to determination by a hearing. Alternatively, when can welfare recipients by-pass the administrative remedy of a fair hearing and settle their claims in a court.

### *2. CASES*

In *Diaz v. Quitoriano*,[264] petitioners in a class action were seeking to stop a county practice of non-action by compelling the Sutter County Welfare Department to advise petitioners of their rights to apply in writing for categorical assistance and to a fair hearing before S.D.S.W.[265] The court held that petitioners were not required to exhaust an unavailable administrative remedy before seeking a mandate proceeding.[266] In so holding, the court stated that "welfare applicants cannot be expected to exhaust administrative remedies they do not know, and are denied the means of finding out about (citation)."[267]

The *Diaz* court characterized the fair hearing as giving only individual relief and not applying to a class. In addition, the court stated that fair hearings have ". . . no binding effect on the rights of future applicants," and only determine that a recipient

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[263]397 U.S. at 278.
[264]268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969).
[265]*Id.* at 811, 74 Cal. Rptr. at 362.
[266]*Id.* at 812, 74 Cal. Rptr. at 363.
[267]*Id.* at 811, 74 Cal. Rptr. at 362.

is entitled to welfare assistance.[268] The teaching of *Diaz* is that fair hearings can be utilized by individual welfare recipients and applicants to settle disputes concerning claims for assistance. However, a fair hearing can neither be used to obtain relief for a class nor to bind persons in the future. Thus, fair hearings decisions have no binding force as precedents.

In *Ramos v. County of Madera*, [269] plaintiffs sought injunctive and declaratory relief in a class action and damages for individually named plaintiffs. Plaintiffs alleged that the defendant county wrongfully required plaintiffs' class of children ten years or older to work in the grape harvest or have their A.F.D.C. assistance terminated.[270] The trial court sustained defendant's general demurrer which was based solely on plaintiff's alleged failure to exhaust administrative remedies. The Supreme Court reversed on grounds that there was no failure to exhaust administrative remedies, since none were available for class relief or for tort damages. The court characterized fair hearings as premised on individual relief and individualized treatment of claims for aid.[271] The court also questioned the binding effect of fair hearing decisions.[272]

Thus both *Diaz* and *Ramos* view the fair hearing as providing relief for individual claims for assistance, but without binding effect as precedent. But, most crucially, where one seeks class relief or seeks to adjudicate claims other than for aid, one is not required to exhaust the administrative remedy before seeking a court determination.

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[268] *Id.* at 812, 74 Cal. Rptr. at 363. *Diaz* was cited in Sailers Inn v. Kirby, 5 Cal. 3d 1, 7, 485 P.2d 529, 532, 95 Cal. Rptr. 329, 332 (1971), as standing for one of a limited number of exceptions to the exhaustion doctrine. In Morton v. Superior Court of Fresno County, 9 Cal. App. 3d 977, 88 Cal. Rptr. 533 (1970), *Diaz* was interpreted to mean not that the "exhaustion doctrine never applies to a class action," but that the Court was the only place to protect rights of future applicants who would not know of the right to a fair hearing and would therefore have no available administrative remedy. *Id.* at 984, 88 Cal. Rptr. at 537.
*88 Cal. Rptr. at 537.*

[269] 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).

[270] *Id.* at 688, 484 P.2d at 96, 94 Cal. Rptr. 424.

[271] *Id.* at 690-691, 484 P.2d at 98-99, 94 Cal. Rptr. 426-427.

[272] *Id.* at 692 n. 5, 484 P.2d at 97 n. 5, 94 Cal. Rptrl

[272] *Id.* at 692 n. 5, 484 P.2d at 97 n. 5, 94 Cal. Rptr 425 n. 5.

## C. THE INDIVIDUAL AND INSTITUTIONAL LIMITS ON THE USE OF FAIR HEARINGS.

The individual limits on use of fair hearings involve attitudes as well as limited skills. The institutional limits involve administrative relationships and practices which limit or preclude exercise of the prior hearing right by welfare recipients.

### *1. THE INDIVIDUAL*

#### *a. Attitudes and Skills*

As Wedemeyer and Moore have aptly stated, "prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have."[273] The *Goldberg* court recognized this problem and footnotes the Wedemeyer and Moore quote to the following statement, "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[274] The court also takes note of recipients' limited skills by stating that "Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."[275]

#### *b. A Study*

Attitudinal limits on recipient use of fair hearings is illustrated by an interesting and revealing study[276] undertaken six years ago of the attitudes toward welfare of ninety-two A.F.D.C.-U[277] recipient families of one California county.[278] The study revealed that these recipients viewed welfare aid not as a matter of right or entitlement, but as money belonging to the welfare agency.[279] Their perceptions were not clear on who de-

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[273]Wedemeyer and Moore, *The American Welfare System*, 54 CAL. L. REV. 326, 342 (1966).

[274]397 U.S. at 268-269.

[275]*Id.* at 269.

[276]Briar, *Welfare from Below: Recipients' Views of the Public Welfare System*, 54

[277]The Aid to Families with Dependent Children, Unemployed Parents Program, 42 U.S.C. §§ 601-610 (1970), *Supra* notes 2 and 20.

[278]Briar, *supra* note 276, at 372-373.

[279]*Id.* at 376-377.

cides whether they will be granted assistance or not. Also, they did not feel that they had much control over welfare decisions.[280]

On the question of appeals, the study shows 60% of the recipients said they were not told of their right to appeal. The author of the study interprets this to mean that information on appeals has little meaning to these recipients. Thus even if all were told of their right to appeal, many would not remember or would ignore that information. Finally, 30% of the recipients did not know to whom they should appeal and the rest lacked that "clear conception" of how to begin an appeal.[281]

*c. Implications*

The implications of this six year old study, though a limited one, are several. First, a welfare recipient by himself may not be able to effectively utilize the fair hearing as a remedy. For if he does not understand the right of appeal, he may not pursue it. Thus, if appealing is outside the normal experience of welfare recipients, the focus of the appeals process may be "inherently inadequate."[282] Secondly, welfare recipients will often: (1) lack assertive capabilities; (2) be frightened by the legal consequences of an appeal; and (3) trust their social worker enough so that they will accept that worker's decision, right or wrong.[283] Most crucially, their dependence on the welfare agency for support may prevent them from challenging that agency.[284]

Even if the recipient is willing to challenge erroneous action through a fair hearing, it is quite difficult for him or her to do it alone. These problems aside from the recipient's limited skills are: (1) the complexity of welfare statutes and regulations; (2) gaining acess and comprehending the regulations; [285] (3) composing required papers; (4) fact gathering of an involved nature; and (5) in some cases developing legal challenges to policies.[286]

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[280]*Id.* at 377-378.
[281]*Id.* at 379.
[282]Comment, *Texas Welfare Appeals: The Hidden Right*, 46 TEX. L. REV. 223, 236-237 (1967) (hereinafter cited as Comment).
[283]*Id.* at 236-238.

[284]Briar, *supra* note 276, at 371.
[285]Note, *supra* note 108, 1245.
[286]Comment, *supra* note 282, at 240.

Thus, unless the claimant has the assistance of counsel, or qualified nonlegal representation, he may not be able to effectively utilize his fair hearing remedy.[287] However, with welfare cutbacks many recipients will file request for Fair Hearings out of desperation regardless of these impediments.

Many of the poor do not seek legal or other help, at least in rural areas. The reason is a "poverty syndrome," a lack of understanding by the poor that the legal system can help them as well as the non-poor.[288]

*d. Improvements*

To improve the individual recipients ability to utilize the fair hearing, several improvements are possible. Aside from providing mandatory representation, legal or otherwise, there should be a "high visibility and accessibility of appeal procedures."[289] This should help facilitate a recipient's knowledge of appeal rights, as would a policy that information on appeals be geared to the education level of the recipients by, for example, using comic books as the Job Corp does.[290] Also, notices in Spanish and Chinese and other languages would greatly facilitate the understanding of recipients who speak those languages[291] Finally, the fair hearing system should be geared "to the resources and capabilities of the people it must serve."[292]

*2. THE INSTITUTIONS*

*a. Administrative Relationships*

Another source of limits on the use of the fair hearing by recipients is the institutional framework in which welfare is ad-

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[287]Note, *supra* note 108, at 1246.

[288]Legal Assistance, *supra* note 54, at 247 in which it is said "[O]ne of the most recurrent frustrations of legal assistance attorneys is the relectance of the poor to approach and make use of the available services." On the poverty syndrome, see generally, M. HARRINGTON, THE OTHER AMERICA, POVERTY IN THE UNITED STATES(1962).

[289]Briar, *supra* note 276, at 385.

[290]Comment, *supra* note 282, at 248.

[291]May letter, *supra* note 99.

[292]Comment, *supra* note 282, at 248.

ministered. There are serious limits with a "rights approach" when there is an "on-going relationship" between a recipient and the welfare worker who makes a challengeable decision. For the recipient may realize that he can either presently assert this right at a hearing or cooperate with that worker and acquiesce in the worker's decision. The latter alternative is based on the realization that the worker will in the future make meaningful decisions concerning the recipient's welfare grant. By choosing cooperation, the recipient does not alienate the worker and does not jeopardize himself or herself in the long run. In many cases, when decisions are not the drastic one of termination, cooperation outweighs rights assertion, and no appeal is taken.[293] The validity of this hypothesis is shown by the fact that right assertion is much more likely when there are "either-or" circumstances such as denials or terminations where the only alternative is to challenge the decision and the "... future risks in the on-going administrative relationship ..." have less weight than assertion does.[294]

*b. Administrative Practices*

Aside from the administrative relationship between recipient and worker, other administrative practices can serve to preclude use of fair hearings. One very recent example of this involves some California county welfare departments trying to persuade welfare recipients to waive aid pending a hearing. This is done by either sending recipients notices that while they are entitled to aid pending, if they lose the hearing, the aid pending amounts will be recovered out of their current grants, or conditioning aid pending on the recipients signing an agreement to

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[293]Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479. 494 (1966).

[294]*Id.* at 496-7. Handler is very critical of the rights approach of Reich saying it doesn't deal with "... the mass of people in welfare administration, the people who have to deal day to day with officials and who are subject to the more elusive forms of administrative manipulation and interference." *Id.* In Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967), the Court noted the dependence of welfare recipients on the good favor of their workers. The Court stated, "The Record also establishes that welfare recipients must depend to a remarkably high degree upon the continued favor of their social workers who are vested with wide discretion to authorize or prohibit specific expenditures." *Id.* at 268, 425 P.2d at 228, 57 Cal. Rptr. at 628.

repay all aid pending amounts if they lose the hearing. While these practices are of doubtful constitutional validity, some counties have apparently successfully persuaded some recipients to waive aid pending their fair hearing in this manner.[295]

### *c. Policy Challenges*

Challenging administrative policies and practices is possible through the fair hearing process because hearings can serve a "revelatory function", showing needed policy changes.[296] However, this is made difficult by the impediments to utilization of the fair hearing, in particular the present practice of denying aid pending with policy challenges.[297] This lessens the utility of the hearing remedy for recipients challenging unreasonable policies. However, the necessity to effectuate the hearing policy remedy is shown by an "administrative tendency to use the existing policy to justify the action rather than to use the situation to question the policy."[298]

### *d. Referees*

Although many problems arise with the local administration of welfare in California,[299] the fair hearings themselves are conducted by referees from the State Department of Social Welfare.[300] Although an extensive treatment of the referees role in fair hearings is beyond the scope of this paper, it is worthy of note that local administrative problems are avoided when state hearing officers are used.

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[295]May letter, *supra* note 99.
[296]Comment, *supra* note 282, at 227.
[297]See § III of Article, *supra.*
[298]Wedemeyer ad
[298]Wedemeyer and Moore, *supra* note 273.
[299]See generally, Article, *The Welfare System and the Farm Laborer*, 2 U.C.D. L. REV. 173, 196-97 (1970) (hereinafter cited as *Welfare System).*
[300]CAL. WELF. & INST. CODE § 10953 (West 1966) as amended (West Supp. 1972). Note, under this section the Director of the Department of Social Welfare determines who is to hear a fair hearing, and can pick himself, an S.D.S.W. hearing officer, or an Office of Administrative Procedure referee when there are backlogs on cases, or when a hearing presents complicated issues of fact or law.

*e. Improvements*

Improvements in administrative practices to enhance the fair hearing remedy for welfare recipients are possible. To remove the risks of the "on-going relationship" it is possible to have a two-tier system with the worker who sees the recipient continually on the first tier being without decision making power. The second tier of the system, possibly supervisors, could make the decision, but never see the recipient so that the recipient does not fear alienating the deciding worker.

Also, departmental policies should be challengeable as easily as other actions are challengeable. This necessitates aid pending regardless of the issue raised in a fair hearing request.[301] In this context, legal or other representation is necessary for a claimant to provide pressure on his side of a dispute and to balance out the other pressures on the welfare official who makes a decision affecting the claimant.[302]

Finally, to provide institutional accountability to welfare recipients, it is suggested that recipients should have political input into local welfare departments with both a "review board" of recipients and hiring of recipients to work for the agency.[303] It is possible that recipients' input would lessen the perceived risk of challenging agency action on the part of other recipients.

## D. CONCLUSION

The limits of who can and will use fair hearings under what circumstances and for what claims has been discussed in this section. The conclusion that emerges is that the prior fair hearing has a lot of potential as a welfare remedy if it is expanded to include more users, and if impediments to its use by those entitled presently to the prior hearing right are removed.

# V. CONCLUSION

The fair hearing in California has been discussed in several contexts. The regulations and hearing practice have been

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[301] See § III, *supra*, of article.

[302] Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. Rev. 361, 375 (1965).

[303] *Welfare System*, *supra* note 299, at 198-199.

analyzed in light of the due process standards articulated by the United States Supreme Court in *Goldberg v. Kelly*.[304] The impact of the HEW and MPP regulations on the ability of a claimant to pursue a fair hearing through the critical grant or denial of aid pending a hearing has been discussed. Finally, the fair hearing has been analyzed in the context of its potential utility as a remedy for welfare recipients and applicants. In all these analyses, discrepancies between law and practice have been noted. The final point is that the guarantees of law are only as effective as the welfare administrators choose, in practice, to make them.

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[304]397 U.S. 254 (1970).