No. 05-AA-236

DISTRICT OF COLUMBIA COURT OF APPEALS

LEE RAMEY AND ROSCOE MILLER,

Petitioners,

v.

D.C. DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition for Review of a Final Order
of the Office of Administrative Hearings

BRIEF FOR PETITIONERS

Amber W. Harding (#484130)*
Washington Legal Clinic for the Homeless
1200 U Street, N.W., Third Floor
Washington, D.C. 20009
PH: (202) 328-5503

Barbara McDowell (#414570)
Legal Aid Society of the District of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001-04589
PH: (202) 628-1161

* Presenting Oral Argument

STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties to this case are Lee Ramey and Roscoe Miller, the petitioners, and the D.C. Department of Human Services, the respondent. The petitioners were represented before the Office of Administrative Hearings (OAH) by Amber W. Harding of the Washington Legal Clinic for the Homeless. The respondent was represented by John Dodge and Sakina Thompson of the Department of Human Services. The petitioners are represented in this Court by Ms. Harding and by Barbara McDowell of the Legal Aid Society of the District of Columbia. The respondent is represented by Edward Schwab of the Office of the Attorney General of the District of Columbia. No intervenors or amici have appeared in this case as of this time.

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STATEMENT OF QUESTIONS PRESENTED

The District of Columbia's Office of Administrative Hearings (OAH) has subject-matter jurisdiction over "adjudicated cases" arising in the Department of Human Services, including cases challenging adverse actions involving public benefits such as Food Stamps, Medicaid, TANF, and, as here, emergency shelter. The questions presented in this case are:

1. Whether, in an "adjudicated case" otherwise within its subject-matter jurisdiction that challenges a denial of public benefits, OAH has authority to consider whether that denial violates the District of Columbia's Human Rights Act, D.C. Code § 2-1401.01 et seq..

2. Whether, in an "adjudicated case" otherwise within its subject-matter jurisdiction that challenges a denial of public benefits, OAH has authority to consider whether that denial violates the federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq..

STATEMENT OF THE CASE

On February 16, 2005, a three-judge panel of OAH dismissed petitioners' challenge to a denial of emergency shelter by the Department of Human Services. OAH ruled that it did not have subject-matter jurisdiction to consider challenges to shelter denials based on the District of Columbia's Human Rights Act or the ADA. Petitioners filed a petition for review on March 22, 2005.

STATEMENT OF FACTS

I. The Petitioners Become Homeless

In March 2004, petitioner Roscoe Miller was diagnosed with diabetes. He had difficulty controlling the disease, and experienced loss of consciousness and confusion from time to time. As a result, he missed work and was fired. His wife, petitioner Lee Ramey, took time off to care for his medical needs, and she lost her job a few months later. They soon fell behind on their

rent and, in December 2004, were evicted from their apartment. See Petitioners' Brief Regarding Jurisdictional Issues and Motion for Immediate Injunctive Relief 1-2 (filed Jan. 18, 2005) [Pet'rs' Juris. Br.], at 1-2 (Appendix [App.] 5-6).

Mr. Miller began regularly suffering from hypoglycemic attacks during the night. During those episodes, he would wake up confused and with blurred vision. Sometimes he was so confused that he did not realize that he was having an episode. Even when he recognized the symptoms, he was often unable to use his glucose monitor to determine the appropriate treatment (usually small snacks or medicine) and to recheck his glucose after the treatment was completed. He depended on Mrs. Ramey to recognize the symptoms of hypoglycemia, check his glucose levels, and provide appropriate relief during an episode. See Pet'rs' Juris. Br. 2 (App. 6); Final Order 1-2 (App. 14-15).

II. The Petitioners Unsuccessfully Seek Suitable Emergency Shelter

During the first week of 2005, petitioners applied for emergency shelter and were told that they could not be placed together anywhere in the shelter system. While the District-funded shelter system for families allows men and women to be placed together, petitioners were deemed to be ineligible for family shelter because they did not have minor children. The shelter system for adults without children is gender-segregated. In order for petitioners to have resided in an emergency shelter, therefore, they would have had to stay in different facilities. See Pet'rs' Juris. Br. 2-3 (App. 6-7); Final Order 1 (App. 14).

On January 5, 2005, petitioners, through counsel, submitted a written request for reasonable accommodation to the Community Partnership for the Prevention of Homelessness, the organization that contracts with the Department of Human Services to provide emergency shelter services. They asked to be placed in a shelter together because of Mr. Miller's disability.

They proposed a placement in a family shelter until a more permanent space could be located because: "1) the space is more appropriately configured for couples of the opposite gender to reside together; 2) the couple needs to be able to store and access Mr. Miller's insulin in a refrigerator; and 3) some modicum of privacy is needed for insulin injections and glucose tests." See Letter of Jan. 5, 2005 (App. 3-4); Pet'rs' Juris. Br. 2-3 (App. 6-7).

Two days later, petitioners learned that the Department of Human Services had decided to place them in the Community for Creative Nonviolence shelter, where they would be on separate floors with no nighttime access to each other.[1] That placement not only failed to meet Mr. Miller's need to have his wife within close proximity at night, but also was not even available for another six days. In the meantime, petitioners had no place to stay at night, and the weather conditions were hypothermic. See Pet'rs' Juris. Br. 3 (App. 7).[2]

III. The Petitioners Seek OAH Review Of The Shelter Denial

On January 11, 2005, because the Department of Human Services still had not secured petitioners' placement together in an emergency shelter, petitioners, through counsel, requested an emergency hearing before OAH to challenge the shelter denial. See Pet'rs' Request for a Hearing (App. 1-4).

On January 13, 2005, OAH issued an order setting an initial status conference for the following day. OAH directed the parties to be prepared to address whether the tribunal had

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[1] The Community for Creative Nonviolence shelter is a privately run emergency shelter that is not part of the District-owned or operated emergency shelter system. Because the shelter is not government funded, residents have no due process rights for shelter expulsions and do not enjoy the same level of support and social services that they would have in a government-funded emergency shelter.

[2] While petitioners awaited a shelter placement, social services organizations paid for seven nights at a hotel and the Department of Human Services paid for an additional seven nights.

jurisdiction to review emergency shelter denials and allegations of violations of the ADA and the Human Rights Act. See Final Order 2 (App. 15).

At the status conference, a three-judge panel heard oral argument on the jurisdictional issues. Petitioners maintained that OAH has jurisdiction over cases challenging shelter denials, including challenges based on violations of the ADA and the Human Rights Act. The Department of Human Services, in turn, acknowledged that OAH has jurisdiction over challenges to shelter denials generally, but contended that OAH does not have jurisdiction over challenges based on the ADA and the Human Rights Act. See Respondent's "Pre-Status Conference" Submission, Record [Rec.] 7, pp. 3-4.

On January 18, 2005, after the Department of Human Services refused to continue to pay for petitioners to stay in a hotel but still had not secured their placement in an emergency shelter, petitioners asked OAH to issue an emergency injunction to place them in a hypothermia shelter or other emergency shelter pending the outcome of the proceedings. See Pet'rs' Juris. Br. 7 (App. 11). In that filing, petitioners raised three legal claims:

First, petitioners argued that the Department of Human Services' denial of shelter was not based on any ground cognizable under District law. See D.C. Code § 4-705, 29 D.C.M.R. §§ 2502.1 et seq. and 2510.1 (stating permissible grounds for denial of shelter).

Second, petitioners argued that "on the nights when the temperature falls below 26 degrees Fahrenheit, the Mayor shall make available appropriate space in District of Columbia ('District') buildings and facilities for any person in the District who does not have any other shelter." D.C. Code § 4-731. The statute does not provide any ground for denial of shelter in hypothermic conditions. See id.

Third, petitioners argued that the Department of Human Services' failure to modify its admission policies in consideration of Mr. Miller's disability and to place him with his caretaker constituted a denial of shelter services and a violation of the ADA and the Human Rights Act. See 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"); 28 C.F.R. § 35.130(b)(8) ("a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity"); D.C. Code § 2-1402.73 ("it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived [protected class]"). See Pet'rs' Juris. Br. 3-7 (App. 7-11).

On January 19, 2005, OAH denied the request for emergency relief as moot, on the understanding that petitioners would be housed in the interim at the Community for Creative Nonviolence shelter. See Final Order 2 n.1 (App. 15). On January 25, 2005, after petitioners again sought emergency relief out of concern that they would have to leave that shelter, OAH heard additional oral argument on its jurisdiction over the Human Rights Act and ADA claims.

IV. OAH Dismisses The Petitioners' Case For Lack Of Jurisdiction

On February 16, 2005, OAH issued its Final Order dismissing the case on the ground that it "does not have jurisdiction to decide Petitioners' claims under either the Human Rights Act or the ADA." Final Order 2 (App. 15).[3]

[3] OAH did not acknowledge the petitioners' arguments that the denial of shelter was impermissible under the statutes and regulations governing the District's shelter program.

With respect to the Human Rights Act, OAH reasoned that, because the Act expressly provides for claims of violations to be adjudicated in court or in the Commission on Human Rights, the Act does not permit OAH to adjudicate claims that a D.C. government agency has denied public benefits in violation of the Act. Final Order 3-6 (App. 16-19). Citing this Court's decision in Estate of Underwood v. National Credit Union Administration, 665 A.2d 621, 638 (D.C. 1995), OAH stated that its consideration of such claims would "frustrate Human Rights Act policy," because its ruling could have issue preclusive effect in a proceeding before a court or the Commission on Human Rights and because it could not grant all of the "broad remedies" available in those forums. Final Order 5-6 (App. 18-19).

With respect to the ADA, OAH observed that the "remedies and procedures" available to enforce Title II of the ADA -- the portion of the ADA that prohibits disability discrimination by public entities -- were intended to be the same as those available to enforce the analogous prohibitions in the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964. Final Order 6-7 (App. 19-20). OAH further observed that none of those statutes expressly provides a private right of action to individuals challenging discrimination by a public entity. Id. at 7 (App. 20). OAH reasoned that, although the Supreme Court has recognized an implied private right of action in state or federal court under those statutes, the Court has not suggested that there is also an implied right of action in a state administrative tribunal. Id. at 8 (App. 21). Accordingly, OAH ruled that a challenge to a denial of benefits by a state or local agency, such as the Department of Human Services, could be raised only in a judicial proceeding, and not in an administrative proceeding. Id.[4]

[4] Petitioners were allowed to remain together in an office at the Community for Creative Nonviolence shelter until February 9, 2005, after which the Department of Human Services placed them in a room together at one of the District's men's shelters. Within the next month,

SUMMARY OF THE ARGUMENT

The Office of Administrative Hearings has expansive statutory authority over "adjudicated cases" arising out of the Department of Human Services and other specified agencies of the District of Columbia government. There is no basis in the text, history, or purpose of OAH's organic statute to construe that grant of authority as stopping anywhere short of the entirety of each such case. Nor did OAH rely on that statute in ruling that it lacked jurisdiction over petitioners' challenge to the Department's denial of emergency shelter because that challenge was based on Human Rights Act and the ADA. OAH instead perceived the constraints on its authority to flow from something implicit in those civil rights statutes. OAH was wrong. The Court should vacate that ruling, which is subject to review de novo.

First, although the Human Rights Act provides express judicial and administrative mechanisms for its enforcement, the Act does not make those mechanisms exclusive. The issues that arise in the application of the Human Rights Act -- such as whether an individual has been discriminated against based on race, sex, disability, or other protected status -- are not of the sort that require resort to a single agency's expertise. Indeed, D.C. agencies have routinely considered Human Rights Act issues in connection with matters within their jurisdiction. There is no justification, in law or logic, for OAH's not doing so as well. OAH's consideration of Human Rights Act issues that arise in the context of an "adjudicated case" would advance the purpose of that Act by enabling persons to challenge agency action as contrary to the Act in what may well be the most expeditious and accessible forum. While OAH was concerned that a party may come to regret its choice of that forum -- for example, because the party could not recover

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Mrs. Ramey found a full-time job, and petitioners moved into an apartment of their own. This case is not moot because the jurisdictional issues, especially in the context of emergency shelter placement, are ones capable of repetition but evading review. See, e.g., In re Johnson, 699 A.2d 362, 366 (D.C. 1997).

damages for a Human Rights Act violation in an OAH proceeding, but would have to seek them elsewhere -- that is the sort of choice that is properly left to the party. For many individuals, as for the petitioners here, the overriding concern is with quickly obtaining the public benefits that they need for subsistence, not eventually obtaining a monetary recovery at the end of a protracted judicial process.

Second, Title II of the ADA, which prohibits discrimination on the basis of disability by public entities, provides persons alleging such discrimination with the same "remedies, procedures, and rights" as are available under the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1974. Although the Supreme Court has recognized that those remedies include a private right of action in court, it has not foreclosed administrative remedies as well. OAH erred in reasoning that, merely because the Supreme Court has not expressly endorsed the adjudication of ADA claims in administrative fair hearings, OAH could not exercise jurisdiction over the petitioners' ADA claim here. In other states, ADA issues are frequently decided in administrative proceedings, to the extent allowed by local law. That practice reflects a common understanding that nothing in the ADA precludes its invocation in such proceedings.

Finally, the ability to raise all of one's grounds for challenging an agency's denial of public benefits in a single OAH proceeding serves important due process interests. Such interests were much on the minds of the Council and the Mayor in establishing OAH. Consistent with due process requirements of an opportunity to be heard at a meaningful time and in a meaningful manner, administrative hearings in public benefits cases must be conducted fairly, expeditiously, and under procedures that are tailored to the circumstances and capacities of the population served. OAH is thus obligated, to an extent that other forums are not, to conduct its proceedings in cases involving safety-net benefits in a manner that is accessible to individuals

who cannot afford legal representation and who often have limited literacy, limited English proficiency, and physical or mental disabilities. For many such individuals, if their claims of discrimination in the denial or termination of public benefits cannot be raised before OAH, they will not be raised at all.

ARGUMENT

I. OAH HAS AUTHORITY TO DECIDE HUMAN RIGHTS ACT ISSUES RAISED IN AN "ADJUDICATED CASE" OTHERWISE WITHIN ITS JURISDICTION.

OAH erred in ruling that it did not have jurisdiction to consider the petitioners' challenge to the denial of emergency shelter based on the Human Rights Act. First, the D.C. Council gave OAH jurisdiction over the entirety of an "adjudicated case" challenging a denial of public benefits, without carving out those issues that OAH could, or could not, consider in such a case. Second, the Council did not bar persons from challenging the actions of D.C. government agencies, such as the Department of Human Services, as violative of the Human Rights Act in administrative proceedings other than those specifically provided for by that Act. Indeed, OAH's exercise of jurisdiction over such challenges would advance the purposes of the Human Rights Act by assuring that parties may raise those issues in what may often be the most meaningful forum. Third, OAH's apparent reliance on the doctrine of primary jurisdiction is misplaced; the application of the Human Rights Act does not require an agency's specialized expertise, as reflected in the Council's choice to allow individuals to proceed directly to court on claims under the Act.

A. OAH Has Jurisdiction Over The Entirety Of A Case Challenging A Shelter Denial, Including A Claim That The Denial Violates The Human Rights Act.

In the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, the Council vested OAH with authority over all "adjudicated cases under the jurisdiction of

[specified] agencies," including the Department of Human Services and the Department of Health. D.C. Code § 2-1831.03(a). The Council defined an "adjudicated case," in turn, to include any "contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type." D.C. Code § 2-1831.01(1). Neither OAH nor the Department of Human Services has disputed that a challenge to a denial of emergency shelter constitutes an "adjudicated case" under that statutory definition. See, e.g., D.C. Code § 4-706(a) (providing that a person denied emergency shelter "may request and receive a review of the denial" under "an appeal procedure established by the Mayor by rule"); 29 D.C.M.R. § 2511.1 (granting "[a]ny applicant" aggrieved by the denial of emergency shelter "a right to a fair hearing").[5]

Under its own organic statute, therefore, OAH has jurisdiction over the entirety of an "adjudicated case." Nothing in the statute purports to restrict the claims or defenses that parties may raise in an "adjudicated case" or the sources of law that OAH may apply in resolving it. The Council must be presumed to have been aware that courts and administrative bodies -- even those of limited jurisdiction -- commonly consider issues arising under a variety of sources of law. See, e.g., Barton v. District of Columbia, 817 A.2d 834, 840-841 (D.C. 2003) (recognizing that a tenant may assert a defense under the federal Fair Housing Act, as well as under the

[5] OAH's Rules of Practice and Procedure recognize that cases within its jurisdiction include those "involving Medicaid, Food Stamps, Temporary Assistance for Needy Families ('TANF'), Emergency Shelter, Interim Disability Assistance, General Assistance for Children, Program on Work, Employment and Responsibility ('POWER'), Energy Assistance, Rehabilitation Services, Burial Assistance benefits or any other benefits provided by the Department of Human Services." 28 D.C.M.R. § 2805.9.

Human Rights Act, to a landlord's claim for possession under District law); Shin v. Portals Confederation Corp., 728 A.2d 615, 618-619 (D.C. 1999) (observing that "a defendant always has the right to present any legal defense as part of a general denial of liability"); see also pp 13-14, infra (discussing invocation of the Human Rights Act in D.C. administrative proceedings); pp. 20-21, infra (discussing invocation of the ADA in state administrative proceedings). In the face of that settled practice, if the Council had intended to exclude particular categories of claims and defenses from "adjudicated cases" under OAH's jurisdiction, the Council could be expected to have done so expressly.

Indeed, OAH's own Rules of Practice and Procedure acknowledge that "[m]any authorities may be applicable to administrative matters heard by this administrative court," including "the Constitution of the United States, statutes and regulations of the United States, and statutes and regulations of the District of Columbia." 28 D.C.M.R. § 2800.5. The decisions of OAH and its predecessor agencies have addressed issues arising under varied sources of law, including issues of constitutional due process, federal preemption, and federal bankruptcy law.[6]

As discussed more fully below, moreover, the Council's purpose in establishing OAH -- to provide "a high-quality, fair, impartial, and efficient system of adjudicating cases at the administrative level" -- is advanced when all grounds for challenging an agency's action may be raised in a single OAH proceeding. Office of Administrative Hearings Establishment Act of 2001, Law No. 14-76, § 2 (Purpose). Plainly, it would be less "efficient" if some of those

[6] See, e.g., District of Columbia Dep't of Public Works v. Charles Russell Properties, No. PW-V-04-12362, 2005 D.C. Off. Adj. Hear. LEXIS 19 (Mar. 3, 2005) (considering due process issue); Georgetown Univ. Hosp. v. James, No. ES-P-04-100448, 2005 D.C. Off. Adj. Hear. LEXIS 18 (Feb. 28, 2005) (considering federal preemption issue); District of Columbia Dep't of Health v. James, No. C-01-80048, 2004 D.C. Off. Adj. Hear. LEXIS 49 (Sept. 30, 2004) (considering federal bankruptcy issues); District of Columbia Dep't of Health v. Yellow Motor Coach, No. I-00-11229, 2004 D.C. Off. Adj. Hear. LEXIS 51 (Mar. 1, 2004) (considering Commercial Clause and federal preemption issues).

grounds could be adjudicated only by OAH, while other grounds could be adjudicated only by some other administrative or judicial tribunal. Especially for many District residents with limited resources, including limited access to counsel, having to navigate two separate adjudicatory processes to challenge a denial of public benefits would raise fairness concerns as well. See Estate of Underwood v. National Credit Union Admin., 665 A.2d 621, 630 (D.C. 1995) (noting that requiring a party to litigate parallel claims in different forums may "create problems of issue preclusion, inconvenience, and unnecessary expense").

B. The Human Rights Act Does Not Bar Parties From Invoking Their Rights Under The Act In OAH Administrative Hearings.

Nothing in the Human Rights Act or its regulations precludes parties from invoking the protections of that Act in an OAH administrative hearing challenging a denial or termination of public benefits. See D.C. Code § 2-1401.01 et. seq.; 4 D.C.M.R. § 100.1 et. seq. Although, as OAH noted, the Human Rights Act specifically provides for its enforcement by filing a complaint in court or in the Office of Human Rights, see D.C. Code § 2-1403.03, the Act does not purport to make those the exclusive forums for its enforcement. Cf. Simpson v. D.C. Office of Human Rights, 597 A.2d 392 (D.C. 1991) (observing, in a case holding that the Human Rights Act did not bar judicial review of "no probable cause" determinations by the Office of Human Rights, that, "when our elected representatives wish to foreclose [certain avenues of challenge], they know very well how to say so").

Permitting parties to invoke the Act in "adjudicated cases" within OAH's jurisdiction serves the broad remedial purpose of the Human Rights Act -- namely, "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit." D.C. Code § 2-1401.01. The reach of the Act is expansive, extending to prohibitions of discrimination in employment, public accommodation, housing, commercial spaces, education, public service,

and "resort or amusement." See D.C. Code § 2-1402.01. The Act explicitly includes the District government, its agencies, and its employees within its purview, prohibiting them from "limit[ing] or refus[ing] to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived [status as a member of a protected class]." D.C. Code § 2-1402.73. The Act's ambitious purpose of eradicating all discrimination in the District of Columbia -- governmental as well as private -- cannot easily be reconciled with OAH's view that discrimination by D.C. agencies is none of its business. The Act would seem to make it the responsibility of all components of the D.C. government to assure that actions within the scope of their authority are not infected with discrimination. Cf. Hathorn v. Lovorn, 457 U.S. 255, 268 n.23 (1982) (explaining that allowing state courts to consider certain issues arising under Section 5 of the Voting Rights Act "furthers the Act's ameliorative purposes by permitting additional tribunals to enforce its commands").

In fact, D.C. government agencies regularly consider Human Rights Act issues arising in matters within their jurisdiction. See, e.g., George Washington Univ. v. District of Columbia Board of Zoning Adjustment, 831 A.2d 921, 927 (D.C. 2003) (holding that "the DCHRA [D.C. Human Rights Act] applies to the BZA's [Board of Zoning Adjustment's] administration of the zoning laws" but finding the order of the Board was not in violation of the Human Rights Act); Hessey v. Burden, 615 A.2d 562, 569 (D.C. 1992) (reviewing a determination by the Board of Elections and Ethics regarding whether an issue is a proper subject for an initiative and holding that the Board had to consider all grounds of challenge to an initiative, including the Human Rights Act); D.T. Corp. v. District of Columbia Alcoholic Beverage Control Board, 407 A.2d 707, 709 (D.C. 1979) (reviewing a decision by the Alcoholic Beverage Control Board that the liquor license be denied because applicant's exclusion of minors from its establishment was in

violation of the Human Rights Act). The agencies in such cases are not, of course, determining the liability of a party for violation of the Human Rights Act or subsequently awarding damages (or other relief aside from taking, or not taking, the action at issue). Instead, the agencies are merely applying the Human Rights Act to determine the legality of the action at issue, as OAH was asked to do in determining the legality of the Department of Human Services' denial of shelter in this case.

Although OAH asserted that its consideration of Human Rights Act issues in "adjudicated cases" otherwise within its jurisdiction would "frustrate Human Rights Act policy" (Final Order 5 (App. 18), quoting Underwood, 665 A.2d at 638), OAH offered no reasoned explanation of why that might be so. While OAH may well be correct that "the broad remedies available from the Human Rights Commission [or a court in a case under the Act] are not necessarily available from other agencies" (id. at 6 (App. 19)), it is for the parties to decide which remedies are most important for them to pursue. Parties whose priority is obtaining emergency shelter or preserving TANF benefits, like parties whose priority is avoiding eviction in a landlord-tenant proceeding, should be able to choose the forum in which they can seek that remedy most simply and expeditiously, even if that forum cannot grant all of the relief that might be available elsewhere under more complicated and time-consuming processes. In any event, a party's presenting a Human Rights Act issue to OAH for resolution in an "adjudicated case" does not, in and of itself, bar the party from initiating a separate proceeding in court or the Office of Human Rights for relief that is unavailable from OAH.[7] And, even if the doctrine of issue preclusion were to bar relitigation in other proceedings of issues decided by OAH (id. at 5 (App.

[7] A very different situation was presented in Underwood, where the employer unsuccessfully maintained that the employee's exclusive remedy for tortuous infliction of emotional distress was through the workers' compensation system. See 665 A.2d at 635.

18)),[8] that risk exists whenever a party has a choice of forum. It is not a reason to deny a party the opportunity to select which of several available forums is most suited to his needs. See pp. 24-28, infra (explaining why OAH may be the most suitable forum for low-income persons challenging a denial of safety-net benefits).

C. The Doctrine Of Primary Jurisdiction Has No Application To This Case.

To the extent that OAH's decision may rest on the view that the Office of Human Rights has primary jurisdiction over Human Rights Act claims (see Final Order 5-6 (App. 18-19)), that view is incorrect. The doctrine of primary jurisdiction does not bar either courts or OAH from considering Human Rights Act issues in the first instance.

Under the doctrine of primary jurisdiction, "issues in claims that are originally cognizable in the courts may, nonetheless, be referred to an administrative body for resolution when the issue falls within the 'special competence' of an agency." Matthews v. District of Columbia, 875 A.2d 650, 655 (D.C. 2005) (quoting Lawlor v. District of Columbia, 758 A.2d 964, 973 n.11 (D.C. 2000)); see Joyner v. Sibley Memorial Hospital, 826 A.2d 362, 374 (D.C. 2003) (confining the doctrine to issues as to which the agency has "special expertise"). As this Court recently recognized, the doctrine does not apply when "the governing statute does not specifically recognize or confer any specialized competency upon the [agency]" with respect to the matter at issue. Matthews, 875 A.2d at 657; cf. United States v. Western Pacific R. Co., 352 U.S. 59, 64 (1956) (explaining that the doctrine applies when "enforcement of the claim requires the

[8] See generally Oubre v. District of Columbia Dep't of Employment Services, 630 A.2d 699, 703 (D.C. 1993) ("Res judicata and collateral estoppel principles apply in administrative cases under certain circumstances. The doctrine applies when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate.") (internal citations omitted); id. at 703-704 (observing that the application of preclusion doctrines in administrative cases "is not encrusted with the rigid finality that characterizes the precept in judicial proceedings").

resolution of issues which, under a regulatory scheme have been placed in the special competence of an administrative body") (emphasis added).

Issues involving whether an individual has been subjected to unlawful discrimination -- including by denial of a reasonable accommodation of a disability -- have not been understood to fall within an agency's "special competence." To the contrary, the D.C. Council chose to allow individuals to proceed immediately to court to seek monetary and injunctive relief for such discrimination without having initially to seek relief from the Office of Human Rights. D.C. Code § 2-1403.03. That choice reflects the Council's understanding that courts are fully competent to decide for themselves issues of discrimination and reasonable accommodation. As in Matthews, therefore, this is not a case in which the governing statute "specifically recognize[s] or confer[s] any specialized competency upon" the agency. Nor have courts been held to have any obligation to cede primary jurisdiction to an agency in cases under federal statutes, such as the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B), and Title II of the Americans With Disabilities Act, 42 U.S.C. § 12131 et seq., that contain similar prohibitions against denials of reasonable accommodation requests by persons with disabilities.

Accordingly, even assuming arguendo that the primary jurisdiction doctrine applies to administrative tribunals such as OAH as well as to courts, there is no justification for applying that doctrine here.

II. OAH HAS AUTHORITY TO DECIDE ADA ISSUES RAISED IN AN "ADJUDICATED CASE" OTHERWISE WITHIN ITS JURISDICTION

Although OAH ruled that it "does not have authority to decide Petitioners' claims under Title II of the ADA" (Final Order 8 (App. 21)), OAH did not identify any statutory provision, federal or local, that denies it that authority. Instead, OAH's ruling turned on Congress's failure to acknowledge expressly that ADA issues may be considered in state administrative hearings.

There is no reason to assume that Congress intended to confine the resolution of ADA issues to the courts, thereby depriving parties of a uniquely convenient, expeditious, and economical forum in which to raise those issues. Indeed, individuals in other jurisdictions routinely raise ADA issues in administrative fair hearings to challenge denials of public benefits.

As a threshold matter, OAH did not suggest that anything in its own organic statute precludes it from considering ADA issues that arise in "adjudicated cases" within its jurisdiction. See D.C. Code § 2-1831.03(a) (vesting OAH with authority to hear and resolve all "adjudicated cases under the jurisdiction of * * * the Department of Human Services" and other specified agencies); see also pp. 9-12, supra. Nor did OAH suggest that any other provision of District of Columbia law constrains its authority to consider ADA issues. Instead, OAH perceived the ADA itself to deprive OAH of that authority, without identifying anything in ADA's text, history, or purposes that would support such a perception.

In Title II of the ADA, Congress prohibited any "public entity" from discriminating in its "services, programs, or activities" against any qualified person with a disability. 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.").[9] In the section of Title II labeled "Enforcement," Congress stated:

> The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12133. In turn, 29 U.S.C. § 794a, which addresses enforcement of the protections in the Rehabilitation Act of 1973 against discrimination by recipients of federal funds, simply

[9] Other titles of the ADA are directed at discrimination in employment (Title I) and in public accommodations and services operated by private entities (Title III).

adopts "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.]." Although Title VI does not explicitly set forth a private remedy, either judicial or administrative, Title VI has long "been construed as creating a private remedy." Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (quoting Cannon v. University of Chicago, 441 U.S. 677, 696 (1979)); see Tennessee v. Lane, 541 U.S. 509, 517 (2004) ("[ADA] Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, which authorizes private citizens to bring suits for money damages.") (internal citations omitted).

Nothing in the statutory reference to "remedies, procedures, and rights" -- in either 42 U.S.C. § 12133 or 29 U.S.C. § 794a -- evinces any congressional intent to confine private enforcement to judicial proceedings, as distinguished from administrative proceedings. OAH did not suggest that the words of the statute, standing alone, imply that courts are the only available forum for asserting rights under the ADA's Title II. Instead, OAH reasoned that, because the Supreme Court's decisions under Title VI of the Civil Rights Act "ha[ve] referred only to remedies available from a federal or state court" (Final Order 8), Congress must be assumed to have intended only those remedies under Title II of the ADA.

OAH was mistaken. There is no reason to assume that Congress intended to authorize only those enforcement mechanisms whose availability was once so unsettled as to have been the subject of Supreme Court litigation. If Congress had intended such a curious result -- and one with such adverse implications for claimants (as discussed in Section III below) -- Congress could be expected to have said so expressly. But it did not. Instead, Congress chose remedial language that is broad enough to encompass administrative as well as judicial proceedings. In the face of such expansive language, it is irrelevant whether Congress specifically focused on enforcement of Title II in administrative fair hearings. "[T]he fact that a statute can be applied in

situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation marks and citations omitted).

Indeed, the Supreme Court has recognized that, when Congress has clearly granted courts the authority to provide a particular remedy, Congress may be understood to have granted administrative agencies that authority as well, so long as the statute does not indicate any contrary understanding. In West v. Gibson, 527 U.S. 212 (1999), for example, the Court was concerned with a statutory scheme that expressly authorized compensatory damages in judicial proceedings against the federal government for employment discrimination, but that did not expressly authorize compensatory damages in preliminary proceedings before the Equal Employment Opportunity Commission. The Court rejected the argument that parties could obtain compensatory damages on their employment discrimination claims only by suing in court, even if all other aspects of their claims could be resolved by the EEOC. The Court reasoned that such an outcome "would force into court matters that the EEOC might otherwise have resolved," thereby "preventing earlier resolution of a dispute" and "increas[ing] the burdens of both time and expense" for the parties. Id. at 219.

OAH further erred in its reliance on Supreme Court decisions addressing the existence or scope of the implied private right of action under Title VI or similar statutes. See Final Order 8 (App. 21). The question whether a tribunal has subject-matter jurisdiction over a given claim is analytically distinct from the question whether a party has an implied private right of action to assert the claim in that tribunal. See, e.g., Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635, 642-643 (2002) (noting that distinction). Here, once one concludes that neither federal nor local law carves out ADA claims from OAH's comprehensive subject-matter jurisdiction over

"adjudicated cases" from the agencies identified in D.C. Code § 2-1831.03, there is no need to consider whether an implied private right of action exists to assert such claims. That is because the "right of action" in this context is expressly provided by the law governing the underlying benefit program -- and, specifically, by the provision of that law that entitles individuals to an administrative hearing to challenge a denial of benefits or services. See, e.g., D.C. Code § 4-706(a) and 29 D.C.M.R. § 2511.1 (providing for fair hearings to challenge denials of emergency shelter); cf. Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) (recognizing that an implied right of action is not necessary in circumstances in which a party has an express right of action under 42 U.S.C. § 1983).

Other jurisdictions permit claimants to invoke the ADA and similar statutes in administrative proceedings, including fair hearings to challenge a denial of public benefits or services. Minnesota, for example, has enacted a statute clarifying an individual's right in such fair hearings to raise "all" federal statutory claims and defenses:

> **Scope of issues addressed at the hearing.** The hearing shall address the correctness and legality of the agency's action and shall not be limited simply to a review of the propriety of the agency's action. The person involved may raise and present evidence on all legal claims or defenses arising under state or federal law as a basis for appealing or disputing an agency action but not constitutional claims beyond the jurisdiction of the fair hearing.

Minn. Stat. § 256.0451(16). Massachusetts, in turn, has promulgated Fair Hearing Rules that expressly provide that "[a]pplicants and recipients have a right to request a fair hearing" with respect to, inter alia, "[d]enials of requests for reasonable accommodations/modifications under the Americans with Disabilities Act." 106 C.M.R. § 343.230(K). Moreover, state courts routinely consider ADA and Rehabilitation Act issues on review of actions taken by a state agency after an administrative hearing, without suggesting that the state agency itself lacked authority to consider those issues in the first instance. See, e.g., Howard v. Department of Social

Welfare, 655 A.2d 1102 (Vt. 1994); Fry v. Saenz, 120 Cal. Rptr. 2d 30 (Cal. Ct. App. 2002); Johnson v. Pennsylvania, 805 A.2d 644 (Pa. Comm. Ct. 2002); Egan v. DeBuono, 688 N.Y.S.2d 18 (N.Y. App. Div. 1999).[10] Indeed, even the District's Office of Human Rights informed OAH in this case that it exercises authority over ADA claims. Respondent's "Response to Request to Provide Office of Human Rights Cases" [Resp't's Human Rights Cases], Rec. 16, p. 1, 4.

Those authorities reflect a general understanding that nothing in federal law bars the consideration of claims and defenses under the ADA or other civil rights statutes in the context of administrative fair hearings. To the contrary, the purposes of those civil rights statutes are advanced when they may be invoked in administrative proceedings -- proceedings that, as explained below, may provide the most meaningful opportunity to be heard for individuals challenging the denial or termination of subsistence benefits..

III. OAH'S JURISDICTION OVER CIVIL RIGHTS ISSUES IN "ADJUDICATED CASES" SERVES THE PURPOSES OF ITS ORGANIC STATUTE AND DUE PROCESS

OAH's exercise of jurisdiction over civil rights issues that arise in "adjudicated cases" -- such as the issues of reasonable accommodation under the Human Rights Act and the ADA here -- finds support in the purposes as well as the text of OAH's organic statute. The statutory purposes of promoting fairness and efficiency in administrative adjudication are served when an individual may raise all of his challenges to a denial of safety-net benefits in a single proceeding

[10] Similarly, in Addiction Specialists, Inc. v. Township of Hampton, 411 F.3d 399 (3d Cir. 2005), the court of appeals held that the Younger abstention doctrine did not bar the district court from considering claims that the Township's zoning decision violated the Fourteenth Amendment and the ADA, even though the same claims were pending in state court on a direct appeal of the zoning decision. In analyzing whether the plaintiff had an adequate opportunity to raise the federal claims in the state court proceeding, the court of appeals operated on the premise that nothing in federal law would bar such claims from being considered by either the local zoning board or the state court, and that the only bar would arise from state law. See id. at 411-414.

under simplified rules of practice tailored to the individual's capacities and circumstances. Assuring an accessible forum for such challenges also comports with the Constitution's guarantee of due process of law.

A. Under OAH's Organic Statute, A Under The Constitution, Administrative Hearings Are To Be Conducted Efficiently And Fairly, With Solicitude For Individuals Seeking To Obtain Or Preserve Subsistence Benefits.

The D.C. Council declared that its purpose in establishing OAH was to provide local residents and businesses with "a high-quality, fair, impartial, and efficient system of adjudicating cases at the administrative level." Office of Administrative Hearings Establishment Act of 2001, Law No. 14-76, § 2 (Purpose). The Council found that a unified administrative hearings tribunal such as OAH would "modernize and improve the quality of administrative adjudication in the District of Columbia" by, inter alia, "promoting due process," "bringing about an appropriate level of consistency and efficiency in the hearing process," and "expediting the fair and just conclusion of contested cases." Id., § 3(4) (Findings).

The legislative history reflects similar concerns about improving fairness, justice, and efficiency in administrative adjudication, especially for those who invoke that process to obtain or preserve subsistence benefits of the sort at issue here. The committee report identified the need for the "perception of a fair and impartial, legitimate process for resolving administrative disputes; more timely and efficient disposition of cases; and a more professional, detached cadre of hearing officers." Report of the Committee of the Judiciary on Bill 14-208, the "Office of Administrative Hearings Establishment Act of 2001," at 1 (Sept. 25, 2001) (quoting comments of then-Corporation Counsel Ferren). In transmitting the draft OAH legislation to the Council, the Mayor expressed concern about the inefficiency of the existing administrative hearing process, observing that "th[e] result has been the apparent, if not the actual, denial of our citizens'

fundamental constitutional rights to due process." Letter of Mayor Williams to Council Chairman Cropp 1-2 (May 1, 2001) (citing Goldberg v. Kelly, 397 U.S. 254 (1970), and Mathews v. Eldridge, 424 U.S. 319 (1976)). And, in urging that the Department of Human Services' hearing functions be among the first transferred to OAH, the Deputy Mayor for Public Safety and Justice observed that such hearings "deal with some of the neediest citizens of our city, determining their rights to TANF, Medicaid, and other 'safety net' entitlements," and that "[i]mmediate improvement in the adjudication services offered to this vulnerable population is essential." Testimony of Deputy Mayor Margret Nedelkoff Kellems 6 (May 23, 2001).

The legislative history thus reflects the Council's and the Mayor's understanding that the Due Process Clause of the Constitution requires fair, adequate, and efficient mechanisms for challenging a denial or termination of subsistence benefits. As the Supreme Court explained in precisely such a context, "[t]he fundamental requisite of due process of law is the opportunity to be heard," which "must be at a meaningful time and in a meaningful manner." Goldberg, 397 U.S. at 267 (internal quotation marks and citations omitted). In order for the opportunity to be heard to be meaningful, the Court explained, it must be "tailored to the capacities and circumstances of those who are to be heard." Id. at 270. Hence, procedural rules that may constitutionally be imposed on other parties, such as rules requiring "[w]ritten submissions," may be "unrealistic," and thus unconstitutional, if imposed on "most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance." Id.[11]

[11] See, e.g., LaBaron v. United States, 989 F.2d 425, 428 (10th Cir. 1993) (holding that due process required that Native Americans challenging termination of federal health services be afforded the opportunity to "state [their] position orally in a setting that insures fairness"); Gray Panthers v. Schweiker, 652 F.2d 146, 166-173 (D.C. Cir. 1980) (holding that, especially in view of "the significant percentage of Medicare claimants disadvantaged by disability, illness, and

Federal and local laws elaborate upon the requirements of due process for persons threatened with the denial or termination of public benefits. See, e.g., 7 C.F.R. § 273.15 (Food Stamps); 42 C.F.R. § 431.200 et seq. (Medicaid); D.C. Code § 4-210.10 (Public Assistance). These include assurances that individuals be able to obtain the information that they need in order to prepare for the hearing, see 7 C.F.R. § 273.15(i)(l) and (p)(1), 42 C.F.R. § 431.200(a); to introduce evidence, present witnesses, and cross-examine opposing witnesses, see 7 C.F.R. § 273.15(p)(2), (3), and (5); 42 C.F.R. § 431.200(b), (c), and (e); D.C. Code §§ 4-210.04 and 4-210.10; and to obtain special assistance if they are proceeding without counsel, see 7 C.F.R. § 273.15(p). The laws also establish time frames in which cases are to be heard and decided. See, e.g., 7 C.F.R. § 273.15(c) (Food Stamps); 42 C.F.R. § 431.244(f)(1)(ii) (Medicaid); D.C. Code § 4-210.12(a) (Public Assistance).

B. OAH's Consideration Of Challenges To Public Benefit Decisions Based On The Civil Rights Laws Promotes Efficiency.

The interests of efficiency are served when parties may raise all of their grounds for challenging a denial of public benefits in one proceeding rather than in multiple proceedings. Here, for example, the petitioners based their challenge to the denial of emergency shelter not only on the Human Rights Act and the ADA, but also on other grounds as to which OAH has not disputed its jurisdiction. See pp. 4-5, supra (describing petitioners' claims). Under OAH's approach, the petitioners and others like them would have to litigate the denial of shelter piecemeal, presenting the former claims to the courts or the Office of Human Rights while presenting the latter claims to OAH itself, even though all of those claims involve the same underlying facts. An array of procedural complications may arise when two tribunals are

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poverty," claimants had a due process right to "simplified, streamlined, informal oral procedures" to challenge denials of Medicare coverage involving less than $100).

simultaneously adjudicating parallel cases, such as whether one should stay its hand in deference to the other, or whether one may enjoin the other from going forward, or whether one may or must accord preclusive effect to the other's disposition of claims or issues. It can be anticipated that most cases challenging a denial of public benefits that include a claim based on the Human Rights Act, the ADA, or another civil rights statute will also include a claim based on other statutory or regulatory grounds as well.

OAH's expertise with respect to the numerous public benefits programs additionally argues for its adjudication of the entirety of a challenge to a denial or termination of such benefits. OAH sees far more cases involving public benefits that do either the courts or the Office of Human Rights and Commission on Human Rights. Indeed, OAH was informed in this case that the Office of Human Rights had investigated only three or four claims of disability discrimination in public accommodations and services throughout 2004; the Commission's Chief Hearing Officer not recall any case during his 15-year tenure on that tribunal that presented an issue of disability discrimination in emergency shelter. See Rec. 26, pp. 1-2.

Additional inefficiencies can be expected if OAH is permitted to carve out civil rights issues from "adjudicated cases" otherwise indisputably within its jurisdiction. Administrative proceedings in tribunals such as OAH -- especially those involving public benefits -- are designed, and often legally mandated, to be concluded more expeditiously than judicial proceedings. Such expedition serves, among other things, to assure that claimants are not deprived for a prolonged period of the public benefits needed to feed, house, and provide medical care for themselves and their families. To that end, administrative tribunals generally conduct "fair hearings" under simplified rules, which eliminate many of the procedural formalities that may complicate and prolong proceedings in court. The efficiencies that such

rules are designed to achieve would be unavailable to individuals whose challenges to a denial or termination of benefits would have to be brought in court (or in the Office of Human Rights) under OAH's ruling in this case. And, to the extent that federal or local laws impose deadlines for hearing and deciding administrative challenges with regard to public benefits, those deadlines would not be binding on a court or on the Office of Human Rights.[12]

C. OAH's Consideration Of Challenges To Public Benefit Decisions Based On The Civil Rights Laws Promotes Fairness.

The interests of fairness also are served when parties may raise at an administrative hearing all of their grounds for challenging a denial of public benefits, including those based on the Human Rights Act, the ADA, and other civil rights laws. As a practical matter, for most individuals challenging an agency's adverse action with respect to lifeline benefits such as shelter, Medicaid, or Food Stamps, if the civil rights issue cannot be raised before OAH, it will not be raised at all.

At the most fundamental level, that is because such individuals are living in poverty. They do not have the means to retain counsel to pursue their challenges. Nor are such challenges attractive to contingency-fee counsel. To be sure, some persons may obtain free representation from legal services organizations, such as the Washington Legal Clinic and the Legal Aid Society, or from pro bono counsel to challenge a denial or termination of public benefits. But the demand for such representation far exceeds the supply. See District of Columbia Bar Foundation, Civil Legal Services Delivery in the District of Columbia 2-3 (Sept. 2003) (estimating that the local legal community is meeting 10 percent or less of the need for civil legal assistance among the District's neediest families). Moreover, even when counsel can be found to

[12] For instance, once a complaint is filed with the Office of Human Rights, the Office will "investigate, mediate and make a legal determination." Only then will the complainant be entitled to request a hearing. Resp't's Human Rights Cases, Rec. 16, p. 4).

provide free representation in an OAH proceeding, counsel may be unable to commit the resources to providing free representation in additional proceedings in a court or the Office of Human Rights.

This means that most low-income individuals challenging adverse decisions with respect to public benefits are doing so pro se, perhaps with lay assistance from a friend, a case worker, or a member of the clergy. See 28 D.C.M.R. § 2839.11-.13 (allowing individuals in cases involving Medicaid, Food Stamps, TANF, emergency shelter, and other benefits to be represented by a layperson). For such individuals, who often have limited education, limited English proficiency, or physical or mental disabilities, it is difficult enough to pursue their claims at an administrative fair hearing.[13] It would be far more difficult, however, if they had to pursue some of those claims in a separate proceeding in court or in another agency. As explained above, fair hearings in public benefits cases -- in potential contrast to judicial or other administrative proceedings -- are required to be conducted under procedures that are "tailored to the capacities and circumstances of those who are to be heard." Goldberg, 397 U.S. at 270; see, e.g., 28 D.C.M.R. § 2805.9 (providing that hearing requests in OAH cases involving emergency shelter, TANF, Medicaid, and other benefits provided by the Department of Human Services may be made orally, in person or by telephone); 28 D.C.M.R. § 2820.1 and .2 (providing that "[t]o the extent it promotes fairness, equity and substantial justice for all parties," OAH will permit "the admissibility of relevant, non-cumulative evidence," and that "[e]vidence shall not be excluded

[13] For example, more than one-third of the District's TANF recipients have neither completed high school nor earned a GED. In addition, 16 percent have physical health problems, and 21 percent have mental health problems. See Gregory Acs & Pamela Loprest, Urban Institute, A Study of the District of Columbia's TANF Caseload iii, 17 (Oct. 2003).

on the ground that it is hearsay").[14] OAH's decision has thus deprived individuals of the most suitable forum for pursuing claims that they have been denied public benefits in violation of the Human Rights Act, the ADA, or other civil rights laws.

CONCLUSION

The Final Order of the Office of Administrative Hearings should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

Amber W. Harding (#484130)*
Washington Legal Clinic for the Homeless
1200 U Street, N.W., Third Floor
Washington, D.C. 20009
PH: (202) 328-5503

Barbara McDowell (#414570)
Legal Aid Society of the District of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001-04589
PH: (202) 628-1161

Counsel for Petitioners

* Presenting Oral Argument

[14] The Washington Legal Clinic and the Legal Aid Society, together with other legal services providers, are consulting with OAH on the development of a set of simplified procedures specifically for cases involving safety-net benefits.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Brief for Petitioners to be delivered by first-class mail, postage prepaid, this 18th day of August 2005, to:

Edward Schwab, Esquire
Office of the Attorney General
John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 409
Washington, DC 20004

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Amber W. Harding