

**Testimony of Maggie Donahue
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**Before the Committee on Government Operations
Council of the District of Columbia**

Performance Oversight Hearing Regarding the Office of Human Rights

February 28, 2019

The Legal Aid Society of the District of Columbia¹ submits this testimony to discuss the performance of the Office of Human Rights (OHR). Legal Aid testified one year ago at OHR's oversight hearing about the agency's failure to fulfill its vital function of combatting the discrimination that many District residents face in housing, employment, and other settings. At that time, we expressed our concerns about systemic problems we saw related to mediation, intake and the initial processing of complaints, unreasonable delays by OHR, unreasonable burdens put on resident complainants, an agency-wide bias against finding non-compliance or discrimination, and a failure to engage in substantive enforcement.²

OHR met with Legal Aid and other advocates to follow up about our 2018 testimony, and it offered to look into some of the specific cases we raised as examples of the problems noted above. We regret to report, however, that we have not seen any indication that OHR has actually made systemic changes. We urge the Committee to use today's hearing to ask the agency what concrete steps it has taken over the last year to address our concerns. Further, we hope that the Committee will closely monitor the agency's progress over the remainder of FY19 and early FY20 to ensure that the agency puts meaningful reforms in place over the next year.

OHR Refuses to Change Its Highly Problematic Intake Process

In our testimony last year, we detailed concerns we had related to OHR's complaint process, and

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the last 87 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, immigration, and consumer protection. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

² See February 22, 2018 Testimony of Maggie Donahue, Senior Staff Attorney, Housing Law Unit, The Legal Aid Society of the District of Columbia (attached as Exhibit A). Available online at <https://www.legalaiddc.org/wp-content/uploads/2018/02/Legal-Aid-Performance-Oversight-Testimony-re-OHR-FINAL.pdf>.

specifically, its broken intake system, where OHR's front desk stop residents from filing meritorious complaints. For those who are able get through the door, we have seen OHR rewrite complainants' complaints, omitting or changing important facts in the process. This unskilled re-writing of complaints not only delays the processing of complaints, but prejudices the ability of complainants to move forward successfully with their complaints. It leaves District residents with the initial impression that they are dealing with an agency that cannot, on a basic level, understand what has happened to them and why it constituted discrimination – even when presented to that agency in black and white in their intake questionnaire.

Most concerning to Legal Aid has been OHR's resistance to consider any reasonable changes to its intake process that would address the concerns we raised. It is unclear why OHR will not, in the very least, agree to only add to, rather than take away from, complainants' complaints when drafting charges and amending complaints. While Legal Aid was told by OHR in 2018 that it changed its policy of omitting certain respondents from charges, we have heard from other advocates that OHR has continued to omit individual respondents from charges they bring, a serious error that limits the potential award and rights of the complainant against the discriminating actor. OHR's broken intake process is further exacerbated by the fact that staff at OHR have at times demonstrated that they do not have a full understanding of discrimination law in the District of Columbia.

More details about the problems with the intake process, the staff's lack of understanding of the nuances of discrimination law, and Legal Aid's proposed solutions can be found in our 2018 testimony.

We urge the Committee to ask OHR what changes it has made to the intake process over the last year, and to press the agency on why problematic practices such as the re-writing of complaints appear to have been left unchanged.

It is Unclear if OHR Has Taken Any Steps to Better Protect Complainants in the Mediation Process

Legal Aid's 2018 testimony also outlined serious problems with the mediation process at OHR, which is often leaving District residents worse off than if they had never filed a complaint in the first place.

OHR followed up with Legal Aid after our 2018 testimony, expressing a willingness to improve in this area noting that it was in the process of changing its form settlement agreement. OHR solicited our suggestions for changes to this form, a clear step in the right direction.

In March 2018, Legal Aid sent a "guidelines for mediators" document that OHR could use in thinking about its own guidance document for mediators of discrimination cases.

In April 2018, Legal Aid submitted a memorandum to OHR, which expanded on the points made in our testimony, pointing out specific problems with some of the form language in OHR

agreements, and making suggestions on how to change this language.³ The memo attached three redlined actual agreements coming from OHR, which showed how the specific changes suggested in the memorandum could be made. The memorandum also made suggestions for general guidelines mediators should be following when drafting agreements, such as setting specific deadlines for respondents and ensuring that obligations are on the respondent, rather than the complainant. These basic guidelines did not appear to be adhered to by mediators at OHR in the past.

Legal Aid has not heard from OHR whether its suggestions were used to draft a new standard form settlement agreement or new guidelines for mediators. So, while OHR's solicitation of feedback was a welcomed signal that OHR is open to change in this area, this Committee should ensure that OHR has followed through and implemented those suggested changes.

OHR also conveyed to Legal Aid that it understood the importance of ensuring that mediators better understood tenants' rights when mediating housing discrimination cases. OHR appeared to understand that this is important so that OHR mediators do not continue to encourage tenants to waive valuable rights in settlements, for little to nothing in return.⁴

It is unclear, however, if OHR has taken sufficient – or any – steps to ensure that its mediators actually understand these rights, including the rights tenants have under rent control, the District's eviction statute, and the implied warranty of habitability. Without knowing whether OHR has effectively trained its mediators in this way, Legal Aid is concerned that tenants, especially those without a lawyer, are continuing to be encouraged unnecessarily to sign away their rights in settlement agreements that are intended to compensate them for the discrimination they have suffered at the hands of the landlord.

While we appreciate that OHR expressed an initial openness to feedback about how to improve the mediation process, it is not clear to us what steps OHR has taken in response to our concerns. The Committee should ask what changes the agency has made to the mediation process, including form mediation agreements, as well as what trainings and materials it offers mediators regarding complainant rights – particularly in cases in which the complainant is a tenant filing a complaint in a housing-related matter. For the mediation process to produce outcomes that are

³ OHR refused to provide to Legal Aid the actual form settlement agreement, but through comparing various agreements coming from the mediation process at OHR provided by our former clients, Legal Aid was able to discern language which it believes to be part of the form mediation settlement agreements that OHR provides to its mediators for use.

⁴ Legal Aid's 2018 testimony discussed how Legal Aid had learned of several cases where OHR mediators encouraged tenants to move out of their rent-controlled units and withdraw their discrimination complaints against their landlords, often for little to no compensation to the tenant for giving up their leasehold interest in the unit, and zero compensation for the discrimination which was the subject of the complaint. The testimony explained that the monetary value to a landlord of a long term tenant moving out of a rent-controlled property is often enormous, and landlords are, with the help of OHR mediators, turning complaints of discrimination against them, into huge gains. *See* Exhibit A (February 22, 2018 Testimony of Legal Aid) at 2.

truly fair and appropriate, it is important that mediators are well-informed and are not using problematic form mediation agreements that stack the odds against the complainants.

It is Unclear If Suggestions for Improving Delays in Processing Cases and Easing Unnecessary Burdens on Complainants Have Been Implemented

Last year, we suggested, among other things, that OHR allow complainants to use verification language, as is allowed in D.C. Superior Court, rather than require notarization, for complaints and witness statements. Finding a notary public to use to verify witness statements and complaints presents an unnecessary burden on complainants; it costs money and time to get notarizations, and as the D.C. Superior Court has recognized in their rule change, is an unnecessary burden on litigants, especially those who are low income and disabled.

OHR responded that the requirement for notarization for the complaint was written into its regulations, but that it would begin work on changing its regulations. Indeed, 4 D.C.M.R. §705.2, §705.6 (2019) requires complaints to be sworn to in front of a notary public (*compare to* Superior Court Civil Procedure Rule 9-I(e)(A) (allowing for verification without a notary public)).

Witness statements must also be notarized under OHR's regulations "if a witness for a party is unable to attend the fact-finding conference."⁵ However, witness statements are not otherwise required to be notarized under OHR's regulations, and a change could immediately be made to OHR's practice of requiring all witness statements to be notarized. This would ease an unnecessary burden on the parties and speed up the investigation process.

Legal Aid does not know if OHR has taken any steps to revise their procedures regarding witness statements submitted outside of the context of a fact-finding conference. It is also unclear what if any steps OHR has taken to amend its regulations so that the notarization requirement for complaints and for witness statements submitted at a fact-finding conference be revised.

Moreover, Legal Aid is unaware of whether OHR has done anything to address policies and practices related to communicating with complainants using their preferred method of communication (i.e. telephone, mail, email), or whether OHR has done anything to address providing complainants with unreasonably short timelines for responses while not adhering to its own timelines. As we noted last year, the failure to consistently honor complainants' preferences for communications can lead to delays and unnecessary dismissals.

As with other areas of concern, the Committee should ask OHR what steps it has taken to address these practices. Until they are addressed, complainants will continue to encounter obstacles to pursuing valid claims of discrimination, leaving discriminatory behavior that OHR was designed to counter unaddressed.

⁵ 4 D.C.M.R. §713.4 (2019).

It is Unclear If OHR Has Done Anything to Address Systemic Bias Against Finding Non-Compliance or Discrimination, and OHR’s Failure to Engage in Substantive Enforcement

The Language Access for Education for Education Amendment Act, once funded, will resolve some of the problems outlined in Legal Aid’s 2018 testimony regarding OHR’s failure to enforce the Act, as it provides that a fine be issued against any agency found to not be in compliance with the Language Access Act.⁶

However, the systemic issues at OHR that are outlined in Legal Aid’s 2018 testimony will not be solved by this legislation. Last year, we expressed several concerns including that OHR will rarely make a finding of non-compliance or discrimination unless the incidents complained of are uncontested and blatant; that OHR will oftentimes fail to engage in any involved analysis to determine whether allegations constitute discrimination or violations under the law; and that OHR will also often make conclusions based on the respondents’ version of events, or assumptions about facts, without giving complainants the opportunity to respond to these alleged facts or assumptions.

It is unclear if OHR has taken steps to improve training in substantive law for its staff, including its nuances, or whether OHR has taken steps to hire more staff with extensive practical experience with discrimination law, to help address some of the systemic issues noted above.

Conclusion

While it is possible that OHR has made improvements since last year’s testimony, we have yet to see confirmation that any improvements have been made. We hope that the Committee will take a close look at the testimony that we presented last year as well as this year, and work closely with OHR to ensure that these outstanding issues are addressed.

⁶ See “Language Access for Education Amendment Act of 2018”, D.C. Act 22-610, available at <http://lims.dccouncil.us/Download/37276/B22-0075-SignedAct.pdf> (accessed 2/27/2019).