

TABLE OF CONTENTS

Table of Authorities	iii
Preliminary Statement Authorities.....	1
Statement of Facts Authorities.....	2
Argument	6
I. The City’s Policy and Practice Violate Plaintiffs’ First Amendment Rights.....	6
A. The City’s Policy is Unconstitutionally Vague.....	9
1. The Policy Leaves Defendant With Unfettered Discretion to “Specifically Authorize[]” That Any Activity Whatsoever Be Conducted on Agency Premises.....	10
2. The Policy Leaves Defendant With Unfettered Discretion to Determine What Types of Speech Constitute “Official Business”.....	11
3. The Policy Leaves Defendant With Unfettered Discretion to Determine What Types of Written Material to “Issue” or “Sponsor”.....	14
4. The Policy Leaves Defendant Unfettered Discretion to Decide Whether and When to Apply His Code of Conduct to the Speech of Non-HRA Employees.....	15
B. The City’s Exclusion of Advocates Constitutes Viewpoint Discrimination.....	16
C. The City’s Exclusion of Advocates Impinges on Plaintiffs’ Speech, Press, Petition and Associational Rights Without Adequate Justification.....	21
1. The City’s Exclusion of Advocates’ Speech Is Subject to and Cannot Survive Strict Scrutiny.....	21
a. The City’s Exclusion of Advocates’ Speech Is Subject to Strict Scrutiny.....	21
b. The City’s Exclusion of Advocates’ Speech Cannot Survive Strict Scrutiny.....	24

2. The City’s Exclusion of Advocates’ Speech Fails Rational Basis
Review.....30

II. The City’s Exclusion of Advocates Violates Due Process.....33

III. The City’s Exclusion of Advocates Violates Equal Protection.....37

Conclusion.....40

TABLE OF AUTHORITIES

Cases

<u>Albany Welfare Rights Org. v. Wyman</u> , 493 F.2d 1319 (2d Cir. 1974).....	passim
<u>Anderson v. Sheppard</u> , 856 F.2d 741 (6th Cir. 1988).....	35
<u>Arkansas Educ. Television Comm’n v. Forbes</u> , 523 U.S. 666 (1998).....	22, 23
<u>Bery v. City of New York</u> , 97 F.3d 689 (2d Cir. 1996).....	25
<u>Bronx Household of Faith v. Community Sch. Dist. No. 10</u> , 127 F.3d 207 (2d Cir. 1996).....	23
<u>Brotherhood of R.R. Trainmen v. Virginia</u> , 377 U.S. 1 (1964).....	9
<u>Burr v. New Rochelle Municipal Hous. Authority</u> , 479 F.2d 1165 (2d Cir. 1973).....	35
<u>California Democratic Party v. Lungren</u> , 919 F. Supp. 1397 (N.D. Cal. 1996).....	29
<u>Calka v. North Am. Van Lines, Inc.</u> , No. 00 CIV. 2733, 2001 WL 434871 (S.D.N.Y. Apr. 27, 2001).....	6
<u>Chicago ACORN v. Metropolitan Pier & Exposition Authority</u> , 150 F.3d 695 (7th Cir. 1998)..	32
<u>City of Lakewood v. Plain Dealer Publishing Co.</u> , 486 U.S. 750 (1988).....	13
<u>Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.</u> , 473 U.S. 788 (1985).....	19, 22, 23, 30
<u>Cullen v. Fliegner</u> , 18 F.3d 96 (2d Cir. 1994).....	30
<u>Elliot v. Weinberger</u> , 564 F.2d 1219 (9th Cir. 1977), <u>rev’d in part on other grounds sub nom. Califano v. Yamasaki</u> , 442 U.S. 682 (1979).....	35
<u>Fighting Finest, Inc. v. Bratton</u> , 95 F.3d 224 (2d Cir. 1996).....	23
<u>Florida Star v. B.J.F.</u> , 491 U.S. 524 (1989).....	31

<u>Francis v. INS</u> , 532 F.2d 268 (2d Cir. 1976)	39
<u>Gasparo v. City of New York</u> , 16 F. Supp. 2d 198 (E.D.N.Y. 1998).....	11
<u>General Media Communications, Inc. v. Cohen</u> , 131 F.3d 273 (2d Cir. 1997).....	38
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970).....	33, 34, 37
<u>Good News Club v. Milford Cent. Sch.</u> , 121 S. Ct. 2093 (2001).....	22, 23
<u>Greenstein v. Bane</u> , 833 F. Supp. 1054 (S.D.N.Y. 1993).....	39
<u>Gregory v. Town of Pittsfield</u> , 470 U.S. 1018 (1985)	33
<u>Haitian Ctrs. Council, Inc. v. Sale</u> , 823 F. Supp. 1028 (E.D.N.Y. 1993)	7, 8, 20
<u>Harman v. City of New York</u> , 945 F. Supp. 750 (S.D.N.Y. 1996), <u>aff'd</u> , 140 F.3d 111 (2d Cir. 1998).....	6, 11
<u>Hawkins v. Denver</u> , 170 F.3d 1281 (10th Cir.)	32
<u>Housing Works v. Safir</u> , 101 F. Supp. 2d 163 (S.D.N.Y. 2000).....	15
<u>Housing Works v. Safir</u> , No. 98 Civ. 4994, 1998 WL 409701 (S.D.N.Y. July 21, 1998)	9, 10, 14, 25
<u>International Soc’y for Krishna Consciousness, Inc. v. Lee</u> , 505 U.S. 672 (1992)	passim
<u>Isaacs v. Bowen</u> , 865 F.2d 468 (2d Cir. 1989)	34
<u>Ladue v. Gileo</u> , 512 U.S. 43 (1994).....	31
<u>Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.</u> , 508 U.S. 366 (1993).....	22
<u>Landon v. Plasencia</u> , 459 U.S. 21 (1982)	34
<u>Legal Servs. Corp. v. Velazquez</u> , 121 S. Ct. 1043 (2001).....	9, 20

<u>Lehman v. Paulsen</u> , 745 F. Supp. 858 (S.D.N.Y. 1990).....	31
<u>Logan v. Zimmerman Brush Co.</u> , 455 U.S. 422 (1982).....	35, 38
<u>Loper v. New York City Police Dep't</u> , 999 F.2d 699 (2d Cir. 1993)	24, 25
<u>Mallette v. Arlington County Employees' Supplemental Retirement Sys. II</u> , 91 F.3d 630 (4th Cir. 1996).....	33
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	33, 34, 37
<u>Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.</u> , 475 U.S. 574 (1986).....	6
<u>Million Youth March v. Safir</u> , 18 F. Supp. 2d 334 (S.D.N.Y. 1998)	9, 10, 16, 25
<u>Moore v. Ross</u> , 502 F. Supp. 543 (S.D.N.Y. 1980)	35
<u>Myers v. County of Orange</u> , 157 F.3d 66 (2d Cir. 1998)	38
<u>NAACP v. Button</u> , 371 U.S. 415 (1963)	8
<u>New Alliance Party v. Dinkins</u> , 743 F. Supp. 1055 (S.D.N.Y. 1990)	11
<u>In re New Hampshire Disabilities Rights Ctr., Inc.</u> , 541 A.2d 208 (N.H. 1988).....	9
<u>New York City Unemployed & Welfare Council v. Brezenoff</u> , 677 F.2d 232 (2d Cir. 1982).....	4, 7, 8, 25
<u>New York City Unemployed & Welfare Council v. Brezenoff</u> , 742 F.2d 718 (2d Cir. 1984).....	8, 24
<u>Paulsen v. County of Nassau</u> , 925 F.2d 65 (2d Cir. 1991)	23
<u>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</u> , 460 U.S. 37 (1983)	21, 22, 23
<u>In re Primus</u> , 436 U.S. 412 (1978)	8, 9

<u>Reynolds v. Giuliani</u> , 35 F. Supp. 2d 331 (S.D.N.Y.), <u>modified in part</u> , 43 F. Supp. 2d 492 (S.D.N.Y. 1999).....	17, 33
<u>Romer v. Evans</u> , 517 U.S. 620 (1996)	39
<u>Rosenberger v. Rector & Visitors of the Univ. of Va.</u> , 515 U.S. 819 (1995).....	22, 23
<u>Sanjour v. E.P.A.</u> , 56 F.3d 85 (D.C. Cir. 1995).....	12, 13
<u>Travis v. Owego-Apalachin Sch. Dist.</u> , 927 F.2d 688 (2d Cir. 1991)	21, 22, 23
<u>Tunick v. Safir</u> , 209 F.3d 67 (2d Cir. 2000)	16
<u>United Yellow Cab Drivers Ass’n, Inc. v. Safir</u> , No. 98 Civ. 3670, 1998 WL 274295 (S.D.N.Y. May 27, 1998).....	25
<u>Velazquez v. Legal Servs. Corp.</u> , 164 F.3d 757 (2d Cir. 1999), <u>aff’d</u> , 121 S. Ct. 1043 (2001) ...	20
<u>Ward v. Rock Against Racism</u> , 491 U.S. 781 (1989).....	22
<u>Washington Legal Clinic for the Homeless v. Barry</u> , 107 F.3d 32 (D.C. Cir. 1997)	7, 8, 31

United States Constitution

First Amendment	passim
Fourteenth Amendment	passim

Rules

7 C.F.R. part 251.6.....	30
7 C.F.R. part 272.5(b)(3)	12
7 C.F.R. part 272.5(c)	12

18 N.Y.C.R.R. part 351.1(b)(1)	12
18 N.Y.C.R.R. part 351.1(d).....	24
18 N.Y.C.R.R. part 356.....	30
18 N.Y.C.R.R. part 441.....	12
18 N.Y.C.R.R. part 800.....	12
Fed. R. Civ. P. 56(c)	6

Other Authorities

Mark Green, “I Don’t Understand: Poor Educational Campaign Weakens Start-up of City’s Medicaid Managed Care Program,” p. 18, 21 (Feb. 2000).....	26
State of New York, Office of the State Comptroller, Division of Management Audit and State Financial Services, A Status Report of Selected Aspects of the Implementation of Welfare Reform in New York City (Aug. 21, 2000).....	18
U.S. Department of Agriculture, Food and Nutrition Service, New York Program Access Review, Nov. to Dec. 1998, pp. 6-24 (Feb. 5, 1999).....	17
U.S. House Comm. on Educ. & the Workforce, Subcomm. on Postsecondary Educ., Welfare Reform: Assessing the Progress of Work-Related Provisions: Training and Life-Long Learning, 1999 WL 699739 (F.D.C.H.) (Sept. 9, 1999).....	12

PRELIMINARY STATEMENT

For several decades, advocates were allowed inside New York City's public assistance centers to provide information, assistance, and representation to public assistance claimants ("claimants"). Those advocates helped claimants to ensure that the City followed constitutionally fair procedures and adhered to its statutory obligations to provide benefits to all eligible individuals and households.

Now, while the City is in the midst of a radical restructuring of its welfare system that has caused confusion among welfare claimants and welfare workers alike, the City has shut its doors to those advocates who desire to provide information, assistance, and representation to welfare claimants but who are unaccompanied by an individual claimant. The harsh consequence is that every day needy and eligible individuals are unable to assert their rights to benefits. As a result, the City erroneously denies those benefits, and deserving individuals and families are left without the food, medicine, and cash essential to their very survival.

The City's policy and practice of excluding unaccompanied advocates from Centers is unconstitutional for several reasons. First, the City's policy is unconstitutionally vague. Courts consistently strike down policies like that of the City, which bestow on politicians and bureaucrats unfettered discretion to suppress speech and activities with which they may disagree and which provide no specific standards or guidelines for the regulation of First Amendment rights.

The City's policy and practice also constitute unlawful viewpoint discrimination. Here, the City's vague policy enables it to intentionally exclude advocates with whom it expects disagreement. If permitted to associate with claimants in Centers, these advocates might help some claimants assert their legal rights in the public assistance system and make more difficult the City's often-proclaimed goal of drastically reducing the numbers of people receiving public assistance.

The City's exclusion of unaccompanied advocates from the public forum it has created in Centers also violates Plaintiffs' First Amendment rights. The City's single-minded attempt to

prevent advocates from associating with claimants in Centers is especially glaring in light of the broad range of people and groups that the City permits into Centers. Even today, the City continues to welcome into its Centers a range of people and activities. It also allows claimants to bring with them into Centers anyone they want – whether they be friends, children, translators, or advocates – regardless of qualification. Nonetheless, the City chases out from Centers advocates who enter on their own to take part in the public assistance forum that the City has created.

The City’s policy also violates Due Process. Denied the resources advocates voluntarily offer, claimants are more likely to suffer from administrative errors that prevent them from receiving public assistance benefits for which they are eligible. The City’s policy also offends the Equal Protection rights of claimants, by treating differently, and without justification, two classes of claimants: those in the first group who bring an advocate to a Center and who are therefore more likely to receive benefits for which they are eligible, and those in the second group who, unable to arrange to bring an advocate with them, will face the public assistance process alone and encounter greater difficulty in obtaining benefits for which they are eligible.

No reason advanced by the City justifies its policy of excluding advocates. Because of the wide range of people the City admits and has admitted to Centers, it is unable to identify a harm caused uniquely by unretained advocates. Instead, by excluding advocates, the City suppresses constitutional rights of claimants and advocates to speech, association, petition, equal protection, and due process.

The City’s policy and practice violates the First and Fourteenth Amendment rights of claimants and advocates as a matter of law. There are no genuine issues of material fact which need to be decided for this Court to strike down the City’s policy of selective exclusion, and Plaintiffs respectfully request the Court to grant their motion for summary judgment.

STATEMENT OF FACTS

Make the Road by Walking (“MRBW”) is a community organization in Bushwick, Brooklyn that seeks herein to obtain permission to go into Income Support Centers and Job Centers (collectively “Centers”) operated by the City of New York in order to provide

information, assistance and representation to claimants. MRBW's members (many of whom receive or have received public assistance benefits, Chatterjee Aff. ¶ 4)¹ and employees want to inform claimants about their rights in the public assistance system, including the right to have the City provide bilingual caseworkers, written materials in the claimants' languages, and, where necessary, interpreters; the right to file a written complaint; and the right to request a fair hearing. MRBW also wants to provide claimants with practical assistance in filling out forms and obtaining necessary documentation, and to represent them within the public assistance system. Chatterjee Aff. ¶¶ 5, 9-34.

Plaintiff Irania Sanchez, who currently receives public assistance benefits on behalf of her infant daughter, wants advocates to be allowed into Centers so that she can seek assistance from them should she encounter difficulties in the future receiving benefits for which she or her daughter is eligible. Sanchez Aff. ¶ 39. In the past, she has experienced difficulties receiving public assistance benefits for which she or her daughter was eligible. Sanchez Aff. ¶¶ 8-22.

As the basis for its policy and practice of denying access to unaccompanied advocates, the City points only to a "Code of Conduct for HRA Employees," Executive Order No. 651 (Ex. 18). Ex. 8, Resp. No. 4. However, this agency memorandum does not contain any language that specifically addresses advocate access. Instead, the language on which the City relies states: "The use of [HRA] premises shall be limited to the transaction of official business and such other activities as may be specifically authorized by the HRA/[Department of Social Services] Commissioner." Def.'s Bates No. 1538.

Although this language has appeared in virtually identical form in each HRA Code of Conduct since 1974, see HRA Executive Order No. 651, p.1 (Dec. 17, 1998) ("This Executive Order . . . replaces HRA Executive Order 639.") (Ex. 18); HRA Executive Order No. 639, p. 1 (Dec. 28, 1995) ("This Executive Order . . . replaces HRA Executive Order 618.") (Ex. 21); HRA Executive Order No. 618, p. 1 (Feb. 7, 1992) ("This Executive Order replaces Executive

¹ "Chatterjee Aff." and "Sanchez Aff." refer, respectively, to the July 25, 2001 affidavits of Anusuya Chatterjee and Irania Sanchez, which are attached to Plaintiffs' Notice of Motion.

Order 510.”) (Ex. 22); HRA Executive Order No. 510 (Sep. 27, 1974) (Ex. 23),² several City administrations during that period have allowed advocates to engage in precisely the type of speech that the City now interprets the Code of Conduct as excluding – providing information, assistance and representation in Centers to public assistance claimants who have not yet retained the advocates, for example:

- On several occasions during the period 1975 to 1977, public assistance advocates working with the Food Law Project tabled at public assistance offices run by HRA, providing information to people about their rights in the public assistance benefits system and helping them enforce those rights. Ensminger Dep. at 17, 38, 44-48 (Ex. 43).
- In 1977, HRA issued regulations, which remained in effect until at least 1983, permitting “[o]rganizations desiring to converse with clients and distribute literature” to sit at “[a] table located in a designated waiting area at each Income Maintenance Center.” See New York City Unemployed & Welfare Council v. Brezenoff, 677 F.2d 232, 235 (2d Cir. 1982) (quoting HRA Regulation of March 15, 1977); see also HRA Office Management Procedures Manual, p. 34a (May 19, 1983) (produced as Def.’s Bates No. 003640) (“Community Tables are specially designated tables made available by each IM Center for use by community agencies and welfare rights groups to enable them to conduct outreach programs and provide information to clients.”) (Ex. 25). In the early 1980’s, pursuant to these regulations, Defendant permitted the New York City Unemployed and Welfare Council and at least four other public assistance advocacy organizations to enter Centers in order to provide public assistance claimants with information about their rights in the public assistance system and with assistance in enforcing those rights. See New York City Unemployed & Welfare Council, 677 F.2d at 234; *id.* at 241 (Murphy, J., concurring in part and dissenting in part); Brown Dep. at 15-16, 47, 38-39, 42-44 (from 1978 to 1984, Defendant’s Rider Center permitted community organizations to sit at tables in the Center, providing information to public assistance claimants about benefits, including by handing out flyers) (Ex. 41).
- During the period 1988 to 1991, HRA permitted public assistance advocates to table at Centers, providing information to claimants about their rights in the public assistance system. Ensminger Dep. at 19, 37-40, 52-53 (Ex. 43).

Defendant claims that although past administrations saw fit to admit advocates, if he were to continue that practice his ability to administer public assistance would be subjected to a range of difficulties including physical hindrances and chaos in Centers, breaches of confidentiality, and confusion on the part of claimants. See discussion infra at 24-30. Defendant has apparently avoided these difficulties when he admits a variety of outside organizations into Centers for equivalent purposes:

² The only difference in this language is that in HRA’s Code of Conduct in effect from 1974 through 1992, Executive Order No. 510, the “Administrator/Commissioner” was the official who could authorize “other activities.”

- Defendant permits Harlem United Community AIDS Center to make presentations in the waiting rooms of public assistance offices run by Defendant’s Division of AIDS Services and Income Support (DASIS) regarding the various services that Harlem United provides, and also to distribute flyers, pamphlets and other written material regarding Harlem United’s services.³ Ex. 27; Ex. 6, Resp. Nos. 6, 8. Harlem United does not have a contract with HRA to provide information to public assistance claimants in DASIS offices. Ex. 9, Obj. & Resp. No. 6 (in response to Plaintiffs’ request for “[a]ll contracts between Harlem United Community AIDS Organization and Defendant,” Defendant provided the document attached as exhibit 26); Ex. 26 (contract solely to provide housing for persons with AIDS, not to provide information at Centers).
- Defendant permits the United States Census Bureau to table in Centers regarding the 2000 Census. Ex. 10; Ex. 3, Obj. & Resp. No. 19; Brown Dep. at 141, 144-45 (Ex. 41).
- Defendant permits the New York City or New York State Department of Health to table at Centers regarding immunizations. Brown Dep. at 141-44 (Ex. 41).
- Defendant permits students, academics, government officials from other jurisdictions, and groups, including a group of teenagers, to tour Centers and other HRA facilities. Diamond Dep. at 176-77, 190-91 (Ex. 42); Ex. 12.
- Defendant permits several community groups – including the Church Avenue Merchants Block Association (“CAMBA”), the Community Food Resource Center (“CFRC”), the Forest Hills Community House (“FHCH”), and the Northern Manhattan Improvement Corporation (“NMIC”) – to enter Centers to provide claimants with information about public assistance benefits. Ex. 14 (CAMBA contract pages regarding services in Centers); Ex. 15 (CFRC contract pages regarding services in Centers); Ex. 16 (NMIC contract pages regarding services in Centers); Ex. 17 (FHCH contract pages regarding services in Centers).
- Defendant permits Medicaid managed care companies to table at Centers, providing claimants with information about rights in the Medicaid system. Ex. 5, Resp. Nos. 1, 2 & 3.

The City presumably has also avoided adverse consequences when it permits claimants to bring with them to Centers any advocate they wish to help them, Ex. 8, Resp. No. 6, although the City makes no attempt to insure that these advocates are qualified, Ex. 8, Resp. No. 1, and it does not deter these advocates from assisting other claimants while in waiting rooms, Brown Dep. at 118 (Ex. 41). Similarly, the City permits claimants to talk to each other and provide each other assistance while in waiting rooms, and it permits claimants to bring any family member or friend with them into Centers, presumably also without suffering the parade of horrors the City claims allowing advocates to engage in those same activities would cause. Brown Dep. at 119 (Ex. 41); Diamond Dep. at 194 (Ex. 42).

³ DASIS offices constitute “Agency premises” to which Executive Order No. 651 applies. Ex. 8, Resp. No. 3.

The only claimed basis for the City’s policy and practice of excluding advocates’ “written materials” from Centers is also contained in the Code of Conduct. Paragraph V.D of the Code of Conduct limits “[d]istribution of written material on Agency premises . . . to releases issued or sponsored by the Agency, releases of recognized staff organizations or clubs approved for distribution by the Office of Staff Resources and releases of certified labor organizations.” This policy has remained substantially unchanged in each Code of Conduct since at least 1974. Despite this policy, the City has permitted numerous organizations to distribute diverse written materials in Centers in recent years, including Brooklyn Legal Services, CAMBA, CFRC (and its Community Housing Assistance Team), the New York State Parole Division, NMIC, and the Pratt Area Community Council. Exs. 10, 11 & 13; Ex. 3, Obj & Resp. No. 19; Ex. 4, Obj & Resp. No. 19.

ARGUMENT

Summary judgment as to all or part of a plaintiff’s case is appropriate when there are no material facts in dispute. Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating that there are no genuine issues as to material facts. See Calka v. North Am. Van Lines, Inc., No. 00 CIV. 2733, 2001 WL 434871 (S.D.N.Y. Apr. 27, 2001). Once this burden has been met, the party opposing summary judgment can prevail only by “‘set[ting] forth specific facts showing that there is a genuine issue for trial,’ and cannot rest on ‘mere allegations or denials’ of the facts asserted by the movant.” Harman v. City of New York, 945 F. Supp. 750, 756 (S.D.N.Y. 1996) (quoting Fed. R. Civ. P. 56(e)), aff’d, 140 F.3d 111 (2d Cir. 1998). In determining whether the parties have satisfied their burdens, the court must view all facts in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

I. The City’s Policy and Practice Violate Plaintiffs’ First Amendment Rights

As is described below, the City’s policy and practice of restricting advocates’ access to Centers violates Plaintiffs’ constitutional rights of speech, association, petition and the press. This policy violates the First Amendment for three independent reasons. First, the City’s policy

is unconstitutionally vague and permits City officials to exercise unfettered discretion. Second, the City is engaged in impermissible viewpoint discrimination against the speech in which advocates seek to engage. And third, the City unconstitutionally restricts Plaintiffs' speech without furthering an adequate governmental interest. There are no issues of material fact which stand in the way of this Court striking down the City's policy and practice on any of these bases.

Claimants and advocates seek to associate inside Centers in order to exchange information about and advance claims for public assistance benefits. The Second Circuit and other federal courts have repeatedly held that such association is protected by the First and Fourteenth Amendments to the United States Constitution and have struck down governmental policies – resembling the City's exclusion of public assistance advocates – that attempt to prevent such association from occurring on government property. See Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32 (D.C. Cir. 1997); Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d Cir. 1974); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993); see also New York City Unemployed & Welfare Council v. Brezenoff, 677 F.2d 232, 235-36 (2d Cir. 1982) (“New York City Unemployed & Welfare Council I”) (discussing a ruling by the district court not before the Second Circuit).

For example, in 1974 the Second Circuit held that the First Amendment's speech, freedom of the press, petition, and association protections applied to a group of advocates seeking to hand out leaflets to claimants regarding their rights in the public assistance system. See Albany Welfare Rights Org., 493 F.2d at 1322-25. The court consequently struck down a ban on handing out informational leaflets within public assistance offices in Albany. See id. at 1324.

Similarly, in 1982 Judge Owen of this Court ruled that the First Amendment rights of advocates were violated by HRA regulations that, among other things, required advocates desiring to provide benefits information and advocacy to public assistance claimants to stay at tables in Center waiting rooms. See New York City Unemployed & Welfare Council I, 677 F.2d at 235. Judge Owen consequently ordered HRA to permit at least one advocate from every

organization “to move freely about th[e] first reception room and speak with people who are sitting around waiting.”⁴ Id. at 235 n.4. In the course of Welfare Council I, the Second Circuit held once again that the advocates’ communications to and association with the waiting claimants were protected by the First and Fourteenth Amendments.⁵ See id. at 239.

The District of Columbia has similarly ruled that the First Amendment rights of advocates were violated by a rule limiting the hours during which advocates could provide services in a waiting room in the district’s office responsible for assigning homeless families to emergency shelters. See Washington Legal Clinic for the Homeless, 107 F.3d at 38-39. Likewise, the Eastern District of New York has ruled that an attempt by the United States government to prevent attorneys from meeting with refugee clients being held on the Guantanamo Bay Naval Base violated the attorneys’ “First Amendment rights to free speech and to associate for the purpose of providing legal counsel.” Haitian Ctrs. Council, Inc., 823 F. Supp. at 1040.

Underlying all of these cases are the principles set forth in a line of Supreme Court cases starting with NAACP v. Button, 371 U.S. 415 (1963). In that case, the Court held that lawyers and non-lawyers must remain free under the First Amendment to “acquaint persons with what they believe to be their legal rights and advise them to assert their rights by commencing or further prosecuting a suit,” and struck down as unconstitutional a statute that criminalized such activity. Id. at 434, 437 (internal quotations omitted); see also In re Primus, 436 U.S. 412, 425 n.16 (1978). The Supreme Court subsequently held that the disciplinary board of the South Carolina Supreme Court had interfered with First Amendment speech and associational rights when it sought to reprimand an ACLU lawyer for offering to represent a woman who had been sterilized as a condition of receiving public medical assistance. See Primus, 436 U.S. at 431-38.

⁴ On information and belief, this order has never been modified and currently remains in effect. This ruling was not before the Second Circuit on appeal. See id. at 235-36.

⁵ Based on this holding, the Second Circuit ruled that the district court had improperly rejected the plaintiffs’ challenge to a separate ban on solicitation of funds without considering whether the ban on solicitation was reasonable. See id. at 240-41. On remand, the district court again upheld the solicitation ban, and the Second Circuit affirmed. See New York City Unemployed & Welfare Council v. Brezenoff, 742 F.2d 718 (2d Cir. 1984) (“New York City Unemployed & Welfare Council II”). Unlike in the New York City Unemployed & Welfare Council I & II litigation, advocates here do not seek to solicit membership fees or any other funds inside Centers.

See also Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043, 1052 (2001) (reaffirming that providing legal assistance to the poor is constitutionally protected speech); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (striking down as violative of the First and Fourteenth Amendments a state court injunction enjoining railroad workers from gathering together for the purpose of helping and advising one another in asserting their statutory rights).

These cases make clear that the First Amendment's speech, assembly and petition provisions protect the rights of advocates and potential clients to speak and associate with one another. See, e.g., Brotherhood of R.R. Trainmen, 377 U.S. at 7 (making clear that the right extends to clients as well as to advocates); In re New Hampshire Disabilities Rights Ctr., Inc., 541 A.2d 208, 212-13 (N.H. 1988) (Souter, J.) (same). In the instant case, MRBW attempts to exercise these same rights by advising claimants about their rights in the public assistance system and offering claimants help in asserting those rights. Under the settled precedents of the Supreme Court and the Second Circuit, these activities fall squarely within the protections of the First Amendment. See Primus, 436 U.S. at 422 ("Appellant was communicating an offer of free assistance by attorneys associated with the ACLU."); Albany Welfare Rights Org., 493 F.2d at 1320 (noting that the advocates at issue sought "to inform welfare recipients of their legal rights").

A. The City's Policy Is Unconstitutionally Vague

Courts have articulated clear standards for determining whether governmental speech regulations are unconstitutionally vague: "It is a fundamental principle of the First Amendment and a pillar of our democracy itself that any exercise of control or circumscription over the right of free speech or to freely assemble and petition cannot be so vague as to grant unbridled discretion to the government authority seeking to abridge those rights." Housing Works v. Safir, No. 98 Civ. 4994, 1998 WL 409701, at *3 ("Housing Works I"). When a governmental entity lacks a clear statutory or regulatory framework to guide its regulation of a particular type of speech, the entity may unconstitutionally restrict speech on an ad hoc basis. See Million Youth March v. Safir, 18 F. Supp. 2d 334, 343 (S.D.N.Y. 1998). Standardless policies are

unconstitutional and dangerous because they have “the potential for becoming a means of supporting a particular point of view.” Housing Works I, 1998 WL 409701, at *4 (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992)). Consequently, “restrictions on public speech may be imposed only pursuant to a scheme that uses ‘narrow, objective, and definite standards to guide’ the appropriate authority.” Id. (quoting Forsyth County, 505 U.S. at 130).

In violation of this principle, the policy statement on which the City undisputedly relies as the basis for its refusal to admit advocates to Centers permits the City to exercise unfettered discretion over who may enter and who may not. The policy states in relevant part:

The use of Agency premises shall be limited to the transaction of official business and such other activities as may be specifically authorized by the HRA/DSS Administrator/Commissioner. . . .
Distribution of written material on Agency premises is limited to releases issued or sponsored by the Agency

Exec. Order No. 651, ¶¶ V.C, V.D (Dec. 17, 1998) (Ex. 18). This policy allows Defendant four different types of unfettered discretion, each of which is sufficient to render the policy unconstitutionally vague: 1) Defendant may “specifically authoriz[e]” that any activity whatsoever be conducted on Agency premises; 2) there are no criteria guiding Defendant’s determination of what constitutes “official business;” 3) there are no criteria guiding what written material Defendant may “issue” or “sponsor;” and 4) Defendant may choose not to apply the policy to non-HRA employees at all.

1. The Policy Leaves Defendant With Unfettered Discretion to “Specifically Authorize[]” That Any Activity Whatsoever Be Conducted on Agency Premises.

It is difficult to imagine a more standardless policy than one that allows the government to “specifically authorize []” that any activity whatsoever be conducted by anyone on Agency premises, without prescribing any criteria for Defendant’s exercise of this discretion. The policy is consequently unconstitutionally vague and must be struck down. See Million Youth March I, 18 F. Supp. 2d at 343 (condemning as unconstitutional a denial of permission to speak “based ‘presumably on the private criteria of a’ City official”) (quoting City of New York v. American

Sch. Publications, Inc., 509 N.E.2d 311, 314 (N.Y. 1987)); Gasparo v. City of New York, 16 F. Supp. 2d 198, 214, 216 (E.D.N.Y. 1998) (preliminarily enjoining because of unconstitutional vagueness a regulation stating that “nothing shall limit the Commissioner of the Department of Transportation’s authority to terminate a newsstand concession”); New Alliance Party v. Dinkins, 743 F. Supp. 1055, 1064-65 (S.D.N.Y. 1990) (“Without any regulatory guidelines, the Parks Department decides whether to grant or to deny the permit. Such a procedure seriously threatens the first amendment rights of the citizenry, and should not be permitted to be used as a justification for the prevention of any speech or conduct protected by the first amendment.”).

2. The Policy Leaves Defendant With Unfettered Discretion to Determine What Types of Speech Constitute “Official Business.”

Even if Defendant were not given *carte blanche* to authorize specifically that any activity whatsoever be conducted on agency premises, so that access were limited to individuals engaging in “official business,” the regulation would still be unconstitutionally vague. The regulation itself neither defines “official business” in any way nor propounds any standards that Defendant must use in determining what constitutes “official business.” The regulation is thus strikingly similar to another HRA speech restriction recently invalidated by the Second Circuit: a ban on all employee speech not “consistent with the efficient and effective operation of the agency.” Harman, 140 F.3d at 119. The Second Circuit ruled, “We do not find this standard to be sufficiently definite to limit the possibility for content or viewpoint censorship. Because [it] allow[s] suppression of speech before it takes place, administrators may prevent speech that would not actually have had a disruptive effect.” Id. at 120-21. Likewise here, the City’s prior restraint on speech invites Defendant to censor advocates’ speech because he suspects it will be inconsistent with what he deems to be the agency’s official business, without requiring him to adhere to any particular standards in making that determination.

Regulations, such as the City’s, barring speech inconsistent with an agency’s official business “inherently disfavor[] speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that ‘toe[] the

agency line.” Id. at 121 (quoting Sanjour v. E.P.A., 56 F.3d 85, 96-97 (D.C. Cir. 1995)); see also Sanjour, 56 F.3d at 96-97 (striking down as unconstitutional a regulation barring reimbursement to employees for expenses associated with speech not “within the mission of the agency” because the regulation granted the government decisionmaker “unbridled discretion”). By vesting government actors with unbounded authority, such regulations invite precisely the sort of viewpoint discrimination that vagueness scrutiny is designed to deter.

Defendant has attempted to place a narrowing interpretation on what constitutes “official business” by claiming that it is “delineated by federal and state law, as well as local law.” Ex. 8, Resp. No. 5. According to Defendant, the relevant laws to be used to define “official business” include all of the following:

N.Y. Social Services Law; the regulations that implement this law, including but not limited to Title 18 of the New York Code of Regulations and Rules; the New York City Administrative Code, Charter and Rules pertaining to the New York City Human Resources Administration; the guidelines for Medicaid managed care organizations issued by the NYS Department of Health; the Food Stamp Act; the portions of the Social Security Act that pertain to Medicaid and public assistance benefits; and the federal regulations that implement these laws,

id., as well as the federal and state laws protecting the privacy interests of public assistance claimants. Id. These laws cover an extremely broad range of activities, including, for example, inspecting and supervising child care agencies, 18 N.Y.C.R.R. part 441, and building and operating supportive housing for homeless people, 18 N.Y.C.R.R. part 800. They do not narrow Defendant’s discretion at all.

The clearest indication that these laws do not adequately narrow Defendant’s discretion is that some of them require Defendant to engage in precisely the sort of activity in Centers in which MRBW seeks to engage. See, e.g., 18 N.Y.C.R.R. § 351.1(b)(1) (“The social services official shall . . . provide applicants and recipients . . . with clear and detailed information concerning programs of public assistance, eligibility requirements therefor, methods of investigation and benefits available under such programs”); 7 C.F.R. § 272.5(b)(3) & (c) (requiring state social service agencies to “inform participant and applicant households of their

[Food Stamp] Program rights and responsibilities,” and authorizing them to “carry out and claim associated costs for Program informational activities designed to inform low-income households about the availability, eligibility requirements, application procedures, and benefits of the Food Stamp Program,” including through the use of “outside organizations”).

It consequently comes as no surprise that Defendant currently admits into Centers numerous non-HRA entities that engage in precisely the sorts of speech in which MRBW seeks to engage. As discussed above, see supra at 5, Defendant permits Medicaid managed care companies to table inside Centers, and has permitted numerous community groups to distribute information about public assistance benefits inside Centers.

These organizations are presumably admitted to Centers because Defendant views them as engaging in “official business.” Nonetheless, Defendant interprets its Code of Conduct as permitting it to prevent MRBW from engaging in the same activities. As the Supreme Court has warned, “a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint discrimination.” City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1988); see also Sanjour, 56 F.3d at 97. Defendant’s admission into Centers of organizations engaging in precisely the sort of activities in which MRBW seeks to engage thus demonstrates that the City’s policy is unconstitutionally vague.

Defendant has asserted that a second narrowing construction of this extremely broad regulation exists – namely, that access to agency premises is allowed only for those non-HRA organizations, corporations, and individuals who are representing a particular public assistance claimant or who have entered into a contract with HRA that contemplates that they will conduct an activity on its premises. Diamond Dep. at 48, 51, 161-62 (Ex. 42); Ltr. from Judy E. Nathan to David S. Udell, dated Sept. 8, 1998, at 1 (Ex. 31). Not only does this limitation not appear in the Code of Conduct, but Defendant employs the limitation so inconsistently as to render it illusory. For example, it is undisputed that Defendant has permitted many uses of HRA premises that do not fall within his stated policy:

- permitting Harlem United Community AIDS Center to make presentations in DASIS waiting rooms and to distribute written material;
- permitting groups of academics, students, government officials from other jurisdictions, as well as teenagers, to tour Centers and other HRA facilities;
- permitting the U.S. Census Bureau to table in Centers regarding the 2000 Census; and
- permitting the New York City or New York State Department of Health to table in Centers regarding immunizations.

See discussion supra at 4.

Additionally, it is undisputed that the City has, while the relevant provisions of its Code of Conduct have been in effect, permitted advocates to engage inside Centers in precisely the type of speech that the City now interprets its Code of Conduct as excluding. Specifically, the City has

- permitted the Food Law Project in the mid-1970's to table inside public assistance offices to provide claimants information about their rights.
- issued regulations in 1977 that were in effect until at least 1983 that permitted “[o]rganizations desiring to converse with clients and distribute literature” to sit at “[a] table located in a designated waiting area at each Income Maintenance Center.”
- permitted several organizations in the early 1980's to enter Centers to provide claimants with information and assistance.
- permitted advocates from 1988 to 1991 to table at Centers to provide information to claimants about their rights within the public assistance system.

See discussion supra at 4.

When, as here, a government entity makes exceptions to speech restrictions, and when “there is no guidance . . . as to when such exceptions are permissible,” so that the government, “in practice, appears to have unbridled discretion to grant exceptions to the policy,” the policy is unconstitutionally vague. Housing Works I, 1998 WL 409701, at *5.

3. The Policy Leaves Defendant With Unfettered Discretion to Determine What Types of Written Material to “Issue” or “Sponsor.”

The provision on which Defendant relies to support his refusal to permit MRBW to distribute “written material” in Centers is also unconstitutionally vague. It reads, in relevant part: “Distribution of written material on Agency premises is limited to releases issued or sponsored by the Agency” Exec. Order No. 651, ¶ V.D. There are apparently no guidelines

defining what “issued or sponsored by the Agency” means. The regulation is consequently strikingly similar to a New York City Policy Department regulation recently invalidated by Judge Baer. See Housing Works v. Safir, 101 F. Supp. 2d 163, 170 (S.D.N.Y. 2000). That regulation limited press conferences in front of City Hall “to events that ‘have traditionally been organized or sponsored by the City of New York.’” Id. at 168. Judge Baer noted that

[t]he Rules set forth no clear principles that will guide City officials as they decide whether or not the City should sponsor an event, [and that consequently] [t]he vice here is that the choice to sponsor or not sponsor non-covered activity is at the sole, subjective discretion of the defendants. The Final Rules, as drafted, allow City officials to arbitrarily decide the types of activities that the City will sponsor. It is this unfettered discretion that this Court finds unconstitutional.

Id. at 168-170.

Likewise here, the City can choose to “issue” or “sponsor” any written material whatsoever. In fact, it is undisputed that Defendant has allowed written material authored by Brooklyn Legal Services, CAMBA, CFRC (and its Community Housing Assistance Team), the New York State Parole Division, NMIC, the Pratt Area Community Council, and the United States Census Bureau, to be distributed in Centers by government agencies, organizations, corporations, and/or individuals other than HRA.⁶ Exs. 10, 11 & 13; Ex. 3, Obj. & Resp. No. 19; Ex. 4, Obj. & Resp. No. 19 (Ex. 4). The Code of Conduct is, consequently, unconstitutionally vague.

4. The Policy Leaves Defendant Unfettered Discretion to Decide Whether and When to Apply His Code of Conduct to the Speech of Non-HRA Employees.

Finally, even if Defendant’s Code of Conduct provided sufficiently clear standards to guide his discretion, Defendant’s policy would still be unconstitutionally vague because Defendant has retained the discretion to decide whether and when to apply it to non-HRA employees. Since 1974, one version or another of Defendant’s Code of Conduct – all containing the relevant language currently contained in paragraphs V.C and V.D of the current Code of

⁶ Additionally, it is undisputed that the City has allowed material authored by Harlem United Community AIDS Center to be distributed at DASIS public assistance offices. See discussion supra at 5.

Conduct – has been in effect. See discussion supra at 3-4. During this period, it is undisputed that HRA has, on numerous occasions, permitted advocates to engage in precisely the type of speech that the City now interprets the Code of Conduct as excluding – providing information, assistance and representation in Centers to public assistance claimants who have not retained those advocates as representatives. See discussion supra at 4.

Although Defendant now interprets the Code of Conduct as barring this type of speech, it is easy to see why previous administrations allowed it. The document is entitled, “Code of Conduct *for HRA Employees*.” Exec. Order No. 651, p. 1 (emphasis added). It begins by stating that it “has been established to inform *employees of [HRA]* of the standards of conduct and performance required of them.” Id. (emphasis added). Most of the provisions of the Code of Conduct, such as those dealing with where employees can smoke, sleeping while on duty, and how employees should dress, id. ¶¶ III.28, II.H, are clearly inapplicable to anyone other than HRA employees. It is not surprising that previous administrations, and even a current HRA employee, Logan Dep. at 82 (Ex. 48), have understood the Code of Conduct as applying only to HRA employees.

Because the Code of Conduct can be and has been interpreted as not applying to the actions of non-HRA employees, and because there are no clear standards for determining whether it does in fact apply, it is unconstitutionally vague. See Million Youth March I, 18 F. Supp. 2d at 343.

B. The City’s Exclusion of Advocates Constitutes Viewpoint Discrimination.

As discussed above in section I.A.2, the regulation on which the City’s exclusion of advocates’ speech is based invites Defendant to engage in viewpoint discrimination. It is hardly surprising, therefore, that the City’s exclusion of advocates is in fact based on disagreement with and a desire to prevent claimants from acting on the advocates’ message.⁷

⁷ Time and again, courts have stepped in to remind the current mayoral administration that the First Amendment limits its authority to prevent speech with which it disagrees. See generally Tunick v. Safir, 209 F.3d 67, 85-86 (2d Cir. 2000) (listing cases).

Within Centers the City speaks about the same topics about which advocate plaintiffs seek to speak, but from a contrary viewpoint: while public assistance advocates seek to enable claimants to enforce their legal rights with respect to public assistance benefits, the City discourages them from doing so. For example, employees of at least two Centers have “actively attempt[ed] to discourage individuals from applying for assistance,” and at one of those Centers they were “taking two to three hours to convince applicants to withdraw their applications.” Reynolds v. Giuliani, 35 F. Supp. 2d 331, 343 (S.D.N.Y. 1999) (describing this and other instances of discouragement), modified in part, 43 F. Supp. 2d 492 (S.D.N.Y. 1999). See also U.S. House Comm. on Educ. & the Workforce, Subcomm. on Postsecondary Educ., Welfare Reform: Assessing the Progress of Work-Related Provisions: Training and Life-Long Learning, 1999 WL 699739 (F.D.C.H.) (Sept. 9, 1999) (testimony of Defendant Turner) (alleging that there is no federal requirement that states and counties “‘encourage’ applicants to enroll in the food stamps program,” and asserting that such encouragement “runs exactly counter to the new law’s goal of promoting work and self-reliance”).

This active discouragement often takes the form of providing public assistance claimants with incorrect information about their rights within the public assistance system, or of failing to inform them about certain rights. For example, during Defendant Turner’s tenure at HRA the City has failed to meet its statutory obligations to provide all claimants with the following information about their rights:

- that the City is statutorily obligated to provide them with either a caseworker who speaks their language or with a translator, and that claimants are not required to bring their own translator to a Center. Ltr. from U.S. Dep’t of Health & Human Servs., Office for Civil Rights, to New York State Dept. of Health Commissioners, at 6-10 (Oct. 21, 1999) (Ex. 37).
- that they have a right to apply for food stamps on the same day they contact a Job Center. U.S. Department of Agriculture, Food and Nutrition Service, New York Program Access Review, Nov. to Dec. 1998, pp. 6-24 (Feb. 5, 1999) (Ex. 38).
- that they have a right to apply for food stamps benefits independent of other benefits. See id.

- that if they withdraw their application for temporary cash assistance the City will treat it as a withdrawal of their application for participation in the food stamps program. See id.
- that they may be excused from normally required work activities if they are unable to find child care that is appropriate. State of New York, Office of the State Comptroller, Division of Management Audit and State Financial Services, A Status Report of Selected Aspects of the Implementation of Welfare Reform in New York City, pp. 10, B-2 (Aug. 21, 2000) (Ex. 53).⁸

The City's policy of discouraging claimants from receiving public assistance benefits is founded on a belief that the receipt of public assistance benefits is destructive and that poor people can and should be compelled to work by depriving them of benefits. According to Mayor Giuliani,

While welfare's original mission was to provide temporary relief to those who had fallen on hard times, it had been transformed into a destructive culture of mass dependency. But today, a tremendous philosophical shift is taking place in New York City. Welfare centers are becoming job centers, public assistance is available to those who need it, helping someone in need find a job has become the City's first priority.

Rudolph Giuliani, WABC Radio Show, Aug. 6, 1999 (Ex. 36). A crucial part of this "philosophical shift" is to ensure that as few people as possible are provided with public assistance benefits. For example, Mayor Giuliani has stated that the success of Center employees "is measured by not how many people they have on welfare, which, after all, is a failure for society and a failure for the person." Rudolph Giuliani, Remarks at the Manhattan Institute Conference, "The New Urban Paradigm," June 21, 1999 (Ex. 34). He has proclaimed that he has "reduced the City's welfare rolls by nearly 45 percent, bringing them to their lowest level since 1967. Now we're committed to going even further." Rudolph W. Giuliani, WINS Address: Reinforcing the Social Contract and the Work Ethic, Nov. 7, 1999 (Ex. 35); see also Rudolph W. Giuliani, WINS Address: Enabling Independence at a New Job Center, Nov. 8, 1998 (Ex. 33).

In sharp contrast, MRBW wants to inform claimants about their rights in the public assistance system and to help them enforce those rights when the City refuses or fails to do so. It

⁸ This report also found that staff at the Greenwood Center failed to provide Medicaid recipients with notices informing them of their responsibilities within the Medicaid system. See id. at 11, B-3.

is because of this conflict between the City's desire to discourage claimants from exercising their rights and MRBW's desire to enable them to exercise those rights that the City refuses to admit MRBW into Centers. Although the City insists that MRBW is excluded from Centers because it "disrupts" Center operations, see, e.g., Ltr. from Judy E. Nathan to Matthew Schneider, dated Oct. 9, 1997 (Ex. 30), several high-placed HRA officials have testified that the MRBW activities they view as "disruptive" consist of informing claimants about their rights in the public assistance system, enabling claimants to assert those rights during meetings with Defendant's caseworkers, and helping claimants file written complaints with Centers when their rights are violated. Benson Dep. at 31-34 (Ex. 40); Brown Dep. at 62-68, 89-90, 92-95, 191-97 (Ex. 41); Diamond Dep. at 180-81 (Ex. 42); Junior Dep. at 120-32 (Ex. 47); Sanders Dep. at 54-55 (Ex. 50); Stoute Dep. at 32-36 (Ex. 52).

It is therefore apparent that the City excludes public assistance advocates from Centers because the advocates' message – that claimants have enforceable rights – conflicts with the City's desire to discourage people from learning about and enforcing those rights. The City's attempt to quash the advocates' message violates the Supreme Court's admonition that speech-restricting regulations must be "viewpoint neutral." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); see also International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992) (even in nonpublic fora restrictions on speech cannot constitute "an effort to suppress expression merely because public officials oppose the speaker's view") (O'Connor, J., concurring) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)). The City's viewpoint-based suppression of MRBW's speech is particularly pernicious because the City is attempting to suppress speech critical of the government and intended to help people enforce their rights against the government. As the Second Circuit has recently warned when evaluating a governmental policy that suppressed legal advocacy efforts on behalf of, and by, welfare claimants, "The strongest protection of the First Amendment's free speech guarantee goes to the right to critici[ze] government or advocate change in governmental policy. . . . Criticism of official policy is the

kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people.”

Velazquez v. Legal Servs. Corp., 164 F.3d 757, 771 (2d Cir. 1999), aff’d, 121 S. Ct. 1043 (2001).

In two recent cases, courts have condemned as unconstitutional government attempts to prevent advocates from assisting potential clients to enforce their rights. In Legal Services Corporation v. Velazquez, the Supreme Court struck down as viewpoint discriminatory a federal government policy of funding legal services lawyers to provide legal assistance to public assistance recipients so long as the lawyers did not assist the recipients in challenging public assistance statutes or regulations. The Court characterized the funding restriction as operating to “insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns.” 121 S. Ct. at 1052. The Court then warned, “[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.” Id.

At issue in Haitian Centers Council, Inc. v. Sale was the federal government’s policy of permitting Haitians held at the Guantanamo Bay Naval Base to “receive[] legal advice, which [was] often . . . erroneous, from the military, the [Immigration and Naturalization Service], the Community Relations Service and even military doctors. The legal rights and options of Haitian detainees [were] discussed on Guantanamo, but only from the viewpoint of which the Government approve[d].” 823 F. Supp. at 1040. The court held that the exclusion of attorneys who wanted to provide legal advice to the detainees from a different perspective was therefore impermissible viewpoint discrimination. See id. at 1041.

As in Haitian Centers Council, by seeking to provide claimants with accurate and complete information about their rights within the public assistance system, and seeking to enable the applicants to enforce those rights, the advocate plaintiffs seek to provide the claimant plaintiffs with advice from a viewpoint strikingly different than the rights-discouraging perspective proffered by the government. By permitting the latter but not the former, the City

engages in unconstitutional viewpoint discrimination. The City should not be permitted to so insulate itself and its policies from effective challenge, and its attempt to do so violates the constitutional ban on viewpoint discrimination.

C. Under the Forum Doctrine of the Supreme Court and Second Circuit, the City's Exclusion of Advocates Impinges on Plaintiffs' Speech, Press, Petition and Associational Rights Without Adequate Justification.

Defendant operates Centers as public fora for speech about the rights of claimants in the public assistance system. Consequently, the City's exclusion of advocates' speech is subject to strict scrutiny. Because the City allows into Centers the same types of speech and activities in which advocates unaccompanied by claimants seek to engage, without defeating the interests that the City claims would be defeated through admission of those advocates, the City's blanket exclusion of advocates' speech by those advocates fails strict scrutiny and is unconstitutional. In the alternative, Defendant's exclusion of advocates' speech fails rational basis scrutiny.

1. The City's Exclusion of Advocates' Speech Is Subject to and Cannot Survive Strict Scrutiny.

a. The City's Exclusion of Advocates' Speech Is Subject to Strict Scrutiny.

The analysis of whether an individual's First Amendment interests trump the government's interests with respect to access to government property depends upon what type of forum that property constitutes. See International Soc'y for Krishna Consciousness, Inc., 505 U.S. at 678-79.

The content-based regulation of First Amendment activity in a "traditional public forum" – defined as government property traditionally available to the public for expressive activity, such as streets and parks – is examined under strict scrutiny. See Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). Thus, such regulation will survive only if the government can show it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. See Perry Educ. Ass'n, 460 U.S. at 45. While the City may impose time, place and manner restrictions on speech in a public forum, those restrictions will survive only if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored

to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of information. See id.; see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (defining standard). Regulation of speech in a “nonpublic” forum – defined as property that the government has not opened to First Amendment activity – is examined under a reasonableness standard. See International Soc’y for Krishna Consciousness, 505 U.S. at 678.

Falling within the two extremes are fora that, although not traditional public fora, have been opened by the government to some speakers or some types of speech. The level of scrutiny applicable to exclusions of speech from such fora depends on whether the government grants access generally or on a case-by-case basis, on the forum’s purpose, and on whether the excluded speech falls inside or outside of the categories of speech that the government allows in the forum. When the government grants speakers access to a nonpublic forum only on a case-by-case basis, and when the purpose of the forum is incompatible with expressive activity, the government’s speech exclusions are subject to only rational basis scrutiny. See Perry Educ. Ass’n, 460 U.S. at 47 (school district’s refusal to grant access to teacher mailboxes was subject to rational basis scrutiny because it required speakers to obtain permission before using the mailboxes); Cornelius, 473 U.S. at 802-06.

However, when the government grants general access to a particular type of speaker or type of speech, and when the purpose of the forum is compatible with expressive activity, the government has created a species of public forum,⁹ Perry Educ. Ass’n, 460 U.S. at 45 (“public property which the State has opened for use by the public as a place for expressive activity” is a

⁹ Although courts sometimes apply the phrases “limited public forum,” “designated public forum,” and “open public forum” to fora of this description, courts just as often try to make distinctions between these types of fora or fail to adequately define what they mean by them. See, e.g., Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2099-2100 (2001) (discussing “open public forum[s]” and “limited public forum[s]” without defining either phrase); Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677-79 (1998) (defining “designated public fora” as fora that the government has opened “for expressive use by the general public or by a particular class of speakers”); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (using the phrase “limited public forum” without defining it); Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 366, 393 (1993) (discussing “designated public forum” as “one open for indiscriminate public use for communicative purposes”); Owego-Apalachin Sch. Dist., 927 F.2d at 692 (noting that a “‘designated public forum’ consists of property that would be a nonpublic forum except for the fact that government has intentionally opened it for use by the public for expressive activity” and a “‘limited public forum’ . . . is created when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.”). Plaintiffs consequently avoid using those phrases.

species of public forum in which the state “is bound by the same standards as apply in a traditional public forum”); Cornelius, 478 U.S. at 802 (“a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects”), and the level of scrutiny to be applied to exclusions of speech depends on the type of speech excluded. Exclusions of speech falling within the type of speaker or of speech generally permitted in the forum are treated like exclusions from traditional public fora and are subject to strict scrutiny. See Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677-78 (1998) (defining a designated public forum as one that the government has opened “for expressive use by the general public or by a particular class of speakers,” and holding that “[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny”).¹⁰ Exclusions of speech falling outside the type of speaker or of speech generally permitted in the forum are subject to reasonableness scrutiny. See Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2100 (2001) (although “[t]he State may be justified ‘in reserving [its forum] for certain groups or for the discussion of certain topics,’ . . . the restriction must be ‘reasonable in light of the purpose served by the forum’”) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995), and Cornelius, 473 U.S. at 806).¹¹

¹⁰ See also Rosenberger, 515 U.S. at 829 (a government that has reserved a forum “for certain groups or for the discussion of certain topics . . . must respect the lawful boundaries it has itself set”); Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 229 (2d Cir. 1996) (“Where a speaker comes within . . . [the purpose for which a forum was created], the State is generally subject to the same strict scrutiny that applies to traditional public forums.”); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991) (“when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects . . . once [it] allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre”); Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991) (when the government “limit[s] access to certain speakers or subjects, ordinances must be applied even handedly to all similarly situated parties”).

¹¹ See also Rosenberger, 515 U.S. at 829 (if the government that has reserved a forum “for certain groups or for the discussion of certain topics” respects “the lawful boundaries it has itself set,” reasonableness scrutiny applies to exclusions of other types of speech); Perry Educ. Ass’n, 460 U.S. at 48 (even if school district had granted general access to mailboxes by allowing civic and church organizations to use them, refusal to allow union to use the mailboxes was subject to reasonableness scrutiny because the union did not fall within the category of civic or church organizations); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1996) (when the government has created a “limited public forum” by designating “‘a place or channel of communication for use by . . . certain speakers, or for the discussion of certain subjects,’ . . . [w]here the proposed use falls outside of the limited forum, ‘the State is subject to only minimal constitutional scrutiny’”) (quoting Cornelius, 473 U.S. at 802, and Fighting Finest, 95 F.3d at 299).

The Second Circuit has held that “a welfare office is to be treated as a public forum for the purposes of speech pertaining to welfare issues.” New York City Unemployed & Welfare Council II, 742 F.2d at 720; see also Albany Welfare Rights Org., 493 F.2d at 1323 (applying strict scrutiny to exclusion of advocates from welfare offices). It is undisputed that the City allows advocates who are accompanied by claimants to discuss public assistance benefits with those claimants in Center waiting rooms without first obtaining permission. 18 N.Y.C.R.R. § 351.1(d); Ex. 8, Resp. No. 6; Brown Dep. at 117-19 (Ex. 41). The City also allows claimants sitting in Center waiting rooms to discuss benefits among themselves without first obtaining permission, Brown Dep. at 119 (Ex. 41); Diamond Dep. at 194 (Ex. 42), as well as benefits-related conversations among claimants or their previously-retained advocates and Center employees. By providing claimants with the information they need to meet their responsibilities and exercise their rights within the public assistance system, this type of speech furthers Centers’ purpose of providing public assistance benefits to eligible individuals and families. Ex. 8, Resp. No. 2. The City has consequently created a public forum for the discussion of public assistance benefits in Center waiting rooms by claimants and advocates, and the City’s refusal to permit certain public assistance advocates to discuss public assistance benefits with claimants is subject to strict scrutiny.

b. The City’s Exclusion of Advocates’ Speech Cannot Survive Strict Scrutiny.

Because Centers are public fora for the discussion of public assistance benefits by claimants and advocates, any content-based regulation will survive only if it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. See discussion supra at 21-23. The City’s absolute ban on advocates unaccompanied by a claimant providing information, assistance and representation to any claimants in any Centers at any time cannot be considered a time, place or manner regulation, and thus this rigorous standard should apply. See Loper v. New York City Police Dep’t, 999 F.2d 699, 705 (2d Cir. 1993) (noting that where a statute “totally prohibits begging in all public places, . . . it is questionable whether the statute even can

be said to ‘regulate’ the time, place and manner of expression . . .”). However, even if the ban were considered a time, place and manner restriction (as opposed to a content-based restriction), it would still be required to be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of information. See discussion supra at 21-22. The blanket nature of the ban makes it virtually impossible for the City to satisfy either of these levels of scrutiny. See Loper, 999 F.2d at 704 (“[A] statute that totally prohibits begging in all public places cannot be considered ‘narrowly tailored’ to achieve that end.”); see also New York City Unemployed & Welfare Council I, 677 F.2d at 239 (“Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.”) (quoting Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 637 (1980) (internal quotations omitted)).

Federal courts in the Southern District of New York have repeatedly held that when the speech the government seeks to prevent has been permitted on occasion, without frustrating the asserted governmental interest, the restriction at issue is not narrowly tailored to further that interest. See Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) (limit on number of vending licenses was not narrowly tailored to avoid congestion where the City had granted licenses in excess of the limit); Loper, 999 F.2d at 705 (restriction on begging without a license did not further government interests where licenses were not required of “certain religious, educational and fraternal organizations”); Million Youth March I, 18 F. Supp. 2d at 347 (City’s refusal to issue a permit for a large march was not narrowly tailored to its interests in safety and preventing congestion given “its long history of successfully dealing with large and unpredictable events”); Housing Works I, 1998 WL 409701, at *3 (restriction on groups demonstrating on the steps of City Hall was not narrowly tailored to interests in safety and security where similarly large groups had been permitted to demonstrate in the past without incident); United Yellow Cab Drivers Ass’n, Inc. v. Safir, No. 98 Civ. 3670, 1998 WL 274295, at *3 (S.D.N.Y. May 27, 1998) (limitation on number of taxicabs in demonstration was not narrowly tailored to interest in preventing congestion where the City had previously permitted

even more taxicabs to demonstrate).

Because the City currently allows in Centers the same expressive and associational activities in which advocates seek to engage, it is evident that the City's exclusion of advocates is not narrowly tailored to further the City's interests. For example, the City asserts that advocates who have not been previously retained will create "physical hindrances" in Centers and will also cause chaos in the Centers, undermine the professional atmosphere that Centers are trying to project, and thus interfere with the Centers' goal of encouraging claimants to find employment. Ltr. from Judith Nathan to Matthew Schneider dated Oct. 9, 1997 (Ex. 30); Joint Ltr. to Mag. J. Eaton dated Mar. 27, 2001, at 11 (Ex. 1); Diamond Dep. at 200-01 (Ex. 42). However, the City permits Medicaid managed care companies, the Census Bureau, and the Department of Health to table in Center waiting rooms. Ex. 5, Resp. No. 1; Brown Dep. at 141-45 (Ex. 41); see also Brown Dep. at 96-99 (testifying that at least one Center waiting room has ample space for three separate tables at which three separate Medicaid managed care companies can sit at one time). The City also permits Medicaid managed care companies to walk around waiting rooms talking to claimants, Ex. 5, Resp. No. 2, and even to make presentations to large groups of people in waiting rooms. Mark Green, "I Don't Understand: Poor Educational Campaign Weakens Start-up of City's Medicaid Managed Care Program," p. 18, 21 (Feb. 2000) (Ex. 39). Tabling and walking around Center waiting rooms talking to claimants are the only two types of physical presence that MRBW seeks to have in Centers. Since the City has apparently permitted these activities without suffering from either "physical hindrances," Brown Dep. at 197 (Ex. 41), or undue chaos, the City's total ban on advocates conducting these activities unless they enter a Center accompanied by a claimant is not narrowly tailored to further the goal of preventing physical hindrances or chaos.

The City also asserts that admitting advocates into Center waiting rooms will compromise claimants' confidentiality, because "[m]any of the people who apply for public assistance are not anxious to have the fact that they're on public assistance known to the general public," and because "[t]hey also may be domestic violence victims or people with AIDS."

Diamond Dep. at 200-01 (Ex. 42); Ex. 8, Resp. No. 6. Preserving the confidentiality of public assistance claimants and others is a legitimate concern. However, it is undisputed that the City currently admits into Center waiting rooms members of the general public, Permahos Dep. at 148-49 (Ex. 49), their friends, family members and advocates, Smith Dep. at 149-50 (Ex. 51), and representatives of other governmental agencies, see discussion supra at 5, presumably without compromising the confidentiality of people seeking assistance at the Centers. Additionally, the City grants Harlem United Community AIDS Center access to its DASIS offices. Ex. 6, Resp. No. 6. It is not credible that the privacy concerns of clients at DASIS offices are less weighty than the privacy concerns of claimants in Centers, to which the City denies access to advocates. A total ban on the admission of advocates unaccompanied by a claimant is, therefore, not narrowly tailored to further the goal of protecting claimants' confidentiality – it is instead only narrowly tailored to keeping advocates out of Centers.

Perhaps more importantly, a desire to protect claimants' confidentiality cannot justify intruding onto those claimants' First Amendment rights. As the Second Circuit noted in a similar case involving an attempt to exclude advocates from upstate welfare offices, although advocates do not have “the right to demand the name of a person on the waiting line if he chooses not to give it, . . . we cannot assume, . . . that everyone on the waiting line would reject all communication with such representative. . . . Unless there is a showing that the listener has been badgered to the point of being made a captive, this intrusion on privacy in a public waiting room is slight against the heavy presumption in favor of free speech and assembly, which are precludes to the orderly redress of grievances.” Albany Welfare Rights Org., 493 F.2d at 1324.

The City also asserts that “admitting advocates into Center waiting rooms gives their presence the appearance of official authorization – either from HRA, the Court or some other governmental entity, thus creating a climate ripe for confusion and possible overreaching.” Joint Ltr. to Mag. J. Eaton dated Mar. 27, 2001, at 10-11 (Ex. 1); Diamond Dep. at 200-01 (Ex. 42). However, the City has dealt with a similar concern regarding representatives-in-training who work for Medicaid managed care companies – the fear that public assistance recipients would

believe that the trainees were fully informed about the Medicaid program – by requiring the trainees to wear identification. Memo from Linda Young to Marketing Directors, NYC Medicaid Managed Care Plans, at 2 (Ex. 29); see also Albany Welfare Rights Org., 493 F.2d at 1325 n.3 (holding that Albany County’s concern that advocates’ speech in welfare offices would be construed as officially authorized could be satisfactorily addressed by requiring the advocates to “clearly designate themselves in an appropriate manner as not being employees of the Albany County Welfare Department”). Additionally, when the City admits Harlem United Community AIDS Center into DASIS public assistance offices and allows its representatives to talk to claimants and distribute written information about the services it provides, the City is presumably able to avoid the appearance that the City endorses all of Harlem United Community AIDS Center’s activities. See discussion supra at 5. Because the City has been able to avoid the appearance that the content of speech by managed care representatives-in-training and Harlem United representatives is officially authorized, its total ban on advocates unaccompanied by a claimant engaging in similar speech at Centers is not narrowly tailored to avoid the appearance of official authorization.

In a related vein, the City asserts that it excludes advocates unaccompanied by a claimant from Centers because advocates provide inaccurate information to claimants and because screening advocates to determine which are qualified would place an administrative burden on the City. Ex. 7, Resp. & Obj. No. 2; Diamond Dep. at 200-01 (Ex. 42). Given the many federal, state and city investigations revealing that under the current administration the City itself frequently provides claimants with inaccurate or inadequate information, see discussion supra at 17-18, the City’s ability to determine whether information regarding public assistance is correct is highly suspect. It is likely that often when City employees assert that advocates have provided incorrect information it is the City employees who are themselves misinformed about the law, or that at the very least there is an honest difference of opinion between the advocates and the City over what the law requires. The City’s assertion that advocates provide “inaccurate” information thus boils down to another instance of viewpoint discrimination – the City wants to exclude

advocates because it wants to prevent claimants from learning of interpretations of the laws governing the public assistance system with which the City disagrees. That is unconstitutional viewpoint discrimination, not the sort of legitimate government interest that can support an exclusion of advocates' speech. Compare California Democratic Party v. Lungren, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996) (“As a matter of law, a purported state interest in preventing voters from being unduly influenced by political party endorsements cannot meet strict scrutiny. Under any set of facts, that goal is not a compelling state interest; on the contrary, it is a wholly illegitimate one.”).

Moreover, although Plaintiffs agree that it is important that claimants be provided with accurate information about the public assistance system – that is, after all, why Plaintiffs are seeking admission to Centers – Defendant’s total ban on advocates entering Centers unaccompanied by claimants is not narrowly tailored to serve that goal. Defendant admits into Centers advocates who are accompanied by claimants, and it also permits claimants (as well as their family members and friends) sitting in waiting rooms to provide each other with information about public assistance benefits. See discussion supra at 5. The City does not screen any of these people to ensure that they are fully informed about the public assistance system. Ex. 8, Resp. No. 1. Consequently, Defendant’s access policy to Centers – which permits all advocates, friends, or family members to enter Centers to provide advice to particular claimants but bans all advocates who attempt to enter Centers to provide advice to claimants generally – is not narrowly tailored to further Defendant’s asserted interest that claimants receive only accurate information about the public assistance system.

Finally, several of the City’s asserted interests are simply illegitimate interests for a governmental entity. The City asserts, for example, that when advocates help public assistance claimants file written complaints with Centers the advocates disrupt Center operations. See discussion supra at 19. The City likewise asserts that when public assistance advocates inform claimants about their rights in the public assistance system and those claimants subsequently assert those rights during meetings with Defendant’s caseworkers the advocates disrupt Center

operations. See id. However, the government has no legitimate interest in preventing public assistance claimants from turning to advocates for assistance in filing written complaints and from learning about their rights from advocates. Association between advocates and clients – and even between advocates and potential clients – for the purpose of exchanging information about and asserting legal rights is constitutionally protected First Amendment activity. See discussion supra at 8-9. Consequently, discouraging the exercise of this activity is not a legitimate governmental interest. See Cullen v. Fliegner, 18 F.3d 96, 104 (2d Cir. 1994) (“[A] state cannot have a legitimate interest in discouraging the exercise of constitutional rights.”). Moreover, the City is statutorily required by law both to inform claimants about how to file written complaints, to accept and thoroughly investigate such complaints, and to ensure that claimants receive complete information about their rights in the public assistance system. See 18 N.Y.C.R.R. part 356; 7 C.F.R. § 251.6; discussion supra at 17-18. Consequently, the City has no legitimate interest in discouraging claimants from filing complaints or learning from advocates about their rights.

Because the City’s total ban on advocates providing information, assistance and representation to claimants about public assistance benefits in Centers unless the advocates enter accompanied by a claimant is not narrowly tailored to further any legitimate government interests, it fails strict scrutiny and is unconstitutional.

2. The City’s Exclusion of Advocates’ Speech Fails Rational Basis Review.

Regardless of the type of forum at issue, the City must demonstrate at least a rational relationship between its exclusion of advocates and two things: the purpose the City seeks to further through the exclusion, and the purpose of the forum itself. See Cornelius, 473 U.S. at 806 (government must show a rational relationship between the exclusion and “the purpose served by the forum”); see also International Soc’y for Krishna Consciousness, 505 U.S. at 687 (O’Connor, J., concurring) (“Consideration of a forum’s special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be

assessed in light of the characteristic nature and function of the particular forum involved.”) (quoting Kokinda, 497 U.S. at 732). The City bears the burden of demonstrating that its speech restrictions are reasonable.¹² See Lehman v. Paulsen, 745 F. Supp. 858, 865 (S.D.N.Y. 1990).

Defendant cannot show a rational relationship between its exclusion of advocates and the purposes that the City purportedly seeks to further through the exclusion because the City allows many other entities to engage in precisely the types of speech in which the unretained advocates seek to engage. See discussion supra at 4-5. The City’s admission of this speech creates two problems for the City. First, it indicates that the City does not genuinely consider it important to exclude people not engaged in “official business” from Centers as a means to avoid harmful consequences. See Ladue v. Gileo, 512 U.S. 43, 53 (1994) (“Exemptions from an otherwise legitimate regulation of a medium of speech may . . . diminish the credibility of the government’s rationale for restricting speech in the first place.”); Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) (professing “serious doubts about whether [the government] is, in fact, serving . . . the significant interests which [it] invoke[d]” where it had failed to regulate a substantial part of the activity giving rise to the alleged harm).

Second, it indicates that admitting advocates causes no actual harm. In two recent cases, speech restrictions have been held to be unreasonable methods of serving the government’s asserted interests because the government sometimes permitted precisely the types of speech at issue. In Lehman v. Paulsen, the court found that the government’s refusal to grant an application for leafleting on Jones Beach was not a reasonable method of furthering the government’s interest in reserving the beach for bathing, because the government “admittedly grants similar applications at Jones Beach for all days but holiday weekends.” 745 F. Supp. 858, 865 (E.D.N.Y. 1990). In Washington Legal Clinic for the Homeless v. Barry the D.C. Circuit

¹² The blanket nature of the City’s exclusion of advocates -- that advocates can never enter Centers for the purpose of providing advice to and advocacy on behalf of claimants unless they have already been retained by a claimant -- makes it particularly difficult for the City to demonstrate a rational relationship that the exclusion is reasonable. See Lehman, 745 F. Supp. at 865 (holding that “bann[ing] the plaintiff from distributing pamphlets throughout the length and breadth of Jones Beach at any time of day during the three day Labor Day weekend” was not reasonable because of the blanket nature of the ban). There “is a difference between reasonable regulation and a total prohibition.” Albany Welfare Rights Org., 493 F.2d at 1324.

found unreasonable a policy admitting unsolicited advocates into the waiting room of a homeless shelter but limiting the hours during which they could be there. 107 F.3d 32. In so finding, the court held that neither of the government’s asserted interests supported the policy because the government admitted the advocates at some times. Id. at 38. Likewise here, the asserted government interest in avoiding physical and other hindrances cannot justify a complete ban because the City often permits advocates representing individuals, Medicaid managed care companies, and others to discuss rights in the public assistance system with claimants in Centers. See discussion supra at 5.

Nor can the City demonstrate a rational relationship between its exclusion of advocates unaccompanied by claimants and the purpose of the forum – providing claimants with benefits to which they are entitled under the law, see discussion supra at 24 – because the City’s exclusion of advocates from Centers actually frustrates that purpose. In this respect, the City’s exclusion is even more unreasonable than the airport leafleting ban struck down by a plurality in International Soc’y for Krishna Consciousness, supra, 505 U.S. 672. There, the Court ruled that airport terminals are public fora. Id. The government had argued that air travel was the core purpose of an airport and that because the congestion caused by leafleting was inconsistent with the hurried nature of air travel the regulation was reasonable. Id. at 688. Justice O’Connor ruled that the restriction was unreasonable because leafleting was “reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.”¹³ Id. at 689. In contrast to that restriction, which was inconsistent with the core purpose of facilitating air travel but consistent with the multipurpose environment the government had created, the City’s exclusion of advocates is inconsistent with the core purpose of Centers – ensuring that eligible people are provided with benefits. Consequently, the City’s exclusion of advocates from Centers fails rational basis review.

¹³ This concurring opinion is binding authority because it was the narrowest majority holding. See Hawkins v. Denver, 170 F.3d 1281, 1289 (10th Cir.); Chicago ACORN v. Metropolitan Pier & Exposition Authority, 150 F.3d 695, 702 (7th Cir. 1998).

II. The City's Exclusion of Advocates Violates Due Process.

Claimants have a procedural due process right to be free of unreasonable barriers to access to lawyers as they proceed through the welfare system, even though they may not have a right to a court-appointed lawyer. By placing unnecessary obstacles in the way of claimants' ability to confer with lawyers, thereby increasing the risk that claimants will be wrongly deprived of subsistence benefits, the City thus denies plaintiffs due process.

Procedural due process "is a principle basic to our society." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The Supreme Court has long held that individuals who are entitled by statutes or regulations to receive various types of welfare benefits have a property interest in continued receipt of those benefits that is protected by procedural due process.¹⁴ Goldberg v. Kelly, 397 U.S. 254 (1970). The benefits that claimants seek fall squarely within this category. In fact, in Goldberg itself the Supreme Court held that for New York City residents, welfare benefits "are a matter of statutory entitlement for persons qualified to receive them." 397 U.S. at 262. This remains true today. See Reynolds v. Giuliani, 35 F. Supp. 2d 331, 341 (S.D.N.Y.) ("Plaintiffs . . . have an overarching property interest in their continued receipt of food stamps, Medicaid and cash assistance."), modified in part, 45 F. Supp. 2d 492 (S.D.N.Y. 1999). By preventing previously unretained advocates from entering Centers, the City creates an unacceptable risk of error, thus depriving claimants of the process due them under the Fourteenth Amendment.

As the Supreme Court has emphasized, "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Eldridge, 424 U.S. at 334 (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)). Rather, it "is flexible and calls for such procedural protections as the particular

¹⁴ This principle applies to plaintiff applicants as well as to plaintiff recipients. As Justice O'Connor has noted, "the weight of authority among lower courts" favors recognizing the existence of a property interest when the applications of individuals who are entitled to benefits are erroneously denied. Gregory v. Town of Pittsfield, 470 U.S. 1018, 1021 (1985) (O'Connor, J., dissenting from denial of certiorari); see also Mallette v. Arlington County Employees' Supplemental Retirement Sys. II, 91 F.3d 630, 638 (4th Cir. 1996) ("[E]very lower federal court that has considered the issue has rejected the 'application/revocation' distinction.") (listing cases).

situation demands.”” Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). In determining whether the particular process sought is constitutionally mandated, courts must look to three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335. See also Landon v. Plasencia, 459 U.S. 21, 34 (1982).

When, as here, the private interest that will be affected involves subsistence benefits, the first Mathews v. Eldridge factor weighs heavily in favor of granting the relief sought. See Isaacs v. Bowen, 865 F.2d 468, 476 (2d Cir. 1989). Because welfare assistance “is given to persons on the very margin of subsistence,” erroneous denials can be catastrophic for claimants. Eldridge, 424 U.S. at 340-43. Until the City corrects its error, claimants may be left without the subsistence benefits necessary to buy the food, clothing and other items. This was the case for Plaintiff Sanchez who faced great difficulty obtaining medical care for her daughter during the period she was wrongfully denied Medicaid benefits. See Sanchez Aff. ¶¶ 9,11. Advocates can help claimants to persuade the City to remedy errors. See discussion supra at 35-36. As in Goldberg, the private interests at stake here are claimants’ actual survival in the face of “brutal need,” Goldberg, 397 U.S. at 261 (quotation omitted), and the private interest affected by the City’s exclusion of advocates from Centers is consequently very great.

The second criterion of the Mathews v. Eldridge test – the risk of erroneous decisions and the value of additional safeguards – also weighs in favor of granting access to Centers. The Supreme Court has long recognized that due process may require the government to permit individuals to obtain the assistance of attorneys or other advocates at administrative proceedings and civil trials. For example, in Goldberg v. Kelly the Court warned, “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”

397 U.S. at 270 (internal quotation omitted). Therefore, the Court held that a welfare recipient attending a pre-termination hearing “must be allowed to retain an attorney if he so desires.” Id.; see also Burr v. New Rochelle Municipal Hous. Authority, 479 F.2d 1165, 1170 (2d Cir. 1973) (holding that when municipal housing authority raises rents in subsidized housing, it must accord due process including permitting the tenants to be represented by counsel when they file written objections); Moore v. Ross, 502 F. Supp. 543, 551 (S.D.N.Y. 1980) (due process requires that applicants for unemployment insurance whose applications are denied be provided hearings at which counsel may be present), aff’d, 687 F.2d 604 (2d Cir. 1982).

In such cases, courts have unanimously recognized that while the Supreme Court has not required the appointment of counsel in most administrative and civil proceedings, the government may not interfere with the ability of individuals dealing with government agencies or civil tribunals to obtain and confer with counsel.¹⁵ The role of counsel is to promote fairness by “ensur[ing] that the agency [or court] will acquire the information it should have in a manner fairly calculated to illuminate the issue for reasoned decision making.” Elliot v. Weinberger, 564 F.2d 1219, 1223 (9th Cir. 1977), rev’d in part on other grounds sub nom. Califano v. Yamasaki, 442 U.S. 682 (1979); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (“[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.”).

The advocate plaintiffs here have helped HRA to obtain information it needs to make fair decisions in claimants’ cases. On at least 22 occasions since February 1999, MRBW helped a claimant file a written complaint with HRA that resulted in HRA correcting a mistake regarding that claimant’s public assistance case. Ex. 19 (gathering complaints and Defendant’s responses). And, on at least sixteen occasions in the same period, the City has assigned claimants new caseworkers after clients represented by MRBW filed complaints about a previous caseworker’s

¹⁵ For example, in Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988), the Sixth Circuit held that when the plaintiff’s trial counsel in a Title VII case withdrew several days before the trial, the district court’s failure to adjourn the proceedings to permit the plaintiff to retain counsel violated his due process rights. See id. at 747.

unresponsiveness, about a caseworker's inability to speak the claimant's language, or about HRA's failure to assign any caseworker at all. Ex. 20 (gathering complaints and Defendant's responses). Brenda Brown, the Director of the City's Queens Center from July 1997 to February 2000, estimates that half of the written complaints that MRBW has helped claimants file had merit. Brown Dep. at 206 (Ex. 41).

It is beyond dispute that MRBW's services are less effective when the City prohibits advocates from offering assistance inside Centers. By being present at the time possibly erroneous decisions are made at Centers, MRBW advocates can urge Center workers to correct a mistake immediately, before the decision wrongly deprives a claimant of necessary benefits. Friedman Jan. 26, 2001 Dep. at 166 (Ex. 44); Gonzalez Dep. at 67 (Ex. 45). Additionally, when MRBW advocates are inside Centers, they can provide claimants with information that can help those claimants assert their rights immediately in many ways, from filling out a form accurately to demanding to file an application for benefits. Chatterjee Aff. ¶ 11, 19. Even when MRBW is unable to persuade a worker to correct a mistake immediately, and must instead help a claimant request an administrative fair hearing, file a written complaint, or seek assistance from a case worker's supervisor, that assistance is more valuable and is likely to reach more claimants when it is offered within a Center. Chatterjee Aff. ¶ 32.

Additionally, claimants entering or leaving Centers are often too rushed to talk with advocates, Friedman Jan. 26, 2001 Dep. at 166 (Ex. 44); Gonzalez Dep. at 67-68 (Ex. 45), while claimants spending hours waiting in Centers to speak with their caseworkers have ample time to meet with advocates, Gonzalez Dep. at 67, 69-70 (Ex. 45). The possibility of claimants meeting at the advocates' offices is also not an adequate substitute for permitting advocates inside Centers. Claimants may not even know of the existence of MRBW or other sources of assistance if the City bars these groups from maintaining a presence in Centers. Friedman Jan. 26, 2001 Dep. at 167-68 (Ex. 44); Sanchez Aff. ¶ 24. Even if claimants do know of the possibility of assistance from MRBW or another source, they may be unable to get to the advocates' offices because of the requirements of tending to family members, of looking for or attending work, or

because of the expense and difficulty of travel. Friedman Jan. 26, 2001 Dep. at 167-68 (Ex. 44). Permitting claimants to consult with advocates within Centers would therefore reduce the risk of erroneous decisionmaking by the City. In sum, the second criterion of the Mathews v. Eldridge test therefore weighs heavily in favor of permitting the advocates into Centers.

The government's interest – the third criterion of the Mathews v. Eldridge test – also weighs in favor of allowing advocates into Centers because the City has asserted no interest that justifies its current policy of exclusion. As discussed above, the fact that the City allows many other entities to engage in precisely the types of speech in which it prevents unretained advocates from engaging indicates that it is unimportant to exclude advocates. See discussion supra at 31-32. More importantly, the City's exclusion of advocates frustrates an important purpose of Centers – providing eligible claimants with benefits to which they are lawfully entitled.

Allowing advocates access to Centers in order to inform claimants of their rights and to ensure that City employees follow the proper procedures would enhance the extent to which needy individuals are provided with the benefits for which they are eligible and thereby assist Centers in operating more effectively. See Goldberg, 397 U.S. at 266 (recognizing, and noting that the State of New York has also recognized, “the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards”). Indeed, the City has identified the “provi[sion of] public assistance benefits to eligible individuals and families” as one of the interests served by its operation of Centers. Ex. 8, Resp. No. 2. Thus, the third Eldridge factor also weighs heavily in favor of permitting access. Because all three Eldridge factors weigh in favor of permitting access, the City's policy and practice violates due process.

III. The City's Exclusion of Advocates Violates Equal Protection.

By permitting claimants to obtain information, assistance and representation from advocates inside Centers only when those advocates enter Centers with a claimant, the City treats differently two groups of similarly situated individuals, with respect to the exercise of their fundamental First Amendment rights, in violation of claimants' Fourteenth Amendment right to equal protection. The first group is comprised of all claimants who do not bring an advocate into

Centers with them. The City does not permit these claimants to receive services from advocates within Centers. The second group is comprised of all claimants who bring an advocate with them into the Centers.¹⁶ The City allows members of this group to interact freely inside Centers with the advocates they have retained. Although the City treats the two groups differently, the groups are similarly situated because at least some members of each share a desire to receive information, assistance and representation from advocates within Centers with regard to claims for initial or continuing public assistance benefits.

“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that [it] be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.” General Media Communications, Inc. v. Cohen, 131 F.3d 273, 285 (2d Cir. 1997) (quoting Carey v. Brown, 447 U.S. 455, 462-63 (1980)). Because Center waiting rooms are a public forum for the discussion of public assistance benefits by claimants and advocates, claimants’ association with advocates within Centers is a fundamental right, and the City’s restriction on that right is subject to strict scrutiny. For the reasons set forth above at 24-30, the City’s exclusion of welfare advocates fails such scrutiny. Therefore, the City’s exclusion also violates claimants’ rights to equal protection.

Even if Centers are not considered public fora for the discussion of public assistance benefits among claimants and advocates, however, claimants’ equal protection claim must still prevail under the rational basis test. When government distinguishes between two classes of individuals by according adverse treatment to one there must be some rational basis for doing so. See Myers v. County of Orange, 157 F.3d 66, 75 (2d Cir. 1998). Consequently, differential treatment of two similarly situated groups of individuals will fail rational basis scrutiny when the distinction between the two groups does not actually further the asserted governmental interest. See Romer v. Evans, 517 U.S. 620, 632 (1996) (“[W]e insist on knowing the relation between

¹⁶ An equal protection claim can be based on a regulation even if it “establishes no explicit classification and does not expressly distinguish between claimants.” Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1982) (Blackmun, J. concurring).

the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.”); see also Greenstein v. Bane, 833 F. Supp. 1054, 1075 (S.D.N.Y. 1993) (holding that the rational basis test is “not a toothless one,” so “the classification scheme must advance a reasonable and identifiable government objective”) (quotations omitted).

The City’s exclusion of advocates violates equal protection because the distinction it creates is arbitrary. Claimants who are prevented from receiving information, assistance and representation from advocates within Centers – those who have do not bring advocates into Centers with them – fall within that category for “irrelevant and fortuitous factors.” Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976). For example, they may not bring an advocate with them because they simply trusted the City to provide the benefits they needed and to which they were legally entitled. Unfortunately, this trust is not always warranted. See discussion supra at 17-18, 31-32. Alternatively, they may have been unaware that advocates were available to help them, Sanchez Aff. ¶ 24, or they may have tried and been unable find an advocate to accompany them, Sanchez Aff. ¶ 39.

None of these factors bears any relationship to the City’s asserted goals. For example, an advocate assisting a claimant he or she meets at a Center is no more likely than an advocate who accompanies that claimant into a Center to create physical hindrances, cause chaos in the Centers, undermine the professional atmosphere that Centers are trying to project, or interfere with the Centers’ goal of encouraging claimants to find employment. In fact, the City’s distinction between the two groups actually frustrates these asserted goals by encouraging each claimant to bring an advocate to the Center, thereby increasing, not reducing, the number of people in the waiting rooms. Because an advocate can assist many claimants in the course of one day, Jenkins Dep. at 69-70, 80-81 (Ex. 46), allowing advocates to assist claimants who did not bring them into a Center can reduce the total number of people in the waiting rooms. Nor is an advocate assisting a claimant he or she meets at a Center more likely than an advocate assisting a claimant who has brought him or her into a Center to threaten claimants’ confidentiality, give off

the appearance that he or she has official authorization from the City, or provide incorrect information.

More importantly, by preventing one group of eligible claimants from receiving the assistance they need to ensure that they receive their benefits, the City is frustrating an important purpose of Centers – to provide benefits to eligible claimants. See discussion supra at 24. The exclusion of advocates is consequently irrational and violates equal protection.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

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