

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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In the Matter of the Application of **MARITZA ALLENDE**,
by her proposed guardian ad litem **VICKI GAIL
PRICE, ESQ.**,

Petitioner,

Index No.: 400195/00

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

Decision & Order

- against-

JASON TURNER, as Commissioner of the New
York City Human Resources Administration;
LIN B. SABERSKI, as Assistant Commissioner'
of Protective Service for Adults; BRIAN J. WING,
as Commissioner of the New York State Office
of Temporary and Disability Assistance,
JOHN A. JOHNSON, as Commissioner of
the New York State Office of Children and
Family Service, and 201-203 30th Street
Realty Corp.,

Respondents.

_____^x
LOUISE GRUNER GANS, J.:

In this proceeding, initiated pursuant to CPLR Article 78 by Petition and Order to Show Cause, petitioner Maritza Allende seeks an order (1) appointing Vicki Gail Price as *guardian ad litem*;¹ (2) declaring Jason A. Turner, Commissioner of the New York City Human Resources Administration ("HRA"),² and Lin B. Saberski, Assistant Commissioner of Protective Services for Adults ("PSA") (collectively the "City

¹Ms. Price was appointed pursuant to a stipulation dated January 25, 2000, which was so-ordered by the Court.

²Also known as the New York City Department of Social Services.

Respondents”), Brian Wing, as Commissioner of the New York State Office of Temporary and Disability Assistance (“OTDA”), and John A. Johnson, as Commissioner of the New York State Office of Children and Family Services (“OCFS”) (collectively the “State Respondents”) to be in violation of the Americans with Disabilities Act (the “ADA”), New York Social Services Law and the regulations and administrative directives of the OCFS governing the provision of social services and protective services for adults; (3) directing the Government Respondents³ to provide Ms. Allende with appropriate protective services in an expedited manner to prevent her eviction; (4) directing the Government Respondents to assist Ms. Allende with the process of applying for essential social services, and to issue to Ms. Allende an emergency grant to pay outstanding rental arrears and prevent her eviction; (5) requiring respondents HRA and OTDA to promulgate procedures and regulations in accordance with its responsibilities under the ADA; and (6) staying the eviction proceeding pending against Ms. Allende.⁴

The City and State Respondents each have not answered instead they cross-move pursuant to CPLR 3211 to dismiss the petition for failure to state a claim and lack of jurisdiction. Petitioner Maritza Allende, in turn, cross-moves pursuant to CPLR 3025(b) for leave to amend her petition,

³HRA PSA, OCFS, and OTDA are collectively referred to as the “Government Respondents.”

⁴*201 203 30th Street Realty Corp. v Allende Maritza*, Kings County, L&T Index No. L&T 57849199.

Respondent PSA has a duty to assist disabled persons to obtain public assistance and is mandated to investigate and respond to the need of the disabled persons within 72 hours of the date PSA becomes aware that a disabled person may need services, and then to act promptly to provide for those needs. PSA Procedure 3-85; 18 N.Y.C.R.R. Section 457.d(c)(2). PSA provides protective services to or for individuals who, because of mental or physical impairments, are unable to meet their essential needs or protect themselves from abuse, neglect or exploitation and who are in need of protection and have no one who is willing and able to assist them responsibly. Social Services Law § 473; 18 N.Y.C.R.R. § 457.1(c).

Respondent HRA furnishes cash public assistance to eligible persons in the City of New York, Social Services Law §§ 62 and 77, including the “family assistance” to persons with dependent children in the household, Social Services Law § 343, et seq., sought by Ms. Allende. It is authorized to provide emergency rent arrears grants to those who face eviction and meet the criteria for such grants.

Respondents OCFS and OTDA coordinate fair hearings for PSA and HRA respectively. OTDA supervises and coordinates social services programs throughout New York State..

This proceeding challenges the delay of two and a half months, from October 20, 1999 to January 7, 2000, before the Government Respondents began to provide petitioner, a mentally disabled person and her minor children, with any essential subsistence benefits and services, bringing them perilously close to eviction and other related disasters.

For purposes of respondents' motions to dismiss pursuant to CPLR 3211 (a)(7), the factual allegations of the petition and supporting affidavits are accepted as true and the petition is liberally construed in petitioner's favor. *Anguita v Koch*, 179 AD2d 454 (1st Dept 1992). It is within the Court's discretion to treat the order to show cause and supporting and opposing affidavits as a notice of petition and pleadings in the proceeding. *Reich v Power*, 30 AD2d 925 (2d Dept), *aff'd*, 22 NY2d 887 (1968). All of these "pleadings" are the framework for the Court's consideration when addressing respondents' cross-motions to dismiss and petitioners' cross-motion to amend. The Court notes at the outset that petitioners' papers are not a model of clarity.

Background

Ms. Allende is a 35 year old single mother of two children, ages 12 and 14. She is mentally disabled and intellectually impaired. She resides with her children at 203 30th Street, Apartment 1, Brooklyn, New York, a rent stabilized apartment where they have lived for over ten years. The monthly rent is \$368.40. Ms. Allende receives monthly SSI benefits in the amount of \$523.00. The SSI benefits alone are obviously insufficient for this family to live on and pay rent without public assistance supplementation and Ms. Allende fell behind in her rent payments. In a nonpayment proceeding in the Kings County Housing Court commenced in February 1999 against Ms. Allende, her landlord alleged rental arrears for the period of November 1, 1996 to January 1999 in the amount of \$9,350.00. Although Ms. Allende's children were eligible for public assistance, they were not receiving it, apparently because Ms. Allende had been unable successfully to complete the application process. She takes

a number of prescription drugs for her psychiatric and other conditions, the side effects of which make her lethargic and require her to sleep for several hours during daytime. She arranges her day so as to sleep while her children are at school and keeps house for her children, but has great difficulty keeping appointments outside the home, be it with social services agencies, the housing court, or an attorney. This is the background to the crisis which precipitated this litigation.

Based on her non-payment of rent, on September 30, 1999, Ms. Allende and her children, were evicted from their apartment. On that day, Ms. Allende obtained legal representation from Ms. Julia Rea of Brooklyn Legal Services, Corp. B., who managed to have the family restored to possession upon the signing of a stipulation for the payment of rent arrears by November 30 1999. Execution of the warrant of eviction was stayed until that date.

Having concluded that under applicable law Ms. Allende's children were eligible for public assistance benefits and that eligibility for those benefits would also create eligibility for a grant for rent arrears, Ms. Rea initially advised Ms. Allende to apply for public assistance benefits on her own, offering to advise her on the application process. However, after Ms. Allende failed to keep several appointments, Ms. Rea concluded that Ms. Allende lacked the capacity to manage the application process, even with legal advice. On October 20, 1999, Ms. Rea as petitioner's counsel contacted PSA and explained to Ms. Roberts, a PSA employee, that Ms. Allende was in desperate need of services. No action was taken in response despite Ms. Rea's repeated telephone calls. On October 28, 1999, Ms. Rea was told by a Mr. or Ms.

Omanuga of PSA that Ms Allende was being referred to a Special Task Force Office. When she called that office, Ms. Rea was informed by a Ms. Dancy, that it was not a subdivision of PSA, but a general welfare center, and that Ms. Allende was rejected for PSA assistance. On calling PSA again, a Mr. Kimmel told Ms. Rea that he would look into the matter. On October 29, 1999, the previously contacted Ms. Roberts informed Ms. Rea that PSA would not likely provide services to Ms. Allende because of the two children, but instead would refer her to the Administration for Children's Services (ACS). Yet another, unidentified, PSA worker told Ms Rea that PSA would not help Ms. Allende because she did not have a definite eviction date. However, on November 3, 1999, Ms. Rea was informed that PSA had not made any determination as to Ms. Allende's application. On November 4, 1999, Assistant Commissioner Lin Saberski advised Ms. Rea that, while a decision had not been made by PSA, Ms. Allende was not likely to be found eligible for PSA services because she had been able to obtain legal representation from South Brooklyn Legal Services, Corp. B.

Ms. Allende, who maintained sporadic contact with Ms. Rea, told her that on or about November 15, 1999, Ms. Hernandez, an HRA case worker had visited Ms. Allende but that Ms. Hernandez had not completed an application for public assistance for her children. On November 30, 1999 Ms. Rea negotiated a further stipulation with Ms. Allende's landlord whereby execution of the warrant of eviction would be stayed until January 5, 2000; she also continued to communicate with PSA and HRA on Ms. Allende's behalf.

Apparently, sometime in November 1999, Mr. Luckner Mondesin, a PSA

caseworker was assigned to Ms. Allende's case. On November 22, 1999, he had no information as to whether an application for public assistance for Ms. Allende had been completed; on December 6, 1999 he told Ms. Rea that it was unlikely that PSA would provide services to Ms. Allende because her income was insufficient to pay her monthly rent of \$368.25. He recommended that she and her children find a cheaper apartment.

Ms. Rea left messages for Mr. Mondesin, Robert Grimston of PSA and Jeff Rogers of PSA, and each promised to investigate, but without result.

On December 9, 1999, Ms. Rea contacted Ms. Hernandez, who had not returned three phone messages left for her. Ms. Hernandez reported that she had not completed Ms. Allende's application for public assistance during her November 15, 1999 visit because Ms. Allende was too tired to complete the application.

Ms. Rea states that on December 20, 1999, Mr. Mondestin told her that he could not assist Ms. Allende in applying for public assistance and that PSA usually does not provide assistance to disabled adults with minor children. In such instances, 'he said PSA refers the matter to ACS.

In a December 27, 1999 letter to the Fair Hearing Section of the New York State Department of Social Services, Ms. Rea requested an expedited fair hearing to challenge PSA's failure "timely" to provide services to Ms. Allende.

On January 5, 2000, the stay of execution of the warrant of eviction expired, without a resolution of Ms. Allende's need for protective services and public assistance, and no fair hearing imminently scheduled. This Petition and Order to Show Cause, dated January 12, 2000, were filed in this Court on Friday, January 14, 2000. With

Martin Luther King's Birthday intervening on January 17, 2000, the Order to Show Cause containing a stay of Ms. Allende's eviction was signed on January 18, 2000. However, on January 7, 2000, 89 days after Ms. Rea's initial request, PSA had issued written notice to Ms. Allende that she was eligible for protective services for adults, and on January 10, 2000, PSA obtained a temporary stay of eviction from the Housing Court. These facts were not known to petitioner's counsel when the within Petition and Order to Show Cause were first filed because PSA did not serve her with the order to show nor advise of its eligibility determination.

On January 19, 2000, HRA issued a \$253 emergency public assistance grant to cover the Allende family's immediate needs. Also, at about this time, Ms. Allende's counsel, Ms. Rea, applied for Jiggets relief (a special State grant for rent arrears and future rent subsidy) on Ms. Allende's behalf. Rita Adhikary, a PSA caseworker, states in her March 2000 affidavit that she was assigned to Ms. Allende's case on February 3, 2000. She states that she immediately applied for PSA financial management services to manage Ms. Allende's finances; arranged to have the electricity turned back on;⁵ applied to HRA for emergency public assistance to pay the rental arrears; and worked with HRA to apply for public assistance benefits for the children. Ms. Allende's counsel was still required to assist and advocate for Ms. Allende, in order for her to obtain Jiggets relief and in complying with various HRA requirements, such as completing an "Absent Parent Questionnaire," obtaining the children's school attendance records, or

⁵The record does not indicate when the electricity had been turned off.

opening a bank account. Neither HRA nor PSA assumed the responsibility of assisting Ms. Allende with these tasks, which Ms. Allende could not perform on her own.

On February 15, 2000, OTDA held the emergency fair hearing requested on December 27, 1999 and issued a decision on February 28, 2000, captioned "In the Matter of the appeal of Maritza Allende from a determination by the New York City Department of Social Services." The decision notes appearances of R. Natarajan for Ms. Allende and "for the Social Services Agency, T. Catapano, Esq., Fair Hearing Representative and R Adhikary, witness (caseworker, PSA)." The Administrative Law Judge, Joachim Heukerott, framed the issue as follows: "Was the Agency's determination regarding the adequacy of services provided to the Appellant through his authorization for Protective Services for Adults correct?" His decision states:

At the hearing the Appellant's representative accepted the terms of the Agency stipulation as a complete resolution of the Appellants' request for a fair hearing . . .

In accordance with the Agency's agreements made at the Hearing, the Agency is directed to take the following actions if it has not already done so:

1. to continue to provide the Appellant with Protective Services for Adults;
2. to monitor the appellant's and her children's public assistance applications, including the income verification process, eligibility verification process and any subsequent decertification processes;
3. to explore the appropriateness of counseling services for the Appellant and her children and to provide access to such services, if necessary; and

4. to apply for housekeeping services for the Appellant.”

The children were accepted for public assistance on February 18, 2000. Jiggets relief was approved on March 6, 2000, and on March 31, 2000, counsel for petitioner received a **Jiggets** check for \$9,350.73 to pay rental arrears.

The Petition

The Petition consists of six claims. The first is for failure” timely” to investigate Ms. Allende’s need for protective services and is against all Government Respondents. The second claim is for failing to provide “timely” and adequate protective services and is against all Government Respondents. The third claim is for failure to assist Ms. Allende in order to enable her to apply for public assistance benefits and is against all the Government Respondents. Fourth, Ms. Allende claims that HRA’s failure to issue a grant, which is necessary to pay rental arrears and prevent eviction, was arbitrary and capricious and contrary to law. The fifth cause of action is against HRA for effectively excluding Ms. Allende from public assistance programs, by failing to provide assistance during the application process in violation of the ADA. The sixth cause of action claims that HRA has failed to promulgate policies to enable disabled persons to seek public benefits in violation of the ADA.

According to her petition, Ms. Allende relies on the following authority for her claims:

17. Title II of the ADA provides that public entities may not either directly or otherwise:

(b)(1)(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from [an] aid, benefit or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; [or]

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

²⁸ C.F.R. §35.130(b).

Further, a public entity “shall not impose . . . eligibility criteria that screen out or tend to screen out [persons with disabilities] from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. §35.130(b)(8).

The Department of Justice has advised public agencies that they must make reasonable modifications in their policies, practices, or procedures to avoid discrimination that violates the ADA. The Department of Justice has provided examples of necessary modifications, including:

A county general relief program provides emergency food, shelter, and cash grants to individual who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation

to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits, Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

ADA Title II Technical Assistance Manual, United States Department of Justice, Section II-3.6100, Illustration 2.

18. Protective Services for Adults in New York is a state-mandated service authorized by Section 473 of the Social Services Law. This section requires the provision of protective services:

for individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from physical abuse, sexual abuse, emotional abuse, active, passive or self neglect, financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly.

N.Y. Social Services Law §473(l).

19. 18 N.Y.C.R.R. §457.1(b), states, in relevant part:

Protective services for adults are provided to individuals 18 years of age or older who, because of mental or physical impairments:

- (1) are unable to meet their essential needs for food, shelter, clothing or medical care [or] secure entitlements due them or protect themselves from physical or mental injury, neglect, maltreatment of [sic] financial exploitation; and
- (2) are in need of protection from actual or threatened harm, neglect or hazardous conditions caused by the action or inaction of either themselves or other individuals; and
- (3) have no one available who is willing and able to assist them responsibly.

20. Eligibility requirements for Protective Services for Adults are further articulated in state policy directive 90 ADM 40, which identifies those who experience "mental illness" and/or "mental retardation" (p.3) and as a result are unable to "receive adequate food, clothing, shelter or medical care, or to obtain those entitlements for which he/she is eligible" (p.4) as eligible for PSA services as long as they are without one who is willing and able to assist them responsibly.

21. PSA is not relieved of its responsibility to provide services to disabled adults in need of protection by the fact that the disabled person has retained legal counsel; 90 ADM 40 states that:

The legal responsibility of other community agencies for the care and protection of individual clients is limited. As with family members, the district's decision to provide PSA to a person served by another agency must be based on a determination as to whether or not the involvement of the other agency(ies) assures that all of the essential needs of the adult, including financial managements, are met and that the client is protected from harm,. If the answer to the question is no, then PSA must be provided.

Id. P. 11.

22. The New York State Social Services Law and Regulations contain a number of strict maximum time limits for completion of PSA's required tasks. Thus, PSA, which is mandated to "receiv[e] and investigat[e] reports of seriously impaired individuals who may be in need of protection," Social Services Law §473(1), must provide "prompt response and investigation" and commence its initial investigation within 24 hours of the receipt of a referral concerning a life-threatening situation. 18 N.Y.C.R.R. §457.1 (d)(2). For potential PSA cases which are not designated as life-threatening situations, the investigation must commence with 72 hours of receipt of the referral and must include a visit to the client within three working days of the referral. Id.

23. PSA's Procedure 3-85, "Intervention in Eviction Situations," directs PSA field offices that "all eviction cases are to be treated as emergencies and visited. . . . within two (2) working days of the receipts of the referral if the eviction has ben postponed or scheduled for a future date or is not yet scheduled." Id. At p.3.

24. State regulations further require PSA to complete a written assessment/services plan within 60 days of the referral date, with completion

determined by the date of the supervisor's signature. 18 N.Y.C.R.R. §457.2(b)(4)(i).

25. In addition to the maximum time frames describes above, State regulations explicitly address the possibility that more immediate action will be required in some cases: "Notwithstanding the time frames for completing the PSA assessment/services plan specified . . . the services needs of individuals who are being assessed for PSA must be addressed promptly and appropriately . . . , regardless of the date the PSA assessment/services plan is complete." 18 N.Y.C.R.R. § 457.2(b)(4)(ii).

26. 18 N.Y.C.R.R. §457.5(b)(1) states that once PSA has determined that an applicant is eligible for services, PSA:

shall visit PSA clients as frequently as staff determine is necessary to assure that the service needs of the individuals are adequately met through the utilization of available community resources. The type and frequency of client contacts will depend on

- (i) the specific circumstances of the individual's situation;
- (ii) the ability and willingness of family members, friends and neighbors to assist the individuals; and
- (iii) the involvement of other agencies in the provisions of services to PSA clients.

18 N.Y.C.R.R. § 457.5(b)(1).

27. PSA services must include, inter alia, "assisting in the location of social services, medical care and other resources," 18 N.Y.C.R.R. §457.1 (c)(6); and "functioning as a guardian, representative payee, or protective payee," 18 N.Y.C.R.R. §457.1(c)(9).

28. In addition, PSA employees are to apply for "public assistance . . . [i]n order to prevent evictions where . . . [t]he client lacks sufficient resources or cannot gain access to resources in sufficient time to prevent eviction." PSA Procedure 3-85 at p.2.

29. PSA's procedure 3-85 also set forth detailed requirements related to PSA's responsibilities vis-a-vis assisting PSA clients applying for social services.

Thus, PSA “must explore (benefits)” for which the client may be eligible “and assist the client in obtaining such benefits.” Id. At 10. Procedures 3-85 also addresses the situation where a PSA client may be unable to apply for public assistance benefits on her own; in such instances PSA must “serve as the client’s representative.” In addition, “if the client’s, or proves to be incapable of following through (with the public assistance application process) on their own, the PSA worker must serve as proxy for such a client.” Id. At 11. This process must be initiated “as soon as possible after the need has been established.” Id.

The New York State Office of Temporary and Disability Assistance has promulgated regulations regarding HRA’s provision of assistance to people with disabilities in order to assist them with completing applications or otherwise accessing its programs and services. OTDA Policy Directives #99-09 set forth HRA’s required actions:

. . .HRA’s responsibility is to make reasonable accommodations for all qualified individuals with disabilities who meet essential eligibility requirements of our program with or without reasonable modifications to our rules, policies and practices and to inform them of the services the Agency offers.

. . .When an individual notifies the Receptionist/CMU worker that s/he cannot complete the forms because of a disability, the worker must alert the Service Section worker to assist the applicant/participant and inform the Group Supervisor.

OTDA Policy Directives #99-09.

In addition, an OTDA brochure sets forth the responsibilities of the HRA Service section for disabled applicants. . . “The Service Section assists applicants and recipients in the IS/Job Center when special help is needed in completing application forms.” Are you Disabled? Brochure appended to OTDA Policy Directive #99-09, “The Americans with Disabilities Act,” 2/9/99. Another OTDA notice assures applicants that they may receive agency assistance in completing the application process. “The Human Resources Administration will assist any applicant in obtaining verification of eligibility for Temporary Assistance, Food Stamps and/or Medicaid. Assistance cannot be denied because of a genuine inability to produce specific documentation, if eligibility can otherwise be established.” Notice appended to OTDA Policy Bulletin #99-15, “Right to File an Application, Your Food Stamps Rights and Notice, Posters,” 2/15/99.

32. Finally, HRA has set forth policies to assist homebound clients, or individuals who are unable to travel to Income Support Centers due to severe health problems or disabilities, to complete their applications for public assistance. HRA Applications Manuals, p.11. HRA's policy requires that a Service Section worker visit the client at home for an interview to fill out the application. The agency is required to then complete the application if necessary, "assist client in verifying eligibility by making collateral calls and writing to agencies for documentation needed." Id. . . .

33. Section 131 of the N.Y. Social Services Law provides that:

It shall be the duty of [local] social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this Chapter [the Social Services Law].

34. Sections 158-159 of the S.S.L. establish the "Safety Net" program (SNA), a state-administered program to provide financial assistance to all persons in the State who are unable to provide for themselves and who are not receiving needed assistance from any other assistance program or source.

35. The New York State Constitution, Article XVII, Section 1 provides that persons who are "needy" be afforded appropriate aid and support by the State and its subdivisions.⁶

Discussion

As is not uncommon, petitioner frames her petition as an Article 78 proceeding, while also requesting declaratory relief. *O'Brien v Board of Ed. of City School Dist. of City of New York*, 71 AD2d 605 (1st Dept 1979)

⁶Ms. Allende, a mentally disabled and intellectually impaired person who qualifies for protective services, is "needy" under this definition and is entitled to the services authorized by state statutes, regulations, and procedures.

Mootness

As a threshold matter, the Government Respondents argue that the petition is moot and should be dismissed. PSA ultimately approved Ms. Allende for protective services and intervened in an eviction proceeding to stay her eviction. At the OTDA fair hearing, PSA agreed to implement a number of services for Ms. Allende, including the provision of protective services, monitoring Ms. Allende's children's public assistance cases, including the income verification process, eligibility verification process and any subsequent **decertification** processes; exploring the appropriateness of counseling services, and applying for housekeeping services.

The Court agrees that the action is moot as to petitioner's request to direct the Government Respondents to provide Ms. Allende with protective services to prevent her eviction, to direct the Government respondents to assist Ms. Allende with the process of applying for public assistance for her children, and to issue Ms. Allende an emergency grant to pay outstanding rental arrears to prevent her eviction. It is not disputed that she has been provided with most if not all of this relief according to the March 28, 2000 affidavit of Rita Adhikary. On this basis, the Court concludes that petitioner's third and fourth causes of action dealing with failure to assist Ms. Allende in obtaining public assistance for her children and providing her with funds for the payment of rent arrears are moot and subject to dismissal.

However, although there has been a change in Ms. Allende's circumstances, certain issues remain open which are encompassed in the first and second causes of

action on the issues of timeliness and the adequacy of services provided.

Clearly, as to three issues, this proceeding for Article 78 relief is not moot. First, PSA did not agree to manage Ms. Allende's children's incomes, as requested by petitioner. The Court finds that Ms. Adhikary's efforts on behalf of PSA, including applying to SSI to assume financial management of petitioner's SSI income, does not address the outstanding issue concerning the management of the children's income.

Second, the petition is not moot as to Ms. Allende's claim that the City Respondents failed to provide Ms. Allende with continued individualized assistance. For example, Julia Rea describes in her March 19, 2000 affidavit that even after Ms. Allende was accepted for protective services, it still fell to her to assist Ms. Allende on February 7, 2000 in completing the application for public benefits, and to pursue the application for Jiggets relief when PSA failed to do so. The City Respondents do not address their failure to assist Ms. Allende in completing her application for public assistance and Jiggets relief. The Court also notes that it was counsel who attempted to open a bank account when Jiggets relief was conditioned thereon. While it is true that she now has an active public assistance case, it is unclear whether Ms. Allende must continue to rely on her attorney for help on matters far outside the scope of an attorney's professional responsibilities, or whether the Government Respondents will take responsibility for keeping the case active, obtaining and providing documents for recertification of Ms. Allende's eligibility, attending appointments with her caseworker, and monitoring rent payments from her and her children's income in order to ensure

that another eviction crisis does not occur.

Third, as petitioner alleges, the services provided to Ms. Allende were not provided to her in a timely manner. The delay in responding to Ms. Allende's "brutal need," *Goldberg v Kelly*, 397 U.S. 254, 261 (1970), is arguably attributable to Government Respondents' failure to accommodate to her disability in the provision of protective services, social services and public assistance in emergency circumstances and to their disregard of their obligations under state statutes, regulations and administrative directives, (Social Services Law § 473 (1); 18 N.Y.C.R.R. 457.1 (b), 457.1 (c)(9), 457.1(d)(2), 457.2(b)(4)(ii); PSA Directive 90 ADM 40; PSA Procedure 3-85; OTDA Policy Directive 99-09; Social Services Law §131; HRA Application Manuals). That failure and disregard is-reflected in the vacillation and questionable pretexts given by PSA, for delay in investigating and providing services and benefits, such as: PSA's inability to provide services to a disabled adult with minor children, to a disabled adult represented by legal counsel, or, to a disabled adult at risk of eviction but without a scheduled eviction date. Likewise, the excuses given by HRA for not applying for public assistance for the Allende children on her behalf is that Ms. Allende was too tired; precisely the reason that she needed their help.

While, "[a]n action is moot if a determination by the court will not, as an 'immediate consequence of the judgment' sought, affect the rights or interest of the parties." *Crumbly v Wack*, 212 AD2d 299 (1 st Dept), *leave to appeal dismissed*, 86 NY2d 808 (1995), there is a well-settled exception to the mootness doctrine. Though a

question is rendered moot by the passage of time or change in circumstances, as respondents argue here, the Court will nevertheless consider the issue if there is a “likelihood of repetition, either between the parties or among other members of the public;” the issue evades review; or there is “a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.” *Hearst Corp. v Clyne*, 50 NY2d 707 (1980).

The Court agrees with petitioner that the issues of providing timely assistance and accommodation (first and second causes of action), supported by adequate guidelines (fifth and sixth causes of action) to disabled persons applying to protective services and public assistance falls squarely within the exception to the mootness doctrine. Specifically, the City Respondents’ alleged failure timely to act on referrals for disabled persons who are on the brink of eviction is capable of repetition yet evades review. See *Piron v Wing*, N.Y.L.J. 6/27/97, p 25, col 5 (Civ. Ct, New York County). See a/so, *New York City Housing Auth. v Fallerder*, N.Y.L.J., November 27, 1996, p. 29, col. 5 (Civ. Ct. NY Co); *2675 Creston Associates v Seldin*, N.Y.L.J., February 9, 1994, p. 23 (Civ, Ct. Bronx Co.); *Jonas Equities v Brunelle*, N.Y.L.J. February 6, 1991, p. 25, col. 2 (Civ. Ct. Queens Co.), *rev’d on other grounds*, N.Y.L.J. June 29, 1992, p. 32, col. 6 (App.Term 2d Dep’t). These cases sufficiently show that claims like those of Petitioner have been repeated and have evaded review in other eviction cases involving disabled persons. Petitioner also persuasively demonstrates that repetition is likely because of the absence of clear guidelines with respect to the provision of

services by PSA and HRA to disabled adults with minor children in the household, and PSA's and HRA's alleged practice to the contrary. Likewise, petitioner persuasively argues that the guidelines provided by HRA and OTDA with respect to the obligation to accommodate disabled public assistance recipients are insufficient. Finally, because of the summary nature of eviction proceedings, the time periods available to avert eviction are brief.

Since PSA is a public agency entrusted with the important duty of assisting disabled persons, and coordinate action by HRA is required to carry it out, delay and failure to accommodate the most vulnerable of our citizens -- the mentally disabled and children -- in the provision of emergency services, are issues of significance to the public. See *Community Board 7 of the Borough of Manhattan v Schaffer*, 84 NY2d 148 (1994). As to these issues in this case, petitioner is not challenging the Government Respondents' failure ever to act. Rather, petitioner challenges the dangerous delay which is allowed to occur before the Government Respondents act, even in emergencies. It is an action which evades review because the Government Respondents eventually act. See, *Codey v Capital Cities, Am. Broadcasting Corp., Inc.*, 82 NY2d 521 (4993); *Brown v Appelman*, 241 AD2d 279 (2d Dept 1998).

Respondents' claim, that they have policies for assisting disabled applicants, does not address whether respondents violate their own policies, whether they also have practices which undermine the official policy and whether those policies are adequate. These are the issues for which petitioner requests declaratory relief. The

first, second, fifth and sixth causes of action may serve as a predicate for such relief. Specifically, petitioner's requests for declaratory relief include: that failure to timely investigate and provide protective services to disabled persons violates the ADA and State law (including inter alia Social Services Law § 473 (1); 18 N.Y.C.R.R. 457.1(b), 457.1 (c)(9), 457.1 (d)(2), 457.2(b)(4)(ii); PSA Directive 90 ADM 40; PSA Procedure 3-85; OTDA Policy Directive 99-09; Social Services Law §131; HRA Application Manuals), and that existing procedures and regulations are inadequate for the effective delivery of protective services and public assistance to disabled persons under state statutes and regulations and the ADA. As to inadequacy, for example, there is no procedure governing the provision of services by PSA to disabled adults who have minor children, and how such services, including public assistance are to coordinated with HRA and CSA where the children are income dependent but not abused or neglected. By its terms 18 N.Y.C.R.R. 457 does not anticipate the provision of protective services by PSA to such families. Further, petitioner claims that certain practices, such as refusing services to disabled persons who have a legal representative, undermine official policies, and are themselves unlawful. These are issues subject to review for declaratory relief because Ms. Allende's disability is continuing, and failures in provision of protective services and public assistance, whether deliberate or by computer glitch, are alleged to be endemic. *Allen v Blum*, 85 AD2d 228 (1 st Dept 1982); *Zuckerman v Board of Education*, 44 NY2d 336 (1978). *Wright v Giuliani*, 230 F3d 54 (2d Cir. 2000); See, *Henrietta D. v Giuliani*, 119 F Supp

2d 181 (EDNY 2000).

Therefore, except for the third and fourth causes of action, Government Respondents' motion to dismiss the petition on the grounds of mootness is denied.

Failure to State a Claim

In their motion to dismiss, the State Respondents claim that petitioner fails to state a claim against them because they do not provide direct services or public assistance. Rather, the State Respondents supervise local social services districts by providing fair hearings. 18 N.Y.C.R.R. § 358 et seq. Since the State Respondents provided Ms. Allende with a hearing, requested on December 27, 1999 and held on February 15, 2000, they argue that they fulfilled all of their obligations and they conclude that the action against them must be dismissed. Since the third and fourth causes of action are already dismissed, the Court need not address them again here. However, the motion to dismiss the remaining first, second, fifth and sixth causes of action against them is denied. Here, petitioner charges the State Respondents with more than failing or refusing to provide such assistance or services. Although the State Respondents may not be responsible for providing direct assistance or services, they have an obligation to assure compliance with its policies, supervise social services work administered by local agencies and require corrective action when they discover noncompliance. See, *Lambooy v Gross*, 129 Misc 2d 564, 575 (Sup Ct, New York County 1985); *Slade v Koch*, 136 Misc 2d 119 (Sup Ct, New York County 1987). Therefore, the State Respondents' motion to dismiss the first and second causes of

action is denied.

Further, this action is about more than the failure to provide services to Ms. Allende. Rather, the fifth and sixth claims are about the failure to follow and to promulgate policies and procedures in accordance with the ADA. To state a claim under the ADA, petitioner must show:

(1) he or she is a “qualified individual with a disability;” (2) he or she is being excluded from participation in, or being denied the benefits of some service, program or activity by reason of his or her disability; and (3) the entity which provides the services, program or activity is a public entity.

Clarkson v Coughlin, 898 F Supp 1019, 1037 (SDNY 1995). Ms. Allende is a disabled individual under 42 USC 912102, 28 CFR §35.104. Petitioner’s allegation that the Government Respondents’ failure to timely provide her with assistance in completing her public assistance application satisfies the second prong, exposing her to the threat of eviction and other disasters, such as electricity shut off. Finally, the Government Respondents are clearly public entities which provide public services. Therefore, petitioner’s fifth and sixth causes of action state a claim for declaratory relief.

The fifth and sixth causes of action name only HRA, with a declaration sought that it is in violation of the ADA, New York Social Services Law and the regulations and administrative directives promulgated pursuant thereto, and is required to implement appropriate policies and procedures consistent with the ADA. After review of all of petitioner’s submissions, specifically the request for relief and memorandum of law, the

Court has concluded that they are asserted against OTDA as well.⁷

Petitioner's claim in her proposed amended Petition against State Respondents based on alleged omissions during the Ms. Allende's fair hearing is discussed separately below.

Failure to Exhaust Administrative Remedies

A petitioner must exhaust all possibilities of obtaining relief through administrative channels before turning to the courts for judicial review. *Schultz v State*, 86 NY2d 225, *cert denied*, 516 US 944 (1995). Ms. Allende requested an administrative hearing on the issue of PSA's timely failure to provide her with necessary services. (December 27, 1999, letter from Julia Rea). In addition, petitioner claims that at the fair hearing the hearing officer barred petitioner from amending her request for relief and from submitting documents to support her claims and failed to address petitioner's claim of untimeliness as a result.

Contrary to respondents' argument, petitioner is not required to exhaust administrative remedies where to do so would cause irreparable injury or would be futile. *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52 (1978). Had petitioner waited for the fair hearing, as respondents suggest, there was a grave risk that she and her two children would be homeless. Eviction and homelessness

⁷The fifth and sixth causes of action have not been alleged against OCFS. If petitioner intends to include OCFS, then she must make a proper motion to amend to do so. Therefore, there is no need to address the motion to dismiss the fifth and sixth causes of action against it.

constitutes irreparable injury. *Wendling v 736 E 64th Assoc.*, 128 AD2d 419 (1 st Dept 1987). As of January 5, 2000, the stay of execution of the warrant of eviction, dated November 30, 1999, had expired. When PSA finally sought to stay the warrant by Order to Show Cause on January 10, 2000, it did not serve the order to show cause on Ms. Allende's attorneys. At that point, in the face of PSA's dilatory response, and the failure by OTDA to schedule the requested emergency fair hearing before the scheduled eviction, it was appropriate for petitioner's counsel to treat the matter as an emergency which permitted administrative procedures to be bypassed.

Motion to Amend

Petitioner seeks to amend the petition to add facts and legal claims arising out of the OTDA fair hearing conducted on February 15, 2000. On December 27, 1999, petitioner had requested an expedited hearing to contest PSA's "failure to timely provide her with necessary services." The fair hearing decision, dated February 28, 2000, on its face, does not address that question, but rather addresses an unspecified determination as to the adequacy of services provided at an unspecified later time. Moreover, the decision after fair hearing characterizes its determination as based on a stipulation by representatives of petitioner and the Agency as "a complete resolution" of petitioner's request for a fair hearing.

By her proposed amendment, petitioner asks the Court to determine that the fair hearing decision improperly characterizes what transpired at the fair hearing and was arbitrary, capricious and contrary to law. Affidavits by Ms. Narajan, Ms. Allende's

representative and Ms. Adhikary, the PSA witness offer conflicting versions of what occurred.

Petitioner alleges that she was prejudiced by the hearing officer's (ALJ's) refusal to accept her proffer of documents related to PSA's failure to timely investigate Ms. Allende's need for protective services, HRA's and PSA's failure timely to assist Ms. Allende in applying for public assistance benefits for her children, HRA's failure timely to provide a rent arrears grant to Ms. Allende, HRA's failure reasonably to accommodate Ms. Allende's disability and HRA's failure to promulgate specific procedures regarding assistance to disabled public assistance applicants, all in violation of 18 N.Y.C.R.R. 358-5.6(b)(7). Further, Ms. Allende alleges a violation of 18 N.Y.C.R.R. 358-3.4 based on the hearing officer's refusal to allow Ms. Allende's representative to explain the connection between's PSA's failures and Ms. Allende's claims arising from those failures. The hearing officer allegedly limited the 'hearing to the question of which services PSA would provide in the future. Likewise, Ms. Allende argues that the hearing officer's refusal to require PSA to act as protective payee for Ms. Allende's children was another denial of her claims in violation of 18 N.Y.C.R.R. 358-5.6(b)(3).

Petitioner also argues that the decision after fair hearing violates 18 N.Y.C.R.R.358-6.1 (a) in form because it fails to set forth the fair hearing issues, the relevant facts, and the applicable law, regulations and approved policy, if any upon which the decision is based, and objects to the absence of a direction to PSA to abide

by its own regulations and procedures by acting as Ms. Allende's proxy and representative in applying for public assistance.

CPLR 3025(b) provides that leave to amend is to be freely given, unless the amendment is obviously lacking in merit. *Sharon Ava & Co., Inc. v Olympic Tower Associates*, 259, 315 (1 st Dept 1999) The same standard for amendment has been applied to Article 78 proceedings, including timely amendment of a petition to assert additional claims. *Lai Chun Chan Jin et al. v Board of Estimate of the City of New York*, 101 AD2d 97 (1 st Dept 1984) (late amendment denied but same rule applied); *In the Matter of Julia Smith v Board of Education of East Ramapo Central School District*, 104 AD2d 445 (2d Dept 1984); *In the Matter of Neil Prendergast v Kingston City School District*, 242 AD2d 773 (3d Dept 1997); *Matter of Charles W. Gerena v New York State Division of Parole*, 266 AD2d 761 (3d Dept 1999)

The Court rejects City Respondents' argument that the amendments include a substantial evidence issue which must be transferred to the Appellate Division pursuant to CPLR 7804. Petitioner acknowledges that the Petition contains two paragraphs containing lack of substantial evidence allegations which were included in error. The Court found them only in Paragraph 84 and they are deemed stricken from the proposed Amended Petition.

The Court also rejects Government Respondents' argument that leave to amend must be denied based on the court's lack of jurisdiction. The defense of failure to exhaust administrative remedies on which this argument is based is discussed and

rejected by the Court in this decision and order.

Having proceeded this far, however, the Court is unable at this point to address the issues raised by Petitioner's proposed amendments. The Court has been informed by Letter from Ms. Natarajan, of South Brooklyn Legal Services dated January 28, 2001 that OTDA is unable to produce the tape recording of the February 15, 2000 fair hearing so that no transcript is available. Her letter in turn attached a letter from OTDA dated January 25, 2001 confirming this fact. In the absence of a transcript it is not possible for the Court adequately to review the conflicting contentions of the parties. Accordingly, petitioner's motion to amend in order to assert claims that the decision after fair hearing was arbitrary and capricious and contrary to law and improperly presented the fair hearing record is held in abeyance and remanded to OTDA to reconstruct the Fair Hearing record with the participation of the Hearing Officer (ALJ), Petitioner and Respondent within 45 days of service of a copy of this Decision and Order with Notice of entry. If Petitioner was indeed prevented from amending her fair hearing request or otherwise prevented from having all her claims considered at the fair hearing, the reasons therefor should be provided.

Pending reconstruction of the fair hearing all provision of protective services to Ms. Allende and her children, including the monitoring of the children's benefits and the family's rent payments shall continue.

Accordingly, it is

ORDERED, that the Government Respondents' cross-motions to dismiss the

petition are granted as to the third and fourth causes of action and otherwise denied;
and it is further

ORDERED ^{first} petitioner's cross-motion for leave to amend her petition to assert claims that the decision after fair hearing was arbitrary and capricious and contrary to law and improperly presented the fair hearing record is held in abeyance and remanded to OTDA to reconstruct the fair hearing record with the participation of the Hearing Officer, petitioner and respondents within 45 days of service of a copy of this Decision and Order with Notice of entry; and it is further

ORDERED that this action is held in abeyance pending the Court's receipt of the reconstructed Fair Hearing record; and it is further

ORDERED, that pending reconstruction, the provision of protective services by PSA to Petitioner and her children, including monitoring of the children's public assistance benefits and the family's rent payments shall continue.

Dated: Apri 6, 2001

ENTER:



HON. LOUISE GRUNER GANS