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Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings

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GIDEON MEETS GOLDBERG: THE CASE FOR A QUALIFIED RIGHT TO COUNSEL IN WELFARE HEARINGS

Stephen Loffredo^{*}
Don Friedman^{**}

In Goldberg v. Kelly, the Supreme Court held that welfare recipients have a right under the Due Process Clause to notice and a meaningful opportunity to be heard before the state may terminate assistance. However, the Court stopped short of holding due process requires states to appoint counsel to represent claimants at these constitutionally mandated hearings. As a result, in the vast majority of administrative hearings involving welfare benefits, claimants—desperately poor, and often with little formal education—must appear pro se while trained advocates represent the government. Drawing on the theory of underenforced constitutional norms, first articulated by Dean Lawrence Sager of the University of Texas School of Law, this Article argues that state legislatures have an independent constitutional duty to recognize and fund a qualified right to appointed counsel at welfare administrative hearings. Although the courts feel themselves to be institutionally constrained from implementing the Due Process Clause to its full extent, elected representative officials suffer from no such incapacity. Indeed, they must conscientiously enforce the requirements of due process to protect against the “brutal need” poor people will suffer if erroneously deprived of subsistence benefits, and also to assure administrative integrity. This Article concludes with a legislative proposal that aims to effectuate the due process mandate of counsel at welfare administrative hearings, taking into account the direct and indirect cost of implementation.

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**GIDEON MEETS GOLDBERG:
THE CASE FOR A QUALIFIED RIGHT TO COUNSEL IN
WELFARE HEARINGS**

INTRODUCTION

Forty years ago, in the landmark case of *Goldberg v. Kelly*,¹ the Supreme Court held that the Fourteenth Amendment's Due Process Clause entitled welfare recipients to notice and a meaningful opportunity to be heard prior to any termination of subsistence benefits.² At a minimum, the Court ruled, due process requires adequate, pre-deprivation notice of the basis for the welfare department's proposed action, followed by an opportunity to contest the action in an administrative hearing bearing most of the elements of a judicial proceeding, including, an impartial adjudicator, a proceeding on the record, and the right to appear in person, to confront and cross-examine adverse witnesses, to adduce evidence through testimony and documents, to present written and oral arguments, and to be represented by counsel.³ The Court justified this holding, in large measure, on its finding that the stakes for a welfare recipient facing loss of her means of survival, were "simply too high," and the risk of erroneous deprivation too great to permit any less protective process.⁴

In theory and aspiration, *Goldberg* placed faith in the adjudicative process to safeguard a poor person's basic dignity and welfare.

¹ 397 U.S. 254 (1970).

² *Id.* at 267-68.

³ *Id.* at 266-71.

⁴ *Id.* at 264, 266.

The reality, however, gives much cause for concern. Each year in New York State, tens of thousands of desperately poor families⁵ facing termination or denial of subsistence benefits seek redress at administrative hearings (known as “fair hearings”) conducted by the state’s Office of Temporary and Disability Assistance (“OTDA”). These are adversarial proceedings, which as a practical matter, constitute the forum of first and last resort for the overwhelming majority of poor families.⁶ The stakes for the individuals who must turn to these administrative hearings could hardly be higher. Loss of subsistence benefits almost invariably precipitates harms of the most dire sort: hunger, homelessness, lack of proper medical care, family disso-

⁵ New York State’s public assistance levels currently bring a poor family to less than fifty percent of the federal poverty line. The maximum monthly public assistance grant for a household of three in New York City is \$691. *See* N.Y. COMP. CODES R. & REGS. tit. 18, §§ 352.2, 352.3 (2008). The 2008 federal poverty level for a household of three is \$1,466.66 per month. *See* 73 Fed. Reg. 3971 (Jan. 23, 2008). The federal poverty level is a measure that itself vastly understates the income necessary to afford minimally decent housing and nutrition. *See* NANCY K. CAUTHEN & SARAH FASS, NAT’L CTR. FOR CHILDREN IN POVERTY, MEASURING INCOME & POVERTY IN THE UNITED STATES 1-2 (2007), *available at* http://www.nccp.org/publications/pdf/text_707.pdf; SYLVIA ALLEGRETTO, ECON. POLICY INST. BRIEFING PAPER #165, BASIC FAMILY BUDGETS: WORKING FAMILIES’ INCOMES OFTEN FAIL TO MEET LIVING EXPENSES AROUND THE U.S. 2 (2005), *available at* <http://www.epi.org/briefingpapers/165/bp165.pdf>. Families with income at or below fifty percent of the federal poverty line are considered to be in “deep poverty.” *See* SHARON PARROTT & ARLOC SHERMAN, CTR. ON BUDGET & POLICY PRIORITIES, TANF AT 10: PROGRAM RESULTS ARE MORE MIXED THAN OFTEN UNDERSTOOD 4 (2006), *available at* <http://www.cbpp.org/8-17-06tanf.pdf>.

⁶ As a formal matter, fair hearing decisions issued by the OTDA are subject to judicial review in state court. *See* N.Y. C.P.L.R. art. 78 (McKinney 2008). These decisions may also be subject to challenge in a plenary action in state or federal court. *See infra* notes 16-22 and accompanying text. As a practical matter, however, it is nearly impossible for an unrepresented party—especially one in the throes of the existential crisis typically occasioned by a loss of subsistence benefits—to mount such a challenge in the courts. A Westlaw search of all New York State courts for the years 2005, 2006 and 2007, revealed a total of two adjudicated pro se Article 78 proceedings challenging a fair hearing decision issued by OTDA. *See* *Rodriguez v. Doar*, 838 N.Y.S. 2d 456 (App. Div. 4th Dep’t 2007); *Sarokina v. Hansell*, 846 N.Y.S. 2d 592 (App. Div. 4th Dept. 2007), *appeal dismissed*, 886 N.E.2d 799 (N.Y. 2008). During this same three-year period, approximately 65,000 public assistance applicants and recipients received unfavorable fair hearing decisions. Thus, even assuming that the number of reported Article 78 dispositions understates the number actually filed by a factor of 30, the rate of pro se appeals would still be less than one in one thousand.

lution, and worse. Yet in all but one or two percent of these adjudications, only one party—the local welfare department—is represented by a trained advocate. In nearly ninety-nine percent of the cases, including thousands of adjudications upholding a denial or termination of a family’s subsistence benefits, the individual claimant must fend for herself without the assistance of an expert adviser.

This state of affairs raises several troubling questions. First, and most glaringly, is whether unrepresented welfare claimants actually receive the “due process of law” promised by *Goldberg*, or whether the absence of counsel, in at least a significant proportion of these cases, denies vulnerable families any *meaningful* opportunity to be heard. It should surprise nobody that in the exceedingly complex area of social welfare law, an unrepresented and untrained welfare claimant frequently has little or no knowledge of her procedural and substantive rights, nor any idea of how to assert those rights effectively in an adversarial proceeding. Thus, the prospect that the absence of counsel routinely results in the loss of legal rights and the erroneous deprivation of basic subsistence benefits looms disturbingly large.

Related to these due process concerns are well-known and much discussed systemic issues, sounding in equality and equal access to justice, which go to the legitimacy, *vel non*, of a legal system that apportions important rights in accordance with ability to pay.⁷ If it is true that welfare claimants’ inability to afford counsel results in

⁷ See Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL’Y 47 (2003); Jack B. Weinstein, *The Poor’s Right to Equal Access to the Courts*, 13 CONN. L. REV. 651 (1981).

the non-assertion of sustainable legal claims and defenses, with consequent loss of entitlements providing for the most basic human needs, then one must ask whether New York State's system of welfare adjudication not only fails to comport with due process, but also offends elemental rule-of-law norms and the fundamental principle of "equal justice under law."

The answer to this systemic question, according to a recent resolution and report of the American Bar Association, would appear to be an emphatic, though unfortunate, "yes." In 2006, the ABA's Task Force on Access to Civil Justice issued a Report concluding that the Nation's commitment to the principle of "equal justice for all" has gone largely, and in many cases, disastrously unfulfilled due to the absence of a right to counsel in civil cases. Accordingly, the Task Force proposed, and the ABA unanimously adopted, a resolution urging federal and state governments "to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."⁸

Describing this Resolution as "a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right,"⁹ the accompanying Report explains that its call for a civil right to counsel is limited to "high-priority categories" involving adversarial proceed-

⁸ American Bar Association House of Delegates, *Task Force on Access to Civil Justice*, 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

⁹ *Id.* at 12.

ings where “the most basic of human needs are at stake.”¹⁰ Included in this class of “high-priority categories” are “quasi-judicial” administrative adjudications involving “basic human needs . . . includ[ing] denials of or termination of government payments or benefits.”¹¹ Hence, the ABA has designated welfare “fair hearings” a proceeding to which a civil right to counsel should urgently attach, though it recognized that public provision of representation by “trained and supervised non-lawyer advocates” may be “sufficient” in this context.¹²

Taking the ABA Report and Resolution as a starting point, this Article sets forth a more detailed argument for a right to representation in welfare fair hearings in New York State. In tune with the approach reflected in the ABA Report, this Article proposes a targeted right to representation that would address the current system’s most serious due process deficits, yet be tailored in a way that reflects political and budgetary realities. Part I of the Article briefly describes the administrative and judicial forums available for adjudication of welfare claims in New York State, with a particular focus on the structure, procedural framework, and actual operation of administrative “fair hearings,” the forum that finally determines rights, obligations, and penalties in the vast majority of welfare disputes in the State. Part II examines the constitutional status of a “right to counsel” in disputes involving subsistence benefits. It provides a doctrinal survey and critique of the most salient Supreme Court cases, as well as an analysis and critique of the New York Court of Appeals deci-

¹⁰ *Id.*

¹¹ *Id.* at 12-13.

¹² *Id.* at 14.

sion rejecting a federal due process claim for assigned counsel at welfare hearings. Part III argues that the state Legislature should make provision for counsel in certain welfare proceedings as a matter of constitutional duty and sound public policy. Drawing on the theory of “underenforced constitutional norms,” this Part maintains that the courts’ refusal to declare a judicially enforceable due process right to counsel in welfare proceedings stems principally from institutional and separation of powers concerns pertaining to the limited role and capacity of the judiciary; that such rulings, therefore, ought not be regarded as definitive statements of the full meaning and scope of constitutional due process; that legislators and other government officials not constrained by factors that may circumscribe the judicial function, have an independent duty to enforce constitutional norms to their full meaning, even where courts believe themselves institutionally incapable of doing so; and that core principles of due process recognized in *Goldberg*¹³ and reaffirmed in *Mathews v. Eldridge*¹⁴ compel the conclusion that due process requires public provision of counsel in at least certain welfare hearings because the interests at stake are of the first order, the risk of erroneous deprivation is intolerably high when the individual must defend herself without the assistance of a skilled advocate, and the societal costs of wrongfully expelling destitute families from programs that provide for “brutal need” tips the balance decisively in favor of a targeted right to government-funded counsel. Part IV concludes the Article with a proposal for structuring and implementing a qualified right to legal rep-

¹³ 397 U.S. at 267.

¹⁴ 424 U.S. 319 (1976).

resentation at fair hearings coupled with a proposal for modest procedural reforms to reduce the risk of erroneous deprivation for individuals appearing without representation.

I. ADJUDICATION OF WELFARE RIGHTS IN NEW YORK STATE

As of May 2008, more than one million households in New York State relied in whole or in part on public cash assistance and food stamp benefits for basic sustenance.¹⁵ Eligible families in New York receive this assistance as a matter of statutory and state constitutional right.¹⁶ Rights pertaining to these basic subsistence programs may be formally asserted—and disputes adjudicated—in three fora: administrative “fair hearings” conducted by the State Office of Temporary and Disability Assistance (“OTDA”);¹⁷ Article 78 proceedings (for review of agency determinations)¹⁸ or plenary proceedings in state court;¹⁹ and plenary individual or class action proceedings in federal court.²⁰

¹⁵ NEW YORK STATE OFFICE OF TEMP. AND DISABILITY ASSISTANCE, TEMPORARY AND DISABILITY ASSISTANCE STATISTICS 1 (2008), *available at* <http://www.otda.state.ny.us/main/bdma/2008-05-stats.pdf>.

¹⁶ N.Y. CONST. art. XVII, § 1; N.Y. SOC. SERV. LAW § 131, 131-a (McKinney 2008).

¹⁷ *See* N.Y. SOC. SERV. LAW § 22 (McKinney 2005); N.Y. COMP. CODES R. & REGS., tit. 18, § 3580-1.1 (2007).

¹⁸ N.Y. C.P.L.R. art. 78 (McKinney 2008).

¹⁹ *See, e.g.,* Allen v. Blum, 447 N.E.2d 68, 68 (N.Y. 1983) (challenging ongoing welfare policy properly brought as a declaratory judgment action rather than an individual Article 78 proceeding).

²⁰ Disputes involving a federally supported assistance program, *see, e.g.,* the federal Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, other federal statutory rights, *see, e.g.,* the Rehabilitation Act of 1973, 29 U.S.C. § 794, or federal constitutional rights, may give rise to a federal cause of action directly under the relevant statutory provision, or pursuant to 42 U.S.C. § 1983 (2000). *See generally* SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS Ch. 5 (2006), *available at* <http://www.povertylaw.org/poverty-law-library/research-guides/fed-practice-manual/2006-chap-5.pdf>.

In reality, all but a miniscule percentage of such disputes are finally adjudicated at an administrative fair hearing.²¹ New York State law authorizes judicial review of agency determinations after an evidentiary hearing if a petition is filed within four months of the disputed agency action,²² but as a practical matter, this path is not open to welfare claimants without access to counsel. Rather, in the overwhelming majority of cases, the adjudication of welfare rights in New York occurs exclusively through the administrative hearing process.²³ For this reason, we focus on the question of whether indigent claimants who find themselves invoking the administrative hearing process ought to be provided with counsel at government expense as a matter of right.²⁴

A. The Fair Hearing System in New York State

Unlike most States, New York uses a two-tiered structure for welfare program administration, dividing authority between the state government and “local social services districts.”²⁵ The state-level

²¹ See *supra* text accompanying note 5.

²² N.Y. C.P.L.R. 217 (McKinney 2008).

²³ See *supra* note 6 and accompanying text.

²⁴ An alternative approach might consider whether government-funded counsel ought to be provided not at the administrative hearing stage—where an assessment and triage of tens of thousands of cases could be required—but rather at the judicial stage—where the administrative process will have winnowed out many cases (those in which the claimant prevailed) that did not most urgently require counsel and the magnitude of the endeavor might seem more manageable. Though there is some merit to this approach, we believe that the involvement of basic sustenance counsels earlier intervention to guard against unjustified and potentially grave deprivations; earlier intervention would also have additional salutary effects that would reduce the incidence of erroneous administrative decision making, *see infra* text accompanying notes 183-86, and thereby avoid any increased strain on judicial resources.

²⁵ Each county in New York constitutes a social services district, with the exception that the five counties of New York City comprise one district. N.Y. SOC. SERV. LAW § 61 (McKinney 2003).

agency, OTDA, articulates and enforces statewide policy, exercises authority over the local districts, and operates the administrative appeals system throughout the State.²⁶ The local social services districts administer the state's public assistance programs at the ground level, operate the welfare centers, render decisions on applications and ongoing eligibility issues, and generally serve as the point of contact between the welfare system and its intended beneficiaries.

Each year, OTDA receives over 200,000 requests for "fair hearings" to contest an action taken, or conversely, an act not taken, by a local social services district.²⁷ OTDA's Office of Administrative Hearings ("OAH") employs approximately 140 hearing officers²⁸—sometimes referred to as "administrative law judges" ("ALJ")—to conduct hearings and recommend dispositions for the appeals. As a formal matter, the OTDA Commissioner, or the Commissioner's designee, must render a decision on each appeal;²⁹ in practice, a supervising ALJ serves as the Commissioner's designee for these purposes.³⁰ The local social services districts appear at fair hearings through an "agency representative," a trained advocate who presents the local agency's case and defends its actions.³¹ A typical docket for an OAH hearing examiner contains twenty to thirty hearings per

²⁶ N.Y. SOC. SERV. LAW §§ 17, 22.

²⁷ NEW YORK STATE OFFICE OF TEMP. AND DISABILITY ASSISTANCE, 2007 ANNUAL REPORT 9, <http://www.otda.state.ny.us/main/news/OTDA-AnnualReport2007.pdf> (stating that in 2007 there were 241,920 requests for hearings, and 109,030 hearings were held).

²⁸ E-mail from Russell Hanks, Deputy General Counsel of OTDA, to Don Friedman, Managing Attorney, Empire Justice Center (Sept. 4, 2008, 13:54 EST) (on file with authors).

²⁹ NY SOC. SERV. LAW §§ 17, 22.

³⁰ See NEW YORK STATE MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS Ch. 2, available at http://www.cs.state.ny.us/pio/hearingofficermanual/manual_for_hearing_officers.pdf.

³¹ See N.Y. COMP. CODES R. & REGS. tit. 18, § 358-5.7.

day.³² The average time to conduct a welfare fair hearing in New York City is approximately seven minutes.³³

B. Legally Prescribed Hearing Procedures

State statutes and regulations set forth the procedural rules that formally govern the administrative appeals process.³⁴ Any applicant for, or recipient of public assistance, food stamps, Medicaid, or certain other types of assistance may request a hearing to challenge the local welfare agency's action or inaction on her case.³⁵ The state must inform all such appellants of their "right to representation by legal counsel, or by a relative, friend, or other spokesman, or that he may represent himself,"³⁶ of the "availability of community legal services" for the hearing procedures; "of the types of information he may wish to submit" at the hearing; and of "additional information which would clarify" the procedures and would assist the individual to better prepare for the hearing.³⁷ Appellants have a right to examine their case records in advance of the hearing, and at the hearing itself, and also have the right to receive—upon request—a copy of all the evidence the local agency intends to submit, as well as any other document in the agency's possession the appellant identifies as necessary to prepare her case.³⁸ The local agency must provide this ma-

³² E-mail from Russell Hanks, Deputy General Counsel of OTDA, to Don Friedman, Managing Attorney, Empire Justice Center (Aug. 28, 2008) (on file with authors).

³³ Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1714 (1993).

³⁴ See N.Y. SOC. SERV. LAW § 22; N.Y. COMP. CODES R. & REGS. tit. 18, § 358-1.1.

³⁵ N.Y. SOC. SERV. LAW § 22(3), (5); N.Y. COMP. CODES R. & REGS. tit. 18, § 358-2.4.

³⁶ N.Y. SOC. SERV. LAW § 22(12)(c).

³⁷ *Id.* § 22(12)(d), (f), (g).

³⁸ N.Y. COMP. CODES R. & REGS., tit. 18, §§ 358-3.4(b), 358-4.2(c), (d).

terial to the appellant at a reasonable time before the date of the hearing if the appellant makes her request sufficiently in advance of the hearing.³⁹

The hearings themselves are adversarial proceedings presided over by an “impartial” hearing examiner from the OTDA’s Office of Administrative Hearings.⁴⁰ The hearing officer bears a general responsibility for ensuring the fairness of the proceedings and is directed by regulation to “elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness.”⁴¹ However, the hearing officer may not “act as a party’s representative.”⁴² A representative of the local agency “must appear at the hearing” with the appellant’s case record and “a written summary of the case,” and must be “prepared to present evidence” and argument in support of the agency’s action or failure to act.⁴³ The appellant has the right to appear in person and/or through counsel, to present his case, to offer documents, to bring witnesses, to examine evidence presented by the agency, and to question agency witnesses.⁴⁴ The local agency bears the burden of proof in all cases involving a reduction or termination of assistance.⁴⁵ The appellant bears the burden in cases challenging a denial of an application or the adequacy of assis-

³⁹ *Id.* at §§ 358-3.4(c); 358-3.7(b). *See also* Rivera v. Bane, Index No. 045305/1992 (Sup. Ct. N.Y. County 1995).

⁴⁰ N.Y. COMP. CODES R. & REGS., tit. 18, § 358.

⁴¹ *Id.* § 358-5.6(a), (b)(3).

⁴² *Id.* § 358-5.6(b)(3).

⁴³ *Id.* § 358-4.3(b).

⁴⁴ *Id.* § 358-3.4.

⁴⁵ N.Y. COMP. CODES R. & REGS., tit. 18, § 358-5.9(a).

tance.⁴⁶ All hearing decisions must be based upon “substantial evidence”⁴⁷ and only upon evidence entered into the record.⁴⁸

C. Reality of Process at Fair Hearings

Unfortunately, the formal and quasi-judicial nature of the hearing process as described by state statute and regulation bears little resemblance to the actual experience of thousands of individuals who must negotiate this system each year. Pro se appellants are frequently unaware of, or do not understand how to assert the array of formal rights, obligations, and procedures that govern the fair hearing process. For example, although all appellants have a right to obtain copies of the local agency’s evidence in advance of the hearing—a right that is critical to the preparation of a meaningful defense—this right is almost never effectively invoked by pro se appellants.⁴⁹ Many factors, including confusing notices, language barriers, education level, physical and mental disability, and the intense stress brought on by threats to subsistence benefits, may impede effective participation in the hearing process by the pro se appellant.⁵⁰ In addi-

⁴⁶ *Id.* § 358-5.9(a).

⁴⁷ *Id.* § 358-5.9(b).

⁴⁸ *Id.* § 358-6.1(a).

⁴⁹ Conversation between Randal Jeffrey, attorney at the New York Legal Assistance Group, and Plaintiffs’ Counsel in *Bane* (on file with the authors); Conversation between Ian F. Feldman, former Assistant Attorney-in-Charge, The Legal Aid Society, Bronx Trial Office, currently Litigation Director, Disability Rights Project, Urban Justice Center (Aug. 2008) (on file with authors).

⁵⁰ Two-thirds of the adults receiving public assistance in New York State have not completed high school and approximately ten percent of adult recipients in New York City lack a ninth grade education. *Testimony of New York State OTDA Commissioner David A. Hansell Before the New York State Assembly Social Services Committee: Hearing to Assess the Adequacy of the Public Assistance Grant in New York State* 5 (Sept. 6, 2007); New York City Department of Social Services, Human Resources Administration, “HRA Facts Quarterly Supplement” (2008), *available at*

tion, the pressure of a docket that routinely consists of twenty-five to thirty hearings per day—and generates hearings that average seven minutes apiece—seems inconsistent with the full realization of the procedural safeguards prescribed by state law, especially in the case of unrepresented appellants.

Although the lack of detailed data poses a challenge for assessing the adequacy of the hearing process, the accumulated experience of advocates around the State allows us to describe a typical pro se hearing chronology.⁵¹ The process ordinarily begins when the individual receives a notice indicating that an application has been denied, or that benefits will be reduced or terminated. These state-prescribed notices are often as long as eight pages and provide a wealth of information, but in language and with technical detail that challenges even experienced advocates. As a result, the majority of appellants do not fully comprehend the legal basis for the agency decision or the procedural rights available to them. But even in cases where the appellant does understand the nature of the agency's claim and the basic structure of the hearing process, the pro se appellant is often not in a position to prepare her case effectively. An individual may know, for instance, that her application was denied because she failed to present a particular document. Her defense may be intuitively sound: perhaps she had made diligent, but unavailing, efforts to locate and produce the document. But there is little chance she will

http://www.nyc.gov/html/hra/downloads/pdf/hrafacts_2008_04.pdf.

⁵¹ The actual hearing experience of these advocates coupled with comparative information they obtained from clients who appeared pro se at a hearing, and from review of transcripts and recordings of pro se hearings provide a more accurate window into the experience of the unrepresented appellant. Two such transcripts are reproduced in the Appendix to this Article.

know or have the research capacity to learn that once she made a reasonable, but unsuccessful effort to obtain a required document, the agency was legally required to assist her. Moreover, if a fee was required to obtain the document, the agency was obligated to pay the fee if she could not afford it.⁵² Furthermore, there is the chance the particular document had been improperly demanded because it did not bear on benefits eligibility. The complexity of this seemingly simple situation pales in comparison with, for example, the legal and factual issues involved in a denial of benefits based on immigration status.⁵³

Many pro se appellants thus arrive at the hearing anxious and ill-prepared. They are called into the hearing room where they often do not understand fundamental elements of the process they confront. Many appellants do not know that the hearing officer is a state employee and the agency representative is there on behalf of the local district, that the proceeding is adversarial, or that appellants have a range of procedural rights, including the right to cross-examine the agency representative or compel the appearance of out-of-court declarants whose statements the agency seeks to introduce. Typically, the only people present in the hearing room are the hearing officer, the agency representative, and the appellant. Where necessary, an interpreter may attend and the appellant may be joined by a friend, relative, or in rare instances, a trained representative. In the adversarial proceeding about to commence, the agency representative is a trained advocate who is familiar with welfare rules and procedures, and often

⁵² N.Y. COMP. CODES R. & REGS. tit. 18, § 351.5(a).

⁵³ See N.Y. SOC. SERV. LAW § 122; N.Y. COMP. CODES R. & REGS., tit. 18, § 349, 373.

has extensive experience in fair hearing advocacy. The appellant is most likely unfamiliar with welfare rules and procedures and has attended few, if any, hearings.

The hearing officer should make an introductory statement outlining the manner in which the hearing will proceed and the issues to be addressed. The agency representative then presents the agency's evidence in support of its determination. Formal rules of evidence do not apply,⁵⁴ and in the vast majority of hearings, the agency's evidence consists entirely of documents, computer records and hearsay statements from the appellant's case record. In theory, the appellant must be given an opportunity to examine and object to the agency's evidence before it is taken into the record, but hearing officers frequently do not honor this right, especially in the case of pro se litigants. In New York City, where roughly two-thirds of all hearings in the state are held, the agency representatives do not have personal knowledge of the appellant's circumstances and must therefore rely upon the documents in the agency's "evidence packet" to construct an account of the case. The local agency in New York City does not produce appellants' case records at fair hearings, although state law requires it.⁵⁵ To the extent the documents do not afford the representative a complete narrative of the events leading to the agency determination, the representative will often "testify" to fill the factual gaps in a manner consistent with the agency's position. Pro se appellants rarely, if ever, challenge these unsubstantiated statements, or otherwise exercise their right to confront and cross-examine

⁵⁴ *Id.* § 358-5.9.

⁵⁵ *Id.* § 358-4.3(c); *see also* Greer v. Blum, 462 F. Supp. 619, 622 (S.D.N.Y. 1978).

adverse witnesses; nor do the hearing officers take steps to facilitate the exercise of this right.

Once the agency completes its case, the hearing officer should invite the appellant to present her side, but too often the invitation is not forthcoming. Instead, the hearing officer may attempt to expedite the process by asking the appellant one or two questions that the officer believes most pertinent. Faced with a perpetually crowded calendar, hearing officers frequently express the need to move the proceedings to an expeditious conclusion. After a total duration of fewer than ten minutes, the typical hearing comes to a close, and the appellant is instructed to wait for a decision.

II. THE RIGHT TO COUNSEL IN WELFARE CASES: A CONCISE DOCTRINAL SURVEY

Thus far, no federal or New York State court has ruled that a welfare claimant has a right to publicly funded representation in a civil proceeding involving subsistence benefits. The closest approach to such a ruling appeared in *Goldberg*, where the Supreme Court held that welfare recipients have a due process right to an evidentiary hearing prior to termination of benefits, and that in light of the weighty personal interests at stake and the high risk of erroneous deprivation, recipients must be afforded procedural safeguards, including the right to retain counsel if desired.⁵⁶ On this last point, Justice

⁵⁶ *Goldberg*, 397 U.S. at 263-64, 266, 270-71. Though stating that the “pre-termination hearing need not take the form of a judicial or quasi-judicial trial,” and characterizing the process due as “minimum procedural safeguards,” the Court went on to prescribe a set of procedural rights nearly unique in administrative adjudication and very close in effect to a regular judicial proceeding. *Id.* at 266-67. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1977-78 (1996) (arguing that the

Brennan wrote for the Court:

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.⁵⁷

Read in isolation, this passage may seem internally inconsistent. It opens with the critical recognition that in many cases a welfare recipient’s right to be heard “would be of little avail” without the assistance of counsel.⁵⁸ But the Court immediately shifts direction, declining to require provision of counsel “at the pre-termination hearing,” even though the absence of appointed counsel would leave most welfare claimants—who by definition lack the funds to retain a lawyer—without the very procedural safeguard the Court had just declared essential to afford a meaningful opportunity to be heard.⁵⁹

Though this passage may easily be mistaken as rejecting a right to state-funded counsel at welfare proceedings, Justice Brennan’s opinion in fact did no such thing. At the time the Court considered and decided *Goldberg*, New York State administered a two-

Goldberg Court “transformed welfare . . . from a mere privilege completely unprotected by due process to a property right subject to the most stringent procedural safeguards available in the United States legal system”).

⁵⁷ *Goldberg*, 397 U.S. at 270-71 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

⁵⁸ *Id.* at 270.

⁵⁹ *Id.*

tiered scheme of welfare appeals composed of a pretermination process and an independent, more extensive post-termination “statutory ‘fair hearing.’”⁶⁰ The *Goldberg* Court merely declined to order provision of counsel *at the pretermination phase* in this two-tiered appeals scheme.⁶¹ Moreover, the Court expressly cautioned that it had calibrated the “minimum procedural safeguards” required at the pre-termination proceeding, “bear[ing] in mind that the [post-termination] statutory ‘fair hearing’ [would] provide the recipient with a full administrative review.”⁶² In other words, the Court’s analysis of the process due at the pre-termination stage assumed that any welfare claimant who did not prevail there would have recourse to a full-blown “statutory ‘fair hearing’ ” at which more ample procedural protections would come into play.⁶³ And, notably, the Court assumed that the enhanced procedural safeguards at these “statutory ‘fair hearings’ ” would *include a right to publicly funded representation*; Justice Brennan expressly recited that federal regulations due to take effect imminently “would give recipients a right to *appointed counsel* at ‘fair hearings.’”⁶⁴

The *Goldberg* Court had no occasion to decide whether due

⁶⁰ *Id.* at 266-67.

⁶¹ *Id.* at 270-71.

⁶² *Goldberg*, 397 U.S. at 266-67.

⁶³ *Id.*

⁶⁴ *Id.* at 258 n.3 (citing Social & Rehab. Servs., Dep’t of Health, Educ., & Welfare, 34 Fed. Reg. 1144 (Jan. 24, 1969) (to be codified at 45 C.F.R. pt. 205) (emphasis added)). Disturbingly, the Department of Health, Education, and Welfare revoked the requirement of appointed counsel, without any explanation, soon after *Goldberg* was decided. See Social & Rehab. Serv., Dep’t of Health, Educ., & Welfare, 35 Fed. Reg. 8448 (proposed May 29, 1970), 35 Fed. Reg. 10,591 (June 30, 1970) (final). The amended regulations continued to offer states federal matching funds to provide counsel to welfare claimants in administrative and judicial proceedings. Social & Rehab. Serv., Dep’t of Health, Educ., & Welfare 35 Fed. Reg. 10,591.

process mandated state-funded counsel at the “statutory fair hearing,” affording “full administrative review” to recipients who did not succeed in their less formal, pretermination proceedings. Nor did *Goldberg* settle the question of whether states would have to provide counsel in a single-tiered system—such as the one New York State currently operates—offering welfare recipients a one-shot, “full administrative review” prior to termination of assistance.⁶⁵ Nevertheless, the logic of the Court’s due process analysis strongly implied a right to assistance of counsel at some point before a decision to terminate subsistence benefits became final. As Justice Black argued in his dissent, although the Court mandated “only the opportunity to have the benefit of counsel at the administrative hearing . . . it is difficult to believe that the same reasoning process would not require the appointment of counsel.”⁶⁶ Indeed, at least some federal and state welfare administrators contemplated that public financing for such counsel would be necessary.⁶⁷

Though *Goldberg* may have pointed towards a right to representation in welfare proceedings, any hope for judicial enforcement

⁶⁵ New York State abandoned its two-tier system of administrative appeals—under which local welfare officials conducted the predeprivation hearings and the state conducted the postdeprivation “fair hearings”—after the Second Circuit ordered it to comply with federal regulations prohibiting reduction or termination of assistance prior to the offer of a *state conducted* fair hearing. See *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971).

⁶⁶ *Goldberg*, 397 U.S. at 278-79 (Black, J., dissenting). Though a dissenting justice’s “slippery slope” objections often do not provide a reliable guide for assessing the import of the majority opinion, Justice Black’s observation here was entirely reasonable. If the meaningful opportunity to be heard guaranteed by due process often required assistance of counsel, and welfare claimants by definition lacked the resources to retain such counsel, *Goldberg* had moved doctrine to within a short step of a right to state-funded representation, even with respect to the pretermination proceedings in New York’s two-tiered administrative appeal structure. The argument for appointed counsel in the current, single-tier appeal system presents an *a fortiori* case.

⁶⁷ See *supra* note 59 and accompanying text.

of such a right faded almost immediately. Before the year was out, the Warren Court's "once glittering crusade to extend special constitutional protection to the poor" went into a "retreat" that soon "turned into a rout."⁶⁸ The Burger Court's retrenchment reached beyond substantive welfare rights to encompass even purely procedural rights—an area in which the judiciary had traditionally felt most capable—prematurely ending a nascent jurisprudence of access to civil justice for the poor.⁶⁹

The first front in this doctrinal retrenchment appeared in the area of judicial filing fees and costs.⁷⁰ After ruling in *Boddie v. Connecticut*⁷¹ that due process requires states to waive filing fees for indigents in divorce proceedings, the Court all but closed the door to such claims in *United States v. Kras*.⁷² In *Kras*, the Court ruled five-to-four that an indigent seeking to discharge his debts in bankruptcy, but unable to pay the Bankruptcy Court's filing fee, had no due process or equal protection right to a fee waiver.⁷³ The Court distinguished *Boddie* on two grounds. First, it asserted that *Boddie's* reasoning rested crucially on the fact that states hold a "monopol[y] . . . [over] the means for legally dissolving [marriage]," whereas govern-

⁶⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 148 (1980); see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1627-72 (The Foundation Press, Inc. 2d ed. 1988); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1306-13, 1333 (1993).

⁶⁹ See, e.g., Pierce, *supra* note 56, at 1973 (observing that by 1978, the Supreme Court had issued nine decisions scaling back its procedural due process jurisprudence).

⁷⁰ For a thorough description and critique of these cases, see Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153.

⁷¹ 401 U.S. 371 (1971).

⁷² 409 U.S. 434 (1973).

⁷³ *Id.* at 443-47.

ment held no analogous monopoly with respect to Kras; a debtor denied access to the bankruptcy courts is not without recourse, the Court said, because he may “in theory . . . adjust his debts by negotiated agreement with his creditors.”⁷⁴ Second, the Court explained, the personal interests in *Boddie*—involving “the marital relationship and . . . the associational interests that surround the establishment and dissolution of that relationship”—had been recognized as having high constitutional significance, whereas Mr. Kras’s interest in eliminating his debt burden, “although important . . . [did] not rise to the same constitutional level.”⁷⁵ Notably, the Court left open the possibility that an individual’s interest in securing “basic necessities” might be of sufficient constitutional magnitude to alter the due process calculus.⁷⁶

Such a scenario reached the Court only a year later, in *Ortwein v. Schwab*,⁷⁷ but the involvement of “basic necessities” in that case had no perceptible impact on the Court’s analysis. In *Ortwein*, a five-member majority upheld Oregon’s appellate filing fee against a due process challenge brought by a recipient of old age assistance who sought judicial review of an administrative action reducing his subsistence payments.⁷⁸ The Court parried Mr. Ortwein’s invocation of *Goldberg* with the dubious logic that since *Goldberg* only guaran-

⁷⁴ *Id.* at 444-45.

⁷⁵ *Id.*

⁷⁶ In discussing the nature of the personal interest at stake, the Court observed that “[i]f Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities.” *Id.* at 445 (emphasis added).

⁷⁷ 410 U.S. 656 (1973) (5-4 decision) (per curiam).

⁷⁸ *Id.* at 656-57, 661.

teed a pretermination administrative proceeding (which Mr. Ortwein had received), and “due process does not require a state to provide an appellate system,”⁷⁹ a filing fee denying Ortwein the opportunity to be heard in court does not offend the Fourteenth Amendment.⁸⁰ The Court distinguished *Boddie* with the summary assertion that Mr. Ortwein’s interest in increased welfare payments has “far less constitutional significance than the interest of the *Boddie* appellants” in judicial dissolution of their marriages.⁸¹ As in *Kras*, the Court did not deny the importance of the private interest at issue; nor, however, did it identify the quantum of “constitutional significance” necessary to trigger a due process right to judicial access, or set forth a doctrinal framework for undertaking that analysis, or explain why Mr. Ortwein’s urgent and intense interest in his old age payments fell short.⁸²

Though highly under-theorized, *Kras* and *Ortwein* plainly communicated the Burger Court’s view that economic interests—even perhaps the interests of those living on the margins of subsistence—were insufficient to warrant a judicially mandated commitment of public funds to open the courts to those unable to purchase

⁷⁹ *Id.* at 660 (citing *McKane v. Durston*, 153 U.S. 684 (1894)).

⁸⁰ The dissenters in *Ortwein* quite rightly took the majority to task for resting its argument on an implied premise that states could constitutionally cut off any judicial remedy for agency action denying “a preexisting right.” See *id.* at 661-62 (Douglas, J., dissenting); *id.* at 665 (Marshall, J., dissenting).

⁸¹ *Id.* at 659 (majority opinion). Ortwein’s circumstances otherwise exactly paralleled those of the divorce claimants in *Boddie*. As the Court noted in *Kras*, “*Boddie* was based on the notion that a State cannot deny access, simply because of one’s poverty, to a ‘judicial proceeding (that is) the only effective means of resolving the dispute at hand.’” *Kras*, 409 U.S. at 443 (quoting *Boddie*, 401 U.S. at 376). The judicial review Ortwein sought was plainly “the only effective means of resolving the dispute” with the Oregon Public Welfare Division once it had issued a final determination reducing his benefits. *Boddie*, 401 U.S. at 376.

⁸² *Ortwein*, 410 U.S. at 658-61.

admission.⁸³ The Court made little attempt to construct a rationale or offer a reasoned justification for the ad hoc lines that it had drawn; but there was no mistaking its determination to reverse the perceived activism of the Warren years and create firm barriers against further expansion of the “due process revolution.”⁸⁴ In light of these rulings, it was nearly unimaginable that the Court would follow *Goldberg’s* analysis to its logical conclusion and find a due process right to state-funded representation in welfare proceedings. Indeed, eight years after *Ortwein*, the Supreme Court extinguished any lingering doubt on this score with its deeply troubling decision in *Lassiter v. Department of Social Services*,⁸⁵ discussed below. But even before the Supreme Court handed down *Lassiter*, the New York Court of Appeals ruled directly that welfare claimants have no Fourteenth Amendment right to assigned counsel in fair hearings.⁸⁶

Brown v. Levine concerned a recipient of aid to the disabled who requested a fair hearing to challenge a proposed termination of his benefits.⁸⁷ After the hearing examiner informed Mr. Brown that

⁸³ See Michelman, *supra* note 70, at 1162-65.

⁸⁴ See, e.g., *TRIBE*, *supra* note 68, at 760-61 (commenting on the Supreme Court’s “narrowed . . . understanding of the substantive scope of the ‘life, liberty, and property’ [interests] entitled to due process protection” and the Court’s “devalued assessment of . . . what process is due”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 968 (2000) (discussing the Supreme Court’s movement away from the “due process revolution” to a regime that “tend[s] to defer to legislative judgments about what procedures are appropriate in different contexts,” and noting that this “more deferential attitude has held the costs of due process hearings in check”).

⁸⁵ 452 U.S. 18 (1981).

⁸⁶ *Brown*, 333 N.E.2d at 377.

⁸⁷ *Id.* at 375. Aid to the disabled was a federal-state-funded and state administered program for destitute disabled individuals. It was subsequently replaced by the federally administered Supplemental Security Income program. See Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (codified as amended in scattered sections of 42 U.S.C. (1972)).

the agency's "termination charges contained . . . serious allegations which, if proved, might constitute fraud,"⁸⁸ Brown sought and received two adjournments for the purpose of obtaining counsel. When his efforts proved unavailing—he did not have the funds to retain counsel, and the local legal services office, overwhelmed by its existing caseload, could not offer him assistance⁸⁹—Brown asked the hearing examiner to appoint counsel to represent him. The hearing examiner refused and Brown appealed to the New York courts, alleging violations of the Fourteenth Amendment's Equal Protection and Due Process Clauses.⁹⁰

In a brief and thinly reasoned opinion, the New York Court of Appeals rejected Brown's claims. After acknowledging the presence of "an important property interest," entitled to due process protection, the court (1) recited the state regulations governing fair hearing procedures;⁹¹ (2) opined (without reference to the record or any other source) that the hearing process "while it may be adversarial in form, is largely . . . inquisitorial," and "would appear designed to minimize inaccuracies and to assure quality and fairness in adjudication,"⁹² and (3) summarily concluded that "legally trained advocates, however desirable, would not appear essential to ensure fairness to either side."⁹³ This comprised the entirety of the court's affirmative analysis.⁹⁴

⁸⁸ *Brown*, 333 N.E.2d at 378 (Fuchsberg, J., dissenting).

⁸⁹ *Id.* at 379 n.*.

⁹⁰ *Id.* at 375 (majority opinion).

⁹¹ *Id.* at 376.

⁹² *Id.*

⁹³ *Brown*, 333 N.E.2d at 376.

⁹⁴ The court also summarily rejected Brown's claim that the "potential for criminal prosecution for welfare fraud" ought to call forth a right to counsel, and distinguished a New York

Regrettably, the Court of Appeals declined to engage seriously with the claims presented in *Brown*. The opinion lacks careful analysis, rests in significant part on counterfactual speculation about the nature of welfare hearings, and fails to set forth the constitutional rule against which the challenged state policy would be measured. This last omission is not merely one of form. The court neglected to address even the most basic components of a due process analysis: it made no fact based inquiry into whether Mr. Brown, or others in similar circumstances, could receive a “meaningful” opportunity to be heard without the aid of counsel; there was no discussion of the nature and complexity of the issues to be adjudicated at the fair hearings, the level of skill and resources required for effective preparation and presentation of claims and defenses at the hearing, the ability of Mr. Brown to perform any of these tasks pro se, or any other factor relating to the risk of erroneous deprivation or the extent to which provision of counsel might mitigate that risk.⁹⁵

In place of any such analysis, the court simply declared that New York’s fair hearing regulations “would appear designed to minimize inaccuracies and assure quality and fairness in adjudication,”⁹⁶ and—as though this observation self-evidently disposed of the issue—jumped directly to the conclusion that due process never requires publicly funded representation at a welfare hearing. The

precedent that required provision of counsel to indigent parents in child neglect proceedings on the ground that such proceedings involved a “fundamental” interest and right. *Id.* at 377.

⁹⁵ Although *Mathews* was not decided until the year after *Brown*, the pillars of due process analysis—nature of private interest, risk of erroneous deprivation, and potential benefit of enhanced procedural protection—had already been established in *Goldberg* itself. See *Goldberg*, 397 U.S. at 263-66.

⁹⁶ *Brown*, 333 N.E.2d at 376.

flaws in the court's approach should be apparent. For one thing, virtually any system of adjudicatory procedural rules—including any state system of criminal procedure—is “designed to minimize inaccuracies and ensure quality and fairness,”⁹⁷ yet at least since *Gideon v. Wainwright*,⁹⁸ that fact alone has never been accepted as sufficient to defeat a due process claim for assigned counsel. The Court of Appeals made no attempt to distinguish New York's wholly unremarkable fair hearing procedures from any run-of-the-mill set of procedural rules, nor point to any extraordinary protections for pro se appellants that could support a categorical and binding presumption against the need for publicly funded counsel.⁹⁹

The court's rationale was further undermined by its reliance on an inaccurate description of the fair hearing process, one directly at odds with the state's fair hearing regulations. Those regulations (which the court held out as a reliable description of the state's fair hearings process earlier in its opinion) provide for adversarial proceedings at which the local welfare agency's case is presented by experienced personnel trained for the purpose, and over which the hearing examiner presides as a neutral and impartial adjudicator, with little or no regulatory duty or authority to guide or assist an unrepre-

⁹⁷ See *id.*; see also FED. R. CIV. P. 1 (construing the F.R.C.P. as “secur[ing] the just, speedy, and inexpensive determination of every action and proceeding”).

⁹⁸ 372 U.S. 335 (1963).

⁹⁹ The regulations recited by the court required: (1) notice of adverse administrative action, together with information on how to request a fair hearing, the availability of community legal services and the right to bring a representative to the hearing; (2) unreduced aid payments pending the outcome of the hearing; (3) an “impartial” hearing officer and decision based on the record; (4) no “[t]echnical rules of evidence”; and (5) “[t]he right to testify, to produce witnesses and evidence and to cross-examine.” *Brown*, 333 N.E.2d at 376.

sented claimant.¹⁰⁰ Yet the court casually brushed aside these regulatory provisions and declared—with no citation at all—that fair hearings were in fact not “adversarial” proceedings, but rather “inquisitorial” ones, and the local welfare departments were not “invariably” represented by trained advocates.¹⁰¹ The court’s counterfactual characterization of the fair hearing process certainly supported its argument against a due process right to counsel, but there was no basis for that characterization in the law or, apparently, in the record.

Judge Fuchsberg issued the lone dissenting opinion. Drawing on *Goldberg*, he emphasized the gravity of an individual’s interest in preserving relief payments, the loss of which might “threaten” the person’s “very survival;” the importance of the right to defend against any such loss at a “due process hearing;” and the recognized right to be represented by counsel in that proceeding.¹⁰² Echoing Justice Black’s dissent, Judge Fuchsberg reasoned that since a “legitimate welfare recipient . . . is, by definition, unable to afford to pay counsel, the Supreme Court’s grant of the right to counsel” in *Goldberg* would be “an empty gesture” unless counsel “or the means to procure it is provided.”¹⁰³ Unlike the majority, Judge Fuchsberg accurately described fair hearings as “adversary proceeding[s]” at which the welfare agency “most often is, represented by counsel.”¹⁰⁴

¹⁰⁰ N.Y. COMP. CODES R. & REGS., tit. 18, § 358-1.1.

¹⁰¹ *Brown*, 333 N.E.2d at 376.

¹⁰² *Brown*, 333 N.E.2d at 378 (Fuchsberg, J., dissenting).

¹⁰³ *Id.* Some commentators and courts, including, apparently, the *Brown* majority, have misread *Goldberg* as declining to find a right to publicly funded counsel at administrative proceedings challenging a termination of welfare benefits. See *supra* notes 56-68 and accompanying text (elaborating on the *Goldberg* Court’s discussion of a right to state provided counsel).

¹⁰⁴ *Brown*, 333 N.E.2d at 379 (Fuchsberg, J., dissenting). Under current regulations, the

Noting that unrepresented litigants, “especially in matters where important legal rights are contested,” are likely “to find themselves handicapped by ignorance or even fear of the law” and “lack of the expertise required for effective advocacy,”¹⁰⁵ the dissent concluded that at least in some cases, a welfare claimant “should not have to rely on administrative paternalism or the haphazardness of self-representation,” and instead is entitled to the assistance of counsel.¹⁰⁶

The Court of Appeals’ summary rejection of Mr. Brown’s due process claim, though breathtaking, reflected the waning fortunes of antipoverty politics and jurisprudence in the mid-1970s, and the growing reluctance of state and federal judiciaries to “impos[e] costly due process requirements in what might be seen as large-scale intrusions into government programs.”¹⁰⁷ Ironically, the court twice alluded to the desirability of assigned counsel at welfare hearings,¹⁰⁸ implicitly acknowledging that the presence of trained advocates would significantly affect process and outcomes, a fact highly relevant to the due process calculus. But, rather than pursue that insight through a textured constitutional analysis, the court offered a weakly reasoned justification for a result it appears to have reached on a

local welfare departments must appear through a representative at every hearing, N.Y. COMP. CODES R. & REGS. tit. 18, § 358-4.3(b), unless it obtains prior permission from the OTDA in an exceptional case to appear “on papers only, . . . where the rights of the appellant can be protected and the personal appearance of the agency is neither feasible nor necessary.” *Id.* § 358-4.3(c). Agency representatives need not be, and typically are not, attorneys.

¹⁰⁵ *Brown*, 333 N.E. at 377 (Fuchsberg J., dissenting).

¹⁰⁶ *Id.* at 379.

¹⁰⁷ See *TRIBE*, *supra* note 68, at 710. Consistent with this general trend, the New York Court of Appeals, earlier in the same year that it decided *Brown*, rejected an indigent’s due process claim for assigned counsel in divorce proceedings. *In re Smiley*, 330 N.E.2d 453 (1975) (4-3 decision).

¹⁰⁸ *Brown*, 333 N.E.2d at 376-77.

blunter, unspoken rationale: that any decision to commit substantial public resources to legal counsel for welfare recipients, even where due process norms may require it, belongs to the legislature, not the judiciary.¹⁰⁹

Six years later, in *Lassiter v. Department of Social Services*,¹¹⁰ a five-to-four majority of the Supreme Court further reduced the prospects for judicially enforceable rights to state-funded counsel in civil proceedings. The specific holding in *Lassiter* was that North Carolina did not deprive an indigent mother of due process when it permanently terminated her parental rights through an adversarial proceeding at which she could not afford an attorney, and the state refused to provide one.¹¹¹ *Lassiter's* full significance, though, far exceeds this holding because the majority there announced a striking new “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”¹¹² This categorical presumption against the right to counsel, Justice Stewart explained, would be weighed against and would ordinarily override the generally applicable and otherwise controlling due process analysis prescribed by *Mathews v. Eldridge*.¹¹³ In other words, even if application of the *Mathews* test—which assesses the

¹⁰⁹ *Id.* That this consideration supplied the overriding motivation for the court was reflected as well in Judge Fuchsberg’s dissent. Anticipating the “cry of cost” that would greet a decision requiring counsel at fair hearings, and answering his colleagues’ choice of judicial method and approach, Judge Fuchsberg described the issue at hand as involving “an essential of the administration of justice, a matter peculiarly within the province of our branch of government,” and “respectfully suggest[ed] that in such matters courts are called upon to take the lead rather than exercise restraint.” *Id.* at 325.

¹¹⁰ 452 U.S. at 18.

¹¹¹ *Lassiter*, 452 U.S. at 24-32.

¹¹² *Id.* at 26-27.

¹¹³ *Mathews*, 424 U.S. at 331-35.

demands of due process by balancing the private interests at stake, the risk of erroneous deprivation, and the government's countervailing interests¹¹⁴—pointed decisively to the need for court-appointed counsel, the majority's new presumption would oust that analysis and dictate the contrary result, except in an extraordinary case.

One need only examine the circumstances in *Lassiter* itself to get an idea of just how exceptional a case is required to be in order to win a right to counsel in a civil setting. Characterizing the issue as “whether the three [*Mathews*] factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption,”¹¹⁵ Justice Stewart gave the following account of those factors in Ms. Lassiter's case:

[T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.¹¹⁶

In any other context, this lopsided alignment of the *Mathews* factors would unquestionably lead to the conclusion that due process de-

¹¹⁴ *Id.*

¹¹⁵ *Lassiter*, 452 U.S. at 31.

¹¹⁶ *Id.*

manded the additional procedural safeguard. Yet the Court invoked its new presumption to conclude that “the Constitution [does not] require[] the appointment of counsel in every parental termination proceeding,”¹¹⁷ and did not require it in Ms. Lassiter’s case. This ruling left open the possibility that the presumption against appointed counsel might be overcome in a particular case if “the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak,” this assessment to be made on a case-by-case basis by the trial court.¹¹⁸

As Justice Blackmun pointed out in his dissent, the majority’s refusal to establish generally applicable due process parameters for North Carolina’s parental termination proceedings broke from the Court’s consistent prior approach of assigning due process requirements through “case-by-case consideration of different decisionmaking contexts, not of different *litigants* within a given context.”¹¹⁹ In theory, *Lassiter*’s litigant-specific approach to due process overrode *Brown*’s categorical ruling against a right to counsel in *any* welfare proceeding,¹²⁰ and opened the way for particular welfare claimants to make individualized, hearing specific due process demands for representation. Yet, *Lassiter*’s introduction of its own quasi-categorical analysis—the presumption against a right to counsel in civil cases—and the potency with which it endowed that new presumption, would almost certainly neutralize this limitation on *Brown* as a practical

¹¹⁷ *Id.* at 31.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 49 (Blackmun, J., dissenting).

¹²⁰ See *supra* notes 96-107 and accompanying text.

matter.

III. ARGUMENT FOR A RIGHT TO COUNSEL IN WELFARE HEARINGS

In this Part we argue that the courts' refusal to enforce a due process right to counsel in *Lassiter*, *Brown*, and similar cases stemmed principally from institutional and prudential considerations having to do with the judiciary's reluctance to impose what it regards as substantial fiscal liabilities on state governments;¹²¹ that core due process principles, reaffirmed by the Court in cases such as *Goldberg* and *Mathews*, nevertheless mandate public provision of counsel in certain proceedings at which subsistence benefits are in jeopardy; and that legislators—who are not constrained by the institutional and separation-of-powers concerns that may counsel *judicial* restraint—bear a broader obligation, both constitutionally and as a matter of sound policy, to remedy the actual denial of due process experienced by thousands of impoverished welfare claimants in New York State each year.

A. The Right to Counsel as an Underenforced Constitutional Norm

The starting point for our analysis is the idea that courts often “underenforce” constitutional norms, especially those that appear in the Constitution's open-textured clauses. The theory of underen-

¹²¹ See *TRIBE*, *supra* note 68, at 710 (linking the retrenchment in due process jurisprudence to the Supreme Court's reluctance to impose costly procedural requirements on government).

forced constitutional norms, developed by Lawrence Sager in 1978¹²² and now widely recognized by constitutional scholars,¹²³ asserts that courts often decline to enforce constitutional provisions to their full meaning for reasons of perceived institutional incapacity or deference to political processes.¹²⁴ When courts defer on such grounds, the theory holds, the resulting judicial action ought not be viewed as the definitive “statement about the meaning of the constitutional norm in question.”¹²⁵ Rather, the full measure of the constitutional norm—beyond the portion the judiciary feels competent to enforce—should be regarded as binding other governmental actors.¹²⁶

The Supreme Court’s right-to-counsel jurisprudence—indeed, its access-to-justice jurisprudence generally—bears the hallmarks of underenforcement. When *Lassiter* reached the Court, the basic tenets

¹²² Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21 (1978).

¹²³ See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1299-1303 (2006). Fallon also argues that the Supreme Court has itself recognized the divergence between pure constitutional norms and the judicial standards deployed to enforce them. *Id.* at 1281-83. See also Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3-4 (2004); Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. 193 (2006).

¹²⁴ See Sager, *supra* note 122, at 1212.

¹²⁵ *Id.* at 1221. An updated and elaborated version of the theory of underenforced constitutional norms appears in LAWRENCE G. SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

¹²⁶ The theory of underenforced constitutional norms, while never expressly acknowledged by the Supreme Court, *but see* Fallon, *supra* note 123, at 1281-83, recently appeared in Justice Breyer’s dissent in *Bd. of Trs. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting). *Garrett* held that the employment discrimination provisions of the Americans with Disabilities Act exceeded Congress’ civil rights power because the statute imposed duties “far exceed[ing] what is constitutionally required.” *Garrett*, 531 U.S. at 358. Writing for the four dissenters, Justice Breyer explained that the Court’s earlier decision in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), which declined to apply “heightened scrutiny” to “disability discrimination claims,” did not reflect a judgment about the outer limit of protection afforded by the Fourteenth Amendment to people with disabilities, but rather rested on institutional and separation of powers considerations that did not apply to the legislative branch, and therefore, do not cabin the constitutional duties and powers of Congress. *Garrett*, 531 U.S. at 383 (Breyer, J., dissenting).

of due process, and the analytical framework for determining its contours in specific contexts were both well established.¹²⁷ In particular, *Mathews* had directed courts to calibrate due process demands by balancing three factors: the gravity of the individual interest at stake, the risk of erroneous deprivation under the challenged procedures (and the value of adding additional safeguards) and the government's interests.¹²⁸ Application of the *Mathews* analysis in *Lassiter*, the majority effectively conceded, would have compelled a ruling that states must guarantee the assistance of counsel in parental termination proceedings.¹²⁹ Yet the Court declined to follow the settled doctrine to its logical conclusion, opting instead to interpose a new, previously unheard of, and almost entirely undertheorized "presumption" against a right to counsel in cases not involving a threat to physical liberty.¹³⁰

¹²⁷ See, e.g., *Mathews*, 424 U.S. at 331-35.

¹²⁸ *Id.* at 334-35 (listing the factors for the colloquial "*Mathews* test").

¹²⁹ Canvassing the *Mathews* factors, the Court found that the parent has a "commanding" interest at stake and faces a "unique kind of deprivation" and "[t]he State may share the indigent parent's interest in the availability of appointed counsel" because "accurate and just results are most likely to be obtained through the equal contest of opposed interests." Therefore, "the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsels;" and the State may have a countervailing but relatively weak interest in cost savings; few parents will be equipped to represent themselves effectively, making the risk of erroneous deprivation in many cases "insupportably high." *Lassiter*, 452 U.S. at 27-31. Thus, the *Mathews* scale tipped overwhelmingly in favor of requiring provision of counsel.

¹³⁰ Justice Stewart correctly observed that the cases in which the Court had upheld constitutional claims for appointed counsel had all involved jeopardy to the litigant's physical liberty. *Id.* at 25 ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.") But this seems a wholly inadequate basis for the Court's grand generalization, since *Lassiter* itself was the first case to present the Court with a Fourteenth Amendment due process claim for state-funded counsel in a setting where physical liberty was not at stake. Moreover, nothing in the cases Justice Stewart cited—which were decided either on Sixth Amendment grounds, or on the basis of *Mathews*-like balancing—intimated that anything other than the governing due process analysis ought to be invoked to evaluate claims for counsel in other contexts. Nor did Justice Stewart advance any such rationale. See Steven D. Schwinn, *The Right to Counsel on Appeal: Civil Douglas*, 15 TEMP. POL. & CIV. RTS. L. REV. 603, 604-07 (2006).

In essence, *Lassiter* suspended ordinary due process analysis with respect to constitutional claims for assigned counsel: the strictures of due process in that respect were no longer to be determined by the settled test for fundamental fairness; rather, an “insensitive presumption”¹³¹ against the indigent litigant would ordinarily control. The Court, to this extent, declined to enforce the constitutional norm to its full (or even previously recognized) meaning, for reasons having no apparent connection with the substance or values of the Due Process Clause.

Although the Supreme Court did not explicitly articulate an institutional or separation-of-powers rationale for its presumption against a right to counsel, it is difficult to view *Lassiter* as anything other than an instance of underenforcement. The Court offered no reason rooted in due process values for its departure from settled doctrine, and none was apparent. To the contrary, it makes no analytical sense to single out the right to counsel and exclude it from the otherwise universally applicable framework for determining whether due process is satisfied in a particular context. At bottom, the right to counsel is simply a procedural safeguard—categorically indistinguishable from any other procedural safeguard—the presence or absence of which a court might need to assess in applying the *Mathews* test. Yet the Court placed this particular procedural safeguard—and only this one—outside the ordinary due process framework, without justifying that special exclusion by reference to fundamental fairness, risk of erroneous deprivation, or procedural reliability; that is to say,

¹³¹ *Lassiter*, 452 U.S. at 42 (Blackmun, J., dissenting).

without any reason having a discernible connection to the purpose or values underlying the Constitution's due process guarantee.¹³² It is for this reason that *Lassiter* is most intelligible through the lens of underenforcement; not as a judgment about "fundamental fairness," but rather as a prudential determination to cabin the so-called "due process revolution"—and calm the institutional, federalism, and separation-of-powers concerns it carried in its wake—by drawing a doctrinally arbitrary line to close the "floodgates" the Court apparently feared.¹³³

Viewed in this way, cases such as *Lassiter* and *Brown* should be understood as speaking only to the question of *judicially enforceable* due process rights; not as defining the full reach of the Constitution's due process guarantee or as absolving other governmental actors of their independent duty to effectuate constitutional norms to their full meaning.¹³⁴ For purposes of this Article, we define the "full

¹³² This point is underscored by the marked contrast between *Lassiter* and a companion case decided on the same day, *Little v. Streater*, 452 U.S. 1 (1981), in which the Court unanimously held that due process required Connecticut to pay for a blood grouping test requested by an indigent respondent in a paternity suit.

¹³³ See *Lassiter*, 452 U.S. at 42, 58-59 (Blackmun, J., dissenting) (characterizing the Court's analysis as resting on an "insensitive presumption" designed to avoid a ruling (requiring counsel in parental termination proceedings) that would "open the 'floodgates' that, I suspect, the Court fears."); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* Ch. 1 (1985) (describing the rise and decline of the "due process revolution"). Political and ideological shifts on the Court undoubtedly played an important role as well. See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1826-29 (2004) (tracing the Supreme Court's retreat from its expansive due process jurisprudence of the late 1960s and early 1970s and attributing the "Court's rapid shift in direction . . . in large part to politics" in the form of conservative appointments to the Court).

¹³⁴ We do not mean to suggest that *Lassiter* has foreclosed any argument for a judicially enforceable constitutional right to representation along the lines proposed in Part IV of this Article. That proposal targets cases in which the private interest is greatest and the risk of erroneous deprivation most acute (due to special incapacity of the claimants and/or special difficulty in presenting claims and defense without assistance of a trained advocate); the proposal also limits the financial burden on government by stipulating that representation

measure” of the due process norm conservatively, as coextensive with the *Mathews* test, free of the presumption imposed by *Lassiter*. We now apply this established standard to New York State’s current system of welfare hearings—an exercise yet to be undertaken by any court¹³⁵—as a yardstick of nonjudicial officials’ duty to protect the due process rights of families facing loss of basic subsistence benefits.

B. The Legislative Duty to Ensure Due Process for Welfare Claimants

Regarded as a defining precedent,¹³⁶ *Mathews* opened its analysis by reaffirming the elemental tenets of due process: that the “‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of

may be provided by attorney-supervised advocates who need not themselves be attorneys. The proposal is therefore distinguishable from the forum-wide claim rejected in *Lassiter*, and consistent with the scenario that *Lassiter* recognized as presenting a viable due process argument.

¹³⁵ *Goldberg*’s discussion of a right to assigned counsel at the informal, pretermination hearing assumed a two-tiered system of administrative review and availability of assigned counsel at the postdeprivation, “full administrative review;” *Goldberg* had no occasion to discuss or decide whether due process would require assigned counsel in an administrative review system of the kind currently operating in New York State. *Brown* was decided before *Mathews v. Eldridge*, and did not apply the three-factor test established by that discussion.

¹³⁶ See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 636 (West 7th ed. 2004) (“All courts must now apply the *Mathews v. Eldridge* balancing test to determine the type of procedures that are required by due process”); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 981 (Aspen Publishers 5th ed. 2005) (“In almost all cases raising questions of procedural regularity, the Court refers to the *Mathews* test.”). Many commentators, while recognizing *Mathews*’s preeminence, view it as a retreat from the “normative reasoning” that produced *Goldberg* and as a rejection of the human dignity value of due process in favor of an instrumental, utilitarian approach. See, e.g., Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK L. REV. 789 (1990); Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); see also Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK L. REV. 731, 732 (1990) (“*Mathews v. Eldridge* represents an outlook that treats the government’s claims as having greater urgency than the claims of individuals—even when there is nothing to justify the government claims.”).

a criminal conviction, is a principle basic to our society' ”¹³⁷ and that due process guarantees an opportunity to be heard “ ‘at a meaningful time and in a meaningful manner.’ ”¹³⁸ Against this backdrop, the Court set forth what has become the authoritative standard for determining what process is constitutionally mandated in any given context:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct 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.¹³⁹

As demonstrated below, the *Mathews* factors weigh sharply in favor of mandating publicly funded representation in at least certain categories of welfare hearings that present an especially acute risk of erroneous deprivation.

1. *The Private Interest*

An impoverished family threatened with termination or reduction of subsistence benefits faces the severest sorts of injury and privation: eviction, homelessness, hunger, family dissolution, dangers of

¹³⁷ *Mathews*, 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951)).

¹³⁸ *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹³⁹ *Id.* at 335.

shelter or street life, illness, and lack of medical care, to name a few. The Supreme Court has repeatedly recognized the special gravity of this private interest, most notably in *Goldberg*, where discussing the constitutional requirement of a predeprivation hearing, the Court observed that

[f]or qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid . . . may deprive an eligible recipient of the very means by which to live . . . Since he lacks independent resources, his situation becomes immediately desperate.¹⁴⁰

Similarly, in *Mathews*, the Court acknowledged that welfare claimants inhabit a uniquely vulnerable position, living “on the very margin of subsistence,”¹⁴¹ dependent on benefits of last resort¹⁴² that, if removed, would leave them destitute and without recourse.¹⁴³ The magnitude of this private interest and the gravity of the harm that er-

¹⁴⁰ *Goldberg*, 397 U.S. at 264 (citations omitted).

¹⁴¹ *Mathews*, 424 U.S. at 340.

¹⁴² The cash assistance programs known as “welfare” (in New York State the Safety Net Assistance program, N.Y. SOC. SERV. LAW §§ 157-159, and the “Family Assistance” program, N.Y. SOC. SERV. LAW § 350 *et seq.*), are residual programs, available only to individuals and families who cannot meet basic subsistence needs through resort to any other government program (*e.g.*, social security, state disability, unemployment insurance, Workers Compensation, etc.) and who have no adequate savings or access to other resources for their support. See N.Y. SOC. SERV. LAW § 131, 131-a.

¹⁴³ *Mathews*, 424 U.S. at 340-41, 342 (contrasting circumstances of a Social Security disability recipient with those of a welfare recipient and noting that the former but not the latter would have access to other government assistance and sources of support in the event of a benefit termination).

erroneous deprivation would inflict explain the special status of welfare benefits in due process jurisprudence, singled out as the only government entitlement that may not be terminated without opportunity for a predeprivation hearing.

Goldberg and *Mathews* thus teach that a needy family's stake in receipt of subsistence benefits constitutes an exceptionally important private interest for purposes of due process analysis, an interest superior in kind and in magnitude to other economic interests. Still, some might argue that any private interest in a government entitlement ranks relatively low in the due process pecking order, a hierarchy that generally values liberty interests above mere property interests. It is certainly true that the Court's due process jurisprudence implies such a hierarchy, but it would not be accurate to dismiss a poor family's interest in avoiding wrongful deprivation of its material means of survival as a mere property interest, comparable in constitutional gravity to all other property interests. To the contrary, as we have seen, the Court has treated welfare benefits as *sui generis* for due process purposes, precisely because erroneous deprivation can immediately result in severe and irreparable injuries involving health, physical integrity, personal danger, and family unity, all interests that sound in liberty more than property.

The Second Circuit captured this point neatly in a jurisdictional decision that turned on a doctrinal distinction between personal and property interests: "Since welfare cases by their very nature involve people at a bare subsistence level, disputes over the correct amounts payable are treated not merely as involving property rights,

but some sort of right to exist in society, a personal right under the Stone formula.”¹⁴⁴ Similarly, federal and state courts have uniformly ruled that even a small reduction of welfare benefits—unlike economic losses in other contexts—constitutes “irreparable harm,” satisfying the strict criteria for obtaining preliminary injunctive relief.¹⁴⁵

In sum, the Supreme Court has recognized a poor person’s interest in subsistence benefits as an exceptionally important one, unique among governmental entitlements, and superior to ordinary property interests for due process purposes. It is akin, in both practical and conceptual respects, to personal liberty interests, the invasion of which touches on “brutal need” and almost inevitably causes “grievous loss” and irreparable injury: it is an individual interest that weighs heavily in the *Mathews* balance.

2. *Risk of Erroneous Deprivation and Probable Value of Additional Procedural Safeguards*

Though nominally designed to accommodate pro se litigants, welfare administrative hearings are in form and function adversarial proceedings at which the local welfare agency appears through a trained expert advocate. It is difficult to generalize about the risk of erroneous deprivation in this setting because many of the hearings—in New York City especially—function as one imagines an intervention by a conscientious supervisor at a welfare center should function:

¹⁴⁴ *Johnson v. Harder*, 438 F.2d 7, 12 (2d Cir. 1971). *Johnson* upheld an assertion of federal civil rights jurisdiction over statutory welfare claims, noting that such jurisdiction turned on a distinction between personal and property interests (only the former qualifying) and that the Supreme Court had repeatedly upheld such jurisdiction in welfare cases. *Id.* at 13.

¹⁴⁵ See, e.g., *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998) (“Numerous cases have held that reductions in AFDC benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families.”).

as corrective to obvious error, oversight, or nonfeasance. The staggering number of hearings requested in New York City and the substantial rate at which the claimant prevails reflect this longstanding bureaucratic reality.¹⁴⁶ But in less straightforward disputes—those involving employment sanctions, for instance—welfare claimants prevail far less frequently. In such cases, the average welfare claimant's lack of relevant knowledge, skill, or experience all but rules out even a minimally effective presentation.¹⁴⁷ With respect to such hearings—affirming thousands of benefit reductions and terminations against pro se claimants—there are strong reasons to believe that the absence of counsel results in an unacceptably high risk of erroneous deprivation.

¹⁴⁶ See *supra* note 27 and accompanying text; N.Y. City Bar Ass'n Comm. on Admin. Law, *Dispute Resolution in the Welfare System: Toward an End to the Fair Hearing Overload*, 48 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 411 (Feb. 1993) (tracing unnecessarily high volume of fair hearing requests to lax quality of administration at welfare centers); N.Y. City Bar Ass'n Comm. On Admin. Law, *Administrative Closings and Churning of Welfare Cases*, 45 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 379 (May 1990). Claimants prevailed in seventy percent of the issues actually adjudicated at welfare hearings in New York City in Fiscal Year 2007. The Mayor's Management Report Fiscal 2007, Supplementary Indicator Tables 25 (City of New York, Sept. 2007). However, factoring in defaults and withdrawals by either side, the claimant success rate drops to fourteen percent. *Id.* Claimant success rate at hearings in other parts of New York State is approximately one in three.

¹⁴⁷ In many ways the *Lassiter* Court's description of parents in pro se termination proceedings applies to the plight of welfare claimants attempting to defend their families' subsistence payments without the aid of counsel:

The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.

Lassiter, 452 U.S. at 30. The transcripts of pro se hearings provided in the Appendix similarly reflect the overwhelming circumstances that confront many unrepresented claimants, as do accounts of pro se hearings in some of the rare judicial appeals. See, e.g., *Earl v. Turner*, 757 N.Y.S.2d 255 (App. Div. 1st Dep't 2003); *Nembhard v. Turner*, 703 N.Y.S.2d 673 (Sup. Ct. N.Y. County 1999); *Lewis v. Barrios-Paoli*, 219 N.Y.L.J. 27 (Sup. Ct. N.Y. County 1998).

First, welfare hearings are adversarial proceedings in form and in nature. The playing field in pro se hearings slants far from level because the local agency is represented by trained advocates who have enormous tactical advantages over the claimant, including access to case and computer files, knowledge of agency practices, ability to read and interpret complex, coded agency records, and knowledge of how to present evidence effectively and cross examine the claimant. At the same time, state regulations define the hearing examiner's role as an impartial referee, with very limited obligations to see to the fair development of the record.¹⁴⁸ It is precisely this procedural configuration—an adversarial contest in which a skilled advocate represents one side, but not the other—that poses the most acute threat to fairness and accuracy.¹⁴⁹

Second, pro se claimants have no realistic opportunity to confront and refute the evidence against them. Most such evidence—and virtually all of it in New York City hearings—consists of computerized agency records laced with codes and jargon indecipherable to the lay person. A pro se claimant rarely, if ever, sees the evidence against her in advance of the hearing, and is frequently offered no

¹⁴⁸ See N.Y. COMP. CODES R. REGS tit. 18, § 358-5.6. By way of contrast, administrative hearings in the Social Security system are inquisitorial in nature. No advocate presents and defends the Social Security Administration determination under the challenge. The ALJ has a clear and wide ranging duty to fully develop evidence that might assist the claimant and to ensure that the inexperience or incapacity of the claimant does not prejudice his case. See e.g., *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000); *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971).

¹⁴⁹ See, e.g., Jerry Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 776 (1973-1974) (arguing that “fairness” and “accuracy” in adversarial adjudication “cannot be maintained when some parties lack the resources to be effective adversaries, and that while “complete equality of adversaries is not a realistic goal, certain types of resources”—including “legal counsel”—“are critical”).

real opportunity to review the evidence at the hearing itself. State regulations do not require a description of the agency's evidence in the pretermination notices sent to recipients,¹⁵⁰ and while claimants have a formal right to request copies of the agency's evidence in advance of the hearing,¹⁵¹ the procedure is almost never successfully invoked by pro se appellants.¹⁵² Moreover, since the rules of evidence do not apply at welfare hearings,¹⁵³ local agencies may—and usually do—“prove” their allegations entirely with hearsay, or even double or triple hearsay, in the form of computer records purporting to reflect information from primary records, that purport to reflect facts gathered from unidentified declarants, who perhaps had personal knowledge of the facts asserted. Unrepresented claimants have almost no chance of understanding these agency records much less refuting the allegations they contain. And without an advocate, the claimant's right to confront and cross-examine these adverse out-of-court witnesses—a right held up by the *Goldberg* Court as essential to the fundamental fairness and accuracy of the proceeding¹⁵⁴—is for all intents and purposes reduced to a nullity.¹⁵⁵ And even if, against

¹⁵⁰ See N.Y. COMP. CODES R. REGS tit. 18, §§ 358-2.2, 358-3.3. Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) (stating that due process notice must include both “the nature of the charges [and] also . . . the substance of the relevant supporting evidence”).

¹⁵¹ N.Y. COMP. CODES R. REGS tit. 18, § 358-3.7, 358-4.2(c).

¹⁵² See *supra* note 52 and accompanying text.

¹⁵³ *Id.* at § 358-5.9.

¹⁵⁴ *Goldberg*, 397 U.S. at 267-68 (stating that “confronting [and cross-examining] any adverse witnesses” are required components of “rudimentary due process” and is especially important “where [welfare] recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases”).

¹⁵⁵ As a result of a federal lawsuit, the State's Office of Administrative Hearings issued a memorandum reminding hearing examiners that appellants have a right to “confront and cross-examine an adverse witness when the witness' statement is submitted at the hearing (in the form of a document or testimony from another witness) and the declarant is not present.”

all odds, the uncounseled claimant managed to invoke this right and obtain subpoenas compelling the presence of adverse witnesses, it is far beyond the capability of most laypersons to prepare and conduct even a minimally effective cross-examination.

Third, issues adjudicated at welfare hearings frequently emerge from a set of bafflingly complex statutory and regulatory schemes that exceed the grasp even of many administrators.¹⁵⁶ Just as critical procedural safeguards have become empty formalities for pro se claimants, so too many legitimate claims, defenses, and substantive rights go unasserted absent the assistance of a representative. Consider, for example, the realm of employment mandates and sanctions. In 1996, federal and state welfare reform laws instituted a

Memorandum from N.Y. State Dep't of Social Servs. Office of Admin. Hearings to All Administrative Law Judges and Professional Staff (Dec. 15, 1992). State regulations do not reflect this right, N.Y. COMP. CODES R. REGS. tit. 18, § 358-3.4(g), nor are appellants otherwise apprised of this right through the hearing notice or the ALJs' opening statement. See N.Y. STATE OFFICE OF ADMIN. HEARINGS, OFFICIAL REPORT OF FAIR HEARING—MODEL OPENING STATEMENT, OTDA-1962 (Revised 10/01).

¹⁵⁶ Fair hearings in New York adjudicate issues arising under, among other areas, the Medicaid program, the Food Stamps Program and two public assistance programs, TANF and Safety Net Assistance program. For each of these programs there are interlocking federal and state statutory and regulatory schemes as well as administrative, interpretive, and policy materials at the federal, state, and local levels of government (only the Safety Net program does not have a federal overlay). The cumulative law governing the TANF and Safety Net programs alone occupies 297 pages of Title 42 of the U.S. Code, 202 pages of Title 45 of the Code of Federal Regulations, 621 pages of New York's Social Services Law, and 150 pages of Title 18 of the New York Codes, Rules and Regulations. See *generally* 42 U.S.C. (2005), 45 C.F.R. (2008); N.Y. SOC. SERV. LAW (McKinney 2008); N.Y. COMP. CODES R. & REGS. tit. 18, (2008). The state regulations and policy are set, described and elaborated upon in the 656-page OTDA Temporary Assistance Source Book and their 265-page Temporary Assistance and Food Stamps Policy Manual. See N.Y. CTR. FOR EMPLOYMENT AND ECON. SUPPORTS, N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMP. ASSISTANCE SOURCE BOOK (2008), <http://otda.state.ny.us/main/ta/TASB.pdf>; CTR. FOR EMPLOYMENT AND ECON. SUPPORTS, N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMPORARY ASSISTANCE AND FOOD STAMP EMPLOYMENT POLICY MANUAL (2008) <http://otda.state.ny.us/main/resources/employmentmanual/employmentmanual.pdf> [hereinafter OTDA POLICY MANUAL]. This list does not include hundreds of pages of policy directives regularly published by the federal, state, and local agencies with oversight responsibilities over these programs. It seems beyond dispute that an understanding of the substantive law or of their procedural rights will far exceed the capacity of laypersons in most cases.

stringent system of employment requirements under which most recipients, unless exempt, must engage in work activities as a condition of eligibility. Any willful failure to cooperate with employment requirements, which can include anything from missing a meeting at the welfare center to a failure to complete the assigned hours of a work activity, carries a sanction—a reduction or termination of subsistence payments for a period of up to six months—unless the individual can demonstrate good cause.¹⁵⁷ But the law also prescribes procedures, standards, and limitations respecting the assignment of work activities, and provides certain rights and protections that circumscribe the scope, grounds, and occasion for imposition of sanctions.¹⁵⁸ For instance, an individual may not be sanctioned for failure to comply with an unlawful work assignment.¹⁵⁹ A work assignment may be, and often is, unlawful for any of a number of reasons, including the absence of an adequate assessment and employability plan;¹⁶⁰ failure to properly process an exemption claim;¹⁶¹ failure to account for the individual's preferences in designating a work activity;¹⁶² failure to provide appropriate assistance to a parent in need of child care;¹⁶³ assignment of work hours in excess of minimum wage limita-

¹⁵⁷ N.Y. SOC. SERV. LAW §§ 341-42.

¹⁵⁸ See *id.* at §§ 331-2, 334, 335-b, 336, 341-42.

¹⁵⁹ N.Y. COMP. CODES R. & REGS. tit. 18, §§ 385.11(a)(4)(ii), 385.12(a)(ii), 385.12(a)(3)(ii)(b).

¹⁶⁰ N.Y. SOC. SERV. LAW § 335(1) - (3); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 385.6(a)(1), 385.6(b)(1)(i).

¹⁶¹ N.Y. SOC. SERV. LAW § 332(1); N.Y. COMP. CODES R. & REGS. tit. 18, § 385.2(b).

¹⁶² N.Y. SOC. SERV. LAW § 335(2)(a); N.Y. COMP. CODES R. & REGS. tit. 18, § 385.6(b)(1)(i)(c).

¹⁶³ N.Y. SOC. SERV. LAW §§ 332-a, 342(1); N.Y. COMP. CODES R. & REGS. tit. 18, § 385.4(a)(1)(ii).

tions (often a factually and legally complex issue);¹⁶⁴ failure to make reasonable efforts to assign college students to workfare positions on or close to campus;¹⁶⁵ failure to make reasonable efforts to assign work activities that do not conflict with an individual's education or training schedule;¹⁶⁶ failure to credit countable education and training activities towards the individual's work requirement;¹⁶⁷ and the list goes on.¹⁶⁸ Furthermore, certain procedural safeguards apply in the sanction context. For instance, a welfare agency may not lawfully initiate an employment sanction unless it offers and properly administers a "conciliation" process, and reasonably concludes from that process that the individual has refused "willfully and without good cause" to comply with employment requirements.¹⁶⁹ Agency failure to abide by these substantive and procedural mandates, which were designed to protect poor families against unjustified sanctions, is common and renders any sanction unlawful.¹⁷⁰ But few, if any, unrepresented claimants are aware of their rights, and so do not assert them. Nor would it be reasonable to expect pro se welfare claimants to have the skill or knowledge to develop a record to support the assertion of these rights. For their part, the hearing examiners rarely

¹⁶⁴ N.Y. SOC. SERV. LAW § 336-c(2)(b); N.Y. COMP. CODES R. & REGS. tit. 18, § 385.9(d)(3)(ii); OTDA POLICY MANUAL at 55.

¹⁶⁵ N.Y. SOC. SERV. LAW § 336-c(4).

¹⁶⁶ N.Y. SOC. SERV. LAW §§ 335-b(2), 336-c(4); N.Y. COMP. CODES R. & REGS. tit. 18, § 385.9(b)(5).

¹⁶⁷ N.Y. SOC. SERV. LAW §§ 335-b(2).

¹⁶⁸ See DON FRIEDMAN, EMPIRE JUSTICE CTR., AN ADVOCATES GUIDE TO THE WELFARE WORK RULES 1 (2008), available at <http://www.empirejustice.org/New/Publications/AdvocateGuide/AdvocateGuideWelfareWrkRules.pdf>.

¹⁶⁹ N.Y. SOC. SERV. LAW § 341(1)(a), (b); N.Y. COMP. CODES R. & REGS. §§ 385.11(a)(1), 385.11(a)(4)(i).

¹⁷⁰ N.Y. SOC. SERV. LAW § 341(1)(b); N.Y. COMP. CODES R. & REGS. § 385.12(a)(3)(ii)(j).

inquire into these issues *sua sponte*, apparently regarding them as affirmative defenses. Thus, the absence of representation in this, and similar settings, routinely and predictably results in erroneous and unlawful deprivations of subsistence payments to impoverished families.

Moreover, the absence of representation can have a devastating impact on accuracy and fairness even in hearings that do not involve legal rights and defenses unknown and unasserted by pro se claimants. Some of the most common disputes at welfare hearings turn on conflicting assertions of fact, often as simple as whether a recipient appeared for an appointment, whether she received notice of an administrative requirement, or whether a caseworker orally rescheduled a meeting. But, as Judge Posner observed in another right-to-counsel context, “difficulty and complexity are not synonyms.”¹⁷¹ Seemingly “simple” cases—“he said-she said” scenarios that will turn on credibility determinations—are often the most challenging to prepare and present effectively; and they pose especially thorny problems for the pro se litigant whose own probity may be under assault. The Supreme Court itself has often warned that the risk of error is especially high, and the need for special procedural safeguards acute, where adjudication of protected interests turns on “issues of witness credibility and veracity.”¹⁷²

Finally, the actual, observable impact of legal representation at welfare hearings strongly confirms the value of that additional safeguard and the substantial risk of error without it. For example, the

¹⁷¹ *Pruitt v. Mote*, 472 F.3d 484, 490 (7th Cir. 2006) (Posner, J., dissenting).

¹⁷² *Mathews*, 424 U.S. at 343-44.

rate of unfavorable outcomes for all appellants in adjudicated hearings involving a workfare dispute between 2000 and 2007 was approximately 30 times greater than the rate for appellants represented by an attorney-supervised law student from the Economic Justice Project, CUNY School of Law during the same period.¹⁷³ While the Court in *Lassiter* found raw statistics, by themselves, to be “unilluminating,”¹⁷⁴ here the differential in outcomes between pro se and represented hearings is too striking to dismiss. It plainly demonstrates that claimants who lack the assistance of an advocate routinely, unknowingly, and involuntarily forfeit important legal rights, and suffer erroneous discontinuance of subsistence benefits as a re-

¹⁷³ The Economic Justice Project (EJP) appeared in over 200 workfare-related hearings during this interval and had a success rate of approximately 99 percent. Cf. Stephen Lofredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173 (2001) (describing the project and its commitment to represent CUNY undergraduates at welfare hearings). EJP accepted for representation any CUNY undergraduate presenting a workfare-related dispute and did not screen out weak or difficult cases. See *id.* During the same years, OTDA affirmed the local agency in adjudicated workfare hearings at annual rates ranging from approximately 20 percent to approximately 55 percent, see N.Y.S. OTDA, Bureau of Data Management and Analysis, 2007 Statistical Report on the Operations of New York State Temporary Assistance Programs Tables 32 and 33, an overall affirmance rate approximately 30 times higher than in the cases represented by EJP. While the EJP data set may not qualify as an absolutely random sampling of workfare-related fair hearings, the differential success rate is far too great to attribute to fortuity or sampling bias. Finally, though it is true that affirmance rates ranging from 20 to 55 percent (and the corresponding appellant success rate between 80 and 45 percent) may appear favorable to recipients, it would be a mistake to interpret these numbers as reflecting adequate procedural protections for pro se appellants. Only a small fraction of employment sanction determinations are appealed. In August 2008, for instance, only 400 out of over 8,000 sanctions were taken to a fair hearing, see NYC Human Resources Administration’s Weekly Report (August 31, 2008), and it seems reasonable to assume that these appeals contest many of the most indefensible actions in a class of agency determinations notorious for arbitrariness and unreliability. See, e.g., Liz Krueger, Liz Accles & Laura Wernick, *WORKFARE: The Real Deal II*, CMTY. FOOD RESOURCE CTR. (July 1997); Sandra Youdelman, *The Revolving Door: Findings on NYC’s Employment Services and Placement System and its Effectiveness in Moving People from Welfare to Work*, COMMUNITY VOICES HEARD (2005). We therefore assume that a high proportion of the agency affirmances in this area ratified unlawful benefit reductions and terminations, an assumption strongly supported by the results of the represented hearings.

¹⁷⁴ *Lassiter*, 452 U.S. at 29 n.5.

sult.

The statistically observable impact of representation is consistent not only with the risk analysis developed above, but also with what we know from having attended hundreds of represented hearings, and having read countless transcripts of pro se hearings: the presence of an advocate powerfully influences the substance and dynamic of the proceeding. As noted earlier, the average pro se hearing in New York takes approximately seven minutes, from start to finish.¹⁷⁵ In a system that adjudicates tens of thousands of hearings, there will inevitably be wide variations in the quality of process and threat to accuracy and fairness when the claimant lacks skilled representation. But even the most conscientious hearing examiner, with a docket of twenty-five to thirty scheduled hearings per day,¹⁷⁶ would be hard pressed to assure fairness and accuracy to pro se claimants on a consistent basis. Under such a regime, the pressure to truncate the process and jump to a preconceived or superficially reached conclusion is simply too high.¹⁷⁷

3. *The Governmental Interest*

As the Court ruled in *Goldberg*, the government has an important interest in avoiding erroneous termination of welfare payments to impoverished families and individuals.¹⁷⁸ To this extent, individual and governmental interests coincide. Moreover, unfounded

¹⁷⁵ See *supra* Part I.A.

¹⁷⁶ Conversation with Russell Hanks, Deputy Gen. Counsel of N.Y. Office of Temp. & Disability Assistance (Aug. 2008) (on file with authors).

¹⁷⁷ See *supra* note 146 and accompanying text.

¹⁷⁸ *Goldberg*, 397 U.S. at 264.

denials of subsistence benefits not only inflict harm on the wronged individuals, but may well increase net public expenditures in the form of emergency shelter costs for families who become homeless, increased Medicaid and municipal hospital expenditures for those who take ill, increased social services costs, and child protective costs, to name just a few of the immediate short-term outlays.¹⁷⁹

Of course, the state's fiscal interests figure on the other side of the ledger as well. First, provision of assigned counsel, even on a targeted basis, would substantially boost the proportion of represented hearings from the current level of approximately one percent and might thereby increase the amount of time, and personnel and expense required to adjudicate a fixed number of hearings. In addition, the financial resources necessary to supply free representation to welfare claimants would not be insignificant, even if the representation were confined to certain categories of cases, and provided by nonlawyer advocates under the supervision of attorneys. On the other hand, the presence of advocates might achieve systemic efficiencies that could reduce expenditures. A representative's ability to clarify issues and focus on relevant facts and governing law would frequently streamline the adjudication process. It has also been our experience that involvement of counsel often produces prehearing settlements, thus reducing the burden and expense of administrative adjudication. Finally, the assignment of counsel may, through a vari-

¹⁷⁹ Steven Banks, *ADR and Litigation Involving Social Problems*, 35 *FORDHAM URB. L.J.* 109, 115–16, (2008); Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 *N.Y.U. REV. L. & SOC. CHANGE* 231, 234 (1989–90); Bradley R. Haywood, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 *COLUM. HUM. RTS. L. REV.* 157, 175–76 (2002).

ety of mechanisms, including the increased cost to local agencies for each hearing requested,¹⁸⁰ alter bureaucratic incentives, encourage greater focus on accurate center-level decision making, and thereby substantially reduce the overall number of requested and adjudicated hearings.¹⁸¹

The last step in the due process analysis calls for a balancing of the three *Mathews* factors. Here, that balance compellingly weighs in favor of publicly funded representation, in at least a significant proportion of welfare hearings. The destitute family's private interest is an exceedingly important one. The government's stake in maintaining subsistence benefits will always rank high in a due process assessment because *any* reduction to a welfare grant, which is already pitched far below the poverty line, immediately robs the family of its means of survival and threatens its fundamental "right to exist in society."¹⁸² The government's overlapping interest in humane and efficient provision for poor families also weighs in favor of providing representation to welfare claimants. Its countervailing interest in avoiding the expense of government funded advocates is of lesser and uncertain significance, since providing the targeted representation proposed here would yield systemic efficiencies that could partially

¹⁸⁰ OFFICE OF TEMP. AND DISABILITY ASSISTANCE, 2007-08 EXECUTIVE BUDGET (2008); OFFICE OF TEMP. AND DISABILITY ASSISTANCE, NYC MONTH-BY-MONTH STATISTICAL DATA (2008); OFFICE OF TEMP. AND DISABILITY ASSISTANCE, NYC MONTH-BY-MONTH STATISTICS (2007); OFFICE OF TEMP. AND DISABILITY ASSISTANCE, OAH STATISTICAL DATA (2007); OFFICE OF TEMP. AND DISABILITY ASSISTANCE, 2006-07 EXECUTIVE BUDGET (2007); OFFICE OF TEMP. AND DISABILITY ASSISTANCE, OAH STATISTICAL REPORT (2005).

¹⁸¹ See *infra* Part IV.C.2 (discussing the high incidence of inaccurate and unlawful decision making at the agency level, and the availability of remedial measures that would drastically reduce the number of administrative appeals and the costs associated with the appeals process).

¹⁸² See *supra* note 142 and accompanying text.

or fully offset its cost, and may also avoid vastly larger social costs down the road. In any event, the state's legitimate, but modest fiscal interest is far outweighed by the intense private interests at stake.¹⁸³ Finally, the risk of erroneous deprivation, though it may vary dramatically across the thousands of welfare hearings adjudicated in New York State, exceeds tolerable levels in substantial categories of hearings where the absence of a skilled advocate will foreseeably result in the involuntary nonassertion and forfeiture of legal rights and/or leave the unrepresented claimant with no realistic prospect of presenting her case with even minimal effectiveness.

Lassiter recognized that certain alignments of the *Mathews* factors in the parental rights setting would tip the scales decisively enough to overcome the Court's presumption against a right to counsel. As demonstrated above, at least some welfare cases present a comparably decisive alignment of *Mathews* factors that would warrant a *judicially ordered* assignment of counsel. But regardless of whether the courts would enforce a due process right to representation in the welfare context, the legislature bears a broader, independent obligation to ensure that individuals receive the full protection of that constitutional right, undiminished by limiting constructions that the judiciary, for separation of powers or related institutional reasons, may adopt as a matter of prudential self-restraint. Even if one regards the full measure of the due process norm as extending no further than the *Mathews* analysis, shorn of *Lassiter's* presumption,¹⁸⁴

¹⁸³ Cf. *Lassiter*, 452 U.S. at 28 (“[T]hough the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here.”).

¹⁸⁴ But see *supra* note 136 (citing critiques of *Mathews* as unduly narrowing the scope

that analysis makes plain that the absence of counsel from particular welfare hearings denies due process to many thousands of the state's poorest and most vulnerable families. The legislature is therefore duty-bound to act. We now turn to a blueprint for that action.

IV. PROPOSAL FOR A QUALIFIED RIGHT TO COUNSEL IN WELFARE HEARINGS

In a system that fully respected due process norms, any person threatened with deprivation of subsistence benefits would have access to an expert advocate for the adversarial proceeding that, for all practical purposes offers the sole opportunity to seek redress. Strong constitutional and policy arguments support legislative action to achieve this goal.¹⁸⁵ We recognize, however, that universal provision of counsel at tens of thousands of welfare hearings exceeds the bounds of current political and fiscal constraint (even though such an arrangement might catalyze fundamental systemic reforms that would reduce overall costs).¹⁸⁶ We therefore propose a qualified right to representation, targeted to priority cases in which the due process deficit is most severe and indefensible, and the legislature's corresponding duty of remediation most acute. To further limit public expense, our proposal provides for representation by qualified non-attorney advocates working under the supervision of an attorney.¹⁸⁷

and impact of due process).

¹⁸⁵ See *supra* Part III.B.

¹⁸⁶ See *supra* Part III.B.3; see *infra* Part IV.C.

¹⁸⁷ Cf. *Vitek v. Jones*, 445 U.S. 480, 499 (1980) (Powell, J., concurring) (concluding that due process would be satisfied by publicly funded representation "by . . . a qualified and independent adviser who is not a lawyer" if provided, when the state proposes to transfer a convicted felon from a prison to a mental hospital). The "Civil Gideon" concept presumes, correctly for the most part, that an individual negotiating a particular legal system is best rep-

We next discuss the criteria for defining priority hearings, and follow with proposed mechanisms for identifying hearings that meet these criteria. We conclude this part with some broader observations and proposals to protect pro se claimants and improve due process throughout the welfare bureaucracy.

A. Criteria for Priority Hearings

Tracking the Supreme Court's approach in *Lassiter*, our proposal calls for provision of representation at those hearings in which the *Mathews* factors align most powerfully in favor of the claimant.¹⁸⁸ Since the governmental interest will not vary appreciably from hearing to hearing, the determinative factors will be the strength of the claimant's private interest and the risk of erroneous deprivation absent the assistance of a qualified advocate.

1. Claimant Stake

As discussed earlier, an impoverished family's interest in retaining its subsistence benefits always ranks as an interest of the highest order because *any* loss of such benefits can have devastating

resented by a trained advocate who is an attorney. See BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 1 (2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf. Although an ideal resolution might entail a right to assigned counsel in all fair hearings, the fact is that highly effective advocacy is engaged in daily by advocates who are not attorneys. In the ranks of the legal services community are many paralegals, social workers, and other community advocates with experience and expertise in the law and practice of public benefits. An effective but much less costly approach to the need for fair hearing representation could well include assignment of trained paralegals under the supervision of attorneys.

¹⁸⁸ See *Lassiter*, 452 U.S. at 31 (noting that due process might require appointment of counsel in particular parental termination proceedings if the *Mathews* factors balanced most decisively in favor of the parent).

repercussions. Hence, any case that presents a high risk of erroneous deprivation absent counsel qualifies as a priority case under our proposal. In addition, cases that threaten unusually severe or immediate injury should receive counsel regardless of the predicted risk of error. Such cases would include, at a minimum, claims for emergency assistance, including emergency shelter and assistance to avert eviction or utility discontinuance; threats of durational sanctions (i.e., disqualification from benefit receipt) whether in employment or other contexts;¹⁸⁹ claims involving rental supplements, the loss of which would place the family at immediate risk of homelessness; and cases in which imminent injury of like magnitude is threatened.

2. *Risk of Erroneous Deprivation*

Perhaps the most accurate method of identifying hearings that present a special risk of error absent counsel is to collect and analyze data revealing appellant success rates by issue and by representation status (i.e., pro se, lay representative, or trained advocate). Any substantial disparity in success rate between represented and unrepresented appellants in a specific category of cases would strongly suggest an especially high risk of error. Our partial comparison of overall appellant success rates to success rates of appellants represented by law students from the CUNY Economic Justice Project (“EJP”) clinic reveal that such disparities indeed exist.¹⁹⁰ State officials ought to adjust OTDA’s data collection to permit a more thor-

¹⁸⁹ Cf. *Mathews*, 424 U.S. at 341 (“As we recognized last Term . . . ‘the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests.’”).

¹⁹⁰ See *supra* Part III.B.2.

ough and systematic analysis. But even without such data, one can reasonably identify pro se hearings that present a heightened risk of error by examining three factors: the issues for adjudication; the difficulty of preparation and/or presentation; and the capacity of the individual appellant. Hearings that implicate the more intricate areas of welfare law (for example, employment requirements and sanctions, and immigration related eligibility issues) and those at which technical legal claims or defenses should ordinarily be asserted, present an acute risk of error for the pro se claimant.¹⁹¹ Similarly, hearings that require more than rudimentary fact development and evidence gathering by the appellant, or that might otherwise pose special challenges for an unrepresented appellant to prepare or present are at special jeopardy for erroneous disposition.¹⁹² Finally, hearings in which the particular appellant lacks the capacity to represent himself effectively without an advocate fall into the high risk category.¹⁹³

¹⁹¹ See *supra* Part III.B.2 (discussing employment sanction claims and defenses).

¹⁹² See *supra* note 172 and accompanying text.

¹⁹³ While many public assistance claimants possess more than adequate capacity to represent themselves effectively at administrative hearings, others may be hampered by linguistic, educational, or mental health issues. See *Testimony of David A. Hansell, supra* note 50 (stating that two-thirds of the adults receiving public assistance in New York State have not graduated high school); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1206 n.20 (1983) (citing a study showing lower educational levels and lack of English-language proficiency correlate with inability to navigate the welfare bureaucracy effectively); EILEEN P. SWEENEY, CTR. ON BUDGET AND POLICY PRIORITIES, RECENT STUDIES INDICATE THAT MANY PARENTS WHO ARE CURRENT OR FORMER WELFARE RECIPIENTS HAVE DISABILITIES OR OTHER MEDICAL CONDITIONS 2, 5 (2000), available at <http://www.cbpp.org/2-29-00wel.pdf> (stating that nationally, one-quarter to one-third of the adult TANF population have a serious mental health problem that might impinge upon their capacity to represent themselves adequately. This population is also among the most likely to face sanctions for alleged failures to comply with program requirements.); see also Mark Nadel, Steve Wamhoff & Michael Wiseman, *Disability, Welfare Reform, and Supplemental Security Income*, 65 SOC. SEC. BULL. 14, 20-24 (2003/2004).

B. Mechanisms for Identifying Priority Hearings

The task of sorting through tens of thousands of pro se hearing requests for those that pose special due process concerns presents significant challenges. On the one hand, our proposal for a qualified right to counsel requires a reasonably reliable method for identifying, from an enormous mass of pending pro se hearings, those cases in which the need for counsel is most pronounced. On the other hand, since the point of qualifying the right to counsel is cost containment, the sorting mechanism itself must not entail an expensive new bureaucracy. Bearing these challenges in mind, we propose a simple, two-pronged system that can identify priority hearings reasonably well and at minimal cost.

First, categories of hearings that by their nature meet the due process priority criteria discussed in the previous section would be designated “priority hearings” and placed on a list for automatic assignment of counsel.¹⁹⁴ For instance, a challenge to a denial of emergency assistance to avert an eviction, or a challenge to imposition of an employment sanction, or a case involving immigrant eligibility for assistance would automatically qualify for assignment of an advocate. The OTDA’s Office of Administrative Hearings could readily identify such priority list hearings based on the claimant’s request for review. This categorical mechanism would impose virtually no additional administrative cost and would efficiently capture most of the

¹⁹⁴ Over time this list might be modified and informed with the aid of data indicating the types of cases in which the presence of an advocate is most likely to affect the outcome and reduce the risk of error. If it does not already do so, the OTDA should compile such information so this process can be fine-tuned until such time as representation is more broadly available.

hearings that pose a threat of unusually severe injury or heightened risk of error associated with adjudication in complex areas.

There remains the difficult and sensitive issue of identifying individual appellants who may lack the capacity to make a minimally adequate presentation of their claims, either because of personal factors or because the case turns out to be one that is especially difficult to prepare and present.¹⁹⁵ An imperfect solution, but one that would impose few if any additional costs, is to enlist the hearing officers in the sorting process. The hearing officer has a unique opportunity to evaluate, on the basis of direct observation, whether a particular pro se appellant has the capacity to protect her interests. Where the hearing officer concludes the requisite capacity is missing, the appellant would be offered an adjournment and assignment of an advocate.¹⁹⁶

We acknowledge that even this modest proposal will carry nontrivial costs and will draw objections from state and local administrators who view even the current system as unduly cumbersome and expensive. But, as we discussed in analyzing the government interest prong of the *Mathews* test,¹⁹⁷ increased presence of counsel at

¹⁹⁵ See *supra* notes 170-72 and accompanying text.

¹⁹⁶ Alternatively, hearings that pose a special risk of error because of difficulty of preparation and presentation could be identified through individualized prehearing reviews conducted by a small "Assigned Counsel Unit," either contracted out by, or internal to, OTDA's Office of Administrative Hearings. Given the number of hearing requests, the nature of any such review would have to be very limited, and could simply consist of screening the "summary of the case" and an "evidence packet" that local agencies are already required to generate for every hearing. 18 N.Y. COMP. CODES R. & REGS. tit. 18, § 358-4.3(b) (listing what evidence must be presented, including: the challenged agency action, the facts, reasoning, and evidence supporting it, and the law and policies on which it rests) [hereinafter "evidence packet"]. These summaries provide a reasonable basis on which to make an efficient and relatively well-informed assessment of the need for counsel. The advantage to this approach is that it would likely capture more of the hearings that fall into this due process priority category. The disadvantage, clearly, is cost.

¹⁹⁷ See *supra* Part III.B.3.

welfare hearings will alter incentive structures throughout the welfare bureaucracy in ways that could significantly improve decision-making quality,¹⁹⁸ and dramatically reduce the extraordinary volume of appeals processed in New York State each year, yielding substantial offsetting savings.

C. Coda: Protecting Pro Se Claimants and Enhancing Systemic Due Process

1. *Improving Fairness for Pro Se Appellants*

Even if accepted, our proposal would leave tens of thousands of vulnerable families and individuals to defend their subsistence benefits in an adversarial setting without the assistance of an advocate. Readily achievable process modifications would enhance the fairness of these hearings for unrepresented appellants and should be pursued. Here are a few examples: Notices of local agency actions, currently so lengthy and dense as to defy comprehension by ordinary individuals, must be redesigned so that they *actually and effectively* communicate critical procedural rights and other essential information to the recipients. State regulations should be amended to require automatic provision of the local agency's "evidence packet" and written "summary of the case"¹⁹⁹ to all appellants in advance of the hearing date, since it is clear beyond dispute that possession of this in-

¹⁹⁸ For instance, a substantial increase in hearings in which the appellant is represented, with the added costs they would impose, and state and local agency time commitment they would demand, might impel the state and localities to revisit local procedures and would hopefully offer a powerful incentive to encourage the informal local resolution of many disputes. *Cf. supra* notes 5-6.

¹⁹⁹ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-4.3(b).

formation is essential to basic preparation for the hearing and to any opportunity to present a meaningful defense.²⁰⁰ Finally, the hearing officer's role should be reconceived, more along the lines of ALJs in the Social Security appeals system,²⁰¹ such that he or she has a clear and affirmative obligation to ensure an equitable setting for the administration of justice;²⁰² and the number of cases assigned to each

²⁰⁰ As noted earlier, state regulations provide that a hearing appellant may request advanced production of copies of all documents the agency intends to introduce at the hearing. See *supra* note 190 and accompanying text.

²⁰¹ Federal regulations and caselaw both impose upon administrative law judges in the Social Security system an affirmative duty to develop the record "fully and fairly," and generally to protect the interests of pro se appellants. See *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980). The *Hankerson* Court explained:

If . . . the claimant does appear pro se, the ALJ has a "duty . . . to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. . . ."

In such cases where the claimant was "handicapped by lack of counsel" at the administrative hearing, the reviewing court has "a duty to make a 'searching investigation' of the record" to ensure that the claimant's rights have been adequately protected. Applying these principles to the record before us, we conclude that the ALJ did not adequately protect the rights of this pro se litigant by ensuring that all of the relevant facts were sufficiently developed and considered.

Id. at 895 (citations omitted). Unlike welfare "fair hearings," which are adversarial in nature, Social Security appeals proceed on an inquisitorial model. See Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC'Y REV. 349, 362 (2004) (reviewing ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2002)); Carolyn A. Kubitschek, *A Re-Evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 ARIZ. L. REV. 53, 65 (1989). The presence of an adverse, trained advocate in the welfare context makes the pro se appellant's need for protection more acute.

²⁰² A few relatively simple modifications to the hearing officer's responsibilities would significantly enhance the fairness of the proceeding. For instance, whether or not the appellant has received a copy of the agency's evidence in advance, the ALJ should ensure that the appellant has ample opportunity at the hearing to review these documents and, where necessary, have them explained. Similarly, if at any point in the proceedings, the ALJ concludes that the appellant cannot prevail unless a particular document, statement or other type of proof is offered, the ALJ should advise the appellant of that fact and offer an adjournment. Since this reconceived role will invariably require that the hearing officer primarily or exclusively assist the appellant, there may be concerns that it would compromise the hearing officer's duty to remain impartial and not to act as an advocate for one party or the other. See N.Y. COMP. CODES R. & REGS. tit. 18 § 358-4.4. But the glaring imbalance between the parties, the trained, educated, experienced advocate for the local agency and the untrained, often undereducated and usually inexperienced appellant, overwhelms any concern that the sug-

hearing examiner must be limited accordingly so that the promise of *Goldberg* is not reduced to whatever due process can be had in ten minutes or less.

**2. *Accuracy and Accountability in
Administration of Welfare Programs in New
York***

The extraordinary volume of welfare hearings requested and adjudicated in New York state looms over a discussion of a right to counsel. Therefore, we conclude with a brief exposition of the reasons for this phenomenon and urge remediation. The availability to state and local welfare departments of attainable and systemic reforms that would sharply reduce the demand for hearings is not only relevant to the due process analysis, since it relates to the question of governmental interest and fiscal burden, but would also make the consideration of assigning counsel a much less daunting policy proposition.

It is a persistent source of frustration for appellants, advocates, and for some government officials, that large numbers of administrative errors, minor disputes, and misunderstandings that might easily and informally be resolved at the welfare center, are routinely and systematically channeled into the fair hearing process. Over the last twenty-five years, state and local bar associations have repeatedly studied this phenomenon, and issued reports criticizing the quality of the decision making process in local welfare agencies, the extent to which that process deprives thousands of the State's most vulnerable

gested reforms would render the process any less fair.

families of substantive assistance and places harmful pressure on the administrative appeals process, and the apparent lack of systemic accountability.²⁰³ In 2002, the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers Association jointly filed an amicus brief that discussed the persistent and destructive dysfunctionality of welfare administration in New York:

For more than 14 years, the New York State Bar Association has reported that the most profound problem confronting the indigent in the adjudication of their rights is the inadequate performance of local social services districts and the inadequate supervision of those districts by the very state agency identified in this appeal.²⁰⁴

The brief goes on to cite a 1988 State Bar Association report whose authors had primarily intended to investigate the state hearing process, but who felt compelled to focus instead upon local agency practices that drove thousands of clients to seek refuge in fair hearings. That report made the following findings:

- It is manifest that local agencies are simply not following law in a substantial percentage of cases.
- In large numbers, clients have their benefits erroneously denied, reduced, or terminated. The same errors occur repeatedly.
- Most [fair hearing appellants] appear pro se and often are persons least able to competently repre-

²⁰³ See *infra* Part IV.C.2.

²⁰⁴ Brief of the N.Y. State Bar Ass'n. et al. as Amici Curiae Supporting Petitioner-Appellant at 12, *Wittlinger v. Wing*, 786 N.E.2d 1270 (N.Y. 2003) (No. 404603/99), 2002 WL 32173747.

sent themselves, many not having the ability to speak or write English, let alone the ability to comprehend the often technical requirements of laws governing their entitlement to public assistance.

- Because of inadequate screening and misinformation among agency caseworkers, many cases needlessly go to the fair hearing stage, where clients often must have a lawyer in order to gain access to justice.²⁰⁵

The 2002 amicus brief noted that the State Bar Association repeatedly “revisited the same issues” in the years following its report, but “found little or no improvement.”²⁰⁶

Local agency administration has arguably shown modest improvement in recent years, but at least one indicator of the persistence of the problem is the fact that hearing requests have remained at historic levels, *even while the case load has been reduced by half*. In other words, the number of hearing requests, as a percentage of the caseload, is at or near an all-time high. The endemic failure of local agencies to adhere to mandates of law, regulation, and policy, combined with an all too frequent rigidity that discourages informal resolution of difficulties, inevitably leads to the extraordinary volume of hearing requests that has long characterized the New York public benefits system. Due process for the intended beneficiaries of this system requires exhaustive reform of the ground level decision making process.²⁰⁷

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Mashaw, *supra* note 149, at 823 (warning that a regime of adversarial due process

V. CONCLUSION

The Supreme Court's decision in *Goldberg* formed part of a due process revolution that deservedly receives praise for its emphasis on participation, accountability, and transparency. Even more, the due process rights of notice and opportunity to be heard afford a source of optimism and hope for individuals whose daily subsistence might otherwise turn on the whim and caprice of a welfare bureaucracy wielding unfettered authority. But the implementation of *Goldberg* falls short in leaving poor people to the frequently insuperable task of negotiating a complex and arcane administrative system without representation. The right to counsel, however, is an underenforced norm that demands realization by the legislature, even if courts regard themselves as institutionally equipped to protect that right. Due process and the rule of law require no less.

hearings is an insufficient response to endemic failures in the administration of large-scale social welfare programs and provides inadequate protection to the intended beneficiaries of those programs, and that due process requires a "management approach to ground level administration that assures accuracy, fairness, and timeliness" at that level.)

APPENDIX

The following are unofficial transcripts of two pro se hearings conducted in New York City, both of which resulted in rulings against the pro se appellant. Names have been altered to safeguard the individuals' privacy. We do not assert that these transcripts represent the typical pro se hearing. Nor, however, do we believe that hearings of the nature captured by the transcripts are especially uncommon.

Pro Se Hearing A

PROCEEDINGS

ADMINISTRATIVE LAW JUDGE: My name is Jane Judge and I have been designated by the Commissioner to conduct this hearing requested by Roberta Recipient, 123 Main Street, Apartment 1A.

MS. CLAIMANT: And I'm Clara CLAIMANT because it's my case.

ADMINISTRATIVE LAW JUDGE: Who is Roberta Recipient?

MS. CLAIMANT: (Indecipherable two words) her name.

MS. CLAIMANT: Her name is on the budget, but she's not – she was originally – we were getting Welfare with her, but they just left her name on the card, but it's my case.

ADMINISTRATIVE LAW JUDGE: Is she getting Welfare?

Ms. CLAIMANT: NO, she's on SSI. Her name is just on the card and her case is on the card, but she doesn't get anything.

ADMINISTRATIVE LAW JUDGE: How old are you?

MS. CLAIMANT: 20.

ADMINISTRATIVE LAW JUDGE: (Inaudible one word) her

name. And who lives with you besides your mother?

MS. CLAIMANT: My sister and my son and (inaudible two to three words).

ADMINISTRATIVE LAW JUDGE: Is that your son?

MS. CLAIMANT: Yeah.

ADMINISTRATIVE LAW JUDGE: How old?

MS. CLAIMANT: Four.

ADMINISTRATIVE LAW JUDGE: All right. What do we have here, Ms. City Representative?

MS. CITY REP: We have a notice to discontinue benefits as of April 25th for failure to comply with the (indecipherable one word). The

client –

ADMINISTRATIVE LAW JUDGE: Agency Number 1. (Whereupon, a document was marked for identification and received into evidence as Agency's Exhibit Number 1, this date.)

Ms. CITY REP: The client was scheduled for a March 29th appointment (inaudible three words) in Brooklyn.

ADMINISTRATIVE LAW JUDGE: Agency Number 2 is the appointment in Brooklyn on the 29th.

(Whereupon, a document was marked for identification and received into evidence as Agency's Exhibit Number 2, this date.)

MS. CITY REP: She failed to appear and (inaudible one word) –

ADMINISTRATIVE LAW JUDGE: May 29th. Agency 3 and Agency 4 are the case notes and the recommendations.

(Whereupon, the above-described documents were marked for identification and received into evidence as Agency's Exhibit Number 3 and 4, respectively, this date.)

ADMINISTRATIVE LAW JUDGE: All right. This was sent – the case name is in your mother's because you're not 21 yet and you're living with her, so this was sent for an eligibility review for March 29th. No one showed up, not you or your mother.

MS. CLAIMANT: We never even got that notice. That's what we – I never got the notice. That's the reason why we –

ADMINISTRATIVE LAW JUDGE: Agency 5. (Whereupon, a document was marked for identification and received into evidence as Agency's Exhibit Number 5, this date.)

MS. CITY REP: Did you get your closing notice?

MS. CLAIMANT: Yes, we got – that's why I come – I got the closing notice, but I did not get a notice to come March 29th. I think I was there like around the 26th or the 27th, and I still never got – I never got the (indecipherable one word) notice (indecipherable three words).

MS. CITY REP: Well, why do you think you receive the closing notice and you didn't get that one? The address is right.

MS. CLAIMANT: The address is right. I can't –

ADMINISTRATIVE LAW JUDGE: Well, maybe your mother got it, or your sister?

MS. CLAIMANT: My mother didn't get it. Nobody in the house got it because if anything, my mother would have (indecipherable one word) to take care of that if she would have got this, so she

would have told me.

ADMINISTRATIVE LAW JUDGE: All right.

MS. CLAIMANT: I don't know why it didn't come. Sometimes the mail doesn't get to the apartment. It must have been an oversight, but I know we got the closing letter and we did not get that letter.

ADMINISTRATIVE LAW JUDGE: Okey-doke. All right. If there's nothing else then, the record is closed.

(Whereupon, the hearing concluded.)

Pro Se Hearing B

PROCEEDINGS

ADMINISTRATIVE LAW JUDGE: Good Morning I'm Josephine Judge, an Administrative Law Judge designated by the Commissioner of the State Department of Social Services to hear your case today.

ADMINISTRATIVE LAW JUDGE: Please state your name, address, age

MS. CLAIMANT: Claire Claimant, 456 Main Street, New York, N.Y.

ADMINISTRATIVE LAW JUDGE: Who else besides yourself is on the budget?

MS. CLAIMANT: My three kids

ADMINISTRATIVE LAW JUDGE: Names and ages of your children

MS. CLAIMANT: April, 15; May, 11; and June, 6.

ADMINISTRATIVE LAW JUDGE: How much do you pay a

month in rent?

MS. CLAIMANT: 330. . . .510.

ADMINISTRATIVE LAW JUDGE: Ok, Ms. City Representative, appearance please.

MS. CITY REP: Ms. City Representative, for the Human Resources Administration.

ADMINISTRATIVE LAW JUDGE: Proceed.

MS. CITY REP: Ms. Claimant was seen at her initial appointment on February 20 at the BEGIN office and refused to accept outcome of assessment because she's a student and did not want to do a WEP assignment

ADMINISTRATIVE LAW JUDGE: (to Ms. Claimant) you don't have to fill that out, ma'am.

MS. CLAIMANT: Hmmm?

ADMINISTRATIVE LAW JUDGE: That's it. Okay, go ahead.

MS. CITY REP: She attends City College and is a sociology major and was given a training and participation denial because her program was over two years in length and a notification of employability and right to contest. The agency mailed out a conciliation notice on March 13 with deadline date of March 24 (inaudible) of March 22. Ms. Claimant came in on March 21 and then declined to accept the WEP assignment because of her attendance at City College (inaudible). The agency mailed out a notice of intent on (inaudible) with an effective date of April 24. Ms. Claimant came in on 4/18 and again stated that she attended school and the issue was not settled and

she applied for the fair hearing.

ADMINISTRATIVE LAW JUDGE: Ok, you're saying that you cannot work because you go to school ma'am?

MS. CLAIMANT: (Inaudible).

ADMINISTRATIVE LAW JUDGE: OK where do you attend school?

MS. CLAIMANT: City College

ADMINISTRATIVE LAW JUDGE: When did you begin?

MS. CLAIMANT: Last Spring

ADMINISTRATIVE LAW JUDGE: Okay, you're getting a BA degree or a BS?

MS. CLAIMANT: BA, not BS. What do you mean by BA?

ADMINISTRATIVE LAW JUDGE: Bachelor of Arts

MS. CLAIMANT: Bachelor of Arts.

ADMINISTRATIVE LAW JUDGE: And it's a 4 year program, right?

MS. CLAIMANT: Yes.

ADMINISTRATIVE LAW JUDGE: Okay, Ms. City Representative, let me have that if that's going to be your evidence. Anything further?

MS. CLAIMANT: Do you need my I.D.?

ADMINISTRATIVE LAW JUDGE: No this is enough. Alright, you'll get your decision in the mail, okay? Okay, have a nice day.

(Whereupon, the hearing concluded.)