No. 128354
IN THE
SUPREME COURT OF ILLINOIS

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Respondent, v. Paula Department, in her capacity as Director of the Illinois Department on Aging, Defendant-Petitioner.	) Petition for Leave to Appeal from the Appellate Court of Illinois, Second District, No. 2-20-0460)) Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois)) Case No. 19MR1106)) The Honorable DONNA R. HONZEL, Judge Presiding.

Answer of Plaintiff-Respondent to Defendant-Petitioner's Petition for Leave to Appeal

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SUPREME COURT CLERK

ARGUMENT

Plaintiff-Respondent Grant Nyhammer, in his capacity as Director of the Northwestern Illinois Area Agency on Aging (NIAAA), is asking the Illinois Supreme Court to deny the Defendant-Petitioner's 'Petition for Leave to Appeal' (Petition) the March 2, 2022 opinion (Opinion)[1] of the Illinois Appellate Court Second Judicial District. *Nyhammer v. Basta*, 2022 IL App (2d) 200460. The Defendant-Petitioner is acting in her capacity as Director of the Illinois Department on Aging (Department).

The Petition should be denied because: 1) the Opinion is the only thing preventing the Department from continuing to close access to the administrative hearing process; 2) the Opinion does not create a split between the judicial districts regarding the Illinois Administrative Procedure Act's (Procedure Act), 5 ILCS 100 *et.seq*., definition of a "contested case"; 3) the Opinion ensures that the Department will finally be held accountable for their alleged misconduct, which the Department has been concealing the past eight years; and 4) the Opinion does not create a split over what constitutes a final administrative decision.

1. Opinion prevents the Department from continuing to deny access to the administrative hearing process

The Petition should be denied because the Opinion is the only safeguard preventing the Department from continuing to deny access to 2.3 million vulnerable

[1] The Petition will be referred to as 'Pet.___'. The following documents that were filed by NIAAA in the appellate court and are contained in the appendix to this reply are: NIAAA's Brief and Appendix of Plaintiff-Appellant; NIAAA's Reply Brief; and NIAAA's Motion for Publication and Attorney Fees.

older adults, and the organizations that serve them, to administrative hearings. A 9. Access to administrative hearings is crucial to holding state agencies accountable for their conduct, *Id.*, but, unfortunately, it has been at least three years since an older adult has even received an administrative hearing with the Department. A 13.

As detailed in the Opinion, the Department has improperly closed access to administrative hearings by creating false barriers such as publishing the wrong address for requesting an administrative hearing for nine years, A 13, or claiming NIAAA's requests for administrative hearings do not satisfy the Department's secret definition of what constitutes a 'contested case' ("the Department denied the NIAAA's petitions without investigation, findings, or *explanation*, but somehow concluded that the petitions failed to present contested cases [emphasis added]," *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶41. The Department determining who gets a hearing to challenge the Department's own conduct obviously insulates the Department from any accountability ("the Department dismissed [NIAAA's] petition [for administrative hearings] without providing any means to effectively appeal or review the decisions and without enacting rules to even validate their actions," *Id* at ¶42). This unfettered power the Department has claimed for itself is why the Opinion concluded that "we do not believe that the legislature ever intended a system for adjudication of rights, duties, or privileges as simplistic as conceived by the Department." *Id.*

Further, without the Opinion, the Department has made it clear it will continue denying access to administrative hearings. For example, during the

pendency of this litigation, when the Department's contested case excuse was likely to be declared invalid by the appellate court, the Department came up with a new reason in September 2021 to deny NIAAA an administrative hearing. A 173. Without the Opinion, unfortunately, NIAAA will again likely have to spend years in litigation challenging the Department's new 2021 reason for closing the hearing process. Since the Opinion is the only thing stopping the Department from denying complete access to the administrative hearing process, the Opinion should stand as written.

2. Opinion does not conflict with other judicial districts regarding contested case

The Petition's claim that the Opinion creates a split between Illinois judicial districts over the Procedure Act's definition of a 'contested case' is without merit. The Petition wrongly claims that the holding of the Opinion "creates confusion as to the meaning of a contested case" under the Procedure Act which will result in state agencies being forced to conduct unnecessary hearings. Pet. 2. Since the Petition cannot even accurately describe the holding of the Opinion as detailed in the following section, its claims about conflicts over the contested case definition are just a pretext to challenge the Opinion and avoid accountability.

A. Petition misrepresents the holding of the Opinion regarding NIAAA's entitlement to a hearing

The Petition's claims about conflicts with other judicial districts over the definition of a contested case should be rejected because the Petition

misrepresents the Opinion. The Petition claims that "the appellate court held that … Nyhammer's disputes with the Department presented contested cases even though he had no right to an administrative hearing under any *independent source* of law [emphasis added]." Pet. 2. This claim is puzzling because the words "independent" and "source" are never used in the Opinion and certainly are never used together to describe NIAAA's right to a hearing.

What the Opinion actually said is that the Department "summarily determined that there was no need for a hearing," *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶41, and in so doing violated the:

- Procedure Act which requires the Department to adopt necessary hearing rules and make factual findings before a hearing request can be denied, *Id at* ¶42;
- Public policy of Illinois as contained in the Procedure Act, *Id* at ¶41; and
- Illinois Administrative Code which requires a hearing to determine if the Department acted reasonably in rejecting NIAAA's designation of service providers. *Id* at ¶43.

i. Right to a hearing under the Procedure Act

Contrary to the claims of the Petition, the Opinion determined that NIAAA's petitions should have been given hearings because the petitions had alleged that the Department had violated the Procedure Act. *Id* at ¶35. The Procedure Act specifically confers NIAAA the right to an adjudicatory hearing under 5 ILCS 100/5-

6, 5 ILCS 100/5-35, and 5 ILCS 100/10-55(c) if the petitions allege that the Department has failed to comply with statutory requirements of the Procedure Act.

The Opinion determined that NIAAA had alleged that the Department had violated the Procedure Act by failing to adopt the required provisions for how the Department will conduct administrative hearings (5 ILCS 100/10-5 through 10-75) and that the Defendant had conceded that it had invalid administrative hearing regulations:

- "Both petitions alleged … that the Department failed to comply with the Procedure Act because it did not implement rules for administrative hearings," *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶35;
- "Defendant [Basta] does not dispute that the Department failed to enact the rules" that comply with the Procedure Act regarding how the Department will conduct administrative hearings," *Id* at ¶38; and
- "The Department dismissed the petitions … without enacting rules [as required by the Procedure Act] to validate its action [of dismissing NIAAA's petitions]." *Id* at ¶42.

Since the Department had not adopted the required administrative hearing rules, the Opinion further determined that the Department violated one of the required hearing rule provisions (5 ILCS 100/10-50(a)) by failing to make factual findings before denying NIAAA hearings. The Procedure Act requires "findings of

fact … accompanied by a concise and explicit statement of the underlying facts supporting the findings" before the Department can deny NIAAA hearings, *Nyhammer v. Basta*, 2022 IL App (2d) 200460 ¶32, and "here, we determine that the Department's summary dismissals of the NIAAA petitions and its conclusory statements" violates 5 ILCS 100/10-50(a) of the Procedure Act. *Id* at ¶33.

The Opinion concluded that in not following the Procedure Act, "the Department failed to provide a means of administrative review … because it failed to grant a hearing where findings fact and law were determined after an *opportunity to be heard* [emphasis added]." *Id* at ¶42. The Opinion, consequently, determined that NIAAA is entitled to an administrative hearing because the Department violated multiple provisions of the Procedure Act.

In addition, in using the 'opportunity to be heard' language, the Opinion is also implicitly citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) as a basis for why NIAAA is entitled to hearings. *Mathews* states that "the fundamental requirement of due process is the *opportunity to be heard* [emphasis added]," which is the same thought as expressed in the Opinion. *Id*; A 19; *Chamberlain v. Civil Service Commission of Gurnee*, No. 2-12-1251, 18 N.E.3d 50,66 (2nd Dist. 2014). Therefore, contrary to the claims of the Petition, the Opinion expressly cited the Procedure Act and implicitly cited *Mathews* as support for its determination that NIAAA's petitions should have been given administrative hearings.

ii. Right to a hearing under public policy

The Opinion also stated that NIAAA was entitled to administrative hearings under the public policy of Illinois (in denying NIAAA hearings, the Department

violated "the enunciated public policy [of Illinois] recognizing that there should be *some form* of administrative review [emphasis added]," *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶41. As support for this public policy, the Opinion specifically cited 5 ILCS 100/10-5 of the Procedure Act which, as stated above, requires the Department to adopt specific provisions regarding how the Department will conduct administrative hearings. *Id.*

This public policy statement in the Opinion also implicitly cites *Mathews* by parroting similar language – the U.S. Supreme Court "consistently has held that *some form of hearing is required* before an individual is deprived of a property interest [emphasis added]" – *Mathews,* 424 U.S. at 333; A 19. The Opinion obviously agreed that the Procedure Act is a codification of the due process principles annunciated in *Mathews* and *Chamberlain*. *Id.* In addition, the Opinion citing the 'enunciated public policy' is likely a reference to *Castaneda v. Illinois Human Rights Commission* which discusses the benefits of allowing easy access to administrative hearings so that disputes can be resolved in an informal setting without the necessity of litigation, which is typically beyond the capabilities of most public benefit recipients. *Castaneda v. Illinois Human Rights Commission,* 132 Ill.2d. 304, 308 (1989); A 151.

Given this cited authority, the Opinion concluded, "the Department was required to give NIAAA adjudicatory hearings and determine the merits of its petitions." *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶43. The Opinion, therefore, cited multiple sources of law for why NIAAA was entitled to a hearing under the public policy of Illinois.

iii. Right to a hearing under Illinois Administrative Code

Finally, the Opinion determined that NIAAA was entitled to a hearing under 89 Ill. Admin. Code 270.215(b)(1). The Opinion stated that "NIAAA's second petition alleged that the Department improperly denied approval of NIAAA's recommended providers … [which] is a question of fact." *Id* at ¶43. Since the second petition pleaded a factual dispute, NIAAA was entitled to a hearing under 89 Ill. Admin. Code 270.215(b)(1) because "the Department made no findings of fact and there was no hearing to allow presentation of evidence regarding the [Department's] alleged unreasonable action [as alleged in the second petition]." *Id* at ¶43.

The Opinion, consequently, cited the Procedure Act, public policy, and the Illinois Administrative Code as sources under which NIAAA was entitled to a hearing, which directly contradicts the claims of the Petition that the holding of the Opinion is that NIAAA "had no right to an administrative hearing under any independent source of law." Pet. 2. Since the Petition obviously misunderstood the holding of the Opinion, the Petition's claims about the Opinion creating conflicts with other judicial districts should be rejected.

B. There is no split between districts about what is a contested case

In addition to misstating the holding of the Opinion as discussed above, the Petition also misstates case law in trying to create a conflict between the Opinion and other judicial districts over the definition of what constitutes a contested case. The definition of contested case is an adjudicatory hearing where the rights of a party are "required by law" to be determined by a state agency. 5 ILCS 100/1-30.

The Petition misconstrues the holdings in three cases (*Munoz v. Department of Registration and Education, Key Outdoor, Inc. v. Department of Transportation, Callahan v. Sledge*) by claiming that the "required by law" phrase means that for a "dispute to constitute a contested case, some source other than the [entire Procedure Act] … must afford a party a hearing." Pet. 19. This is an overstatement of the holdings in these three cases (Three Cases) as what they actually mean is that for a dispute to constitute a contested case, some source other than *the statutory definition of contested case* must afford a party a hearing.

This is evident from the Three Cases as the courts determined the plaintiffs were not entitled to administrative hearings because the underlying statutes of their disputes with state agencies did not grant the plaintiffs rights to administrative hearings (the Medical Practice Act did not afford plaintiff an administrative hearing in *Munoz v. Department of Registration and Ed.*, 101 Ill. App. 3d 827 (1st Dist. 1981); the "Highway Code" did not afford plaintiff a hearing in *Key Outdoor, Inc. v. Department of Transp.*, 322 Ill. App. 3d 316 (4th Dist. 2001); and the Group Insurance Act did not afford plaintiff a hearing in *Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 29. Since the underlying statutes did not afford plaintiffs administrative hearings in the Three Cases, the courts determined the plaintiffs did not have contested cases because the state agencies were not 'required by law' (i.e. the statutes under which the disputes arose) to give hearings. In other words, the Three Cases just mean that the Procedure Act's definition of contested case *alone* does not create an entitlement to a hearing.

Given this, the Three Cases are entirely consistent with the Opinion. As stated above, the Opinion determined that NIAAA was entitled to administrative hearings under multiple legal sources other than the contested case definition, so the Opinion does not conflict with the Three Cases. Since there is no actual split in the judicial districts regarding what constitutes a contested case, the Petition should be denied.

C. Opinion only affects agencies who refuse access to hearings

Even if there was a split in the districts over contested case, however, the Petition should still be denied because the Opinion will not have any impact on other state agencies. The Petition claims that confusion between the judicial districts over what constitutes a contested case will result in "state agencies … expend[ing] limited resources holding hearings" for parties who are not entitled to hearings. Pet. 2. Such a notion is absurd, particularly coming from the Department which has not conducted a hearing in years, as the Opinion will not result in throngs of vulnerable old adults showing up at state agencies with the Opinion and demanding frivolous administrative hearings.

The Opinion will clearly not have any impact on other state agencies because no other state agency has utilized the contested case excuse as a means to completely shut down access to the administrative hearing process as the Department has done. For example, to get an administrative hearing with the Illinois Department of Human Services (DHS), a person merely needs to check a box on a form and email it to DHS. A 151. DHS is a $11 billion dollar state agency, FY23 IDHS Budget Presentation

https://www.dhs.state.il.us/page.aspx?item=140951 (last visited April 14, 2022), making it roughly 10 times the size of the Department, Illinois Department on Aging, *Fiscal Year 2020 Enacted Budget*, https://www2.illinois.gov/aging/Documents/Final%20IDOA%20FY20%20Revised%20w%20enacted_0612.pdf, and is the largest human service agency in Illinois. DHS obviously understands that the public policy in Illinois is allowing easy access to administrative hearings so that disputes can be resolved in an informal setting. *E.g. Castaneda v. Illinois Human Rights Commission,* 132 Ill.2d. 304, 308 (1989); A 151. Since the Procedure Act's definition of contested case is irrelevant to getting a hearing at DHS, the Opinion obviously will have no impact on the Illinois' largest human services agency.

The DHS process for requesting a hearing is instructive on how far outside the norm the Department is operating. While DHS will grant a hearing with minimal information, NIAAA cannot even get *explanation*, *Nyhammer v. Basta*, 2022 IL App (2d) 200460, ¶42, from the Department for being denied hearings, despite NIAAA pleading extensive allegations that far exceed even judicial pleading standards. A 10. Since it is obvious the Department is not operating even remotely similar to other state agencies, the only actual impact the Opinion will likely have on state agencies is that one state agency, i.e. the Department, will be forced to start allowing access to the administrative hearing process. Regardless of the definition of contested case, therefore, the Opinion will have no impact on other state agencies, so the Petition's dire warnings about precious state resources being squandered by unworthy public benefit recipients should be rejected.

3. Opinion ensures accountability for misconduct

The Petition should also be denied because the Opinion will finally force the Department to account for its alleged misconduct as described in NIAAA's Petition for Hearing (NIAAA Hearing Request). A 76 – A 88. As alleged in the NIAAA Hearing Request, in 2014 the Department started illegally withholding potentially millions of dollars from NIAAA and its clients, concealed their misconduct for five years until 2019, when it was inadvertently admitted by the Department, refused to investigate the misconduct after the admission, and has subsequently concealed from NIAAA all information about the alleged misconduct/funding withheld. A 78 - 80. In an effort to continue their concealment, the Department has forced NIAAA to engage in years of protracted litigation just to get the Opinion to order the Department to provide NIAAA with an administrative hearing. Since the Petition is just another attempt of the Department to avoid accountability and unnecessarily delay this litigation, it should be denied so that NIAAA can finally get the hearing ordered by the Opinion.

4. Opinion does not create split over final administrative decisions

Finally, the Petition wrongly claims that the Opinion creates a conflict between districts regarding whether a denial of a hearing is an appealable final decision. Pet. 21. In an attempt to manufacture another split, the Petition quotes a line from *Shempf v. Chaviano*, 2019 IL App (1st) 173146 out of context to wrongly claim that *Shempf* means that a state agency denying a hearing is not a final administrative decision. Pet. 22. In *Shempf,* the defendant, the Illinois Department of Labor (DOL), was required by the Prevailing Wage Act to conduct **public**

hearings after DOL had posted the prevailing wage rate. *Shempf*, 2019 IL App (1st) at ¶ 45. At the **public hearing**, affected individuals can introduce evidence which is evaluated by the state agency before the DOL ultimately renders a final administrative decision. *Id.*

The *Shempf* plaintiff asked for a hearing before the DOL had even posted the wage rates, which prompted the *Shempf* court to note that "the denial of a hearing [to plaintiff] was not itself, a final administrative decision … [because the DOL's] refusal to hold a hearing did not fix the rights of the parties or terminate the proceedings … [as] the proceedings had not even begun." Id. at ¶ 47. Since *Shempf* pertains to only how the DOL renders a final administrative decision under the peculiar public hearing process dictated by the Prevailing Wage Act, it has no relevance to how the Department denied NIAAA hearings.

The Petition, nevertheless, claims that the Opinion conflicts with *Shempf* and "will create confusion among administrative agencies." Pet. 22. As support for this supposed 'confusion', the Petition quotes a line from *Shempf* ("the denial of a hearing was not itself, a final administrative decision," Pet. 21) in an apparent attempt to claim that the Department denying NIAAA hearings was not a final decision. This is perplexing as *Shempf* obviously has no relevance because the Department: is not DOL, is not subject to the Prevailing Wage Act, did not deny NIAAA hearings because of the Prevailing Wage Act, did not deny NIAAA hearings because the Department had not yet posted the prevailing wage rate, does not conduct public hearings regarding the subject matter of NIAAA's petitions, was not following a statutory process in the Prevailing Wage Act which dictates when the

Department issues final administrative decisions, etc. Contrary to the claims of the Petition, consequently, there is no conflict between the districts over what constitutes a final administrative decision, so the Petition should be denied.

Conclusion

In conclusion, the Petition should be denied because the Opinion is the only thing preventing the Department from closing the entire administrative hearing process to our most vulnerable citizens, there is not split between the districts, and the Opinion is forcing the Department to finally answer for years of alleged misconduct.

Dated: April 19, 2022

Respectfully submitted,

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Certificate of Compliance

I certify that this answer conforms to the requirements of Rule 315 and Rule 341. The length of this answer, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the answer under Rule 315 is 3,827 words.

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Certificate of Filing and Service

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 19, 2022, I electronically filed the foregoing Answer of Plaintiff-Respondent Grant Nyhammer to Defendant-Petitioner's Petition for Leave to Appeal with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system and served it upon Defendant-Petitioner at the following e-mail address:

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APPENDIX

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APPELLATE COURT 2ND DISTRICT

No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

Brief and Appendix of Plaintiff-Appellant
Grant Nyhammer

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ORAL ARGUMENT REQUESTED

Table of Points and Authorities

NATURE OF THE ACTION

Grant Nyhammer (Plaintiff), as Executive Director of the Northwestern Illinois Area Agency on Aging (NIAAA), filed a Complaint for Mandamus (Complaint) against Paula Basta (Defendant), in her capacity as the Director of the Illinois Department on Aging (Department), seeking a mandamus ordering Defendant to perform her ministerial duty to: (1) have administrative rules that comply with the Illinois Administrative Procedure Act (Procedure Act); and (2) provide Plaintiff with two administrative hearings. The trial court, without jury, granted Defendant's motion to dismiss based on the Complaint, so questions about the pleadings are raised by this appeal.

ISSUE PRESENTED FOR REVIEW

1. Did the trial court commit reversible error in granting Defendant's motion to dismiss?

2. Did the trial court err in causing delay?

JURISDICTION

Plaintiff timely filed his *Notice of Appeal*, C. 160, within 30 days after the trial court's July 20, 2020 entry of the *Memorandum of Decision as to Plaintiff's "Motion to Vacate" (sic) ie Motion to Reconsider*, C. 158, which is the order disposing of the last pending post-judgment motion. This Court has jurisdiction under Illinois Supreme Court Rule 301. *See* Ill. Sup. Ct. R. 301.

STATUTES INVOLVED

This appeal involves the interpretation of the Illinois Mandamus Statute, 745 ILCS 5/14-101, *et seq.*; 735 ILCS 5/2-615; the Procedure Act, 5 ILCS 100/1-

1, *et seq.*; and the eight other provisions under which the Plaintiff has requested hearings:

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 3026(f)

> (f) Withholding of Area Funds
>
> (1) If the head of a State agency finds that an area agency on aging has failed to comply with Federal or State laws, including the area plan requirements of this section, regulations, or policies, the State may withhold a portion of the funds to the area agency on aging available under this subchapter.
>
> (2)
>
> (A) The head of a State agency shall not make a final determination withholding funds under paragraph (1) without first affording the area agency on aging due process in accordance with procedures established by the State agency.
>
> (B) At a minimum, such procedures shall include procedures for—
> (i) providing notice of an action to withhold funds;
> (ii) providing documentation of the need for such action; and
> (iii) at the request of the area agency on aging, conducting a public hearing concerning the action.

42 U.S.C. § 3027(a)(5)

> (5) The plan shall provide that the State agency will –
>
> (A) afford an opportunity for a hearing upon request, in accordance with published procedures, to any area agency on aging submitting a plan under this subchapter, to any provider of (or applicant to provide) services . . . .

5 ILCS 100/10-5

> Sec. 10-5. Rules required for hearings. All agencies shall adopt rules establishing procedures for contested case hearings.

89 Ill. Admin. Code § 230.440(a)

> (a) Request for hearing
>
> A written request for a hearing shall be filed by the aggrieved agency or organization with the Department or the area agency on aging, as appropriate, within 30 days following receipt of the notice of adverse action.

89 Ill. Admin. Code § 220.502

> Section 220.502 Request for Hearing or Appeal
> The request for a hearing or appeal shall be in writing and shall include . .

89 Ill. Admin. Code § 230.410(a)(1)

> Section 230.410 Hearing Before the Department
> [T]he Department shall provide an opportunity for a hearing to:
>
> (a) Any area agency on aging when the Department proposes to:
>
> (1) Disapprove the area plan or any amendment to the area plan which has been submitted to the Department by the area agency on aging; or
>
> (2) Withdraw from the agency designation as an area agency on aging . . . .

89 Ill. Admin. Code § 270.215(b)(1)

> 1) The Department reserves the right to provide recommendations, reject recommendations, or direct action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so unreasonably.

STATEMENT OF FACTS

Plaintiff filed the three-count Complaint on November 5, 2019. C.4. Count I of the Complaint alleges that Defendant does not have administrative rules for administrative hearings that are required by the Procedure Act. C.8. Plaintiff's

Brief in Support of Complaint for Mandamus (Brief) alleges that because Defendant does not have the required hearing rules, Defendant has effectively closed the administrative hearing process to 2.3 million older adults in Illinois. C.52. The Brief alleges that the reason the Defendant has shut down the hearing process is to avoid accountability. C.53.

Count II of the Complaint alleges that Defendant has improperly failed to provide Plaintiff an administrative hearing on the initial petition (Initial Petition). The Initial Petition alleges nine counts of illegal actions taken by the Defendant, (C. 16-19) including improperly withholding funding from Plaintiff. C. 17-19. The Brief alleges that the Defendant is statutorily obligated to fund Plaintiff and that this obligation is meaningless if Plaintiff is not allowed to challenge the alleged misconduct of the Defendant through an administrative hearing. C.54.

Count III of the Complaint alleges that Defendant has improperly failed to provide Plaintiff an administrative hearing on the Adult Protective Services Program (APS) Petition. C.9. The APS Petition has five counts which allege that Defendant illegally rejected Plaintiff's designation of an APS provider (C.37.), has improperly intervened in the APS designation process (C.37.), is using an illegal APS manual to manage the APS Program (C.37.), and that Defendant does not have administrative rules required by the Procedure Act (C. 38.). The Brief alleges that Defendant not having the required hearing rules is the basis for Defendant denying Plaintiff's hearings on both of Plaintiff's petitions. C.53.

PROCEDURAL HISTORY

On June 26, 2019, Plaintiff filed the Initial Petition with the Defendant, alleging that the Defendant withheld OAA funding from Plaintiff in violation, *inter alia*, of 42 U.S.C. § 3026(f)(2)(b). C. 7; C. 12. On July 29, 2019, the Defendant emailed a letter to Plaintiff denying Plaintiff a hearing on its Initial Petition, alleging that the Initial Petition did not present a contested case. C. 7; C. 31.

On August 23, 2019, Plaintiff filed its APS petition for administrative hearing (APS Petition) with the Defendant. C. 7; C. 32. On September 24, 2019, the Defendant emailed a letter to Plaintiff denying Plaintiff a hearing on its APS Petition, alleging the APS Petition did not present a contested case. C. 7; C. 51.

On November 5, 2019, Plaintiff filed the Complaint in the Circuit Court of the 17th Judicial District, Winnebago County, requesting that the trial court enter a mandamus ordering Defendant to adopt administrative rules for contested hearings that comply with the Procedure Act and provide Plaintiff hearings on its two petitions. C. 4; C. 9 – 10.

The deadline for Defendant to respond to the Complaint was December 2, 2019. C. 58. On December 2, 2019, Defendant filed her first motion for extension of time to answer or otherwise plead to the Complaint, pursuant to Illinois Supreme Court Rule 183. C. 58. On December 9, 2019, Plaintiff filed its *Plaintiff's Objection to Extension of Time*, arguing that the first motion for extension of time should not be granted because Illinois Supreme Court Rule 183 does not apply to deadlines set by statute, the motion for the extension requested an extension six times the statutory limit, and mandamus is a summary proceeding requiring speedy

resolution. C. 70 – 71. On December 11, 2019, the trial court entered an order granting Defendant an additional 30-day extension of time from the date of the order. C. 73.

On January 10, 2020, Defendant filed her *Defendant's Motion To Dismiss Under 735 ILCS 5/2-615*. C. 74. On January 15, 2020, the trial court set oral argument for the motion to dismiss to February 28, 2020. C. 94. On February 28, 2020, the trial court granted Defendant's motion to dismiss (Dismissal) and the Complaint was dismissed with prejudice. C. 120.

On March 6, 2020, Plaintiff filed his *Motion to Vacate*, requesting that the trial court reconsider the Dismissal. C. 121. On March 12, 2020, the trial court set oral argument to two months out on May 5, 2020. C. 132. Then, on April 21, 2020, the trial court continued the oral argument on the *Motion to Vacate* and reset it for status hearing to July 1, 2020. C. 152. Plaintiff filed his *Continuing Objection to Delay*, restating that mandamus is a summary proceeding required to be decided expeditiously. C. 152. On July 1, 2020, the trial court set the *Motion to Vacate* for status of decision to August 20, 2020. C. 154. On July 10, 2020, Plaintiff filed his *Third Objection to Delay*, arguing that setting status of decision to August 20, 2020 is an unnecessary delay, *inter alia*, because it is 80 days after the court began again accepting civil hearings because of the COVID-19 pandemic. C. 154 – 155.

On July 21, 2020, the trial court filed its *Memorandum of Decision as to Plaintiff's "Motion to Vacate" (sic) i.e. Motion to Reconsider*. C. 158. On August 17, 2020, Plaintiff filed his *Notice of Appeal* with this Court. C. 160.

ARGUMENT

I. Trial Court Committed Reversible Error in Entering the Dismissal

The Dismissal should be reversed because the trial court: (1) used the wrong standard in construing facts against the Plaintiff and (2) made mistakes of law regarding Defendant's mandatory obligations to provide Plaintiff hearings. Since the Dismissal was entered pursuant to 735 ILCS 5/2-615, the standard of review is de novo. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418-19 (2002).

1. Court used wrong fact standard

The Dismissal should be reversed because the trial court used the wrong fact standard in evaluating facts alleged in the Complaint and supporting documents. The standard is:

> In reviewing the sufficiency of a complaint, the court must not only accept all well-pled facts from the complaint but must also accept as true … all reasonable inferences that may be drawn from those facts. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006).

The trial court failing to follow the *Marshall* standard is reversible error:

> A trial court should grant a motion to dismiss a complaint under section 2—615…*only when* the allegations in the complaint, construed in the light most favorable to the plaintiff, fail to state a cause of action upon which relief can be granted…The complaint is to be construed liberally and should be dismissed *only when* it appears that the plaintiff could not recover under any set of facts [emphasis added]. *Ryan v. Yarbrough*, 355 Ill. App. 3d 342, 823 N.E.2d 259, 263 (2d Dist. 2005).

The trial court, unfortunately, ignored the *Marshall* standard by construing alleged facts liberally *against* the Plaintiff in dismissing all three counts of the Complaint.

a. Court confused about who the Plaintiff represents in dismissing Count I

The trial court improperly dismissed Count I of the Complaint by wrongly concluding that Plaintiff does not represent the interests of older adults. The Complaint alleges in ¶:

- 9-10 that Plaintiff is the public advocate representing the interests of older adults (C.5); and
- 8 that it has been over three years since an older adult has had an administrative hearing with the Defendant. C.5.

The Brief alleges that:

- the address that the Defendant has for older adults requesting administrative hearings, as pled in ¶24 of the Initial Petition (C.14.), has been wrong for the past nine years (C.53);
- having the wrong hearing address is being used by Defendant to prevent older adults from getting hearings (C.53);
- Because Defendant does not have the required rules for administrative hearings, Defendant has effectively closed the administrative hearing process to 2.3 million older adults in Illinois. C.52.

Plaintiff has alleged in Count I, therefore, that he is representing the interests of all older adults who are prevented from accessing administrative hearings by the Defendant. Despite this, the trial court dismissed Count I by stating:

> You haven't named a single individual. R.32. [Older adults not getting hearings is] not what's at issue here. R.32. We're specifically talking about your agency and the funding that the department has provided your agency. We're not talking about John Smith who lives down the road on Oak Avenue. R.33. On a basis -- your complaint was on a basis of your agency, not on a basis of any particular, you know, John Smith or Jane Doe. *That's a completely different set of considerations* [emphasis added]. R.34.

When Plaintiff's counsel informed the trial court that Count I was being brought on behalf of all older adults who are being denied hearings, the trial court

responded by saying “well, no, you’re [not]”. R.33. The trial court, therefore, dismissed Count I under the incorrect factual understanding that Plaintiff was not representing the interests of older adults who were being denied access to the administrative hearing process. If the trial court had understood this, then it would have been ‘a completely different set of considerations’ according to the trial court. Since the trial court misconstrued facts against Plaintiff that were likely the reason Count I was dismissed, the Dismissal violated the *Marshall* standard and should be reversed.

b. Court ignored allegations about funding in dismissing Count II

The trial court improperly dismissed Count II of the Complaint by making factual errors regarding the allegations pertaining to funding. The Complaint alleges in ¶:

- 17 that the Defendant is required to give Plaintiff an administrative hearing if the Defendant withheld OAA funding (the footnote to ¶17 cites the federal law that requires the Defendant to give Plaintiff a hearing before withholding OAA funding) (C.7); and
- 18 that the Defendant withheld OAA funding from the Plaintiff. (C.7).

The Initial Petition alleges in ¶:

- 12-14 that the Defendant is required to award Plaintiff OAA and other funding (C13);
- 35-42 that the Defendant terminated Plaintiff’s contract in the APS program (C.15);
- 43-47 that a Defendant employee admitted she had been ordered to withhold funding from Plaintiff for an illicit purpose (C. 15);
- 48-52 that the Defendant subsequently gave no funding to Plaintiff during a period it awarded $3.79 million to other area agencies on aging, (C. 15-16);
- 53-60 that the Defendant refused to investigate or provide any information about how much or what type of funding was withheld from Plaintiff (C. 16); and

- 68-69, 76-78, 82-85, and 89-92 that the Defendant withheld funding from Plaintiff (C. 17-19).

Despite these numerous allegations about funding being withheld from Plaintiff, the trial court dismissed Count II by stating:

> Count II…has to do with some funding that may or may not have been actually withheld that may have been pursuant to some sort of order that may or may not actually have existed. R. 20. As for the alleged denial of funding, which seems to be conclusory, nonetheless, from the pleading, I'm not sure whether there were actually funds withheld or whether there's a suspicion. It appears that it's just a suspicion that there were some funds withheld from state funding. The initial petition it appears to kind of take a shotgun approach, but then in terms of any specifics, they really do have to do with state other funding as opposed to federal funding under the OAA. R.21.

Plaintiff's Counsel asked the trial court if she was dismissing Count II because the Complaint did not allege OAA had been withheld. R.29. The trial court responded by stating "from what I could tell, [it] was not OAA funding." R.29. When Plaintiff's Counsel showed the trial court that the Complaint had specifically alleged in ¶18 that OAA funding had been withheld from Plaintiff (R.30.), the trial court stated:

> I don't think that matters to the decision…[there] weren't any other supportive allegations…it is speculative at best. R.30-31.

The trial court obviously realized it had made a critical error and, rather than fixing the mistake, started grasping for alternate explanations to justify the Dismissal. Further, despite the allegations containing detailed information about the funding being withheld (e.g. dates, admissions, Defendant refusing to disclose information about what funding was withheld) the trial court treated all these allegations with outright skepticism, which is in direct contradiction of the *Marshall* standard. It is perplexing that the trial court would dismiss the Complaint because it lacks details that Defendant is refusing to disclose.

Finally, the trial court made the factual error of claiming that Plaintiff has "no legal right to funds" (R.22.), despite the Brief alleging that:

- Both federal and state law confer special status on Plaintiff as the Defendant is statutorily obligated to fund the Plaintiff (C.53.);
- These special rights of Plaintiff to receive funding are rendered meaningless if the Defendant can simply refuse to give a hearing when confronted with funding misconduct (C.53.); and
- Even if Plaintiff was not given unique funding privileges, the Plaintiff is still entitled to a hearing to challenge Defendant for withholding funding for an illicit purpose under *Bio-Medical Laboratories, Inc. v. Trainor* (C.54).

The trial court erred, therefore, in construing well-pled facts about funding being withheld, and reasonable inferences from those facts, against Plaintiff in violation of the *Marshall* standard in dismissing Count II.

c. Court ignored APS designation allegations in dismissing Count III

The trial court improperly dismissed Count III of the Complaint by concluding Plaintiff cannot designate APS providers. The APS Petition alleges in ¶:

- 6 that Plaintiff is the regional administrative agency (RAA) for the APS program in Northwestern Illinois (C.32);
- 12 that Illinois law gives Plaintiff the authority to designate APS providers (C.33);
- 37 that Defendant contacted at least one of Plaintiff's APS provider applicants to gather information (Information) about the application process (C.35);
- 38 that it is believe the Information was used in the rejection (C.35);
- 39 that the Defendant did not disclose to Plaintiff that it had contacted the APS provider applicant to gather Information (C.35);
- 55 that Defendant has tainted the APS provider applicant process by gathering the Information (C.37);
- 44 that the Defendant has not rejected any RAA designation for APS providers in at least ten years (C.36);

- 47 that Plaintiff, as the RAA, has the authority and responsibility to designate APS providers (C.36);
- 48 that the reasons given by the Defendant for rejecting Plaintiff's APS designation are insufficient (C.36);
- 51 that the Defendant has limited authority to reject Plaintiff's APS designation (C.37); and
- 53 that the Defendant's rejection of Plaintiff's APS designation was unreasonable. (C.37).

The trial court, nevertheless, dismissed Count III by stating that the Defendant has the authority to reject Plaintiff's designation:

> [Plaintiff] submits [the APS Provider designation] for approval to the [Defendant] and the [Defendant] has the discretion to accept or reject it. Again, there is not an absolute. There's discretion in the [Defendant] to accept or reject it. R.24.

In other words, despite Plaintiff pleading that Plaintiff has the authority to designate APS providers, the trial court concluded the opposite in dismissing Count III. In so doing, the trial court again violated the *Marshall* standard.

2. Court misstated the law

The trial court erred in entering the Dismissal because the trial court made multiple misstatements of law. Mistakes of law in a motion to dismiss are reversable. "[W]hen we review the matter de novo, we are not constrained to make the same mistake the trial court made." *Ryan*, 355 Ill. App. 3d 342, 823 N.E.2d at 263. As described below, the trial court's mistakes centered around a basic misunderstanding about the nature of a mandamus.

A mandamus is appropriate for compelling Defendant to perform her mandated duties because "mandamus is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved." *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 38 (2011). A mandamus

order will be entered if there is “a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply." *Id.* at 39. C.56. All three of these mandamus elements are essentially satisfied when public officials refuse to do something that is required by law such as when a statute uses the term “shall”. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 909 N.E.2d 783, 792 (Ill., 2009) (the “shall” in the sex offender statute imposed a mandatory obligation upon the presiding judge). C.56. While the trial court correctly noted that imperative words like ‘shall’ create a mandatory obligation appropriate for a mandamus, (R. 22, 31) it proceeded to disregard the mandatory obligations cited in each of the three counts of the Complaint.

a. Court misunderstood Article 10 in dismissing Count I

The trial court erred in dismissing Count I of the Complaint by disregarding the mandatory obligations contained in Article 10 (Article 10) of the Procedure Act. Count I of the Complaint alleges that Defendant has a ministerial duty to implement administrative rules on the thirteen administrative hearing topics contained in Article 10. C.8. This duty is mandatory as Article 10 states:

> All agencies *shall* adopt rules establishing procedures for contested case hearings….All agency rules establishing procedures for contested cases *shall* at a minimum comply with the provisions of this Article 10 [emphasis added]. 5 ILCS 100/10-5 – 10-10.

Despite this being an unequivocal mandatory obligation, Defendant has refused to implement the rules. C.8. For example, Defendant has an administrative rule for evidence – “the hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure ….,” 89 Ill. Admin. Code § 220.514 – that directly contradicts Article 10 – “the rules of evidence and privilege

as applied in civil cases in the circuit courts of this State shall be followed," 5 ILCS 100/10-40. C.117. As another example, while Article 10 requires Defendant to have rules for the qualifications and conflicts of interest for administrative law judges, 5 ILCS 100/10-20; 100/10-30, the term 'administrative law judge,' is absent from Defendant's current administrative rules. C.117.

The reason Article 10 sets required minimums is to ensure that all Illinois state agencies have hearing regulations that comport with due process (C.116):

> This [United States Supreme] Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest …The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner [internal citations omitted]. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The Illinois Appellate Court of the Second District has further refined this for administrative hearings at the state agency level by stating:

> [A]n administrative proceeding is governed by the fundamental principles and requirements of due process of law….The procedural safeguards required vary with the circumstances of the case…[provided] that due process in an administrative proceeding requires the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence (internal citations omitted). *Chamberlain v. Civil Service Commission of Gurnee*, No. 2–12–1251, 18 N.E.3d 50, 66 (2nd Dist. 2014).

Chamberlain requires, therefore, that state agencies provide:

1. Proper notice and a hearing (i.e. opportunity to be heard);
2. The right to cross examine adverse witnesses; and
3. Impartial rulings on evidence.

Article 10 is, therefore, just a codification of the due process principles annunciated in *Chamberlain* and that is why Article 10 is written to be a mandatory obligation for Defendant. C.116.

The trial court, nevertheless, concluded that Defendant complying with Article 10 is discretionary – "there's nothing alleged in Plaintiff's Count I that is of a type subject to a writ of mandamus due to a discretionary manner, manner Article 10 was written." R.18. This is an obvious misstatement of law that the trial court used as the basis for dismissing Count I.

The trial court also mistakenly stated that since the Illinois General Assembly Joint Committee on Administrative Rules (JCAR) had a role in implementing administrative rules, it somehow made Defendant's obligation to comply with Article 10 discretionary – "all the rules from the department is [sic] subject to JCAR approval. So it's not as simple a matter as plaintiff's complaint alleges." R.19. The trial court again misstates the law because Defendant does not need JCAR approval as she can implement rules over the objection of JCAR – "if an agency refuses…to remedy an objection stated by the Joint Committee, it shall notify the Joint Committee in writing of its refusal and shall submit a notice of refusal to the Secretary of State." 5 ILCS 100/5-110. C.125. Also, the Illinois General Assembly knew when obligating Defendant to implement hearing rules that the Defendant would need to work with JCAR since JCAR is a committee of the General Assembly. C.125. Just because a statutory obligation requires Defendant to work with the General Assembly does not make it any less a mandatory obligation particularly since Defendant has the authority to implement rules without JCAR's, or anyone else's, approval. C.125. The trial court, therefore, mistakenly concluded that Defendant has discretion to ignore Article 10, which is reversible error under *Ryan*.

b. Court made mistakes about mandatory hearings in dismissing Count II

The trial court also misstated Defendant's legal duty to provide Plaintiff a hearing on the Initial Petition when dismissing Count II of the Complaint. Despite Plaintiff requesting a hearing pursuant to seven provisions that require Defendant to grant a hearing, Defendant refused to grant a hearing by claiming the Initial Petition is not a 'contested case' (Complaint ¶ 20, C.7).

The Initial Petition (C.22.) requested a hearing pursuant to the five following provisions:

i. 42 U.S.C. § 3026(f)(2)(A), which states the Defendant "**shall** not make a final determination withholding funds … without first affording the area agency on aging due process";

ii. 42 U.S.C. § 3026(f)(2)(B), which states that Defendant "**shall** include procedures for … providing notice of an action to withhold funds; providing documentation of the need for such action; and at the request of the area agency on aging, conducting a public hearing concerning the action";

iii. 42 U.S.C. § 1983, which states "Every person who [acting on behalf of a state agency] … causes … [a] deprivation of any rights … secured by the Constitution and laws, **shall** be liable to the party injured in … [a] proper proceeding for redress";

iv. 42 U.S.C. § 3027(a)(5), which states the Defendant "**will** … afford an opportunity for a hearing upon request … to any area agency on aging submitting a plan under [the OAA]";

v. 89 Ill. Admin. Code § 230.410(a)(1), which states that the Defendant "**shall** provide an opportunity for a hearing to … any area agency on aging when the Department proposes to … disapprove the area plan".

All five of the above use imperative language, so they are ministerial duties that Defendant must perform by giving Plaintiff a hearing. Further, the Initial Petition also asked for a hearing under two additional provisions (C.22.) from the administrative code, which are:

i. 89 Ill. Admin. Code §230.440(a), which states that "a written request for a hearing shall be filed by the aggrieved agency…within 30 days following receipt of the notice of adverse action"; and

ii. 89 Ill. Admin. Code §220.502, which states that "the request for a hearing…shall be in writing."

These additional provisions are made implicitly mandatory by *Chamberlain*, which, as stated above, requires Defendant to provide an administrative hearing. Further, if Defendant can just ignore these administrative hearing provisions and not give hearings then these provisions become meaningless, which contradicts the rules of statutory interpretation. *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 561 N.E.2d 656, 661 (1990). The above administrative code provisions, therefore, create mandatory obligations for Defendant to provide a hearing if their elements are met.

Despite Plaintiff providing overwhelming authority for receiving a hearing, the trial court stated Plaintiff is not entitled to a hearing:

> I don't see the plaintiff has provided any statute, rule or otherwise that particularly mandates -- specifically mandates a right to a hearing…and there's no specific provision that requires a hearing, a shall or must requiring of a hearing, then nothing about not receiving funds fits the definition of a contested case, i.e., a substantive right which requires due process. R.22.

The trial court was obviously mistaken as Plaintiff cited seven provisions that mandate Defendant provide a hearing, so it is perplexing why the trial court would make such a demonstrably incorrect claim in dismissing Count II.

While it is unclear, it appears the trial court might have been trying to say that the definition of contested case gives Defendant the authority to deny access to hearings if the Defendant determines the hearing request does not fit her view of a contested case. If this is what the trial court was trying to say, it is without merit because a contested case is:

> An adjudicatory proceeding . . . in which the individual legal rights . . . of a party are required by law to be determined by an agency only after an opportunity for a hearing. 5 ILCS 100/1-30.

In other words, a contested case simply means any circumstance where Defendant is required by another law (such as the seven cited in the Initial Petition or *Chamberlain*) to provide a hearing. *Callahan v. Sledge*, No. 4–11–0819, 980 N.E.2d 181, 190 (4th Dist. 2012) (court determined there was no contested case because the "plaintiff fails to reference legal authority that requires CMS to conduct a hearing"). The converse of the *Callahan* holding is that if there is legal authority that requires a hearing, then there is a contested case. C.54.

Further, allowing Defendant the unfettered authority to reject hearing requests because she deems them not to be contested cases is inconsistent with the plain language of the entire statute, as the Procedure Act is about establishing minimum procedures that are imposed on the Defendant for conducting hearings – i.e. the top of the section regarding contested cases reads, "Rules required for hearings. All agencies shall adopt rules establishing procedures for contested case hearings." 5 ILCS 100/10-5. C.55. The term contested case is not, as the trial court is supposedly claiming, intended implicitly to give Defendant unlimited authority to

refuse to give hearings in contradiction to *Chamberlain* or the other seven provisions cited in the Initial Petition.

The term 'contested case' being a limitation on Defendant, and not on Plaintiff obtaining a hearing, is also consistent with the purpose of having administrative hearings, which is to:

i. Allow the state agency to fully develop and consider the facts;
ii. Have the state agency use their expertise in resolving disputes;
iii. Not force an aggrieved party to go to court for relief;
iv. Protect state agency operations by avoiding interruptions;
v. Give the state agency the chance to correct mistakes; and
vi. Converse judicial time by avoiding piecemeal appeals. *Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 547 N.E.2d 437, 439 (1989). C.53.

Obviously, Defendant arbitrarily blocking access to the administrative hearing process by claiming something is not a contested case defeats all the reasons stated above for even having an administrative hearing process.

Finally, the definition of contested case is irrelevant to Plaintiff receiving a hearing as *Vuagniaux* dictates the Initial Petition just needs to provide enough information to put Defendant on notice of the actions being contested. C.54. "Administrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding." *Vuagniaux v. Department of Professional Regulation*, 208 Ill.2d 173, 802 N.E. 2d 1156, 1169 (2003). This is consistent with the purpose of administrative hearings being a less formal forum for a state agency to resolve disputes. The content of the Initial Petition, therefore, need only state facts which apprise the Defendant of the issues in dispute. *Vuagniaux,* 208 Ill.2d 173, 802 N.E. 2d at 1170. As long as a hearing request provides this minimal detail, *Chamberlain* requires Defendant

provide a hearing, regardless of her definition of a contested case. The trial court's reference to contested case, therefore, is insufficient justification for dismissing Count II.

The trial court's dismissal of Count II, consequently, is based on a misunderstanding of Defendant's ministerial duties to provide administrative hearings, which is reversible error under *Ryan*.

c. Court confused the issue in dismissing Count III

The trial court was confused about what was being asked in Count III of the Complaint. The issue in Count III is if Defendant has a ministerial duty to provide Plaintiff a hearing on the APS Petition (C.9.). The trial court misunderstands the issue by stating that since Defendant has the discretion to reject Plaintiff's APS designation, Defendant may refuse Plaintiff a hearing:

> There's discretion in the department to accept or reject [Plaintiff's APS designation]. And so, therefore, there's not a substantive right for an agency to have every recommendation granted and, therefore, because mandamus requires a substantive right for a ministerial action about which an agency has no discretion, it doesn't fall within there. R.24.

The trial court obviously misunderstood that rejecting a designation is a different issue than refusing a hearing. As stated above, it is a factual error for the trial court to conclude that Defendant has discretion to reject the APS designation. A hearing is obviously necessary so that evidence can be presented to determine who has the right to designate APS providers. Even assuming *arguendo*, however, that Defendant has discretion to reject the APS designation, it is irrelevant to Defendant's mandatory obligation to provide Plaintiff a hearing in the first place.

Further, the trial court, in dismissing Count III, ignored the actual reason that Defendant gave for refusing to give a hearing, which is that the APS Petition is not a contested case. C.51. In ignoring the real reason that Defendant refused a hearing, the trial court is allowing Defendant to invent alternative explanations to justify her conduct (C.91.), which is improper:

> Arguments made for the first time on appeal may not be used to support the agency's action because courts may not accept appellate counsel's post hoc rationalizations for agency action. Van Dyke v. White, No. 4–14–1109, 60 N.E.3d 1009, 1017 (4th Dist. 2016) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 -69 (1962)).

Defendant is forbidden, therefore, from creating new theories to justify her conduct. C.91. Also, the trial court ignored that the APS Petition requested a hearing because Defendant:

- Is illegally using an APS manual to manage the APS Program (C.37);
- Has tainted the APS designated process (C.37.); and
- Has not adopted rules in compliance with Article 10 (C.38).

Since the dismissal did not address why Plaintiff is not entitled to hearings on any of these issues alleged in the APS Petition, it is faulty. Since the trial court focused on the wrong issues in dismissing Count III, it should be reversed under *Ryan*.

In conclusion, since the trial court committed numerous and fundamental mistakes of law and fact, the Dismissal should be reversed. If the Dismissal stands, then Defendant will continue to close the entire administrative hearing process to our most vulnerable citizens and will be rewarded for covering up the misconduct as alleged in the Initial Petition. The Dismissal, therefore, is a miscarriage of justice that should be reversed.

II. Trial Court Erred in Causing Delay

The trial court erred in unnecessarily causing delay in the resolution of this matter. The standard of review for courts granting delays is abuse of discretion. *Hernandez v. Power Constr. Co.*, 73 Ill. 2d 90, 95 (1978). In determining an abuse of discretion, the court must balance the interest in prompt disposition of the case with the equally compelling interest in obtaining justice. *Merchants Bank v. Roberts*, 292 Ill App. 3d 925, 927 (2d District 1997).

A mandamus is a summary statutory proceeding for the purpose of an expeditious resolution ("[w]here public issues of serious concern require speedy resolution, this court and others have not hesitated to act in mandamus." *People ex rel. Scott v. Kerner*, 32 Ill. 2d 539, 208 N.E.2d 561, 565 (1965). This is evident by the mandamus statute giving defendants up to only five days to respond to a complaint. 735 ILCS 5/14-10.

Despite it being a mandamus, the trial court unnecessarily delayed this lawsuit three times over Plaintiff's objections. C. 70, C. 73; C. 152; C. 154; C. 167-68. The first delay came after the trial court improperly extended the time for Defendant to respond under Illinois Supreme Court Rule 183. C. 58. This extension was an error because the trial court improperly relied on Rule 183, which does not apply to statutory deadlines such as the mandamus statute:

> Rule 183's plain language indicates that it only applies to the time limits set forth by the Illinois supreme court rules. It simply does not apply to a statutory time limit. *Robinson v. Johnson*, No. 1-02-2121, 15 (Ill. App. 2004).

Further, the extension granted by the trial court was six times the statutory limit, so it alone was an abuse of discretion. C. 58 – 59.

The second delay came on April 21, when the trial court *sua sponte* delayed the oral argument of Plaintiff's *Motion to Vacate* from May 5, 2020 to July 1, 2020. C. 153; C. 167.

The third delay came on July 1, 2020, when the court set the status for decision on the *Motion to Vacate* to August 20, 2020. C. 154; C. 167. The trial court did not provide sufficient justification for any of these delays (C. 154 – 55) in resolving the mandamus. The trial court, therefore, abused its discretion in unnecessarily delaying resolution of the Complaint.

CONCLUSION

For the foregoing reasons, the Dismissal should be reversed and the case remanded with directions to grant Plaintiff's mandamus.

Dated: November 23, 2020

Respectfully submitted,

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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

E-FILED
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APPELLATE COURT 2ND DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

APPENDIX TO BRIEF

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2

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

FILE STAMP

Nyhammer
Plaintiff

Case No. 2019-MR-11106

Basta
Defendant(s)

NOTICE OF FILING

PLEASE TAKE NOTICE that on July 20, 2020, the attached Memorandum of Decision and Order was filed by the Court.

CERTIFICATE OF SERVICE --- SERVICE LIST

Under penalties as provided by 735 ILCS 5/1-109, I state that I served this notice and the document referenced here to the persons listed below by the means specified.

Inean L. Ferris
Representative, Trial Court Administration

Party and address/email address	Method of Service (1st class, email, fax)
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Rockford, Illinois 61101

3

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

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Nyhammer vs. Basta
2019-MR-1106

MEMORANDUM OF DECISION AS TO PLAINTIFF's "MOTION TO VACATE" (sic) ie MOTION TO RECONSIDER

Plaintiff alleges the court ignored that it must accept as true all well-pleaded facts of a complaint. In so doing, it is plaintiff who ignores that "well-pleaded facts" do not include legal conclusions or speculation. The plaintiff additionally sets forth alleged "factual errors" by the court which take liberties with what the court actually said in making its ruling. A party must strive to be sure it does not mischaracterize what the court has said for one example, plaintiff claims the court said the NIAAA is not entitled to funding from the defendant (paragraph g). What the court actually said was that, "there is not a substantive right in funds that you, one, are not guaranteed and, two, are discretionary based on a whole lot of factors." None of the alleged "factual errors" are actual quotes and in large part are taken out of context. In any event, there's no need to belabor this allegation of error. The court has reviewed the allegations and do not find "factual errors" that serve to reverse the court's prior denial of mandamus.

Plaintiff also alleges a variety of "mistakes of law" and enumerates them as provisions the court disregarded. The case in subparagraph (a) pertains to public assistance payments to welfare recipients and is not applicable so it is not a mistake of law for the court not to have followed it. Paragraphs (b) and (c) cite to 42 U.S.C. section 3026 subparts and (d) which is 45 CFR section 1321.63(b). The court did not disregard these sections but the allegations of the complaint, which refer to a petition, does not provide well-pleaded facts that any OAA funds were withheld. There is an admittedly speculative allegation of a belief OAA funding may have been withheld in 2014 but nothing plead to support the speculation. Conversely, plaintiff did attach to the complaint and incorporate into it petitions previously filed. In the first one, Exhibit 2 to the complaint, marked as Exhibit C therein, is a December 30, 2013 letter from IDOA indicating termination of a particular grant that was to take effect January 31, 2014. This is non-speculative support for the

fact discretionary **non**-OAA funding ceased in 2014 in accord with the IDOA's authority. Contrary to plaintiff's assertions, the court did consider these sections but found no well-plead facts which would support mandamus. In fact, plaintiff's own exhibit belied the allegation that it had a "belief" OAA funding had been withheld in 2014.

Paragraphs e, f, and g, do not apply to this complaint. As for paragraph (h) the defendant does have rules, so this section (it's actually subsection a not b) does not apply either. Paragraphs (i) – (n) refer to "contested cases" and the pleadings do not support the statutory definition of a "contested case." 5 ILCS 100/1-30 states that "Contested case" means "an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which individual rights, duties or privileges of a party are required by law to be determined by an agency only after opportunity for a hearing." Finally, paragraph (o) is a section referring to an area plan that's been disapproved which is also not a subject of the pleading at issue. Plaintiff is mistaken about the "mistakes of law" alleged to have occurred; none of these allegations support reversal of the denial of mandamus.

Plaintiff states that the court "expressed that the likelihood of plaintiff prevailing on the initial petition and the APS petition...is a reason for denying the mandamus" and that the court "said that the dismissal was warranted because the defendant will prevail on the petitions...." These words were simply never uttered by the court. Counsel should always be cautious about attributing statements to the court and must take great care not to do so inaccurately. Taking liberties with the court's words and putting one's own spin on them is unacceptable and a violation of the Rules of Professional Conduct Rule 3.3.

Plaintiff states the Court "seemed confused" about whose interests NIAAA is representing. That completely ignores the court's comments about the 2.3 million older Americans that are citizens of this region (*sic*) and the need for their welfare to be provided for as well as its encouragement for the parties to communicate to get past some of the concerns of the plaintiff (pp 25-27 of the transcript).

Contrary to plaintiff's allegations in his motion, the court considered the entirety of the materials provided it, the law and the well-pleaded facts. The court explained that mandamus is an extraordinary remedy for acts in violation of mandatory requirements. The court explained that acts which are discretionary in nature do not provide a plaintiff substantive rights which mandamus may apply to.

The "Motion to Vacate" ie "Motion to Reconsider" is denied.

SO ORDERED:

July 20, 2020

JUDGE DONNA R. HONZEL

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

GRANT NYHAMMER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO. 2019 MR 1106**
	)	**ARGUMENT**
PAULA BASTA,	)	
	)	
Respondent.	)	

REPORT OF PROCEEDINGS had in the above-entitled cause, before the Honorable DONNA R. HONZEL, Judge of said Court, on the 28th day of February, 2020.

APPEARANCES:

MR. TIMOTHY SCORDATO, Attorney at Law,
Appeared for the Petitioner.

MS. KATHERINE SNITZER, Attorney at Law,
Appeared for the Respondent.

THE COURT: Good afternoon. Thank you. Please be seated.

MR. SCORDATO: Good afternoon.

THE CLERK: Calling the 1:30 matter. Grant Nyhammer versus Paula Basta.

MR. SCORDATO: Timothy Scordato for Nyhammer.

THE COURT: Okay.

MS. SNITZER: And this is Attorney General, Katherine Snitzer on behalf of the director.

THE COURT: All right. Let's pull it up for you here. All right. So I have the case pulled up if that is necessary. All right. So it's your motion. So --

MS. SNITZER: Yes, Judge, we're, we're actually here on two motions, but the first is mine.

THE COURT: Well, you're the first one.

MS. SNITZER: Yes. The motion to dismiss. As just a preliminary matter, defendant did -- or excuse me. Plaintiff did file a response to my reply, which I don't think the briefing schedule allowed for outside --

THE COURT: I don't know that I -- I don't know whether any of my --

MS. SNITZER: I meant the briefing schedule I

provided for a response in our reply, but it did not provide for a sur-reply or any additional filings so I'd ask that that be stricken.

THE COURT: And I'm not sure that I actually saw it to be honest.

MR. SCORDATO: Okay. Well, I'm pretty sure that we decided last time that on February 14th any sort of reply to their reply, that we would have an opportunity to respond.

THE COURT: Not typically, but in any event --

MR. SCORDATO: Okay.

THE COURT: -- I don't know that I ended up getting a courtesy copy anyway. So it's probably --

MR. SCORDATO: I --

THE COURT: -- moot at this point.

MR. SCORDATO: -- okay. Well, I have sent several courtesy copies.

THE COURT: Of that?

MR. SCORDATO: That one I sent one courtesy copy.

THE COURT: Okay. So, I mean, I've got -- I mean, I've received everything. I just don't remember seeing --

MR. SCORDATO: Okay.

THE COURT: -- anything that was titled a sur-reply and so forth.

MS. SNITZER: I think he --

THE COURT: And --

MS. SNITZER: I'm sorry. Excuse me. I think it was titled response to our response or something like that.

THE COURT: In any event, if I got it I read it. So to whatever extent it's not going to ultimately --

MR. SCORDATO: Sure.

THE COURT: -- the law is what the law is and you're going to inform me what your position is regarding the facts of the law and go from there.

MS. SNITZER: So, Judge, and I think we laid this out pretty well in our briefs, but I'll just briefly summarize our argument. The compliant has three counts. The first alleges that the department's administrative rules don't comply with the Administrative Procedure Act regard to their hearing rules. And then the second two counts are counts for a mandamus asking for you to require the department to hold hearings on two different petitions that they submitted to the department. We

don't believe that any of these claims for mandamus present a clear right on behalf of the plaintiff or a clear duty for the defendant.

So with regard first to the, the Administrative Procedure Act on the, the department's rules. The APA requires the department to have rules for administrative hearings. And it, it also lays out several minimum standards that the, the department has to comply for -- comply with when it conducts administrative hearings. The APA has very few prescriptions in terms of specific categories of rules that have to be adopted. The -- in terms of the, the specific rules, they, they can adopt rules on a number of topics, but they only have to adopt rules on -- as far as I can tell, administrative law judges and their qualifications and disqualifications basically.

And the department does have a rule for that. They have a rule of the -- the, the department's rules refer to hearing officers, but that is the distinction without a difference is hearing officers are acting as administrative law judges. They're making recommendations to the director and then the director makes the final

decision and the department has a rule that provides for their qualifications.

Director -- the department also has a number of rules that address administrative hearings and there's -- those rules comply with the APA. In one of the plaintiff's briefs he, he alleges that the department's rule on, on evidence does not comply with the APA because it's not the same as the circuit court's rule of evidence. But the -- if I could read the APA's full rule on evidence and contested cases it says that the rules, evidence and privileges applied in civil cases in the circuit court shall be followed, but it goes on to say that evidence not admissible under those rules of evidence may be, however, admitted. May be admitted, however, if it is a type commonly relied on -- conduct of their affairs.

So the department's more expansive rules meet that -- rule, evidence rule meets that standard. And there's no -- the plaintiff doesn't point to any specific requirement in the APA that the department's not in compliance -- it’s not compliant with.

Additionally with regard to the

administrative rules, the relief that they're seeking is that this court order the department to adopt rules. And while the department can propose new rules, they can't unilaterally adopt those rules without approval from the joint committee on administrative rules, which is the legislative committee. So they can't -- they, they simply can't comply with that order without approval from the committee and so the relief that they're seeking is not, is not proper. The department wouldn't have the authority to comply.

So going on to the second -- Count 2, which asks for a mandamus for the department to hold a hearing on what plaintiff calls its initial petition. This simply is not, not a petition on which the department is required to hold a hearing. The department's rules and they require the department to hold a hearing in only very specific circumstances when they disprove of AAA's area plan or a -- plan or when it seeks to withdraw the designation as AAA. And -- excuse me, area agency on aging, which I think we've -- I think both parties have referred to as AAA's in their briefing.

Plaintiff does not allege anywhere that that

has happened and so they're not entitled to administrative hearing under the department's rules, under any of the statutes that they've, they've pointed to or under the APA. The APA doesn't create a right to hearing unless it's a contested case. And a contested case is a case where you can't take away someone's substantive right without a hearing without due process. The -- there's no statute here that, that creates such a right and so this isn't a contested case. So the department's not required to hold a hearing.

For the initial petition, they're asking for a hearing regarding a grant funding that was basically taken away from the plaintiff in 2014. So not only is this is a very old case, it's also -- it's not the type of funding where you'd be required to hold a hearing. The only statute that they point to that requires hearings is the Federal Older Americans Act, but the funding that they're talking about was not funding under the Older American's Act. It was funding -- it was state, state appropriated funding under the -- excuse me real quick. Under the Adult Protective Services Act. So it's not, it's not covered by those federal statutes

that they're citing.

Going to Count 3, which is denial of -- and a claim for mandamus on another petition. This is what they call the APS petition. And here, the funding at issue -- or excuse me. There is no funding at issue. Here, the, the petition before the Court was to contest the -- or for the -- excuse me, the agency was to contest the department's decision not to accept their recommendations for provider agencies. There is -- they don't point to any statute, any rule that gives them a right to a hearing when the, when the department does not accept the recommendations. They're -- those -- it's the department's decision who to designate as those provider agencies and those -- their recommendations are taken into account, but they don't have a right to require the department to accept those recommendations and they don't have a right to a hearing when the department decides otherwise. In sum, Judge, none of their accounts for mandamus state a claim for relief and we could ask that the complaint be dismissed.

THE COURT: Okay.

MR. SCORDATO: Well, Your Honor, I think that

this is a pretty simple matter. When it comes down to it, constitution rules of due process require an opportunity for a hearing, an opportunity for notice, an opportunity to provide evidence and the department hasn't given us any of those opportunities.

The standard for an administrative appeal is extremely low. Basically all we have to do is ask for an appeal and we should receive one. Or, at least, have this heard in front of the administrative law judge. In fact, the department is unilaterally deciding that we don't get an appeal even when they are a party to the appeal itself.

As far as Count 1 on the administrative law judge that defendant brought up, the issue of the ALJ, nowhere in, in the department's rules have they mentioned an administrative law judge. Yes, they do mention a hearing officer, but who knows what a hearing officer is. The APA specifically mentions an administrative law judge. And this is, again, to get back to this point of complying with the bare minimum of standards of due process. There needs to not be any confusion when it comes to an administrative law judge. If they come to us and

say the hearing office isn't -- they don't have to follow these rules because these rules are for an administrative law judge, we don't want to be back in court. We want no confusion over that.

As far as the, the rules of the evidence, their rule of evidence directly contradicts the procedure act. Their rule of evidence states that no formal rules of evidence are needed, whereas the Procedure Act states that circuit court, formal rules, statutory and common law shall be followed.

As far as, as far as Count 2, defendant erroneously states that we only receive a hearing when they disapprove of an area, area plan or a de-designate an AAA. Of course the problem with that is that the statute does not use the term only. I'm not sure where they're coming up with this idea of only and that directly contradicts this idea that they mentioned before that we do receive a hearing when they withdraw Older American Act Funding. And we did specifically allege in our complaint that Older American Act Funding had been withheld from us. That's just a, a plain false statement by the defendant.

As far as us not pointing to any, any sort

of rules that, that grant us a hearing, we point to seven different rules that give us a hearing even though we -- administrative hearing, we don't need to point out. All we have to do is ask for an administrative hearing just, just for the, the basis of minimum standard of due process. If the motion to dismiss is granted there's no, there's no remedy for, for us or the 2.3 older Americans who are receiving benefits in the State of Illinois. Where are they to go? How are they -- if, if they're denied those benefits, how do they appeal that decision? Currently there's absolutely no way for them to appeal that. They have to resort to some sort of extraordinary remedy like a mandamus, such as what we're doing here. And for those reasons we ask that the motion to dismiss be denied

THE COURT: All right. Your motion, last word.

MS. SNITZER: Well, Judge, the idea that, that you get an administrative hearing just because you ask for one, you have to have a right that's being -- you have to have a, a substantive right to that hearing. You can't just ask for a hearing on any topic and, and get an administrative hearing. And he's correct that the, the word only is not used

very well. There is a rule that gives the right to an administrative hearing where the AAA designation is removed. There is no rule that gives a right to a hearing for the things that he's complaining about. So while the word only doesn't -- is -- that is our explanation because they're -- because that rule does exist, but there is no rule that it allows a hearing for these other topics that he wants to demand a hearing on. And you have to have a substantive right that's provided by a statute, that's provided by the Constitution. He can't point to any of those. The agency is simply not required to give anyone who asks for a hearing a hearing. They have to have a substantive right at issue.

And then for the -- in terms of the claim the Older Americans Act Funding, well, it's denied. They don't -- that's an entirely conclusory allegation. They don't point to any specific denial of funding and all of the other allegations, all the specific allegations are regarding state funding. And, finally, with -- in terms of older Americans being denied hearings, he doesn't represent -- he represents his -- this organization. He doesn't represent potential plaintiffs and -- that, that

might have a right to a hearing. That's, that's determined on a case by case basis and we would, we would ask that the motion be granted.

MR. SCORDATO: If, if I may, Your Honor?

THE COURT: Go ahead.

MR. SCORDATO: So, as I said before, there's 2.3 million older adults in, in the State of Illinois and there's absolutely no way for them to get a hearing at this point. The department doesn't even have the correct address for -- to receive these appeals. They moved from that address nine years ago. They haven't updated their, their rules in, in decades. I mean, this is just a little bit ridiculous. I mean, they have to be able -- older -- yes, we are representing ourselves, but we also represent, and it is our legal responsibility to represent, older Americans in Illinois. And right now there's just, there's just no way for them to receive a hearing if their benefits are denied. That strictly violates due process.

THE COURT: There is a distinct different between a particular older person being denied specific benefits and a generalized group of people. So I want to make sure that -- there's, there's a

difference. And so none of the allegations that have been made in your complaint pertains to any one specific person who has been denied benefits. I mean, just --

MR. SCORDATO: That's correct.

THE COURT: -- to make a distinct --

MR. SCORDATO: Because they're just blocking the administrative hearing process off to everybody.

THE COURT: Okay. So --

MR. SCORDATO: There's, there's no rule in place to receive an administrative hearing under the department.

THE COURT: All right. Well, actually, I, I have to go based on the complaint that has been filed and as I'm sure you know, every mandamus case has to start with *Marbury vs Madison*, if you remember that way back when. And *Marbury vs Madison* basically sets forth the foundation for any mandamus going forward. And it absolutely has to be -- well, first of all it's an extraordinary remedy that --

MR. SCORDATO: Correct.

THE COURT: -- in only rare circumstances can be given and it has to be regarding an official, an agency, doing something that they are specifically

mandated by law to do without discretion playing into that. So not only *Marbury*, but all of the cases since, make a, a very strong distinction between those acts where -- which are ministerial, which are mandated particularly by statute and those that involve levels of discretion as it often the case in the variety of agencies and, and so forth.

So in Count 1 you're alleging that their rules to comply with the Procedure Act. There are numerous section covering administrative hearings, 5 ILCS 100/10 all specifically govern the rules and the department is subject to those rules and those administrative rules set forth that 100/10-10 minimum rules. At minimum these rules have to conform with Article 10 of the administrative hearings, but 10-10 is also clearly worded in terms of the agencies discretion. It says the rules the agency establishes may include and then gives a laundry list that is clearly not exhaustive by its own terms.

And so there's nothing alleged in Plaintiff's Count 1 that is of a type subject to a writ of mandamus due to a discretionary manner, manner Article 10 was written. And, when you look

at 5 ILCS 100(c), which is the rule-making provision, Article 5 provides, provides all sorts of provisions for rule making, whether it be on an emergency basis or otherwise. And it establishes specifically at 100/5-90 JCAR, the Joint Committee on Administrative Rules. And 100/5-110 it sets forth that what JCAR's responsibilities are when an agency, such as the department, proposes rules or amendments to rules or asked to repeal rules and all the rules from the department is subject to JCAR approval.

So it's not as simple a matter as plaintiff's complaint alleges for the department to change its rules to amend them or add to them or alter them and it is not an act. It is solely under the discretion of the department in and of itself. And even if, in their discretion there is a need to add to the administrative rules that they're already bound by that sets forth specific requirements, for example, for -- and so forth, before they can do that they have to go through JCAR.

So what Count 1 asks the Court to do is something that the Court doesn't actually have the authority to do by statute because to order them to

change their rules, well, even if there was a specific rule that was blatantly wrong, the Court doesn't have the power to simply tell them, look, you have to change your rules, it's -- there's so much discretion involved as well as submission to another entity that makes it not the type of scenario that a mandamus order -- I can't order them to change their rules because there's just too many levels and requirements. Not the least of that analysis is the fact that the, the rules set forth the list of things they may, but do not say that these are things that they must or that they shall have rules regarding. And so the motion to dismiss Count 1 is granted. It just doesn't meet the standard of *Marbury* and its progeny.

Count 2, alleging the failure to provide NIAAA a hearing on its initial petition, which as best I can tell, has to do with some funding that may or may not have been actually withheld that may have been pursuant to some sort of order that may or may not actually have existed. It's somewhat vague. There appears to be some speculation involved also, but per 89 Illinois Administrative Code 230.410, department shall provide opportunity for a hearing

to any area agency on aging when the department proposes to, one, disapprove the area plan or amendment to the area plan which has been submitted or withdraw from the agency designation as the designation as an area agency on aging. So it, it sets forth those instances that are a shall. And you're correct, both of you are correct, it doesn't say only, but in terms of what they shall do, the shall is completely set forth there. There's no extra line in there that says, as well as, x, y, z. And as far as what the shall is for opportunity for a hearing under that particular section, it's not here.

As for the alleged denial of funding, which seems to be conclusory, nonetheless, from the pleading, I'm not sure whether there were actually funds withheld or whether there's a suspicion. It appears that it's just a suspicion that there were some funds withheld from state funding. The initial petition it appears to kind of take a shotgun approach, but then in terms of any specifics, they really do have to do with state other funding as opposed to federal funding under the OAA, but in any event, the case law is clear that a benefit or a

grant of funds is not a protected entitlement if the granting of that benefit or funding is at the discretion of government officials to grant or deny that benefit of grant.

So there are no due process arguments that can satisfy the requirements of a writ of mandamus because there is not a substantive right in funds that you, one, are not guaranteed and, two, are discretionary based on a whole lot of factors. And for the all foot notes and citations to the various codes, regulations and provisions in the complaint, I don't see the plaintiff has provided any statute, rule or otherwise that particularly mandates -- specifically mandates a right to a hearing when a grant has been denied. And so when there's no legal right to funds, there's -- and there's no specific provision that requires a hearing, a shall or must requiring of a hearing, then nothing about not receiving funds fits the definition of a contested case, i.e., a substantive right which requires due process. And based on the, the various provisions, I believe from what I read, the petition may have been time barred even in, even if there was a shall because -- and I didn't write down the statute, but

I believe it was 120 days.

So clearly from 2014 bringing it sometime to the first part of 2019 I think would be time barred, but, I mean, obviously, that's not the, the main thrust of the decision. It all deals on the fact that, clearly, under the law there's not a substantive right which requires due process from a grant or funding, you know, from the state level. Even if there were I, I think it probably would have been time barred anyway. But for all of those reasons and primarily the foregoing and not to the limitation, the motion to dismiss Count 2 has to be granted.

And as for Count 3 that the department failed to provide a hearing on its APS petition, which rejected NIAA recommendations for provider agencies, the APS at 320 ILCS 20/3.5 covers quote/unquote other responsibilities and it states the department shall also be responsible for certain enumerated activities, quote, contingent upon funding, which isn't really the issue in Count 3, but it simply supports not only the finding that I had in terms of granting Count 2, but it also goes to the fact that clearly the way this is all set up,

the agency submits it for approval to the agency and the agency has the discretion to accept or reject it. Again, there is not an absolute. There's discretion in the department to accept or reject it. And so, therefore, there's not a substantive right for an agency to have every recommendation granted and, therefore, because mandamus requires a substantive right for a ministerial action about which an agency has no discretion, it doesn't fall within there.

Now, as far as -- and I looked at the most recent. I've got the newest set of statutes and they continue to have that Capitol Drive address even though the legislature has updated the newest thing. So, and I don't know, and, obviously, it's not part of this. So Count 3 also, the motion to dismiss is granted.

As for the concern that an individual who may have an appeal for something, I mean, there wouldn’t probably be any different measure of manner as -- I mean, on a regular basis I have ALJ appeals and administrative reviews from any number of alphabet agency where individuals have felt that they were denied improperly certain benefits and so

forth. So there's nothing about this decision that prevents that in any manner, but, I mean, there is a valid point. That if the published place for which notice of, of an appeal is one that is defunct and monitoring and so forth, then, I mean, the Court can't necessarily order you to do it, but, I mean, I would hope that this exercise might be informative for the department to maybe look at in conjunction with JCAR to clean up some of, some of those loose ends.

For example, if, in fact, that -- like I said, even the 2018 updated that, that has online updated through whatever date in 2020, if that is a defunct address then, I mean, it does have a point that, okay, well, the department does really need to do something so that people have the proper avenue to give those. I don't know if it's monitored or not. I mean, that's beside the point, but if, in fact, somebody sends a notice there and it just stalls, that is a problem and I would hope that the department would, would look into that and try to figure out and make sure that for those things that clearly are substantive rights that require due process, that there is an avenue for individuals or

whom ever to make sure that they get their notice and so forth and get notice of any number of other things, but I, I don’t know and I can't tell, obviously, here.

But all of these things -- I mean, I think that the base of this is certainly a question as to whether or not communication has been flowing perhaps as well as it should have. Obviously, we've got two different administrations and things that happen in a prior administration. I know there was comments in there about, well, you know, we can't really, we can't really do a lot about what a prior administration may have done. To a certain extent that's true, but I certainly would encourage the parties to try to work together to try to make sure that -- I mean, obviously, this region and the 2.3 million older Americans that are citizens of this region, certainly, I mean, the whole idea of all of the acts is that, you know, their welfare be provided for. And while this isn't the manner in which to do so, that doesn't mean that there shouldn't be ongoing conversations.

And, you know, I did see, for example, on the provider agencies that appear that there were

questions like, okay, well, you need to supplement this or give us more information. I got the impression, maybe it was wrong, that there was just a little bit missing or that needed to be clarified a little bit in terms of the proffer of different provider service agencies. You know, those, again, are things that I would hope communication would be a little bit more open. Kind of get past the -- looks like the loggerheads and maybe the breakdown in communication that resulted in this. And maybe as a result of this and so forth. Hopefully that can be overcome. You know, just for the, for the broader goal of making sure that this agency and the people that it represents in the northern tier counties do have the opportunity.

I mean, there is some allegations that there were a couple of funding opportunities that they apparently never got notice of. There either needs to be a check to make sure that when notice of opportunities goes out that has gone out of everyone. I don't know. These are all things that I can't order or whatever, but just some suggestions that perhaps should be considered with some weight to try to make sure that, I mean, we all know,

perhaps, that Cook County seems to think -- and that region seems to think that it's them and everybody else and a lot of times it at least appears when it comes to the educational system in other areas that Cook County sucks up everything and they kind of forget about the read-headed step children that is the 98 percent of the rest of the state in terms of location anyway.

So, you know, anything to make sure to facilitate a little bit more balance and, obviously, you know, this jurisdiction is within NIAA's reach and we, obviously, would open hope that the citizens in, in this jurisdiction and circuit would have the same opportunity as everyone else throughout the state, but those are all things -- I mean, again, I can't order based on the, the limited power the Court has in this capacity, but those are all things that, like I said, I'd hope would be at least contemplated and hopefully some communication lines can be opened up.

MS. SNITZER: Let me try to pass that on to my client.

MR. SCORDATO: Your Honor, I need to perfect the record for appeal --

THE COURT: Sure. Absolutely.

MR. SCORDATO: I just need to know specifically. So Count 3 you're saying is denied.

THE COURT: Correct.

MR. SCORDATO: Because the department has complete discretion on whether to reject the proprietor agency designation?

THE COURT: That's what the statutes say, yes.

MR. SCORDATO: Okay. And then you're saying that Count 2 is denied and even the, the allegation that they withdrew Older American Act funds from us?

THE COURT: Their -- the specific -- so in Count 2 their complaint with all the footnotes and back and forth, I think the actual allegation was other funding, but this is from back in 2014. It was really unclear. They were conclusory in terms of the allegation. It was unclear exactly -- it seemed like it was, well, there may have been this, there may have been that, but it was primarily, the gist was that other funding that, from what I could tell, was not OAA funding, but in any event there, there weren't sufficient pleadings that would have brought it within the rubric of a substantive right of funding for which due process was required.

MR. SCORDATO: So we did specifically allege that Older American Act Funding was withheld. I mean, I have the complaint. I can show you right now if you want.

THE COURT: I don't think that matters to the decision, but sure, show me what you're referring to.

MR. SCORDATO: Paragraph 18.

THE COURT: Yeah. So it is believed. I didn't find -- because there weren't any other supportive allegations as to -- it, it was pretty vague in terms of --

MR. SCORDATO: Well, they, they gave us a very vague answer. They told us that they withheld funding from us. We asked specifically for them to investigate and tell us which funding they held from us and they did not.

THE COURT: All of the material specifically really talked about what they could point to as this other funding and there was really nothing other than the one line that it is believed that there was no follow up or no additional allegations that gave anything other than as speculative, it is believed. So I didn't filed that it was a compelling enough

allegation for the Court to be able to order a mandamus just based on that. And really, the brunt of all of the paragraphs had to do with this, this other funding that appeared to be state funding. So, you know, it is believed is speculative at best and without any other additional allegations to, to provide a basis for what that belief might have been based on was not sufficient. So --

MR. SCORDATO: And you stated for Count 2 as well that no due process argument can be brought by a mandamus?

THE COURT: So by mandamus you have to have -- if it is not a specifically statutorily imposed shall do, must do might be another way, then you have to look at whether or not it is a substantive right that has been denied without due process and Count 2 was asking for this initial petition which had to do with withholding allegedly some other funding based on other agencies getting some other funding and all of that funding, the grants and the benefits, those are all discretionary allocations. And so the, the cases are pretty clear and they are, they are cited. I didn't write all of them down, but there are any number of cases that absolutely

talk about the fact that discretionary grant of funds, discretionary grant of benefits where there is a process that enables whatever agency it is granting those benefits or issuing those grants, they are not mandated that they shall give those X amount of funding. And so for a mandamus there has to be a very clear substantive right to the grant or benefit that is being alleged to have been withheld and the case law says those aren't in this situation.

MR. SCORDATO: Okay. And the, the older Americans in, in Illinois who applied for benefits or are receiving benefits, especially welfare benefits, and then are denied those benefits how do you make the --

THE COURT: That's not what's at issue here. That's not this case. I'm sure they have any number of avenues to do that, but that's not what this is about --

MS. SNITZER: And I believe --

THE COURT: You haven't named a single individual who -- I mean, there's, there's all kinds of manners in which --

MR. SCORDATO: Oh, we're naming --

THE COURT: -- specifically --

MR. SCORDATO: -- we're naming all of them.

THE COURT: Well, no, you're --

MR. SCORDATO: I mean, because there's absolutely no way for them to receive the hearing. That's what we're saying.

THE COURT: That's not what we're saying. We're specifically talking about your agency and the funding that the department has provided your agency. We're not talking about John Smith who lives down the road on Oak Avenue. None, you know, John Smith or whoever --

MS. SNITZER: Sure.

MR. SCORDATO: Well, that's, what's why, that's why we brought Count 1 is because they don't have fair hearing rules. They don't have --

THE COURT: But that's not --

MR. SCORDATO: -- an opportunity for people to be given a hearing.

THE COURT: That's not this case.

MS. SNITZER: Just this is also, I mean, very much not part of the complaint, but most of the welfare -- most of the type of rights, welfare benefits that you seem to be talking about are

administered by other state agencies. So --

MR. SCORDATO: Are you saying that the department on aging does not administer these benefits?

MS. SNITZER: No. I mean, if you're talking about welfare benefits, that's usually -- but in any event that's not part of this action.

THE COURT: Yeah. So this was for -- on a basis -- your complaint was on a basis of your agency, not on a basis of any particular, you know, John Smith or Jane Doe. That's a completely different set of considerations.

MR. SCORDATO: Okay. And then for Count 1 --

THE COURT: What I said.

MR. SCORDATO: So you said that the agency has discretion whether or not to adopt rules?

THE COURT: Sure. I mean, the Act indicates -- as I said, I mean, you can get the tape again and play it all back, I suppose, but 10-10 is clearly worded in terms of the agencies discretion and 5 ILCS 100 and the rule-making provisions of Article 5 provides for rule making and the oversight of JCAR to DOA and all of those work together and because the Court can't just order the department to change

its rules or amend its rules because they, in and of themselves, do not have the ability -- so even if I were to order them, oh, change your rule to this, that or the other --

MR. SCORDATO: Mm-hmm.

THE COURT: -- it would have no effect because they would still have to go through a process. It would be up to --

MR. SCORDATO: Correct. They, they would have to go through a process and that's what the general assembly is asking them, them to do and they said that they shall have rules for administrative hearings. They still have to go through that process. If they're denied because it's unlawful, they still have to go through that process.

THE COURT: All right. See order.

(Which were all the proceedings of record heard in the above-entitled matter on this date.)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

C E R T I F I C A T E

I, Ashleigh M. Huston, a Court Specialist for the Circuit Court of Winnebago County, 17th Judicial Circuit of Illinois, transcribed the electronic recording of the proceeding of the above-entitled cause to the best of my ability, and I hereby certify the foregoing to be a true and accurate transcript of said electronic recording, which recording contained the operator's certification as required by General Order 16.01(C).

Ashleigh M. Huston

Ashleigh M. Huston

Date: April 8th, 2020

ELECTRONICALLY FILED
DOC ID: 7232184
CASE NO: 2019-MR-0001106
DATE: 11/5/2019 8:21 AM
BY: A H, DEPUTY

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL DISTRICT
WINNEBAGO COUNTY

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant	Mandamus Case No. 2019-MR-0001106

COMPLAINT FOR MANDAMUS

Plaintiff, Grant Nyhammer as Executive Director & General Counsel of the Northwestern Illinois Area Agency on Aging (NIAAA) seeks a writ of mandamus, pursuant to 735 ILCS 5/14-101, *et seq*. against the Defendant.

I. Parties

1. The Defendant, Paula Basta, is the Director of the Illinois Department on Aging (Department).

2. The Department is the Illinois state agency responsible for "providing services for senior citizens" and for complying with the Older Americans Act (OAA).[1]

3. "The Department shall. . . provide . . . assistance to . . . area agencies on aging. . .[and] to make grants to area agencies on aging."[2]

4. The Department has designated NIAAA as the area agency on aging[3] (AAA) for planning service area 1.[4]

[1] The Department has "the following . . . duties . . . to receive and disburse State and federal funds made available directly to the Department including those funds made available under the Older Americans Act . . . for providing services for senior citizens . . . and shall develop and administer any State Plan for the Aging required by federal law." 20 ILCS 105/4.01. The OAA can be found at 42 U.S.C § 3001, *et.seq*. References in the Complaint to the OAA means the federal statute and corresponding regulations at 45 CFR § 1321.
[2] 20 ILCS 105/4.01(6), (16), (21)-(23).
[3] An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.
[4] The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging...Area 1...is

5. "Responsibilities of . . . [the AAAs] shall include the development of an area plan that provides for the development of a comprehensive and coordinated service delivery system for . . . services needed by older persons."[5]

6. "The Older Americans Act intends that the area agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the planning and service area. This means that the area agency shall proactively carry out...a wide range of functions...designed to lead to the development or enhancement of comprehensive and coordinated community based systems in...each community in the planning and service area."[6]

7. "Older people...are **entitled to**. . . a comprehensive array of community-based, long-term care services . . . including **access** to... social assistance in a coordinated manner and which are readily available when needed, with emphasis on maintaining a continuum of care for vulnerable older individuals [emphasis added].[7]

8. Excluding programs for Community Care and the Adult Protective Services, the Department has not had an administrative hearing in at least the last three years.[8]

9. NIAAA is the "public advocate" for older adults in Area 1.[9]

10. As the public advocate, NIAAA is required to "represent the interests of older persons to public officials [and] public...agencies"[10] such as the Department.

11. The Plaintiff, Grant Nyhammer, is the Executive Director & General Counsel for NIAAA.

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comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside and Lee." 20 ILCS 105/3.08.

[5] 20 ILCS 105/3.07.

[6] 45 CFR § 1321.53(a).

[7] 42 U.S.C. § 3001.

[8] See Exhibit 1, "FOIA Response."

[9] 45 CFR § 1321.61(a).

[10] 45 CFR § 1321.61(b)(1). Similarly, Illinois law states that "an area agency on aging shall throughout the planning and service area...monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons...[and] represent the interests of older persons to public officials, public and private agencies or organizations." 89 Ill.Adm.Code §230.150(a)(1)-(3).

II. Legal Background

The Department's legal duties under the Procedure Act

12. "The provisions of the Illinois Administrative Procedure Act are hereby expressly adopted and shall apply to all administrative rules and procedures of . . . [the Department]."[11]

13. "Each agency shall . . . adopt rules of practice setting forth the nature and requirements of all formal hearings."[12]

14. "All [Department] agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this Article 10 [of the Procedure Act]."[13]

15. Article 10 of the Procedure Act requires that the Department have hearing procedures for:

    a. The qualifications of administrative law judges;[14]
    b. The necessary details required in a hearing notice;[15]
    c. The disqualification of an administrative law judge;[16]
    d. Bias or conflicts of interests;[17]
    e. What must be included in the record for a contested hearing;[18]
    f. The rules of evidence at a hearing;[19]
    g. The proposal for decision;[20]
    h. What must be in the decision and orders;[21]
    i. Expenses and attorney fees in contested hearings;[22]
    j. Ex parte communications after a notice of hearing;[23]

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[11] 20 ILCS 105/5.02.
[12] 5 ILCS 100/5-10(b).
[13] 5 ILCS 100/10-10. The term contested case "means an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing." 5 ILCS 100/1-30. Contested case, therefore, means any circumstance where the Department is required by law to provide a hearing to determine a party's legal rights, duties, or privileges.
[14] "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings." 5 ILCS 100/10-20.
[15] 5 ILCS 100/10-25.
[16] "The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-30(b).
[17] 5 ILCS 100/10-30(b).
[18] 5 ILCS 100/10-35.
[19] 5 ILCS 100/10-40.
[20] 5 ILCS 100/10-45.
[21] 5 ILCS 100/10-50.
[22] 5 ILCS 100/10-55.
[23] 5 ILCS 100/10-60.

k. Staying contested hearings for military service;[24]
l. Waiving compliance with Procedure Act;[25] and
m. Service by email.[26]

III. Factual Background

Background of Initial Petition

16. On June 26, 2019, NIAAA filed a Petition for Administrative Hearing (Initial Petition) with the Department. The Initial Petition is attached as Exhibit 2.

17. *Inter alia*, the Initial Petition alleges that the Department withheld OAA funding from NIAAA in violation of 42 U.S.C. § 3026(f)(2)(b).[27]

18. It is believed the Department withheld OAA funding from NIAAA.

19. On July 29, 2019, the Department e-mailed a letter to NIAAA. The letter is attached as Exhibit 3.

20. In the July 29th letter, the Department refused to give NIAAA a hearing on its Initial Petition, claiming it is not a contested case.

Background of APS Petition

21. On August 23, 2019, NIAAA filed the attached APS Petition for Hearing (APS Petition) with the Department. The APS Petition is attached as Exhibit 4.

22. On September 24, 2019, the Department emailed a letter to NIAAA. The letter is attached as Exhibit 5.

23. In the September 24th letter, the Department refused to give NIAAA a hearing on its APS Petition, claiming it is not a contested case.

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[24] 5 ILCS 100/10-63.
[25] 5 ILCS 100/10-70.
[26] 5 ILCS 100/10-75.
[27] "[The Department] shall not make a final determination [about] withholding funds . . . without first affording the area agency . . . a public hearing concerning the action." 42 U.S.C. § 3026(f)(2)(b).

Count I
Failure to have Administrative Rules that Comply with the Procedure Act

24. Paragraphs 1-23 above are incorporated into Count I.

25. Paragraphs 33-34 of the Initial Petition are incorporated into Count I and are referenced as paragraphs 26-27 of this Complaint for Mandamus.

28. Defendant has a duty to have administrative rules for hearings that comply with the Procedure Act.

29. Defendant does not have administrative rules for hearings that comply with Article 10 of the Procedure Act for:

    a. The qualifications of administrative law judges;[28]
    b. The necessary details required in a hearing notice;[29]
    c. The disqualification of an administrative law judge;[30]
    d. Bias or conflicts of interests;[31]
    e. What must be included in the record for a contested hearing;[32]
    f. The rules of evidence at a hearing;[33]
    g. The proposal for decision;[34]
    h. What must be in the decision and orders;[35]
    i. Expenses and attorney fees in contested hearings;[36]
    j. Ex parte communications after a notice of hearing;[37]
    k. Staying contested hearings for military service;[38]
    l. Waiving compliance with Procedure Act;[39] or
    m. Service by email.[40]

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[28] "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings." 5 ILCS 100/10-20.
[29] The Department rules state that "each hearing shall be conducted at a reasonable time, date and place." 89 Ill.Adm.Code §220.507. The Procedure Act requires more information be included in the notice such as: the nature of the hearing; the legal authority and jurisdiction; relevant substantive and procedural statutes; a short plain statement of the matters asserted; addresses of parties, etc. 5 ILCS 100/10-25.
[30] "The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-30(b).
[31] *Id.*
[32] 5 ILCS 100/10-35.
[33] 5 ILCS 100/10-40.
[34] 5 ILCS 100/10-45.
[35] 5 ILCS 100/10-50.
[36] 5 ILCS 100/10-55.
[37] 5 ILCS 100/10-60.
[38] 5 ILCS 100/10-63.
[39] 5 ILCS 100/10-70.
[40] 5 ILCS 100/10-75.

Count II
Failure to Provide NIAAA a Hearing on its Initial Petition

30. Paragraphs 1-23 above are incorporated into Count II.

31. Paragraphs 29-58 of the Initial Petition are incorporated into Count II and are referenced as paragraphs 32-61 of this Complaint for Mandamus.

62. Defendant has a duty to provide Plaintiff an administrative hearing on the Initial Petition.[41]

63. Defendant refuses to provide Plaintiff an administrative hearing.

Count III
Failure to Provide NIAAA a Hearing on its APS Petition

64. Paragraphs 1-23 above are incorporated into Count III.

65. Paragraphs 35-40, 58-62 of the APS Petition are incorporated into Count III and are referenced as paragraphs 66-71 and 72-76 respectively.

77. Defendant has a duty to provide Plaintiff an administrative hearing on the APS Petition.[42]

78. Defendant refuses to provide Plaintiff an administrative hearing.

WHEREFORE, the Plaintiff, Grant Nyhammer as Executive Director of NIAAA, requests that this Court enter a mandamus ordering the Defendant to:

A. Adopt administrative rules for contested hearings that comply with the Procedure Act;

B. Provide Plaintiff a hearing on its Initial Petition;

C. Provide Plaintiff a hearing on its APS Petition;

D. Pay NIAAA's damages and costs;

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[41] *See* Exhibit 2, 1 n.1-5.
[42] *See* Exhibit 4, 1 n.1-2.

E. Pay the reasonable expenses of litigating this Petition, including attorneys' fees, as IDoA has failed to adopt valid administrative rules for contested hearings;[43] and

F. Comply with any other just order the Court deems appropriate.

Respectfully submitted,

/s/ Timothy Scordato
Timothy Scordato,
Attorney Registration #6322807
Staff Attorney, NIAAA
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
tscordato@nwilaaa.org
(815) 226-4901
Fax: (815) 226-8984

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

[43] "In any case in which a party has any administrative rule invalidated by a court for any reason, including . . . the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." 5 ILCS 100/10-55(c).

EXHIBIT
1

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

October 28, 2019

Via email: gnyhammer@nwilaaa.org
Grant Nyhammer
NWIAAA
1111 S. Alpine Road
Rockford, IL 61108

Dear Mr. Nyhammer:

The Illinois Department on Aging has received your Freedom of Information Act (Act) request for: "Excluding information from the Community Care Program and Adult Protective Services, please provide a list of administrative hearings conducted by the Illinois Department on Aging for the past three years. Please list the information by date, subject matter of the administrative hearing, and the result."

After a diligent search, we have found no responsive records for this request.

Regards,

//signed//
Linda S. Ballard, FOIA Officer
Office of General Counsel
Aging.FOIA@Illinois.gov

EXHIBIT 2

Northwestern Illinois Area Agency on Aging,)
Petitioner,)
v.)
The Illinois Department on Aging,)
Respondent

Petition for Hearing

The Petitioner, the Northwestern Illinois Area Agency on Aging (NIAAA), through its attorney Grant Nyhammer, is requesting a hearing regarding this Petition for Hearing (Petition) against the Respondent, the Illinois Department on Aging (IDoA). NIAAA is requesting a hearing on this Petition pursuant to two provisions[1] of the Older Americans Act[2] (OAA), a federal civil rights statute[3], the Illinois Administrative Procedure Act[4] (Procedure Act), and three provisions[5] of the Illinois Administrative Code. In support of this Petition, NIAAA states the following:

Parties

1. IDoA is the state agency responsible for complying with the OAA.[6]
2. Paula Basta is the Director of IDoA.
3. Betsy Creamer is a former employee at IDoA.
4. Ms. Creamer retired in December 2018 after decades of being employed by IDoA.
5. Ms. Creamer is currently serving as a consultant with IDoA.
6. IDoA has designated NIAAA as the area agency on aging[7] (AAA) for planning service area 1 (Area 1).[8]
7. Area 1 encompasses the nine counties in northwestern Illinois.[9]
8. Grant Nyhammer is the Executive Director & General Counsel for NIAAA.

Legal Authority

NIAAA as independent advocate

9. IDoA "may not designate any regional or local office of the State as an area agency."[10]
10. NIAAA is the "public advocate"[11] for older adults (Clients) living in Area 1.

11. NIAAA is required to "represent the interests of older persons to public officials [and] public...agencies."[12]

IDoA funding AAAs

12. IDoA is the state agency responsible for disbursing funding for aging programs including funding to the AAAs. [13]

13. IDoA must "award the funds made available under...[the OAA] to designated area agencies on aging according to the formula".[14]

14. In addition to OAA funding, IDoA awards other funding[15] (Other Funding) to AAAs.

IDoA's obligations under the OAA

15. IDoA must improve the capacity to serve older adults by concentrating resources.[16]

16. IDoA may not withhold funding from NIAAA without providing due process.[17]

17. Due process is a federal right.[18]

18. A state agency employee who "causes...any...deprivation of any rights...secured by... laws, shall be liable to the party injured in an action at law...or other proper proceeding for redress."[19]

19. Before withholding funding from NIAAA, IDoA must give NIAAA:
    a. Notice that IDoA intends to withhold funding; and
    b. Documentation of why IDoA is intending to withhold funding.[20]

20. When IDoA is allocating funding to the AAAs, IDoA must:
    a. Act in the best interests of older adults;[21]
    b. Give preference to older adults in greatest need;[22] and
    c. Consider the needs of rural older adults.[23]

IDoA's obligations under Illinois law

21. "The provisions of the Illinois Administrative Procedure Act are hereby expressly adopted and shall apply to all administrative rules and procedures of...[IDoA]."[24]

22. "All...[IDoA] rules establishing procedures for contested...[hearings] shall...comply with the [Procedure Act]."[25]

23. The IDoA administrative rules for contested hearings have not been updated since 2002.[26]

24. IDoA has an administrative rule that states that "all requests for hearings or appeals to the Department shall be filed with the Hearing Coordinator, Department on Aging, 421 East Capitol Avenue, Springfield, Illinois 6270."[27]

25. The Illinois Constitution states that "no person shall be deprived of...property without due process of law."[28]

26. In the Illinois Adult Protective Services (APS) Program, the regional administrative agency (RAA) is the "nonprofit agency in a planning and service area that provides regional oversight and performs functions."[29]

27. Illinois law in 2014 stated that, "the designated Area Agency on Aging shall be designated the regional administrative agency [in the APS Program] if it so requests."[30]

Allegations of Fact

28. Mr. Nyhammer makes the following factual allegations in Paragraphs 29-60 based on information and belief.

Area 1 Information

29. In 2018 IDoA approved NIAAA's area plan (Plan) for the years 2019-2021.

30. As part of the Plan, NIAAA described how it would demonstrate effective leadership in advocating for the interests of Clients.[31]

31. On June 20, 2019, NIAAA submitted to IDoA an amendment to the Plan.

32. Area 1 has an estimated 100,000[32] older adults who are considered greatest need and over 63,000[33] rural older adults.

IDoA administrative rules for hearings

33. The address given in the IDoA administrative rule[34] for filing a hearing request is incorrect.

34. The position identified in the IDoA administrative rules for receiving hearing requests[35] is incorrect.

IDoA terminating NIAAA from APS Program in 2014

35. On July 16, 2013, NIAAA sent an email to then IDoA Director John Holton. The email is attached and labeled as Petition Exhibit A.

36. In Exhibit A, Mr. Nyhammer stated that the new APS Program manual (Manual) was invalid and requested that IDoA recall the Manual.

37. On October 21, 2013, Mr. Nyhammer sent an email to IDoA Director Holton. The email is attached and labeled as Petition Exhibit B.

38. In Exhibit B, Mr. Nyhammer stated that NIAAA is considering litigation regarding the Manual.

39. IDoA Director Holton sent NIAAA a letter dated December 30, 2013. The letter is attached and labeled as Petition Exhibit C.

40. In Exhibit C, IDoA states that it is terminating NIAAA as RAA without cause.

41. Prior to being terminated as the RAA as stated in Exhibit C, NIAAA had been the RAA for Area 1 for over a decade.

42. IDoA terminating NIAAA as the RAA in 2014-2015 was contrary to NIAAA's request.

April 2019 meeting at IDoA

43. On April 8, 2019, a meeting (Meeting) was held at the IDoA offices in Chicago with IDoA Director Basta and Mr. Nyhammer.

44. Attending the Meeting by phone were Ms. Creamer and two current IDoA employees (Jose Jimenez and Lora McCurdy).

45. During the Meeting, Mr. Nyhammer brought up the issue of NIAAA being terminated as the RAA in 2014.

46. Ms. Creamer responded to Mr. Nyhammer by stating that she had been given an "order" (Order) in 2014 to withhold funding from NIAAA to retaliate for NIAAA's advocacy regarding the Manual.

47. Ms. Creamer did not say who gave her the Order or give any details about the funding she subsequently withheld from NIAAA.

IDoA's conduct after the Order

48. IDoA had failed to disclose the Order to NIAAA until it was admitted to by Ms. Creamer at the Meeting.

49. NIAAA has not received a notice regarding the funding withheld because of the Order.

50. IDoA has not provided NIAAA with documentation regarding the funding withheld because of the Order.

51. In 2014 -2015, IDoA awarded over $3.79 million in Other Funding to the AAAs.

52. In 2014-2015, NIAAA received zero in Other Funding.

2019 Correspondence

53. On April 15, 2019, NIAAA sent an email letter to IDoA Director Basta. NIAAA's letter is attached and labeled as Petition Exhibit D.

54. In Exhibit D, Mr. Nyhammer asks IDoA to investigate funding being withheld from NIAAA because of the Order.

55. IDoA Director Basta sent an email letter to NIAAA dated June 11, 2019. IDoA Director Basta's email letter is attached and labeled as Exhibit E.

56. In Exhibit E, IDoA Director Basta states that she "cannot speak to the past practices" of IDoA.

57. IDoA has refused NIAAA's request to investigate the Order.

58. IDoA has refused to disclose to NIAAA how much funding was withheld from NIAAA because of the Order.

59. IDoA has not taken adequate measures to ensure that future funding will not be improperly withheld from NIAAA.

60. IDoA has not taken adequate measures to ensure that NIAAA will not be improperly terminated as the RAA.

Count I

61. Paragraphs 1-60 are incorporated into Count I.

62. IDoA does not have administrative rules for contested hearings that comply with the Procedure Act.

63. IDoA does not have administrative rules that comply with Procedure Act for:

    a. The qualifications of administrative law judges[36];
    b. The necessary details required in a hearing notice[37];
    c. The disqualification of an administrative law judge[38];
    d. Bias or conflicts of interests[39];
    e. What must be included in the record for a contested hearing[40];
    f. The rules of evidence at a hearing[41];
    g. The proposal for decision[42];
    h. What must be in the decision and orders[43];
    i. Expenses and attorney fees in contested hearings[44];
    j. Ex parte communications after a notice of hearing[45];
    k. Staying contested hearings for military service[46];
    l. Waiving compliance with Procedure Act[47]; or
    m. Service by email.[48]

64. IDoA not having valid administrative rules for contested hearings is an impediment to NIAAA receiving a fair hearing for this Petition.

65. IDoA not having valid administrative rules for contested hearings discourages AAAs from challenging actions of IDoA.

66. IDoA's administrative rules for contested hearings are invalid under the Procedure Act.

67. IDoA has violated the Procedure Act because it does not have the required valid administrative rules for contested hearings.

Count II

68. Paragraphs 1-60 are incorporated into Count II.

69. IDoA violated the OAA[49] by withholding funding from NIAAA pursuant to the Order because IDoA did not provide NIAAA:
    a. Due process;
    b. Notice of the intended withholding; or
    c. Documentation of the intended withholding.

Count III

70. Paragraphs 1-60 are incorporated into Count III.

71. IDoA failing to take adequate measures to prevent funding from being improperly withheld from NIAAA continues to have a chilling effect on NIAAA's advocacy.

72. IDoA violated the OAA[50] by withholding funding from NIAAA pursuant to the Order as it was done for the improper purpose of retaliating against NIAAA for NIAAA's advocacy.

Count IV

73. Paragraphs 1-60 are incorporated into Count IV.

74. It is an improper purpose for IDoA to withhold funding from NIAAA because of the Order.

75. In withholding funding from NIAAA for an improper purpose, IDoA violated the OAA by failing to:
    a. Improve the capacity of serving older adults by concentrating resources;[51]
    b. Act in the Clients best interests;[52]
    c. Give preference to Clients with greatest economic need;[53] and
    d. Consider the needs of rural Clients in funding AAAs.[54]

Count V

76. Paragraphs 1-60 are incorporated into Count V.

77. Ms. Creamer acted under the color state law when she withheld funding from NIAAA because of the Order.

78. Ms. Creamer has deprived NIAAA of its federal due process rights[55] by withholding funding from NIAAA pursuant to the Order.

Count VI

79. Paragraphs 1-60 are incorporated into Count VI.

80. IDoA failing to take adequate measures to prevent funding from being improperly withheld from NIAAA continues to have a chilling effect on NIAAA's advocacy.

81. IDoA has violated Illinois law by withholding funding from NIAAA for the improper purpose of interfering with NIAAA's state mandated[56] advocacy responsibilities.

Count VII

82. Paragraphs 1-60 are incorporated into Count VII.

83. IDoA terminated NIAAA as the RAA on January 31, 2014 as retaliation for NIAAA's advocacy efforts.

84. It was improper for IDoA to terminate NIAAA as the RAA in retaliation for NIAAA's advocacy.

85. IDoA violated Illinois law[57] by terminating NIAAA as the RAA.

Count VIII

86. Paragraphs 1-60 are incorporated into Count VIII.

87. IDoA failing to take adequate measures to prevent NIAAA from being improperly terminated as the RAA continues to have a chilling effect on NIAAA's advocacy.

88. IDoA has violated Illinois law by improperly terminating NIAAA as the RAA as it interferes with NIAAA's state mandated[58] advocacy responsibilities.

Count IX

89. Paragraphs 1-60 are incorporated into Count IX.

90. Implicit in IDoA's obligation to disburse funding[59] to the AAAs is that the allocation not be done for an improper purpose.

91. IDoA withholding funding from NIAAA because of the Order is an improper purpose.

92. IDoA violated Illinois law[60] by withholding funding from NIAAA under the Order.

WHEREFORE, NIAAA requests that the administrative law judge/hearing officer order that IDoA has:

A. Violated the Procedure Act because it does not have the required administrative rules for contested hearings.

B. Invalid administrative rules for contested hearings.

C. To adopt administrative rules pursuant to the Procedure Act for contested hearings.

D. Violated the OAA by withholding funding from NIAAA pursuant to the Order because IDoA did not provide NIAAA;
   a. Due process;
   b. Notice of the intended withholding; or
   c. Documentation of the intended withholding.

E. Violated the OAA by withholding funding from NIAAA pursuant to the Order as it was done for the improper purpose of retaliating against NIAAA for NIAAA's advocacy efforts.

F. To take adequate measures to ensure that future funding will not be improperly withheld from NIAAA.

G. Violated the OAA in withholding funding from NIAAA pursuant to the Order. In so doing, IDoA failed to:
   a. Improve the capacity of serving older adults by concentrating resources;
   b. Act in the Clients best interests;
   c. Give preference to Clients with greatest economic need; and
   d. Consider the needs of rural Clients in funding AAAs.

H. Violated Illinois law by interfering with NIAAA's state mandated advocacy responsibilities.

I. Violated Illinois law by improperly terminating NIAAA as the RAA in 2014-2015.

J. To take adequate measures to ensure that NIAAA will not be improperly terminated as the RAA in the future.

K. Violated Illinois law by not giving NIAAA due process in withholding funding because of the Order.

L. Denied NIAAA a federally protected right in violation of 42 U.S.C. § 1983.

M. Caused a financial loss to NIAAA for which NIAAA should be compensated.

N. To pay the costs of litigating this Petition as IDoA has failed to adopt valid administrative rules for contested hearings[61] and NIAAA has incurred attorney fees[62] in litigating this Petition.

O. To adopt administrative rules pursuant to the Procedure Act for awarding future funding to AAAs.

P. To comply with any other determination that the administrative law judge/hearing officer deems just and equitable.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in Paragraphs 29-60 above are true and correct, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Respectfully submitted,

Grant Nyhammer,
Attorney Registration #6239576
Executive Director & General Counsel for the Petitioner
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
gnyhammer@nwilaaa.org
(815) 226-4901
(815) 226-8984 fax

Subscribed and sworn to before me
this 26th day of June, 2019.

NOTARY PUBLIC

JENNIFER SNOW
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
July 24, 2022

[1] "[IDoA] will...afford an opportunity for a hearing upon request...to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. §3027(a)(5). As alleged in the Petition, NIAAA is submitting a Plan amendment. NIAAA is also requesting a hearing under and 42 U.S.C. § 3026(f)(2)(b) which states "[IDoA] shall not make a final determination [about] withholding funds...without first affording the area agency...a public hearing concerning the action." As alleged in the Petition, IDoA has withheld funding from NIAAA.

[2] 42 U.S. Code § 3001 *et.seq*. References in the Petition to the OAA means the federal statute and corresponding regulations at 45 CFR § 1321.

[3] "Every person who [acting on behalf of a state agency]... causes...[a] deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in...[a] proper proceeding for redress." 42 U.S.C. § 1983. As alleged in the Petition, Ms. Creamer has deprived NIAAA of federal due process rights.

[4] 5 ILCS 100 *et.seq*. "All agencies shall adopt rules establishing procedures for contested case hearings." 5 ILCS 100/10-5.

[5] NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code §230.440(a) which states that "a written request for a hearing shall be filed by the aggrieved agency...within 30 days following receipt of the notice of adverse action." As alleged in the Petition, on June 11, 2019 IDoA took the adverse action of declining NIAAA's request to do an investigation. NIAAA is also requesting a hearing pursuant to 89 Ill.Adm.Code §220.502 which states that "the request for a hearing...shall be in writing." Finally, NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code §230.410(a)(1) which states that "the Department shall provide an opportunity for a hearing to...Any area agency on aging when the Department proposes to...disapprove the area plan." The Petition alleges that IDoA is interfering with NIAAA's advocacy which is an effective disapproval of the advocacy section in NIAAA's area plan.

[6] IDoA has "the following...duties...to receive and disburse State and federal funds made available directly to the Department including those funds made available under the Older Americans Act...for providing services for senior citizens...and shall develop and administer any State Plan for the Aging required by federal law." 20 ILCS 105/4.01

[7] An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

[8] The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

[9] " Area 1, which is comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside and Lee." 20 ILCS 105/3.08.

[10] 45 CFR § 1321.33.

[11] 45 CFR § 1321.61(a).

[12] 45 CFR § 1321.61(b)(1). Similarly, Illinois law states that "an area agency on aging shall throughout the planning and service area...monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons...[and] represent the interests of older persons to public officials, public and private agencies or organizations." 89 Ill.Adm.Code §230.150(a)(1)-(3).

[13] IDoA "shall be the single State agency for receiving and disbursing federal funds made available under the [OAA]". 20 ILCS 105/4.

[14] 45 CFR § 1321.63(b).

[15] AAA are "eligible for...other funds made available by the State of Illinois or the federal government." 20 ILCS 105/3.07.

[16] "It is the purpose of...[the OAA for]...State agencies...to concentrate resources in order to develop greater capacity...to serve older individuals." 42 U.S.C. §3021(a)(1).

[17] IDoA cannot withhold AAA funds "without first affording the area agency on aging due process." 42 U.S.C. § 3026(f)(2)(b).

[18] Due process requires that "at a minimum ... deprivation of...property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1949).

[19] 42 U.S.C. § 1983.

[20] AAAs are entitled to due process which "shall include procedures for...providing notice of an action to withhold funds; providing documentation of the need for such action; and at the request of the area agency on aging, conducting a public hearing concerning the action." 42 U.S.C. § 3026(f)(2)(b).
[21] "The State shall...serve as an effective...advocate for older individuals." 42 U.S.C §3025(a)(1)(D).
[22] "The State agency shall...provide assurance that preference will be given to providing services to older individuals with greatest economic need and older individuals with greatest social need."42 U.S.C §3025(a)(2)(E).
[23] "The [IDoA state] plan shall provide assurances that the special needs of older individuals residing in rural areas will be taken into consideration and shall describe how those needs have been met and describe how funds have been allocated to meet those needs."42 U.S.C §3027(a)(10).
[24] 20 ILCS 105/5.02.
[25] 5 ILCS 100/10-10.
[26] The legislative notes to 89 Ill.Adm.Code §220 state that they were last "amended at 26 Ill. Reg. 9652, effective July 1, 2002."
[27] 89 Ill.Adm.Code §220.503(a).
[28] Illinois Constitution, Article I, Section 2.
[29] 320 ILCS 20/2(l).
[30] "Regional administrative agency" means...the designated Area Agency on Aging shall be designated the regional administrative agency if it so requests." 320 ILCS 20/2(l).
[31] Exhibit 2(A) of the Plan requires NIAAA to "provide a description of the activities the Area Agency on Aging will engage in as it provides leadership...for the elderly through...advocacy."
[32] Area 1 has 160,037 older adults based on the 2017 Census estimate. Most of these older adults fit multiple categories of greatest need so 100,000 is a conservative estimate for Area 1.
[33] According to the 2017 Census estimate, Area 1 has 63,079 older adults living in rural counties.
[34] 89 Ill.Adm.Code §220.503(a).
[35] *Id.*
[36] "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings." 5 ILCS 100/10-20.
[37] The IDoA rules state that "each hearing shall be conducted at a reasonable time, date and place." 89 Ill.Adm.Code §220.507. The Procedure Act requires more information be included in the notice such as: the nature of the hearing; the legal authority and jurisdiction; relevant substantive and procedural statutes; a short plain statement of the matters asserted; addresses of parties, etc. 5 ILCS 100/10-25.
[38] "The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-30(b).
[39] *Id.*
[40] 5 ILCS 100/10-35.
[41] 5 ILCS 100/10-40.
[42] 5 ILCS 100/10-45.
[43] 5 ILCS 100/10-50.
[44] 5 ILCS 100/10-55.
[45] 5 ILCS 100/10-60.
[46] 5 ILCS 100/10-63.
[47] 5 ILCS 100/10-70.
[48] 5 ILCS 100/10-75.
[49] 42 U.S.C. § 3026(f)(2)(b).
[50] 45 CFR § 1321.61(b)(1).
[51] 42 U.S.C. §3021(a)(1).
[52] 42 U.S.C §3025(a)(1)(D).
[53] 42 U.S.C §3025(a)(2)(E).
[54] 42 U.S.C §3027(a)(10).
[55] 42 U.S.C. § 3026(f)(2)(b).
[56] 89 Ill.Adm.Code §230.150.
[57] 320 ILCS 20/2(i); Illinois Constitution, Article I, Section 2.
[58] 89 Ill.Adm.Code §230.150.

[59] 20 ILCS 105/4.01.
[60] 20 ILCS 105/4.01. and the Illinois Constitution, Article I, Section 2.
[61] "In any case in which a party has any administrative rule invalidated by a court for any reason, including...the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." 5 ILCS 100/10-55(c).
[62] "In any action or proceeding to enforce a provision of sections...1983...of this title...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

NIAAA Petition Exhibit A

From: Grant Nyhammer
Sent: Tuesday, July 16, 2013 4:41 PM
To: Holton, John K. (John.K.Holton@Illinois.gov)
Cc: Moorman, Lois (Lois.Moorman@Illinois.gov)
Subject: RE: Updated Standards Chapters 1, 2, 3, and 10

Director Holton:

I just received the new Adult Protective Services Standard and Procedures Manual (Manual) which I understand did not go through the rulemaking process contained in the Illinois Administrative Procedure Act (Act), 5 ILCS 100 *et. seq.* I believe this was, unfortunately, a mistake and the Illinois Department on Aging (IDoA) should recall the Manual as I believe it is invalid under the Act.

As you know, the Act delineates the process that IDoA must follow in promulgating a 'rule' which is broadly defined as any:

> Agency statement of general applicability that implements, applies, interprets, or prescribes law or policy. 5 ILCS 100/1-70.

This essentially means that the Act applies to any statement by a state agency about how a public program is managed regardless of how the statement is classified. For example, a federal court deemed a letter interpreting an Illinois statute sent to a private insurance company from the Illinois Department of Insurance to be a rule subject to the Act. *Com-Co Insurance Agency, Inc. v. West Bend Mutual Insurance Company*, 666 F. Supp. 1126, 1128 (ND IL 1987).

The Manual states that it is procedures for "Regional Administrative Agencies and APS Provider Agencies" for "conducting activities under the Adult Protective Services Act" (Manual, Page 1). By its own terms, the Manual is an IDoA statement implementing a program created by state statute which affects the rights of external parties. The Manual is, consequently, the quintessential rule subject to the Act.

[Note that while the Act does exclude from rulemaking *internal* IDoA policies ("statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency"), the Manual does not fit this exception as its whole purpose, as stated above, is affecting external parties including the rights of victims and perpetrators.]

Since a rule failing to comply with the Act is unauthorized (5 ILCS 100/5-6) and invalid (5 ILCS 100/5-35(b)), the Manual should be withdrawn as it creates tremendous uncertainty for those of us managing the APS program.

If you decide to put the Manual through the rulemaking process, I am happy to help in any way needed. Please contact me if you have any questions.

Thanks,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road
Rockford, IL 61108

NIAAA Petition Exhibit B

From: Grant Nyhammer
Sent: Monday, October 21, 2013 4:34 PM
To: Holton, John K. (John.K.Holton@illinois.gov)
Cc: sonia.bhagwakar@illinois.gov
Subject: Mandamus Compliant

Director Holton:

In hopes that we can find a solution sort of litigation, please find attached a Mandamus Complaint (and exhibits) that NIAAA is considering filing. I have also attached a press release that explains why we think this unusual step is necessary in the event we cannot reach a mutually agreeable resolution.

NIAAA is willing to work with IDoA to solve this problem but we are resolved to do what is necessary to protect our grantees and clients. Please respond within 14 days.

Sincerely,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging

NIAAA Petition Exhibit C

Illinois Department on Aging
One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 217-785-3356, Fax: 217-785-4477, Web: www.state.il.us/aging

December 30, 2013

Grant Nyhammer, Executive Director
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108-1605

Dear Mr. Nyhammer:

This letter is being sent to notify you that the Department on Aging will be terminating its Fiscal Year 2014 Adult Protective Services Program Grant with Northwestern Illinois Area Agency on Aging (NIAAA), effective January 31, 2014.

This letter serves as written notice, as required by the Department on Aging's current grant agreement with Northwestern Illinois Area Agency on Aging (IDoA No. APS 1401) Item #31, which states:

> "This Grant may be terminated without cause by either party upon thirty (30) days' written notice."

Effective February 1, 2014, the Department on Aging will assume the functions of the "regional administrative agency" in Planning and Service Area (PSA) 01, as outlined in Section 303 of the Adult Protective Services (APS) Standards and Procedures Manual.

The Department on Aging appreciates the work of NIAAA staff, Janet Williams, on behalf of the APS Program in PSA 01. The decision to terminate this grant does not reflect any concern for the quality of her performance in completing the functions of the regional administrative agency's role in the program.

If you or your staff has any questions in the weeks ahead related to NIAAA's responsibilities associated with closing out the grant, please contact Lois Moorman, Program Administrator for the Department's Office of Adult Protective Services.

Sincerely,

John K. Holton

John K. Holton
Director

JKH:lm
cc: Kim James, Chairperson, NIAAA Board of Directors

Respect for yesterday. Support for today. Hope for tomorrow.

NIAAA Petition Exhibit D

April 15, 2019

Paula Basta, Director
Illinois Department on Aging
One Natural Resources Way #100
Springfield, IL 62702-1271

Director Basta:

Thank you for meeting with me on April 8, 2019. I appreciate that the Illinois Department on Aging (IDoA) is interested in improving relationships with the area agencies on aging (AAAs) so we are asking as a first step that you initiate an investigation regarding how IDoA has been denying funding to the Northwestern Illinois Area Agency on Aging (NIAAA). As you know, Betsy Creamer admitted at our April 8, 2019 meeting that IDOA has been denying NIAAA funding to punish us for advocating for our clients. Ms. Creamer said this has been occurring since at least 2014 -2015 when NIAAA was excluded from over $3.79 million in funding that was awarded to the other AAAs.[1] If IDoA has used millions of dollars to punish AAAs, then the integrity of the entire aging network is threatened as it is premised on AAAs being independent advocates protecting the best interests of our clients from actions of IDoA.[2]

The conduct admitted to by Ms. Creamer, unfortunately, appears to have been ongoing as IDoA regularly engaged in secret negotiations with AAAs and then made surprise funding announcements such as:

- On August 30, 2017 at the IDoA/AAA meeting, IDoA announced that it had awarded three AAAs $309,000 in funding for the Alzheimer's Disease Supportive Service Program; and
- On August 22, 2017, IDoA announced that two AAAs had agreed to pilot a version of the Community Reinvestment Program (CRP). IDoA has refused to disclose the amount of the funding.

NIAAA was unaware of either funding opportunity until IDoA made the above announcements. Further, the CRP announcement was inexplicable because it was made during the CRP administrative rule process which prohibits IDoA from discussing the CRP with AAAs. In order to determine how IDoA chose the two CRP pilot AAAs, NIAAA did a Freedom of Information Act request and, as you can see from the attached, the Illinois Attorney General (AG) determined that IDoA is continuing to improperly withhold that information from NIAAA. (Note that the AG also stated that IDoA counsel "should be mindful of its statutory obligation to cooperate" with the AG.) Given this, we believe it is prudent to bring in outside counsel to investigate because Ms. Creamer's admission likely involves wrongdoing during the previous administration by high level staff who may still be working at IDoA.

Please acknowledge receipt and respond within 14 days.

Sincerely,

Grant Nyhammer
Grant Nyhammer,
Executive Director & General Counsel

NIAAA Petition Exhibit E

Illinois Department on Aging

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

June 11, 2019

Grant Nyhammer
Executive Director
Northwestern IL. Area Agency on Aging
1111 S. Alpine Road
Rockford, IL 61108

Dear Grant:

Thanks again for meeting with me and sharing your perspective about past practices here at the Department on Aging specific to funding allocation decisions that impact the Area Agencies on Aging (AAA) network. While I cannot speak to the past practices referenced, I can assure you that the Department is committed to strengthening our relationships with the Aging Network, including our partnership with the AAAs.

In the spirit of collaboration and transparency, I can assure you that this Administration and the Department are committed to ensuring that the AAAs are notified of **every** funding opportunity that becomes available through both federal and state initiatives. As you know, the Governor's introduced budget included new funding opportunities for the AAA network to expand services to address social isolation, gap filling funds to enhance services for older adults with Alzheimer's and other forms of dementia, and funding to increase the availability of home delivered meals. I am very happy to share that the proposed funding was approved by the General Assembly and the Department is working hard to allocate those resources to all 13 of our AAAs.

As we discussed during our initial meeting, the Department is very interested in continued collaboration with your AAA and strengthening our partnership to provide quality based services to older adults across Illinois.

Sincerely,

Paula Basta, M.Div.
Director, IDoA

Respect for yesterday. Support for today. Planning for tomorrow.
www.illinois.gov/aging

EXHIBIT 3

Illinois Department on Aging

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

July 29, 2019

Via Electronic Mail Only

Grant Nyhammer
Executive Director & General Counsel
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108

Re: June 26, 2019, Petition for Hearing and July 24, 2019 Inquiry

Dear Mr. Nyhammer:

This correspondence is in follow up to the July 23, 2019, telephone conversation with Attorney Scordato, and in response to your July 24, 2019, email. As General Counsel Armstead and I discussed with Attorney Scordato of your office, it does not appear that your Petition presents a "contested case" as defined in the Illinois Administrative Procedure Act. Attorney Scordato graciously agreed to provide additional support for your agency's claim that it is entitled to an administrative hearing; however, such additional information has not been received to date. In the absence of a "contested case," the Illinois Department on Aging ("Department") is unable to issue a final decision or order (See 5 ILCS 100/10-50).

The Department is happy to discuss all of the issues referred to in your "Petition for Hearing" in an effort to resolve your concerns. If you would like to schedule a telephone conference or meeting, please let me know.

Sincerely,

Paulette F. Dove

Paulette F. Dove
Deputy General Counsel

Cc: Paula A. Basta, M.Div.
Lora McCurdy
Rhonda Armstead

EXHIBIT
4

Northwestern Illinois Area Agency on Aging,)
Petitioner,)
v.)
The Illinois Department on Aging,)
Respondent)

Petition for Hearing

The Petitioner, the Northwestern Illinois Area Agency on Aging (NIAAA), through its attorney Timothy Scordato, is requesting a hearing regarding this Petition for Hearing (Petition) against the Respondent, the Illinois Department on Aging (IDoA). NIAAA is requesting a hearing on this Petition pursuant to three provisions of the Illinois Administrative Procedure Act[1] (Procedure Act) and three provisions[2] of the Illinois Administrative Code (Code). In support of this Petition, NIAAA states the following:

Nature of Action

1. This action concerns IDoA rejecting NIAAA's designation of Adult Protective Service (APS) Providers. NIAAA, as the regional administrative agency (RAA) for the APS program, has broad authority to manage the APS program which includes the specific responsibility of designating APS Providers. IDoA, in rejecting NIAAA's designation, is improperly intruding on authority granted to NIAAA by the Illinois General Assembly. In addition, IDoA is using conflicting standards to govern the APS program in rejecting NIAAA's designation and is unlawfully managing the APS Program with invalid rules. Finally, IDoA does not have administrative rules for hearings that comply with the Procedure Act, preventing NIAAA from receiving a fair hearing on this Petition for Hearing.

Parties

2. IDoA is an agency of the State of Illinois.

3. NIAAA is a 501(c)(3) nonprofit organization.

4. IDoA has designated NIAAA as the area agency on aging[3] (AAA) for planning service area 1 (Area 1).[4]

5. Area 1 encompasses the nine counties in Northwestern Illinois.[5]

6. IDoA has designated NIAAA as the RAA for the Adult Protective Services (APS) Program for Planning Area 1.[6]

7. Grant Nyhammer is the Executive Director & General Counsel for NIAAA.

Legal Authority

8. The Adult Protective Services Act (APS Act) states IDoA "shall . . . manage a protective services program for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect. The Department shall contract with . . . regional administrative agencies . . . for the provision of those functions."[7]

Three standards for managing the APS Program

9. The APS Act states IDoA "shall adopt such rules and regulations as it deems necessary to implement [the APS Act]."[8]

10. The Adult Protective Services Program Standards and Procedures Manual[9] (Manual) states, "The [Manual] is the official document of the [IDoA] for conducting activities under the Adult Protective Services Act . . . ."[10]

11. The Code states that "this Subpart describes the organization of the Adult Protective Services Program administered by and through the Illinois Department on Aging."[11]

Conflicting Standards For Designating APS Providers

12. The APS Act states, "Each regional administrative agency shall designate provider agencies . . . ."[12]

13. The Code states, "Each RAA . . . shall [merely] . . . recommend the designation of APS provider agencies . . . ."[13]

14. The Manual states, "The RAA is responsible for designating APS [Providers] . ."[14]

Conflicting Standards For Evaluating APS Provider applications

15. The Manual states "the RAA shall award contracts to successful applicants based ***primarily*** [emphasis added] upon the evaluation of a written proposal, submitted to the RAA during the competitive procurement process."[15]

16. The Code states "qualified potential APS provider agencies shall be scored by the regional administrative agency. The highest scoring potential APS provider agency shall be recommended as the designated APS provider agency for the applicable planning and service area."[16]

Conflicting Standards for Contracting with Providers

17. The Code states, "[IDoA] will enter into the contract with the designated APS provider agency."[17]

18. The Manual states, "RAA shall award contracts to successful applicants . . . ."[18]

Conflicting Rules for Supervisor and Case Worker Qualifications

19. The APS Act states IDoA, "shall by rule develop standards for minimum staffing levels and staff qualifications."[19]

20. The Code states, "APS supervisors shall have . . . a Master's Degree in health, social sciences, social work, health care administration, gerontology, ***disability studies*** . . . . [emphasis added]."[20]

21. The Manual states, "Each person employed as a supervisor of a [case worker] shall have either . . . a Master's Degree in health, social sciences, social work, health care administration, gerontology, criminal justice, or public administration, and one year experience in health or human services . . . ."[21]

22. The Code states, "The required qualification for APS case workers include . . . Master's Degree in health, social services, social work, health care administration, gerontology, ***disability studies*** . . . . [emphasis added]."[22]

23. The Manual states, "Each person employed as a [case worker] shall have either . . . a Master's Degree in health, social services, social work, health care administration, gerontology, criminal justice, public administration . . . ."[23]

IDoA's Rulemaking Obligations Under the Procedure Act

24. "The provisions of the Illinois Administrative Procedure Act [Procedure Act] are hereby expressly adopted and shall apply to all administrative rules and procedures of . . . [IDoA]."[24]

25. "Each agency shall . . . adopt rules of practice setting forth the nature and requirements of all formal hearings."[25]

26. "All . . . [IDoA] rules establishing procedures for contested . . . [hearings] shall . . . comply with the [Procedure Act]."[26]

27. The IDoA administrative rules for contested hearings have not been updated since 2002.[27]

28. IDoA has an administrative rule that states that "all requests for hearings or appeals to the Department shall be filed with the Hearing Coordinator, Department on Aging, 421 East Capitol Avenue, Springfield, Illinois 6270."[28]

29. A rule is defined in the Procedure Act as any statement of general applicability that implements, applies, interprets, or prescribes law or policy.[29]

30. The rulemaking process in the Procedure Act requires (in part) that a proposed rule be published in the *Illinois Register*; there be an opportunity for the public to comment on the proposed rule, there be public hearings if requested on the proposed rule, and that the Joint Committee on Administrative Rules be given notice of the proposed rule.[30]

31. A rule that does not comply with the rulemaking process in the Procedure Act is invalid.[31]

Allegations of Fact

32. Mr. Scordato makes the following factual allegations in Paragraphs 33 - 45 based on information and belief.

IDoA Administrative Rules for Hearings

33. It is believed that the Department moved from 421 East Capital Avenue over nine years ago,[32] so it is doubtful that any hearing requests sent to that address will reach the Department.

34. It is believed that it has also been at least nine years since the Department had a "Hearing Coordinator" position.

IDoA's rejection of NIAAA's designation

35. On June 17, 2019, NIAAA designated APS Providers for Area 1.

36. On July 31, 2019, IDoA sent a letter to NIAAA. The letter is attached as Exhibit A.

37. Between June 17 and July 31, 2019, IDoA contacted at least one NIAAA APS provider applicant to gather information (Information) about NIAAA's application process.

38. It is believed the Information was used in Exhibit A.

39. IDoA did not disclose to NIAAA that it had contacted an APS provider to gather the Information.

40. In Exhibit A, IDoA denied NIAAA's designation of APS Providers.

41. Exhibit A states that it is rejecting NIAAA's designation because of "errors in the instructions and application used for scoring purposes."

42. The errors (Errors) allegedly committed by NIAAA as stated in Exhibit A are that NIAAA:

    a. Does not have the authority to enter into contracts with APS Providers;
    b. Used "out-of-date" terminology in referring to the Manual;
    c. Relied on "questionable weighting preferences" in scoring APS Provider applicants;
    d. Committed scoring errors for an APS Provider applicant;
    e. Made mistakes regarding terminology about qualifications;
    f. Listed incorrect training requirements; and
    g. Asked about "ambiguous operating commitments."

43. IDoA has not within at least the last ten years performed a review of a RAA recommendation for APS Providers as was done in Exhibit A.

44. IDoA has not rejected any RAA recommendation for APS providers in at least ten years.

45. No APS provider applicant had any questions of NIAAA during the application process.

Count I

46. Paragraphs 1 - 45 are incorporated into Count I.

47. As the RAA, NIAAA has the authority and responsibility to designate APS providers.

48. The Errors are insufficient for rejecting NIAAA's designation of APS Providers because IDoA's claim that NIAAA:

    a. Does not have the authority to enter into contracts with APS Providers contradicts the APS Act which gives that authority to NIAAA;
    b. Used out-of-date terminology in referring to the Manual is immaterial;
    c. Relied on questionable weighting preferences in scoring APS Provider applicants contradicts the APS Act which gives the discretion to NIAAA;
    d. Committed scoring errors for an APS Provider applicant is irrelevant as there was no competition regarding the referenced APS Provider;

e. Made mistakes regarding terminology about qualifications is erroneous because the Manual and the Code have conflicting standards;
f. Listed incorrect training requirements is immaterial; and
g. Asked about ambiguous operating commitments is immaterial given the authority granted NIAAA under the APS Act.

49. IDoA violated the APS Act[33] by unlawfully rejecting NIAAA's designation of APS Providers.

Count II

50. Paragraphs 1 – 48 are incorporated into Count II.

51. IDoA has limited authority to reject NIAAA's designation of APS Providers.[34]

52. The Errors are unreasonable for rejecting NIAAA's designation of APS Providers.

53. IDoA violated the Code[35] by unreasonably rejecting NIAAA's designation of APS Providers.

Count III

54. Paragraphs 1 - 45 are incorporated into Count III.

55. IDoA has tainted NIAAA's APS Provider applicant process by gathering the Informaton.

56. In tainting the process, IDoA violated the APS Act and the Code by unlawfully rejecting NIAAA's designation of APS Providers.

Count IV

57. Paragraphs 1 - 45 are incorporated into Count IV.

58. IDoA promulgates rules for the APS Program through the Manual.

59. The Manual is more than 180 pages long.

60. The Department manages the APS Program with the Manual.

61. The Manual is subject to the Procedure Act.

62. The Manual was not adopted under the rulemaking process contained in the Procedure Act.

63. The Manual is invalid under the Procedure Act.[36]

Count V

64. Paragraphs 1- 45 are incorporated into Count V.

65. IDoA does not have administrative rules for contested hearings that comply with the Procedure Act.

66. IDoA does not have administrative rules that comply with Procedure Act for:

    a. The qualifications of administrative law judges;[37]
    b. The necessary details required in a hearing notice;[38]
    c. The disqualification of an administrative law judge;[39]
    d. Bias or conflicts of interests;[40]
    e. What must be included in the record for a contested hearing;[41]
    f. The rules of evidence at a hearing;[42]
    g. The proposal for decision;[43]
    h. What must be in the decision and orders;[44]
    i. Expenses and attorney fees in contested hearings;[45]
    j. Ex parte communications after a notice of hearing;[46]
    k. Staying contested hearings for military service;[47]
    l. Waiving compliance with Procedure Act;[48] or
    m. Service by email.[49]

67. IDoA's administrative rules for contested hearings are invalid under the Procedure Act.

68. IDoA not having valid administrative rules for contested hearings is an impediment to NIAAA receiving a fair hearing for this Petition.

69. IDoA not having valid administrative rules for contested hearings discourages anyone from challenging unjust actions of IDoA.

70. IDoA has violated the Procedure Act[50] because it does not have the required valid administrative rules for contested hearings.

WHEREFORE, NIAAA requests that the administrative law judge/hearing officer find that IDoA has:

A. Invalid administrative rules for contested hearings.

B. Violated the Procedure Act because it does not have the required administrative rules for contested hearings.

C. To adopt administrative rules pursuant to the Procedure Act for contested hearings.

D. To cease using the Manual to promulgate policies for the APS Program.

E. To revoke the Manual.

F. To cease using conflicting rules to govern the APS Program.

G. To accept NIAAA's designation of APS Provider.

H. To pay the costs of litigating this Petition as IDoA has failed to adopt valid administrative rules for contested hearings. [51]

I. To comply with any other determination that the administrative law judge/hearing officer deems just and equitable.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the factual statements set forth in paragraphs 32-45 above are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Respectfully submitted,

Timothy Scordato,
Attorney Registration #6322807
Staff Attorney
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
tscordato@nwilaaa.org
(815) 226-4901
(815) 226-8984 fax

Subscribed and sworn to before me
this 23rd day of August, 2019.

NOTARY PUBLIC

JENNIFER SNOW
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
July 24, 2022

[1] 5 ILCS 100 *et.seq*. "All agencies shall adopt rules establishing procedures for contested case hearings." 5 ILCS 100/10-5. " No action by any agency to adopt, amend, or repeal a rule after this Act has become applicable to the agency shall be valid unless taken in compliance with this Section." 5 ILCS 100/5-35(b). Procedure Act requires a hearing because "all rulemaking authority exercised . . . [by the Department] is conditioned on the rules being adopted in accordance with all provisions of . . . [the Procedure Act]; any purported rule not so adopted . . . is unauthorized." 5 ILCS 100/5-6.

[2] NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code § 230.440(a), which states that "a written request for a hearing shall be filed by the aggrieved agency . . . within 30 days following receipt of the notice of adverse action." NIAAA is also requesting a hearing pursuant to 89 Ill.Adm.Code § 220.502, which states that "the request for a hearing . . . shall be in writing." Finally, NIAAA is requesting a hearing pursuant to 89 Ill.Adm.Code § 270.215, which states "The Department reserves the right to provide recommendations, reject recommendations, or direct action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so unreasonably."

[3] An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

[4] The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

[5] "Area 1, which is comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside and Lee." 20 ILCS 105/3.08.

[6] "The Department shall designate an Area Agency on Aging as the regional administrative agency." 89 Ill.Adm.Code § 270.215.

[7] 320 ILCS 20/3(a).

[8] 320 ILCS 20/10.

[9] The Manual can be found at http://thecluttermovement.com/wp-content/uploads/2018/06/Standards-Manual-Illinois-Department-on-Aging-APS-.pdf (last visited on August 23, 2019).

[10] ILLINOIS DEPARTMENT ON AGING, ADULT PROTECTIVE SERVICES PROGRAM STANDARDS AND PROCEDURES MANUAL Rule 101 (2018).

[11] 89 Ill.Adm.Code § 270.200(a).

[12] 320 ILCS 20/3(b).

[13] 89 Ill.Adm.Code § 270.215.

[14] ILLINOIS DEPARTMENT ON AGING, *supra* 307.

[15] *Id.* at 307(c).

[16] 89 Ill.Adm.Code § 270.220(c)(1).

[17] 89 Ill.Adm.Code § 270.215.

[18] ILLINOIS DEPARTMENT ON AGING, *supra.*

[19] 320 ILCS 20/3(a-1).

[20] 89 Ill.Adm.Code § 270.225(i).

[21] ILLINOIS DEPARTMENT ON AGING, *supra* 306(C).

[22] 89 Ill.Adm.Code § 270.225(i).

[23] ILLINOIS DEPARTMENT ON AGING, *supra* 306(E).

[24] 20 ILCS 105/5.02.

[25] 5 ILCS 100/5-10(b).

[26] 5 ILCS 100/10-10. The term contested case "means an adjudicatory proceeding...in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing." 5 ILCS 100/1-30. Contested case, therefore, means any circumstance where the Department is required by law to provide a hearing to determine a party's legal rights, duties, or privileges.

[27] The legislative notes to 89 Ill.Adm.Code § 220 state that they were last "amended at 26 Ill. Reg. 9652, effective July 1, 2002."

[28] 89 Ill.Adm.Code § 220.503(a).

[29] 5 ILCS 100/1-70.

[30] 5 ILCS 100/5-40.
[31] 5 ILCS 100/5-35(b).
[32] Doug Finke, *Department on Aging to move offices despite questions*, THE STATE JOURNAL-REGISTER (Mar. 12, 2010) https://www.sj-r.com/x673415983/Department-on-Aging-to-move-offices-despite-questions.
[33] "Each regional administrative agency shall designate provider agencies . . . ." 320 ILCS 20/3(b).
[34] "The Department reserves the right to provide recommendations, reject recommendations, or direct action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so unreasonably. Any such action by the Department will be authorized in circumstances where there is a State or federal contracting prohibition with the proposed provider agency, an actual or unmitigated conflict of interest, a provider agency does not meet minimum qualifications, or any similar circumstances." 89 Ill.Adm.Code § 270.215.
[35] 89 Ill.Adm.Code § 270.215.
[36] 5 ILCS 100/5-35(b).
[37] "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings." 5 ILCS 100/10-20.
[38] The IDoA rules state that "each hearing shall be conducted at a reasonable time, date and place." 89 Ill.Adm.Code § 220.507. The Procedure Act requires more information be included in the notice such as: the nature of the hearing; the legal authority and jurisdiction; relevant substantive and procedural statutes; a short plain statement of the matters asserted; addresses of parties, etc. 5 ILCS 100/10-25.
[39] "The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-30(b).
[40] *Id.*
[41] 5 ILCS 100/10-35.
[42] 5 ILCS 100/10-40.
[43] 5 ILCS 100/10-45.
[44] 5 ILCS 100/10-50.
[45] 5 ILCS 100/10-55.
[46] 5 ILCS 100/10-60.
[47] 5 ILCS 100/10-63.
[48] 5 ILCS 100/10-70.
[49] 5 ILCS 100/10-75.
[50] 5 ILCS 100/10-10.
[51] "In any case in which a party has any administrative rule invalidated by a court for any reason, including . . . the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." 5 ILCS 100/10-55(c).

EXHIBIT
A

IDoA
Illinois Department on Aging

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

July 31, 2019

Elaine M. Sharpe, Board President
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

Delivery via email: insightems@gmail.com

Grant Nyhammer, Executive Director & General Counsel
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

Delivery via email: gnyhammer@nwilaaa.org

Re: Request for Proposals for the Designation of Adult Protective Services Provider Agencies

Dear Ms. Sharpe and Mr. Nyhammer:

The Department has reviewed your recommendations regarding designations of provider agencies under the Adult Protective Services Program for Planning and Service Area 1.

Based on various deficiencies in the underlying Request for Proposal process, specifically errors in the instructions and application used for scoring purposes, the Department is exercising its right to reject the recommendations which will require your Area Agency on Aging to extend the designations for all current provider agencies until such time that a subsequent solicitation can be completed. (See 89 Ill. Adm. Code 270.215 and 270.220.) A report summarizing the review conducted by the Department is enclosed. It may be a helpful reference in determining necessary form revisions and other possible improvements once you have had an opportunity to consider this matter in more depth.

I have asked Lois Moorman and Claudia Kemple to contact you next week in case there are follow-up questions or points needing further clarification. Please let them know if there is any additional assistance that the Department can provide as you discuss the next steps for completing this designation cycle.

As always, the Department is appreciative of the time and efforts of Northwestern Illinois Area Agency on Aging in providing support for this important program.

Sincerely,

Paula M. Basta, M. Div.
Director

Enclosure

cc: Lois Moorman, Program Administrator
Claudia Kemple, Area Coordinator

Request for Proposals for Designation of Adult Protective Services Provider Agencies
Northwestern Illinois Area Agency on Aging

Procurement Process

The procurement for Adult Protective Service (APS) provider agencies is a two-stage process involving responsibilities resting with the Area Agency on Aging (AAA) (89 Ill. Adm. Code 270.220) and the Department (89 Ill. Adm. Code 270.215).

The AAA has the following responsibilities:

"a) *Each regional administrative agency* in turn *shall* procure and recommend the designation of APS *provider* agencies *within its planning and service area with prior approval by the Department on Aging and:*

1) *monitor the use of services;*

2) *provide technical assistance to the APS provider agencies,* including APS program training and any instructional materials required by the Department; and

3) *be involved in program development activities.* [320 ILCS 20/3(b)]

b) A procurement shall be issued by the regional administrative agency at least every six years, except as provided in subsection (e).

c) The procurement for APS providers shall include a solicitation and evaluation of potential APS provider agencies.

1) Qualified potential APS provider agencies shall be scored by the regional administrative agency. The highest scoring potential APS provider agency shall be recommended as the designated APS provider agency for the applicable planning and service area or subarea of the planning and service area.

2) The Department will approve or take other action regarding the recommendation for designation in accordance with Section 270.215(b).

d) The RAA may make a recommendation for withdrawal of the designation of an APS provider agency to the Department for approval, which shall not be unreasonably withheld. If the procurement fails to produce an APS provider agency for the service area that demonstrates adequate qualifications for designation, the regional administrative agency shall propose for designation a conditionally qualified provider agency for a limited term and until such time that a subsequent procurement results in an APS provider agency for the service area."

Link: http://www.ilga.gov/commission/jcar/admincode/089/089002700C02200R.html.

The Department has the following responsibilities:

"b) The Department will approve the designation and withdrawal of designation recommendations of the regional administrative agencies for APS provider agencies.

1) The Department reserves the right to provide recommendations, reject recommendations, or direct action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so unreasonably. Any such action by the Department will be authorized in circumstances where there is a State or federal contracting prohibition with the proposed provider agency, an actual or unmitigated conflict of interest, a provider agency does not meet minimum qualifications, or any similar circumstances which would prevent the Department from entering into or continuing a contractual agreement with the provider agency.

2) The Department will enter into the contract with the designated APS provider agency.

3) A designation is deemed withdrawn in the event of a contract termination."

Link: http://www.ilga.gov/commission/jcar/admincode/089/089002700C02150R.html.

Review of the Request for Proposal (RFP) and related Application and Instructions

A review of these documents reveals deficiencies relating to the following matters: reservation of rights by Northwestern Illinois Area Agency on Aging (NIAAA), use of out-of-date references and terminology, questionable weighting preferences, scoring errors, bifurcation of education and experience qualifications for staffing, incorrect in-service training requirements, and ambiguous operating commitments.

Reservation of rights by NIAAA

In the instructions, NIAAA states:

"The successful applicant(s) will be based primarily upon an evaluation of a written application submitted to NIAAA from this Request for Proposals. NIAAA reserves the right, however, to consider other factors such as an applicant's: financial resources, management structure/stability, past performance of NIAAA funded services, past performance of other grant funded services, etc. NIAAA also has the right to deny any application, to reject any informality, and to make all final decisions relative to contract award and any special contract conditions." See Item 1 on page 2, Item 8 on page 4, Item 9 on pages 4-5, Item 10 on page 5, and Item 12 on page 5 of the RFP.

This language does not correctly describe the procurement process given the responsibilities split between the AAA and the Department. Specifically, NIAAA does not have authority "to make all final decisions relative to contract award and any special contract conditions." It is the responsibility of the Department to enter into the contract with the designated agency. (89 Ill.

Adm. Code 270.215(b)(2).) It is also problematic for NIAAA and/or its Executive Director to attempt to reserve the right to "deny any application" without articulating a standard for undertaking such discretionary action.

Use of Out-of-date References and Terminology

At various points in the application and instructions, NIAAA references the Elder Abuse and Neglect Program, the *Elder Abuse and Neglect Program Standards and Procedures Manual*, and Elder Abuse Provider Agencies. This terminology is out-of-date. The Elder Abuse and Neglect Program was renamed as the Adult Protective Services Program in accordance with Public Act 98-49, effective July 1, 2013. The version of the Adult Protective Services Program Standards and Procedures Manual that is currently in use was last revised in August of 2018.

Questionable Weighting Preferences

NIAAA has incorporated a weighting preference for those applicant agencies with experience in the provision of Older Americans Act Services in Part II of the application. This requirement is not relevant to the organizational standards and responsibilities for providers under the Adult Protective Services Program, but its inclusion does not change the outcome of scoring because each applicant received the maximum of 5 points. See 89 Ill. Adm. Code 270.225.

However, the inclusion of weighting preferences for a "minority status" agency in Part III of the application is a cause for concern. By definition, an APS provider agency must be "a public or nonprofit agency" and a preference favoring a minority-status agency does not seem to be the most relevant performance indicator. (320 ILCS 20/2(h).) No definition is provided for the term "minority". Also, the intended "minority status" criterion is not clear because and the instructions and application shift references between "minority ownership" versus "minority operations". Moreover, NIAAA is scoring on only one preference when federal and Illinois public policy promotes economic development opportunities for a broader array of businesses; specifically, businesses owned by minorities, businesses owned by persons with disabilities, businesses owned and controlled by veterans, and business owned and controlled by women. (See 2 CFR 200.321 and the Illinois Procurement Code (30 ILCS 500); the Business Enterprise for Minorities, Women, and Persons with Disabilities Act (30 ILCS 575); the Veterans Preference Act (330 ILCS 55).) Lifescape Community Services, Inc. received five points for this item, but it is not possible to confirm this provider agency is a minority-owned business based on the information provided to the Office of Adult Protective Services.

The focus on availability of bi-lingual staffing is another weakness in the application. An APS provider agency must be able to meet communication needs for a wide array of situations, including individuals who have vision, hearing, or speech disabilities; individuals who use auxiliary communication aids and services; individuals for whom English is a second or foreign language; and individuals with intellectual, cognitive or developmental disabilities. Two applicants, Elder Care Services of DeKalb County and Stephenson County Senior Center, scored a zero and it is not possible to properly evaluate applicant agencies without a broader inquiry as to communication capacity.

Scoring Errors

Elder Care Services of DeKalb County marked Item IV(1)(b) in its application, but NIAAA did not assign any score. There was a maximum possible score of "3" for this item. Correction of this omission is necessary.

NIAAA made marks in the scoring column for both item V(1)(a) and for item V(2)(a) to indicate a negative response even though each applicant agency actually indicated it would exceed the requirements relating to in-service training for its respective staff under these two items. Correction of these errors is not required because no points were assigned to these items.

Bifurcation of Education and Experience Qualifications for Staffing

Staffing qualifications for APS supervisors and APS case workers are set forth at 89 Ill. Adm. Code 270.225(i). Some combination of education and experience is required except as to an APS case worker who has a Master's Degree in health, social services, social work, health care administration, gerontology, disability studies, criminal justice or public administration.

The required qualifications for APS supervisors include:

"A) Education

i) a Master's Degree in health, social sciences, social work, health care administration, gerontology, disability studies, criminal justice or public administration, and one year experience in health or human services; or

ii) a Registered Nursing license, or a Bachelor of Science in Nursing (B.S.N.) or a Bachelor of Arts (B.A.)/Bachelor of Science (B.S.) in health, social sciences, social work, health care administration, gerontology, or criminal justice and three years' experience in health or human services, including either one year of supervisory experience or one year of experience in aging, adults with disabilities or domestic violence programs or services;

B) Department sponsored APS case worker certification and on-line forms training;

C) Department sponsored Phase II certification training within six months after the APS case worker certification, to be placed on the Department's list of APS Case Workers;

D) Department sponsored APS supervisor's certification training;

E) Fourteen hours of participation by actual attendance at in-service training and/or webinars on abuse of eligible adults, rights of older

adults and adults with disabilities, self-neglect, and domestic violence subjects within a calendar year. For partial years of employment, training shall be prorated to equal approximately 45 minutes for each full month of employment. Participation by actual attendance at regional, State or national conferences on abuse of older adults and adults with disabilities and rights of older adults and adults with disabilities, self-neglect, and domestic violence qualify as in-service training. Participation should be documented and included in the employee's personnel file; and

F) Eleven hours of qualifying recertification every three years, which must be documented in the employee's personnel file."

Link: http://ilga.gov/commission/jcar/admincode/089/089002700C02250R.html.

The instructions and questions in the application do not correctly state the education and experience qualifications for APS supervisors. There is no reference to disabilities studies. The experience qualification for APS supervisors who have a Master's Degree under 89 Ill. Adm. Code 270.225(i)(1)(A)(i) is not addressed at all and the experience qualification for APS supervisors who have a Registered Nursing license, a B.S.N., a B.A., or a B.S. under 89 Ill. Adm. Code 270.225(i)(1)(A)(ii) is misstated in referencing "aging/domestic/disability violence programs or services". Also, the wording of the last question on this issue requires an assumption that the minimum qualifications have been met if an applicant marks "Neither a) or b) apply" as its response. One final note on this issue is that only Elder Care Services of DeKalb County currently employs any APS staff who are reported to hold Master's Degrees according to the Department's Adult Protective Services Case Worker Registry.

The required qualifications for APS case workers include:

"A) Education

i) Master's Degree in health, social services, social work, health care administration, gerontology, disability studies, criminal justice or public administration;

ii) a Registered Nursing license, or a B.S.N. or a B.A./B.S. in health, social sciences, social work, health care administration, gerontology, or criminal justice and one year experience in health or human services; or

iii) a Practical Nursing license, with two years' experience in health or human services;

B) Department sponsored APS case worker certification and on-line forms training;

C) Department sponsored Phase II certification training within six months after the APS case worker certification, to be listed on the Department's list of APS Case Workers;

D) Twelve hours of participation by actual attendance at in-service training and/or webinars on abuse of eligible adults, rights of older adults and adults with disabilities, self-neglect, and domestic violence subjects within a calendar year. For partial years of employment, training shall be prorated to equal approximately 45 minutes for each full month of employment. Participation by actual attendance at regional, State or national conferences on abuse of older adults and adults with disabilities and rights of older adults and adults with disabilities, self-neglect, and domestic violence qualify as in-service training. Participation should be documented and included in the employee's personnel file; and

E) Eleven hours of qualifying recertification every three years, which must be documented in the employee's personnel file."

Link: http://ilga.gov/commission/jcar/admincode/089/089002700C02250R.html.

The questions in the application relating to APS case workers do not follow the same format as those for APS supervisors. There is no question about whether APS case workers will be required to exceed experience requirements. Moreover, an assumption is also required regarding whether the minimum qualifications have been by an applicant who marks "APS workers will **not** be required to exceed the minimum educational requirements listed in the instructions."

The instructions provide examples of how an applicant agency can exceed the minimum education and experience requirements for staff hired on or after the effective date of the contract. Specific information was not required to be submitted with each application, so provider agency commitments cannot readily be included in drafting the resulting Provider Contracts. Instead, NIAAA will need to review written policy, job descriptions, and staff resumes on file in conducting Period Program Operations Administrative Reviews. It is also possible that an applicant agency awarded extra points will never see a need to comply with this commitment if staffing is stable and no openings arise during the term of the contract.

Incorrect In-service Training Requirements

NIAAA is attempting to determine whether each applicant agency is willing to exceed in-service training requirements for APS supervisors and APS case workers. However, the first question uses an out-of-date citation to Section 306(C)(3) in the Elder Abuse and Neglect Program Standards and Procedures which references a narrow exemption addressing qualifications for APS supervisors whose employment predates implementation of the APS Program. Applicant agencies are then questioned about additional training requirements for this situation. This flaw affects the outcome of the procurement.

Moreover, the instructions and application do not correspond with each other in Part V. The required hours are listed correctly in the instructions, but the application itself does not refer to either the current training topics or the proper training hours for both APS supervisors and APS case workers. There is also no reference to the recertification training requirements on the application. Based on the instructions, the application should have included space for an applicant agency to indicate the number of in-service training hours elected to be required over the minimum requirements for APS supervisors.

Ambiguous Operating Commitments

The APS Program has detailed operating commitments for provider agencies. The instructions and applications generally address requirements even though out-of-date references are used, but no questions were posed to determine compliance with the following commitments in accordance with 89 Ill. Adm. Code 270.225(c):

"1) The APS provider agency shall not be closed for more than four consecutive days, unless an alternative method of receiving reports is approved by and on file with the regional administrative agency and the Department.

2) If a recorded message is activated during business hours, there has to be an option to talk directly to a report taker at that time, rather than leaving a message on voice mail.

3) A report taker has to be available at least seven hours each working day."

Link: http://www.ilga.gov/commission/jcar/admincode/089/089002700C02250R.html.

Although it did not make a difference in the scoring, for item 3 under Part VI of the instructions, NIAAA incorrectly states that "Elder Abuse Provider Agencies are not required to have staff available to go out on weekends to respond to elder abuse reports." Per 320 ILCS 20/3(c), APS provider agencies must be able to respond to reports based on required timeframes and intake of a Priority 1 could necessitate staff working on a weekend. To meet this responsibility, a provider agency may use an on-call system to call staff into work after normal business hours and on weekends.

The last question in Part VI relates to whether an applicant agency will "routinely exceed" the required response timeframes for initial face-to-face visits. This question creates an ambiguous operating commitment because the instructions cite an out-of-date standard that references exceptions to the timeframes for provider agency responses to reports. Also, a "routine" response is more descriptive of a frequent and routine business occurrence which is not the same as the requirement in the instructions for an applicant agency to commit "to the higher timeframe for every report (if applicable)".

Recommendations for Process Improvements

The Department offers the following recommendations for process improvements:

1. require separate applications for different service areas;
2. clarify the decision-making process with respect to roles of NIAAA staff, the Executive Director and the Board;
3. update terminology and citations;
4. revise questions to cite correct requirements;
5. reassess point distribution awarded under Part VII – Part IX;
6. consider expanding list of items used for awarding points based on specialized experience in Part IX, such as work with Fatality Review Teams, Multi-disciplinary Teams, etc.; and
7. request policies, job descriptions, and staff resumes to document items relating to commitments by an applicant agency to exceed minimum requirements.

EXHIBIT 5

Illinois Department on Aging

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

September 24, 2019

Via Electronic Mail Only

Grant Nyhammer
Executive Director & General Counsel
Northwestern Illinois Area Agency on Aging
1111 South Alpine Road, Suite 600
Rockford, Illinois 61108

Re: August 23, 2019, Petition for Hearing - Designation of Adult Protective Service Providers

Dear Mr. Nyhammer:

On or about August 23, 2019, the Illinois Department on Aging (Department) received the document entitled "Petition for Hearing" (Petition) submitted via email on behalf of Northwestern Illinois Area Agency on Aging (NIAAA) related to NIAAA's designation of Adult Protective Service (APS) Providers. **The Department is unable to provide a hearing because the Petition fails to present a contested case that would support the right to an adjudicatory hearing.** (5 ILCS 100/1-30 and 5 ILCS 100/10-25 (a)). The Department properly exercised its oversight and discretion in rejecting NIAAA's recommendations. As noted in Director Basta's July 31, 2019, correspondence (Attached to Petition as Exhibit A), the Department is ready and available to provide assistance regarding the designation process.

The Adult Protective Services Act (Act) defines "Provider Agency" as "any public or nonprofit agency in a planning and service area that is selected by the Department or appointed by the regional administrative agency with prior approval by the Department . . . " (320 ILCS 20/2(h)). The Act also clearly states NIAAA must obtain "prior approval" from the Department in the APS Provider designation process (320 ILCS 20/3(b)). As you are aware, the Department is the entity that enters legal agreements with APS Providers.

The Department would like to meet with you at your earliest convenience to develop a cooperative and respectful path forward to achieve our joint goal of protecting the vulnerable residents of Illinois.

Please contact me at 217-782-4842 or by email at paulette.f.dove@illinois.gov to discuss further. Thank you.

Sincerely,

Paulette F. Dove
Deputy General Counsel

Cc: Paula A. Basta, M.Div.
Lora McCurdy
Rhonda Armstead

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL DISTRICT
WINNEBAGO COUNTY

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant	Mandamus Case No.

Brief in Support of Complaint for Mandamus

Plaintiff files this Brief in Support of the Complaint for Mandamus (Complaint) filed in the above captioned manner. The Complaint alleges that the Defendant failed in her capacity as the Director of the Illinois Department on Aging (Department) to adopt the statutorily required administrative rules for hearings and has refused to give administrative hearings, which were requested in the two petitions (Petitions) attached as exhibits to the Complaint.

In support of the Complaint, the Plaintiff states the following:

1. The Defendant is denying access to administrative hearings for the Northwestern Illinois Area Agency on Aging (NIAAA) and all older adults;
2. The administrative hearing process is crucial for holding the Department accountable;
3. NIAAA has the right to challenge the Department's unlawful conduct;
4. The Defendant improperly denied hearings on the Petitions; and
5. A mandamus order is appropriate and necessary because the Defendant has failed to perform her required duties.

1. Defendant is denying access to hearings

NIAAA is filing the Complaint on behalf of itself and the 2.3 million older adults[1] in Illinois that are affected by a billion dollar[2] state agency effectively closing the administrative hearing process as there has not been an administrative hearing in at least three years[3] under any of the seven[4] provisions cited in Plaintiff's Petitions.

[1] *See Policy Academy State Profile*, Administration on Community Living, https://acl.gov/sites/default/files/programs/2016-11/Illinois%20Epi%20Profile%20Final.pdf (last visited November 1, 2019)

[2] The Department's 2020 Budget is $1,185,541,102. *See* Illinois Department on Aging, *Fiscal Year 2020 Enacted Budget*, https://www2.illinois.gov/aging/Documents/Final%20DEPARTMENT%20FY20%20Revised%20w%20enacted_0612.pdf.

[3] Complaint, Paragraph 8.

[4] The Petitions requested hearings under: 42 U.S.C. §3027(a)(5); 42 U.S.C. § 3026(f)(2)(b); 42 U.S.C. § 1983; 5 ILCS 100/10-5; 89 Ill.Adm.Code §230.440(a); 89 Ill.Adm.Code §220.502; and 89 Ill.Adm.Code §230.410(a)(1).

This is because the Defendant is refusing to update the Department's administrative rules to comply with the Illinois Procedure Act. For example, the regulations state:

> All requests for hearings or appeals to . . . [the Department] shall be filed with the Hearing Coordinator, Department on Aging, 421 East Capitol Avenue, Springfield, Illinois 6270.[5]

It is believed that the Department moved from the 421 East Capital Avenue address over nine years ago[6] and it has been at least nine years since the Department had a "Hearing Coordinator" position. Having the wrong address for years is indicative of the confusing jumble of Department regulations[7] for requesting hearings. The Defendant is, unfortunately, capitalizing on the regulatory disarray the Department has created to close the administrative hearing process as demonstrated by her refusal to give hearings on the Petitions.

2. Defendant is trying to avoid accountability by closing the hearings process

The reason that the Defendant is blocking access to the administrative hearing process is to avoid accountability. The purpose of the administrative hearing process is to:

a. Allow the state agency to fully develop and consider the facts;
b. Have the state agency use their expertise in resolving disputes;
c. Not force an aggrieved party to go to court for relief;
d. Protect state agency operations by avoiding interruptions;
e. Give the state agency the chance to correct mistakes; and
f. Converse judicial time by avoiding piecemeal appeals.[8]

Administrative hearings, therefore, are crucial to the administration of justice by ensuring that NIAAA (and older adults) have a method for challenging unjust Department actions without having to resort to litigation which is beyond the means of many older adults.

3. NIAAA has a right to challenge the Department's unlawful conduct

In closing the hearing process, the Defendant is improperly trying to prevent NIAAA from challenging the Department's unlawful awarding of funding as alleged in the Initial Petition.[9] Both federal and state law confer special status on NIAAA as the Department is statutorily obligated[10] to fund AAAs. These special rights are obviously rendered meaningless if the Department can simply refuse to give a hearing when confronted with funding misconduct.

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[5] 89 Ill.Adm.Code § 220.503(a).

[6] Doug Finke, *Department on Aging to move offices despite questions*, THE STATE JOURNAL-REGISTER (Mar. 12, 2010) https://www.sj-r.com/x673415983/Department-on-Aging-to-move-offices-despite-questions.

[7] There are five different ways for older adults in the administrative code to request hearings which are: 89 Ill.Adm.Code § 230.440(a); 89 Ill.Adm.Code § 220.502; 89 Ill.Adm.Code § 270.158; 89 Ill.Adm.Code § 240.400; and 89 Ill.Adm.Code § 270.414.

[8] The administrative hearing process "allows the administrative agency to fully develop and consider the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary . . . . The doctrine also helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals." *Castaneda v. Illinois Human Rights Commission*, 547 N.E.2d 437, 439 (1989).

[9] Complaint, Paragraph 16.

[10] "The Department shall. . . provide . . . assistance to . . . area agencies on aging. . .[and] to make grants to area agencies on aging." 20 ILCS 105/4.01(6), (16), (21)-(23). See also 45 CFR § 1321.63(b) which states the Department must "award the funds made available under...[federal law] to designated area agencies on aging according to the formula."

Further, even if AAAs were not given unique privileges, NIAAA is still entitled to a hearing because the Department cannot withhold funding from NIAAA for an illicit purpose:

> Thus to say that there is no 'right' to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.[11]

Since the Initial Petition alleged misconduct in the awarding of funding, NIAAA is entitled to a hearing.

Regarding the APS Petition,[12] NIAAA has the right to challenge if the Department is acting outside the scope of their authority as Illinois courts routinely overturn state agency actions that are "arbitrary, unreasonable or capricious."[13] NIAAA should, therefore, be granted a hearing on the APS Petition because it is alleging that the Department is acting beyond their delegated authority. Both Petitions, consequently, should be given a hearing.

4. Defendant improperly denied hearings

In denying NIAAA hearings on the Petitions, the Defendant incorrectly claims that hearings are unwarranted because the Petitions do not present 'contested cases'.[14] The Defendant apparently[15] does not dispute[16] that NIAAA is entitled to hearings under the seven[17] provisions cited in the Petitions but instead is claiming that the definition of 'contested case' implicitly grants them extraordinary powers to override the other laws requiring administrative hearings. Such a claim of unfettered power by the Defendant to deny hearings is without merit.

First, the definition of contested case is irrelevant to NIAAA receiving a hearing as the Petitions just need to provide enough information to put the Department on notice of the actions being contested. "Administrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding."[18] The content of the Petitions, therefore, need only state facts which apprise the Department of the issues in dispute,

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[11] *Bio-Medical Laboratories, Inc. v. Trainor*, 370 N.E.2d 223, 226 (Ill., 1977) (citing Gonzalez v. Freeman, 334 F.2d 570, 574-75 (D.C. Cir., 1964)).

[12] Complaint, Paragraph 21.

[13] "It is axiomatic that where the legislature empowers a municipal corporation or administrative agency to perform certain acts, courts will not interfere with the exercise of such powers, or substitute their discretion, unless the action of the municipality or agency is palpably arbitrary, unreasonable or capricious." *U.S. Steel Corp. v. Pollution Control Bd.*, 380 N.E.2d 909, 913 (Ill. App., 1978) (citing *Richards v. Board of Ed. of Tp. High School Dist. No. 201*, 171 N.E.2d 37, 41 (Ill., 1960); "'Any power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created.'" *Crittenden v. Cook Cnty. Comm'n On Human Rights*, 990 N.E.2d 1161, 1165 (Ill. 2013) (quoting *Vuagniaux v. Department of Professional Regulation*, 802 N.E.2d 1156 (Ill. 2003)).

[14] See Exhibits to the Petitions.

[15] The Defendant offers no explanation about why the Petitions do not satisfy the definition of contested cases.

[16] The only reason given by the Defendant for denying hearings on the Petitions is that they were not contested cases.

[17] *Supra* Note 4.

[18] *Vuagniaux v. Department of Professional Regulation*, 802 N.E.2d 1156, 1169 (Ill., 2003)

so that they can prepare for a hearing.[19] This is consistent with the purpose[20] of administrative hearings which is resolving disagreements in a less formal setting than court. Since the Petitions lay out facts and issues that far exceed what would likely be required, even in court, the definition of contested case is not a valid reason to deny NIAAA an administrative hearing.

Second, the Defendant is misconstruing 'contested case' which is "an adjudicatory proceeding . . . in which the individual legal rights . . . of a party are required by law to be determined by an agency only after an opportunity for a hearing."[21] In other words, a contested case simply means any circumstance where the Department is required by another law (such as the seven cited in the Petitions) to provide a hearing.[22] This is consistent with the plain language[23] of the statute, which is about establishing minimum ***procedures***[24] that are imposed on the ***Department***[25] for conducting hearings. The term contested case is not, as the Defendant claims, intended to implicitly[26] give her unlimited authority to refuse giving hearings because the subject matter makes her uncomfortable.

Further, if the Defendant wants to make a novel claim regarding the definition of contested case, then they should assign the Petitions to an administrative law judge[27] (ALJ) for a determination. The Defendant failing to do so, unfortunately, means that the alleged misconduct and specious legal rationale is beyond reproach, which is why a mandamus is necessary. The Petitions, therefore, should be assigned to an ALJ for factual and legal determinations.

5. Mandamus is warranted and necessary

Finally, a mandamus is proper to compel the Defendant to perform her mandated duties.[28] A mandamus order is appropriate if there is "a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply."[29] All three of these

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[19] *Id.* at 1170.

[20] *Supra* note 8.

[21] 5 ILCS 100/1-30.

[22] See *Callahan v. Sledge*, where the court determined there was no contested case because the "plaintiff fails to reference legal authority that requires CMS to conduct a hearing." *Callahan v. Sledge*, 980 N.E.2d 181 (2012). The converse of this holding is that if there is legal authority that requires a hearing, then there is a contested case.

[23] "The primary rule...[in statutory interpretation is] to ascertain and give effect to the true intent and meaning of the legislature...[which] is best evidenced by the language used." *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 561 N.E.2d 656, 661 (1990).

[24] "All agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this [statute]". 5 ILCS 100/10-10.

[25] The applications of the term "contested case" in the regulations puts burdens on the Department not on NIAAA or older adults asking for a hearing. For example, the top of the section regarding contested cases reads, "Rules required for hearings. All agencies shall adopt rules establishing procedures for contested case hearings." 5 ILCS 100/10-5.

[26] It is error to read any implicit terms into a statute giving the Department extraordinary powers. "A court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions...or conditions that the legislature did not express." *Kraft*, 561 N.E.2d at 661.

[27] "All agencies shall adopt rules concerning the minimum qualifications of administrative law judges." 5 ILCS 100/10-20.

[28] "Mandamus is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved." *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 38 (2011).

[29] *Id.* at 39.

elements are essentially satisfied when public officials refuse to do something that is required by law,[30] such as what is alleged in the Complaint. A mandamus order, therefore, is appropriate.

For the reasons stated above, this court should enter mandamus orders as requested in the Complaint.

Respectfully submitted,

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[30] People ex rel. Birkett v. Konetski, 909 N.E.2d 783, 792 (Ill., 2009) (finding that the word "shall" in the Sex Offender Registration Act, 730 ILCS 150/1, *et seq.*, imposed a mandatory obligation upon the presiding judge to inform a sex offender of the obligation to register).

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

GRANT NYHAMMER, as Executive Director of the Northwestern Illinois Area Agency on Aging,	)	
Plaintiff,	)	
v.	)	
	)	Case No. 19 MR 0001106
PAULA BASTA, in her capacity as Director of the Illinois Department on Aging,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS UNDER 735 ILCS 5/2-615

Defendant, Paula Basta, Director of the Illinois Department on Aging, through her attorney, Kwame Raoul, the Illinois Attorney General, moves this Honorable Court to dismiss Plaintiff's Complaint for Mandamus pursuant to 735 ILCS 5/2-615.

BACKGROUND

I. The Department and NIAAA

The Department is an administrative agency that administers several programs to benefit senior citizens in Illinois, including receiving and disbursing federal funds made available to it under the federal Older Americans Act ("OAA") (42 U.S.C. § 3001 *et seq.*). *See* 42 U.S.C. § 3025(a)(1) (requiring states to designate an agency to receive OAA funds); 20 ILCS 105/4 ("[T]he Department . . . shall be the single state agency for receiving and disbursing federal funds made available under the [OAA].").

In implementing the OAA, the Department designates public and private nonprofit organizations throughout Illinois as "area agencies on aging," each of which provides services to seniors within a specific geographic area. 42 U.S.C. § 3025(a)(2)(A); 20 ILCS 105/3.07, 3.08.

Every three years, each area agency on aging develops an "area plan" for the provision of social and nutritional services to seniors in its area. 20 ILCS 105/3.07; 89 Ill. Admin. Code § 230.130(a). The area agencies on aging submit these area plans, and any amendments to their area plans, to the Department for approval. 89 Ill. Admin. Code § 230.130(e)

The Department distributes federal OAA funds to each area agency on aging based on a mathematical formula codified in the Department's regulations, which takes into account factors such as population, poverty levels, the number of seniors in the area, and the extent to which the area is urban or rural. *See* 89 Ill. Admin. Code § 230.45

NIAAA, a private nonprofit entity, is the area agency on aging for Area 1, which encompasses Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside, and Lee Counties. 20 ILCS 105/3.08.

Along with receiving and disbursing OAA funds, the Department also administers the Adult Protective Services Act, *see* 320 ILCS 20/3, which requires it to establish and administer "a protective services program of response and services for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect." 320 ILCS 20/3(a).

Under the Adult Protective Services Act, the Department contracts with and funds public or private nonprofit entities designated as "regional administrative agencies" that implement the Adult Protective Services Act program in a given region. 320 ILCS 20/2(i); 320 ILCS 30/3(a).

II. Plaintiff's "Initial Petition"

In fiscal year 2014, NIAAA was the regional administrative agency for Area 1 under the Adult Protective Services Act. At the time NIAAA was a regional administrative agency, the area agency on aging for a given region could request to be designated as the regional

administrative agency for the same region. 320 ILCS 20/2(i) (2012). Alternatively, the Department could serve as a regional administrative agency if the area agency on aging did not request to be designated as the regional administrative agency. *Id.*

On July 16, 2013, Plaintiff emailed the then-Director of the Department, John Holton, claiming that the Department did not comply with the Illinois Administrative Procedure Act when it published an Adult Protective Services Standards and Procedures Manual ("Manual") without submitting it through the formal administrative rulemaking process set forth in the Illinois Administrative Procedure Act. Ex. A to Ex. 2 to Compl. Plaintiff asked the Department to withdraw the Manual and submit it through the rulemaking process. *Id.*

On October 21, 2013, Plaintiff emailed Holton again, this time attaching a draft complaint for mandamus that NIAAA was "considering filing." Ex. B to Ex. 2 to Compl. But Plaintiff said he hoped to "find a solution short of litigation" and a "mutually agreeable resolution. *Id.* The Complaint does not state whether Plaintiff ever filed the draft complaint for mandamus attached to his October 21, 2013 email.

On December 30, 2013, the Department sent Plaintiff a letter stating that it was terminating the Fiscal Year 2014 Adult Protective Services Program Grant issued to NIAAA. Ex. C to Ex. 2 to Compl. It noted that its grant agreement with NIAAA permitted either party to terminate the grant without cause with 30 days' notice. *Id.* The Department said that it would serve as the regional administrative agency for Area 1 in NIAAA's stead *Id.* The Complaint does not state whether NIAAA responded to the Department's termination of the grant in any way.

On April 8, 2019, Plaintiff met with Defendant and several Department employees, including Betsy Creamer. Ex. 2 to Compl. ¶¶43-44. Plainitff alleges that Ms. Creamer told him that, sometime in 2014, an unnamed individual gave her an order "to withhold funding from NIAAA to retaliate for NIAAA's advocacy regarding the Manual." *Id.* ¶¶ 46-47.

Plaintiff alleges that, between 2014 and 2015, the Department awarded $3.79 million in unspecified "Other Funding" to area agencies on aging other than NIAAA. Ex. 2 to Compl. ¶¶51-52. The Complaint does not specify whether this was the funding withheld as a result of the order allegedly given to Creamer or where the "Other Funding" came from.

On April 15, 2019, Plaintiff wrote to Defendant Director Basta and asked her to "initiate an investigation regarding how [the Department] has been denying funding to [NIAAA]." Ex. D to Ex. 2 to Compl. On June 11, 2019, the Director replied to Plaintiff, stating that she could not speak to those funding decisions, since they were made by her predecessor." Ex. E to Ex. 2 to Compl. She assured Nyhammer that the Department was "committed to strengthening [its] relationships with" NIAAA and to making sure that every area agency on aging was aware of grant opportunities. *Id.*

On June 26, 2019, Plaintiff, acting on behalf of NIAAA, filed a "Petition for Hearing" with the Department. Ex. 2 to Compl. The Petition for Hearing requested that the Department provide NIAAA with a hearing on the Department's alleged decision to withhold "Other Funding" from NIAAA and the Department's decision to terminate NIAAA as a regional administrative agency in 2013. *Id.* It also requested that the Department grant extensive declaratory relief and award NIAAA the funds that the Department allegedly withheld. *Id.*

On July 29, 2019, the Department wrote to Plaintiff in response to the Petition for Hearing. Ex. 3 to Compl. It said that it would not provide NIAAA a hearing because the

petition did not present "a 'contested case' as defined in the Illinois Administrative Procedure Act. … In the absence of a 'contested case,'[the Department] is unable to issue a final decision or order…." *Id.*

III. Plaintiff's "APS Petition"

As explained above, in administering the Adult Protective Services Act, the Department contracts with and funds public or private nonprofit entities designated as "regional administrative agencies, provider agencies, or both" to implement the Adult Protective Services Act program in a given region. 320 ILCS 20/2(i); 320 ILCS 20/3(a). Provider agencies receive funding from the Department and are responsible for assisting "eligible adults who need agency services to allow them to continue to function independently." 320 ILCS 20/3(c). The provider agencies are "selected by the Department or appointed by the regional administrative agency with prior approval by the Department on Aging." 320 ILCS 20/2(h). In addition to their role in selecting of the provider agencies, the regional administrative agencies "monitor the use of services, provide technical assistance to the provider agencies and [are] involved in program development activities." 320 ILCS 20/3(b).

The Department's administrative regulations provide a process of choosing provider agencies. The regional administrative agencies make recommendations and the Department reviews and approves those recommendations. *See* 89 Ill. Adm. Code 270.215(b). However, the rules are clear that the Department is ultimately responsible for the selection of provider agencies. 89 Ill. Adm. Code 270.215(b)(1) ("The Department reserves the right to provide recommendations, reject recommendations, or direct action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so

unreasonably."). Once approved, the Department enters into a contract with each chosen provider agency. 89 Ill. Adm. Code 270.215(b)(2).

On June 17, 2019 NIAAA submitted provider agency recommendations to the Department. Ex. 4 to Compl. On July 31, 2019, the Department rejected NIAAA's provider agency recommendations. Ex. A to Ex. 4 to Compl. The Department cited errors in the provider evaluations that NIAAA submitted as part of its recommendations. *Id*. The Department did not deny NIAAA any funding, nor did it prevent NIAAA from submitting new recommendations and participating in the Adult Protective Services Program.

On August 23, 2019, NIAAA submitted another Petition for Hearing to the Department. Ex. 4 to Compl. The Petition requested that the Department provide NIAAA a hearing regarding the decision to reject its recommendations. It further requested that the Hearing Officer order the Department to accept NIAAA's provider recommendations and grant extensive declaratory relief. *Id*.

On September 24, 2019, the Department informed Plaintiff that NIAAA was not entitled to a hearing regarding the Department's decision to reject NIAAA's provider agency recommendations. Ex. 5 to Compl. The Department explained that the Petition did not "present a contested case that would support the right to an adjudicatory hearing" under the APA. *Id*.

On August 22, 2019, Plaintiff sought leave to file an original action for mandamus in the Illinois Supreme Court alleging that the Department improperly denied NIAAA a hearing. The Supreme Court denied Plaintiff's motion on October 2, 2019.

On November 5, 2019, Plaintiff filed this Complaint for Mandamus.

LEGAL STANDARD

"A motion filed pursuant to 2–615 of the Code challenges the legal sufficiency of the complaint based on defects that are apparent on its face." *Ripes v. Schlechter*, 2017 IL App (1st) 161026, ¶ 12; 735 ILCS 5/2-615. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86 (2002).

ARGUMENT

Plaintiff is not entitled to any of the mandamus relief he is seeking. Mandamus is an extraordinary remedy used to compel a public official to perform a purely ministerial duty when no discretion on her part is involved. *People ex rel. Glasgow v. Kinney*, 2012 IL 113197, ¶ 7. To obtain an order of mandamus, a party must establish "a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the [order]." *Cordrey v. Prisoner Rev. Bd.*, 2014 IL 117155, ¶ 18 (internal quotation marks omitted). And a complaint for mandamus "must allege facts" establishing each of these requirements. *Noyola v. Bd. of Educ. of City of Chi.*, 179 Ill. 2d 121, 133 (1997). None of the Counts in the Complaint for Mandamus allege a clear right or a clear duty.

I. Count I Does Not Allege a Claim for Mandamus to Require the Department to Change its Administrative Rules.

Count I alleges that the Department has failed to comply with the Administrative Procedure Act ("APA") in establishing administrative rules for hearings. However, Plaintiff's conclusory allegations do not establish that the Department has failed to comply with the APA. To the contrary, the Department's administrative rules provide for hearings in accordance with the APA. Accordingly, there is no clear right or clear duty, and Plaintiff has not stated a claim for mandamus.

Most of the APA's provisions establish requirements for administrative hearings. *See e.g.*, 5 ILCS 100/10-25; 5 ILCS 100/10-35; 5 ILCS 100/10-40; 5 ILCS 100/10-45; 5 ILCS 100/10-50. The APA also provides that agencies may establish additional rules for their hearings, but those rules must be consistent with the APA:

> All agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this Article 10. In addition, agency rules establishing procedures *may* include, but need not be limited to, the following components: pre-hearing conferences, representation interview or deposition procedures, default procedures, selection of administrative law judges, the form of the final order, the standard of proof used, which agency official makes the final decision, representation of parties, subpoena request procedures, discovery and protective order procedures, and any review or appeal process within the agency.

5 ILCS 100/10-10(emphasis added). Finally, in a few instances, the APA requires agencies to adopt administrative rules on certain subjects. Importantly, the APA requires each agency to "adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings" and to adopt a rule regarding "disqualification of an administrative law judge for bias or conflict of interest." 5 ILCS 100/10-20; 5 ILCS 100/10-30.

Initially, Plaintiff misreads the requirements of the APA. Plaintiff relies on several sections for the proposition that the Department is required to adopt certain rules. Compl. ¶15. However, most of the provisions of the APA that he cites do not require agency rulemaking. Rather, the APA provides minimum requirements for administrative hearings with regard to hearing notices, what is included in the administrative record, rules of evidence, a proposal for final decision, and so forth. 5 ILCS 100/10-25; 5 ILCS 100/10-35; 5 ILCS 100/10-40; 5 ILCS 100/10-45; 5 ILCS 100/10-50. Count I does not point to any provision of the APA which states that agencies must adopt rules on those subjects. Rather, 5 ILCS 100/10-10 provides that they *may* promulgate rules on those matters so long as they are consistent with the APA's procedures.

The only provisions that Plaintiff cites which require an agency to adopt rules are 5 ILCS 100/10-20 and 5 ILCS 100/10-30. Those sections require rules regarding qualifications of administrative law judges and conflicts. Here, the Department has complied with the APA. 89 Ill. Admin. Code 220.506 provides that "[a]ll hearings will be conducted by an impartial Hearing Officer authorized by the Department Director or area agency on aging, as appropriate, to conduct hearings, who has not participated in the action being appealed."

Moreover, the Department has additional administrative rules regarding hearings. 89 Ill. Admin. Code 220.507 provides for hearing notices; 89 Ill. Admin. Code 220.514 provides for rules of evidence; and 89 Ill. Adm. Code 220.518 establishes requirements for Hearing Officer recommendations and final decisions.

In summary, Count I does not point to any legal or factual basis to support its conclusory allegation that the Department's rules violate the APA. To the contrary, the Department has complied with the APA. Thus, Plaintiff cannot point to a clear right or a clear duty to support its mandamus claim.

Finally, the Department does not possess clear authority to comply with the requested order. Plaintiff's prayer for relief asks this Court to order the Department to "[a]dopt administrative rules for contested hearings that comply with the [APA]." Compl. at 6. The Department, however, does not have authority to single-handedly adopt new administrative rules. Under the APA, all proposed rules must be submitted to the Joint Committee on Administrative Rules ("JCAR") before they can take effect. 5 ILCS 100/5-110. JCAR has the authority to block adoption of any proposed rule. *Id.* Accordingly, the Department can submit proposed rules to JCAR, but it does not have the authority to adopt rules without the approval of JCAR. For these reasons, Count I should be dismissed under 735 ILCS 5/2-615.

II. Count II does not allege a claim for mandamus because NIAAA does not have a clear right to a hearing on its "Initial Petition."

Count II fails to allege facts establishing that NIAAA has a clear right to a hearing or that the Department has a clear duty to give NIAAA a hearing. It alleges that the Department withheld grant money from NIAAA. But no provision of the Illinois Act on the Aging (20 ILCS 105/1 *et seq.*) or the Adult Protective Services Act requires a hearing when an area agency on aging or regional administrative agency is denied grant funds.

And under the Department's regulations, an area agency on aging has a right to a hearing with the Department only if the Department (1) disapproves of an area plan or an amendment to an area plan submitted by the area agency on aging; or (2) seeks to withdraw an area agency on aging's designation as an area agency on aging. 89 Ill. Admin. Code § 230.410(a). Count II does not allege that the Department disapproved of NIAAA's area plan, rejected a proposed amendment to its area plan, or attempted to withdraw NIAAA's designation as an area agency on aging.

Nor does Count II allege facts showing that NIAAA had a clear constitutional right to a hearing under procedural due process principles. "Procedural due process protections are triggered only when a constitutionally protected liberty or property interest is at stake, to which a person has a legitimate claim of entitlement." *Hill v. Walker*, 241 Ill. 2d 479, 485 (2011). Organizations do not have a legitimate claim of entitlement to the award of future government contracts or funds where the government has discretion to decide which organization, if any, will receive the contract or funds. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987) ("[A] disappointed bidder for a [government] contract in Illinois lacks a property interest.");

Polyvend, Inc. v. Puckorius, 77 Ill. 2d 287, 294 (1979) (sole bidder for government contract that had received prior contracts did not have claim of entitlement to contract where state reserved discretion to reject any and all bids).

Here, NIAAA's Petition for Hearing shows that it had no claim of entitlement to the Adult Protective Service Program Grant the Department terminated in late 2013, as the grant agreement gave the Department the discretion to cancel it without cause. Ex. C to Ex. 2 to Compl. And Plaintiff fails to even identify the source of the "Other Funding" the Department allegedly withheld, thus failing to allege that NIAAA had a legitimate claim of entitlement to this funding under any statute, regulation, or contract. Ex. 2 to Compl.; *see Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972) (state law determines whether party has claim of entitlement to benefit); *C. Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶ 26 ("A legitimate claim of entitlement may arise from statute, regulation, municipal ordinance, or express or implied contract.") (internal quotation marks omitted). Because Plaintiff has not alleged facts showing that NIAAA was entitled to receive the grants allegedly withheld from it, he has failed to allege that NIAAA had a clear right to a hearing under the Due Process Clause.

Further, Count II does not point to any statute or regulation that gives NIAAA the right to a hearing. Instead, the Complaint merely points to the APA. The APA, however, requires an agency to hold a hearing only in a "contested case," *see* 5 ILCS 100/10-25(a), which is "an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an opportunity for a hearing." 5 ILCS 100/1-30 (emphasis added). The funds for regional administrative agencies are state-funds that stem from the Adult Protective Services Act, and not federal-funds under the Older Americans Act. 320 ILCS 20/2(i). As noted, neither the Illinois Act on the Aging nor the Adult

Protective Services Act require the Department to hold a hearing when an area agency on aging is denied grant funds. Thus, the Department's decisions were not "contested cases" under the Illinois Administrative Procedure Act. *See, e.g., Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 29 (agency decision to deny coverage for medical expenses not a "contested case" where Group Insurance Act did not require agency to hold hearing on decision); *Key Outdoor, Inc. v. Dep't of Transp.*, 322 Ill. App. 3d 316, 322-23 (4th Dist. 2001) (denial of commercial driveway permit not "contested case" where Highway Code did not require agency to hold hearing on issuance of permit); *Munoz v. Dep't of Registration & Educ.*, 101 Ill. App. 3d 827, 829-30 (1st Dist. 1981) (decision to deny applicant medical license not a "contested case" where Medical Practice Act did not require hearing on issuance of license).

Thus, Count II does not allege facts that show that there is a clear right to a hearing or that the Department has a clear duty to hold a hearing. Accordingly, Count II fails to state a claim for mandamus and should be dismissed pursuant to 735 ILCS 5/2-615.

III. Count III does not allege a claim for mandamus because NIAAA does not have a clear right to a hearing on its "APS Petition."

Like Count II, Count III does not point to any clear legal right to a hearing or any clear duty to provide NIAAA a hearing. Count III alleges that the Department rejected NIAAA's recommendations regarding designations of provider agencies. The Department has the authority to reject those recommendations. The Adult Protective Services Act specifically makes the Department responsible for selecting or approving provider agencies, and the Act does not allow a regional agency to select provider agencies without approval from the Department. 320 ILCS 20/2(i); 320 ILCS 20/3(a). Further, the administrative rules are clear that "[t]he Department reserves the right to provide recommendations, reject recommendations, or direct

action of a regional administrative agency in the designation of APS provider agencies; however, the Department will not do so unreasonably." 89 Ill. Adm. Code 270.215(b)(1).

Here, the Department properly exercised its authority to reject NIAAA's recommendations based on its concerns over NIAAA's evaluations of the proposed provider agencies. In addition, the Department's decision did not harm NIAAA. It did not deny NIAAA any funding, and it did not prevent NIAAA from participating in the Adult Protective Services Program as a regional administrative agency. The Department appropriately rejected NIAAA's recommendations, and its actions did not give NIAAA a right to an administrative hearing.

No provision of the Illinois Act on the Aging (20 ILCS 105/1 *et seq.*) or the Adult Protective Services Act requires a hearing when the Department rejects provider recommendations. Again, under the Department's regulations, an area agency on aging has a right to a hearing with the Department only if the Department (1) disapproves of an area plan or an amendment to an area plan submitted by the area agency on aging; or (2) seeks to withdraw an area agency on aging's designation as an area agency on aging. 89 Ill. Admin. Code § 230.410(a). Count III does not allege that the Department disapproved of NIAAA's area plan, rejected a proposed amendment to its area plan, or attempted to withdraw NIAAA's designation as an area agency on aging.

Nor does Count III allege facts showing that NIAAA had a clear constitutional right to a hearing under procedural due process principles. As explained above, procedural due process protections apply only where a party can point to "a constitutionally protected liberty or property interest." *Hill*, 241 Ill. 2d 479, 485. With regard to its recommendations, Plaintiff has not alleged that it lost any contract or funding because of the Department's decision.

Like Count II, Count III does not point to any statute or regulation that gives NIAAA the right to a hearing. NIAAA has a right to recommend provider agencies, but it does not have the right to require the Department to accept those recommendations. Again, Plaintiff merely points to the APA, which requires an agency to hold a hearing only in a "contested case," *see* 5 ILCS 100/10-25(a). A "contested case" is "an adjudicatory proceeding . . . in which the individual legal rights, duties, or privileges of a party are *required by law* to be determined by an agency only after an opportunity for a hearing." 5 ILCS 100/1-30 (emphasis added). Neither the Illinois Act on the Aging nor the Adult Protective Services Act require the Department to hold a hearing when an it rejects a designation of APS provider agencies. Thus, the Department's decisions were not "contested cases" under the Illinois Administrative Procedure Act. *See, e.g.*, *Callahan*, 2012 IL App (4th) 110819, ¶; *Key Outdoor, Inc.*, 322 Ill. App. 3d at 322-23; *Munoz*, 101 Ill. App. 3d at 829-30.

In short, Count III does not allege facts to show that NIAAA has a clear right to a hearing or that the Department has a clear duty to hold a hearing. Accordingly, Count III fails to state a claim for mandamus and should be dismissed pursuant to 735 ILCS 5/2-615.

CONCLUSION

WHEREFORE, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice.

Respectfully Submitted,

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By: */s/ Katherine Snitzer*

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT from the Circuit Court of
WINNEBAGO COUNTY

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee	)	Appeal from order dismissing mandamus in the Circuit Court of Winnebago County Trial Court Case No. 2019-MR-0001106 Honorable Judge Honzel Presiding

Notice of Appeal

Notice is given that Plaintiff Grant Nyhammer, as Executive Director of the Northwestern Illinois Area Agency on Aging (NIAAA), by his attorney, Tim Scordato, files this *Notice of Appeal* and appeals to the Appellate Court of Illinois, Second District from the following final judgment of the Circuit Court of Winnebago County:

1. The final judgment, *Memorandum of Decision and Order*, entered of record on July 20, 2020 in favor of Defendant and against Plaintiff, which affirmed the trial court's order of February 28, 2020 granting Defendant's motion to dismiss.

2. The trial court's order of February 28, 2020.

3. The *Report of Proceedings* before the Honorable Judge Donna Honzel on February 20, 2020.

By this appeal, Plaintiff requests that the Appellate Court of Illinois, Second District reverse the trial court's judgment and order that Defendant shall: (a) Adopt administrative rules for contested hearings that comply with the Illinois Administrative Procedure Act; (b) Provide Plaintiff a hearing on its Initial Petition; (c) Provide Plaintiff a hearing on its APS Petition; and (d) Pay Plaintiff's court costs and attorneys' fees, as Defendant has failed to adopt administrative rules for contested hearings.[1]

[1] "In any case in which a party has an administrative rule invalidated by a court for any reason, including . . . the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including attorney's fees." 5 ILCS 100/10-55(c).

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 17, 2020, the foregoing **Notice of Appeal** was electronically filed with the Clerk, Winnebago County Court, and served upon the following by email:

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Counsel for Plaintiff

No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

Dated: November 23, 2020

/s/ Timothy Scordato
Timothy Scordato
Attorney for Plaintiff-Appellant

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 23, 2020, the foregoing **Brief and Appendix of Plaintiff-Appellant**

Grant Nyhammer was electronically filed with the Clerk, Appellate Court of Illinois, Second Judicial District, and served upon the following by email:

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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Department, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

Reply Brief and Supplementary Appendix of Plaintiff-Appellant Grant Nyhammer

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ARGUMENT

The trial court's dismissal (Dismissal) of the Complaint for Mandamus (Complaint) should be vacated. The Brief and Supplementary Appendix of Defendant-Appellee (DE Brief) does not defend any of the errors made by the trial court as asserted in the Brief and Appendix of Plaintiff-Appellant Grant Nyhammer (NIAAA Brief).[1] The DE Brief instead creates new explanations for upholding the Dismissal and is replete with mistakes similar to those made by the trial court. Since Defendant is denying access to the administrative hearing process for 2.3 million older adults in Illinois and the organizations that serve those older adults, such as Northwestern Illinois Area Agency on Aging (NIAAA), (NI Br.8; C.52) the Dismissal should be vacated so that the Defendant can be held accountable for her conduct.

1. Count I is well pled

The DE Brief does not claim that Count I fails to state a cause of action. As required in a 735 ILCS 5/2-615 motion to dismiss:

> A trial court should grant a motion to dismiss a complaint under section 2—615…*only* when the allegations in the complaint, construed in the light most favorable to the plaintiff, fail to state a cause of action upon which relief can be granted [emphasis added]. *Ryan v. Yarbrough*, 355 Ill. App.3d 342, 823 N.E.2d 259, 263 (2nd Dist. 2005). NI Br.7.

Count I is about Defendant's failure to implement administrative hearing rules that are required by the Illinois Administrative Procedure Act (Procedure Act), 5 ILCS 100/1-1 *et.seq*. NI Br.13-15. Count I is asking "the [trial] Court [to] enter a

[1] This brief cites the DE Brief as "DE Br.____" and the NIAAA Brief as "NI Br._____." The supplementary appendix to this brief is cited as "SA___."

mandamus ordering the Defendant to…adopt administrative rules for contested hearings that comply with the Procedure Act." C.9.

The DE Brief confuses Count I as it mistakenly claims that Count I is somehow predicated on Plaintiff getting administrative hearings for Counts II and III ("the validity [of Count I]…depended on whether NIAAA had a right to a hearing on his two petitions"). DE Br.14. The DE Brief confuses that Counts II/III are asking that Defendant be ordered to give Plaintiff administrative hearings (C.9), and Count I is asking that Defendant be ordered to implement required administrative hearing rules. C.9. These are independent causes of action. Count I is not, therefore, dependent on Counts II/III, so the Dismissal of Count I should be vacated for the reasons stated in the NIAAA Brief (NI Br.7-9, 13-15).

2. Counts II and III are well pled

The DE Brief does not claim any defects in pleading of Counts II/III. Counts II/III allege that Defendant "had a duty to provide NIAAA with an administrative hearing" on the initial petition (Initial Petition) and the Adult Protective Services (APS) petition (APS Petition) and that Defendant "refused to provide Plaintiff an administrative hearing" on those petitions (Petitions). C.9. These straightforward allegations, supported by the pages of additional and specific facts of the Complaint and the Petitions (incorporated into the Counts) (C.4 – C.9), more than adequately state a valid mandamus cause of action under *Ryan*.

The DE Brief does not attack the sufficiency of the pleadings but instead challenges the *truthfulness* of the allegations of the Complaint by claiming that Plaintiff "failed to show that NIAAA had a right to a hearing on his petitions under

any [law]". DE Br.15. Since this claim directly contradicts what was alleged in the Complaint, it should be rejected under *Ryan*.

While it is unclear, it is possible that the DE Brief is claiming that the allegations in the Complaint (i.e. Defendant had a duty to provide Plaintiff a hearing on the Petitions) is solely a matter of law that can be decided in a motion to dismiss. However, an issue can be decided as a matter of law only if "there is no genuine issue as to any material fact." 735 ILCS 5/2-1005. An issue is also not a matter of law "if reasonable people could draw different inferences from the undisputed facts." *Wood v. National Liability & Fire Insurance Co.*, 324 Ill.App.3d 583, 585, 755 N.E.2d 1044 (2001).

The sole reason Defendant gave for refusing to provide hearings on the Petitions is that they were not 'contested cases'. C.31, 51. Plaintiff disputes that the contested case excuse was the real reason Defendant denied hearings and asserts it was merely a pretext in an attempt to prevent Plaintiff from seeking judicial review. C.52 – C.55. The Illinois Department on Aging's (Department) letter refusing a hearing for the Initial Petition states that "In the absence of a 'contested case,' the …Department is unable to issue a final decision or order (See 5 ILCS 100/10-50)". C.31. In other words, the Department is refusing to give a hearing and is refusing to issue a final decision that Plaintiff could appeal to the circuit court. Since only final agency decisions are appealable, *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 427, 141 Ill.Dec. 453, 551 N.E.2d 640 (1990), the contested case excuse is likely just a pretext for the Department trying to avoid judicial scrutiny.

In order to determine if it is just a pretext, questions need to be answered such as:

- Has anyone else ever been given a hearing by the Department because they presented a contested case;
- Are there any circumstances under which Plaintiff can get a hearing for the issues raised in the Petitions;
- Is it a policy/practice of the Department to deny area agencies on aging (AAAs) access to the administrative hearing process;
- Is closing the administrative hearing process to all older adults a policy/practice of the Department;
- When was the last time the Department conducted an administrative hearing and why;
- Since the DE Brief does not defend the 'contested case' rationale, is the Department now conceding it is an invalid reason for denying the Petitions;
- Does the Department agree that easy access to administrative hearings is the public policy of Illinois for the reasons listed in *Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 308 (1989), C.53; NIAAA Br.19;
- When was the last time the Department granted an administrative hearing to another AAA and under what circumstances;
- When was the last time the Department granted an administrative hearing to an organization and under what circumstances.

Since the real reason that Defendant denied hearings on the Petitions is a disputed fact, it is not a matter of law and is, therefore, inappropriate for a motion to dismiss (or even a motion for summary judgment).

In the alternative, if this court believes that Plaintiff's right to a hearing for the Petitions is appropriate for review, then the following is a discussion why Defendant has a duty to provide Plaintiff hearings on the Petitions.

3. Plaintiff has a right to a hearing under administrative law

Plaintiff has a general right to administrative hearings because easy access to the administrative hearing process is the public policy of the State of Illinois. See *Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 308 (1989); C.53.; NIAAA Br.19. To ensure easy access, the administrative pleading standard (Administrative Standard) for administrative hearings is extremely liberal. "Administrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding." *Vuagniaux v. Department of Professional Regulation*, 208 Ill.2d 173, 802 N.E.2d 1156, 1169 (Ill., 2003); NI Br.19. All that is needed in an administrative hearing request is "a short and plain statement of the matters asserted," 5 ILCS 100/10-25(a)(4), so that the opposing party "is reasonably apprised of the case against him to intelligently prepare his defense." *Vuagniaux* at 1170 citing *Siddiqui v. Department of Professional Regulation*, 307 Ill.App.3d 753, 757, 718 N.E.2d 217 (1999).

For example, to get an administrative hearing with the Illinois Department of Human Services (DHS), a person merely needs to check a box on a form and email it to DHS.[2] Attached and labeled as SA1-2 is the appeal form from the DHS

[2] This Court may take judicial notice of the publicly available appeal form included in the supplementary appendix to this brief, which is also on the Illinois Department of Human Services Website at https://www.dhs.state.il.us/onenetlibrary/12/documents/forms/il444-0103.pdf. See *Leach v. Dep't of Emp't Sec.,* 2020 IL App (1st) 190299, ¶ 44 ("Information on [government] websites and in public records are sufficiently reliable such that judicial notice may be taken"); *Kopnick v. JL Woode Mgmt. Co.,* 2017 IL App (1st) 152054, ¶ 26.

website. This means that under the Administrative Standard, the Petitions just need to ask for a hearing regarding some action or inaction taken by the Defendant. Since the Petitions make 40 pages of allegations (C.12-52), they obviously far exceed the Administrative Standard, so Plaintiff is entitled to hearings on the Petitions as discussed in more detail below.

The DE Brief, unfortunately, just ignores the Administrative Standard (and *Ryan*) by repeatedly making up its own versions of facts such as: the Department followed the funding formula (DE Br.19); Plaintiff should have known how much money was withheld (DE Br.20); the Department had the right to terminate the APS contract (DE Br.22); there are "no limits on the Department discretion" to reject Plaintiff's recommendation (DE Br.22); etc. Obviously, if the Department wants to dispute the allegations of the *Petitions*, then the proper venue is at the administrative hearing level and not in a motion to dismiss a *mandamus complaint*.

4. Plaintiff has a right to hearings under due process

Plaintiff has a right to hearings on the Petitions under due process. The DE Brief wrongly claims that Plaintiff "lacked a clear constitutional right to a hearing". DE Br. 20. The DE Brief, unfortunately, ignores *Mathews v. Eldridge* which states:

> This [United States Supreme] Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest…The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner [internal citations omitted]. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). NI Br.14.

This means that organizations, such as NIAAA, have had for decades the unambiguous constitutional due process right to challenge adverse Department

actions through administrative hearings (organizations have due process rights as "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses," *Grosjean v. American Press Co*., Inc., 297 U.S. 233, 244 (1936). As discussed in more detail below, Plaintiff had a right to hearings on the Petitions under *Mathews*.

5. Defendant has a duty to provide a hearing under Count II

The Dismissal of Count II should be vacated because the DE Brief makes numerous mistakes of law and fact in claiming that Plaintiff is not entitled to a hearing under *Mathews,* the Procedure Act, or any of the seven provisions cited[3] in the Initial Petition. C.12. NI Br.16-17. As stated below, Defendant had a duty to provide a hearing under all of these provisions.

a. Plaintiff is entitled to a hearing under *Mathews*

Mathews gives Plaintiff the right to a hearing to defend its due process property interests as alleged in the Initial Petition. Protectable due process property rights are created when a state confers a legal right on organizations:

> The hallmark of property…[for purposes of due process] is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' Once that characteristic is found, the types of interests protected as "property" [under due process] are varied and, as often as not, intangible… the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement [internal citations omitted]. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

[3] The provisions are: 42 U.S.C. § 3026(f)(2)(A); 42 U.S.C. § 3026(f)(2)(B); 42 U.S.C. § 1983; 42 U.S.C. § 3027(a)(5); 89 Ill. Admin. Code § 230.410(a)(1); 89 Ill.Adm.Code §230.440(a); and 89 Ill.Adm.Code §220.502.

> While the legislature may elect not to confer a [due process] property interest…it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. *Vitek v. Jones*, 445 U. S. 480, n. 6 (1980), quoting *Arnett v. Kennedy*, 416 U.S. at 167.

This means that if the state has conferred a legal interest to Plaintiff, then Plaintiff has the due process right to a hearing before Defendant deprives Plaintiff of that interest.

The Initial Petition requested a hearing to vindicate the following four NIAAA property rights:

i. To be the public advocate representing older adults pursuant to 89 Ill. Admin. Code § 230.150(a)(1)-(3);
ii. To receive funding from the Department pursuant to 20 ILCS 105/3.07;
iii. To participate in the administrative rule making process (e.g. making public comments on proposed regulations as the public advocate, testifying at hearings on proposed regulations as the public advocate) under the Procedure Act; and
iv. To be the regional administrative agency (RAA) in the APS program pursuant to 5 ILCS 100/5-40.

All four of these are protectable property rights under *Logan*. To protect these property interests, the Initial Petition alleges in ¶:

Right to be advocate

- 10-11 that NIAAA is the public advocate representing the interests of older adults to the Department under 45 CFR § 1321.61(a) and 89 Ill. Admin. Code § 230.150(a)(1)-(3) (C.13);
- 70-72, 79-80, 86-88 that the Department is interfering with NIAAA's public advocacy for older adults (C.18);
- 71, 80, 87 that the Department has not taken any measures to prevent the Department in the future from interfering with NIAAA's advocacy duties (C.18-19);

Right to funding

- 14 that NIAAA has a statutory right to funding from the Department pursuant to 20 ILCS 105/3.07 (C.13);
- 89-92 that the Department is violating Illinois law by withholding funding from NIAAA for an *improper* purpose (C.19);
- 71 that the Department has not taken any measures to ensure that the Department in the future will not improperly withhold funding from NIAAA (C.18);

Right to participate in rulemaking

- 21-22 that the Department must follow the Procedure Act for developing hearing rules (C.13);
- 67 that the Department has violated the Procedure Act by not having valid administrative rules (C.17);

Right to be RAA

- 35-42 that the Department terminated NIAAA as the RAA in the APS Program (C.15);
- 82-85 that the Department unlawfully terminated NIAAA as the RAA in the APS Program (C.19); and
- 86-88 that the Department has not taken any measures to ensure that NIAAA will not be improperly terminated as the RAA in the future (C.19).

Since the Initial Petition alleges that the Department infringed on these four protectable property interests of Plaintiff, Plaintiff was entitled to a hearing on the Initial Petition under *Mathews*.

The DE Brief, nevertheless, by citing two cases, claims that Plaintiff does not have a protectable property interest. DE Br. 21. The first is *I-57 & Curtis, LLC v. Urbana & Champaign Sanitary District* which is about a landowner claiming his property lost value because of local zoning ordinances. *I-57* 2020 IL App (4th) 190850 ¶ 2. DE Br. 21. Even a cursory reading of *I-57* makes it clear that it is limited to the arcane world of municipal subdivision annexation law and has no

relevance to the instant case, which is about specific legal rights given exclusively to Plaintiff (and the other AAAs) by Illinois law.

The second case is *Polyvend Inc. v. Puckorius,* which DE Brief cites for the claim that the Defendant has discretion to deny Plaintiff funding. DE Br. 21. *Polyvend* is about a company having their bid for a public contract rejected because the company president had a bribery conviction, which prevented the company from getting a state contract under Illinois procurement law. *Polyvend Inc. v. Puckorius*, 77 Ill. 2d 287 395 N.E.2d 1376 (1979).

Polyvend, however, is irrelevant because Plaintiff has been given special statutory privileges so that Plaintiff can function as the public advocate representing the interests of older adults to the Department without fear of retaliation. NI Br.11. This is why, unlike the state vendor in *Polyvend*, 20 ILCS 105/3.07 requires the Defendant to fund Plaintiff (it is also why federal law (see C.13) requires the Defendant to fund Plaintiff). If Plaintiff cannot vindicate the funding rights given to it under 20 ILCS 105/3.07 by alleging the Department abused their discretion by improperly withholding funding from Plaintiff, then 20 ILCS 105/3.07 becomes a meaningless declaration and will have a chilling effect on Plaintiff's ability to be an effective advocate for older adults.

Further, even if Plaintiff did not have these special legal protections, it still has the right to challenge the Department for improperly exercising their discretion under *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540 (1977), which allows an organization to challenge the process the state uses in awarding funding. C.54; NI Br.11. In other words, under *Bio-Medical Laboratories*, Plaintiff has the right to

challenge a funding denial for misconduct such as that alleged in the Initial Petition. *Polyvend*, therefore, is not applicable to Plaintiff's protectable property interests as pled in the Initial Petition.

b. Plaintiff is entitled to a hearing under 89 Ill. Admin. Code § 230.410(a)(1)

The DE Brief misstates facts and law in erroneously claiming that Plaintiff was not entitled to a hearing under 89 Ill. Admin. Code § 230.410(a)(1), which states that the Defendant "shall provide an opportunity for a hearing to … any area agency on aging when the Department *proposes* to … disapprove the area plan [emphasis added]". The DE Brief misstates the law by leaving out the word 'proposes' in claiming that NIAAA can only get a hearing "when the Department disapproves the area agency on aging's plan or an amendment." DE Br.16.

The DE Brief also misconstrues the facts in violation of the Administrative Standard as the Initial Petition alleges in:

- ¶29 that the Department approved NIAAA's area plan in 2018 (C.14);
- ¶30 that as part of the area plan, NIAAA described how it would demonstrate effective leadership in advocating for older adults (C.14);
- ¶31 that NIAAA had submitted an area plan amendment and was waiting for the Department's approval at the time the Initial Petition was filed (C.14); and
- Footnote 5 that:

  "NIAAA is requesting a hearing pursuant to 89 Ill. Admin. Code §230.410(a)(1)…[because] the [Initial] Petition alleges that IDoA is interfering with NIAAA's advocacy which is an effective disapproval of the advocacy section in NIAAA's area plan." C.22.

The Initial Petition, consequently, alleges that the Defendant has disapproved Plaintiff's area plan by interfering with Plaintiff's advocacy. C.22. The DE Brief, nevertheless, claims that Plaintiff was not entitled to a hearing because the Initial Petition failed to claim "that the Department rejected its [Plaintiff's] area plan". DE Br.16. This is a misstatement of fact that obviously violates the Administrative Standard. Further, as stated above, all that is needed for Plaintiff to obtain a hearing the Defendant to *propose* to reject the area plan, which the Initial Petition explicitly alleged. C.22. Plaintiff, therefore, is entitled to a hearing under 89 Ill. Admin. Code § 230.410(a)(1).

c. Plaintiff is entitled to a hearing under 42 U.S.C. § 3027(a)(5)

The DE Brief similarly violates the Administrative Standard by misconstruing facts and misstating the law in claiming under 42 U.S.C. § 3027(a)(5) that Plaintiff was not entitled to a hearing. Section 3027(a)(5) states that the Defendant "will … afford an opportunity for a hearing upon request … to any area agency on aging submitting a plan under" the Older Americans Act (OAA). The DE Brief misstates the law by claiming that Plaintiff is not entitled to a hearing under section 3027(a)(5) because "Nyhammer did not allege that the Department improperly rejected NIAAA's area plan or amendments to the plan." DE Br.17. Again, the DE Brief is misstating the law as section 3027(a)(5) does not require an area plan amendment be rejected for Plaintiff to receive a hearing. Since Plaintiff specifically alleged in ¶31 of the Initial Petition that Plaintiff had submitted an area plan amendment to the Department (C.14), it satisfied the requirement under section 3027(a)(5). Therefore, Plaintiff is entitled to a hearing under this provision.

d. Plaintiff is entitled to a hearing under 89 Ill. Admin. Code § 230.440(a) and 89 Ill. Admin. Code § 220.502

The DE Brief makes an error of law in claiming that Plaintiff is not entitled to a hearing under 89 Ill. Admin. Code § 230.440(a), which states that "a written request for a hearing shall be filed by the aggrieved agency … within 30 days following receipt of the notice of adverse action," and 89 Ill. Admin. Code § 220.502, which states that "the request for a hearing … shall be in writing." Without citing any authority, the DE Brief claims that these two regulations "simply set forth the required form of a request for a hearing … [and] they do not create a right to a hearing." DE Br.17. This interpretation of these two regulations is without merit.

As stated above, under *Mathews*, the public policy of Illinois under *Castaneda*, and under the Administrative Standard, all that is required of an aggrieved organization to receive an administrative hearing is for the organization to ask for a hearing over a disputed issue. Both of these regulations are just a codification of those requirements. Also, as the DHS appeal form in the supplementary appendix demonstrates, the process for requesting an administrative hearing is suppose to be as simple as described in these two regulations.

Further, the DE Brief mistakenly reads an implicit limitation into these two regulations in claiming they do not mean what they say (a court should not "depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions." *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 561 N.E.2d 656, 661

(1990). In addition, both of the regulations state the hearing request be in writing, so if they were merely procedural, then they would be redundant and at least one of them would be made meaningless, which is also error ("a statute should be construed so that no word or phrase is rendered superfluous or meaningless," *Id.*).

Finally, both of these are the Department's regulations and if the Department did not want them to confer a hearing right, then they should have made that clear when they implemented them. The Department should not now be rewarded for implementing regulations and using the ambiguity they created to deny Plaintiff hearings. These two regulations, therefore, mean what they say, which is that Plaintiff can get a hearing if it requests it in writing. Since the Initial Petition complies with the requirements of both of these regulations, Plaintiff was entitled to a hearing under both 89 Ill. Admin. Code § 230.440(a) and 89 Ill. Admin. Code § 220.502.

e. Plaintiff is entitled to a hearing under 42 U.S.C. § 3026(f)(2)(A),(B)

The DE Brief ignores the Administrative Standard in claiming that Plaintiff is not entitled to a hearing under 42 U.S.C. § 3026(f)(2)(B), which states that the Department "shall include procedures for … conducting a public hearing concerning the action [of withholding OAA funds]." Plaintiff pled in the Initial Petition that it was requesting a hearing because the Department had improperly withheld OAA funds. The Initial Petition states in ¶:

- 1 that the Department is the state agency responsible for complying with the OAA (C.12);
- 13 that the Department must award NIAAA OAA funding (C.13);
- 16 that the Department cannot withhold OAA funding without giving NIAAA due process (C.13);

- 17 that due process requires that NIAAA be given a hearing (C.13);
- 46 that the Department admitting it had improperly withheld funding from NIAAA (C.15); and
- 69 that NIAAA be given a hearing because the Department violated the OAA by withholding funding from NIAAA (C.17).

In addition, the Complaint expressly states in ¶ 18 that the Department withheld OAA funding from NIAAA. C.7. This means that the Complaint/Initial Petition explicitly allege that the Department had withheld OAA funding from NIAAA and that NIAAA is requesting a hearing because the Department had violated the OAA by withholding funding from NIAAA.

The DE Brief also wrongly claims that the Complaint alleging the Department had withheld OAA funding was an impermissible "conclusory allegation … without any further facts." DE Br.19. Such a claim is inexplicable as the Initial Petition alleges in ¶:

- 35-38 that in its role as advocate for older adults, NIAAA informed the Department in 2013 that NIAAA was considering a mandamus lawsuit because the Department was running state benefit programs illegally (C.15);
- 38-42, 83 that the Department retaliated against NIAAA in 2013 for NIAAA's advocacy by illegally terminating NIAAA from the Adult Protective (APS) Services Program from 2014-2015 (C.15, C.19);
- 45, 91 that when NIAAA raised the issue of the termination from the APS Program in a meeting on April 8, 2019, the Department admitted it had improperly retaliated by withholding funding from NIAAA (C.15, C.19);
- 51-52 the details in 2014-2015 of the Department excluding NIAAA from over $3.79 million in funding that was instead given to other area agencies on aging (C.16);
- 71 that the Department had not taken any measures to prevent the Department from improperly withholding funding from NIAAA in the future (C.18);

- 53-57 that despite given multiple opportunities, Defendant has not denied that the Department withheld OAA funding from NIAAA (C.16); and
- 53-57 that Defendant has refused NIAAA's direct request to provide information about the funding withheld (C.16).

The Initial Petition, consequently, pleads an eight-year history of overwhelming facts to support the allegation that the Department has withheld OAA funding from NIAAA.

The DE Brief, nevertheless, makes the inexplicable claim that the Initial Petition actually contradicts the Complaint that alleges OAA had been withheld. DE Br.18. The DE Brief is obviously improperly grasping for new excuses on appeal to justify the Department's denial of a hearing. See *Van Dyke v. White*, No. 4–14–1109, 60 N.E.3d 1009, 1017 (4th Dist. 2016) ("Arguments made for the first time on appeal may not be used to support the agency's action because 'courts may not accept appellate counsel's post hoc rationalizations for agency action.'") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 -69 (1962)). Since the Defendant made no claim that it was denying Plaintiff a hearing because the Initial Petition had failed to plead that OAA funds had been withheld, it cannot be used on appeal as a post hoc rationalization. The Initial Petition and the Complaint have alleged sufficient details, therefore, to warrant a hearing under 42 U.S.C. § 3026(f)(2)(A).

f. Plaintiff is entitled to a hearing under the Procedure Act

Plaintiff is entitled to a hearing under the Procedure Act because the Initial Petition alleges in ¶:

- 21-22 that the Department must have hearing rules that comply with the Procedure Act, C.13;
- 62-63 that the Department does not have hearing rules that comply with the Procedure Act, C.17;
- 64 that the Department not having valid hearing rules is an impediment to NIAAA getting administrative hearings, C.17; and
- 66-67 that the Department does not have administrative rules for contested hearings that comply with the Procedure Act, C.38.

Since the Initial Petition alleges sufficient facts under the Administrative Standard, Plaintiff was entitled to an administrative hearing under the Procedure Act to challenge the Defendant's invalid administrative hearing rules.

g. Plaintiff is entitled to a hearing under 42 U.S.C. § 1983

Finally, the DE Brief wrongly claims (DE B.17) that Plaintiff is not entitled to a hearing under 42 U.S.C. § 1983, which mandates a hearing if the Defendant is denying Plaintiff a hearing under some other law. NI Br.16. As stated above, Plaintiff was entitled to a hearing under *Mathews* and multiple other legal provisions, so Plaintiff was also entitled to a hearing under 42 U.S.C. § 1983 as alleged in ¶ 76-78 of the Initial Petition. (C.20).

Since the Defendant was mandatorily required to provide Plaintiff a hearing on Count II for the numerous reasons stated above, the Dismissal of Count II should be vacated.

6. Defendant's duty to provide Plaintiff a hearing under Count III

The Dismissal of Count III should also be vacated because Plaintiff was entitled to a hearing for the four[4] reasons cited in the APS Petition. C.32.

[4] The APS Petition requested a hearing under the Procedure Act and three regulations: 89 Ill. Admin .Code § 230.440(a), 89 Ill. Admin. Code § 220.502, and 89 Ill. Admin. Code § 270.215.

a. Plaintiff is entitled to a hearing under the Procedure Act

Plaintiff was entitled to a hearing under the Procedure Act because the APS Petition alleges in ¶:

- 31,61 that a rule that does not comply with the Procedure Act is invalid and that the APS Manual is a rule, C.35, 37;
- 60, 62-63 that the Department manages the APS Program with the APS Manual which was not adopted under the rulemaking process contained in the Procedure Act so the APS Manual is invalid
- 64-70 that the Department does not have administrative rules for contested hearings that are invalid under the Procedure Act. C.38

Since the APS Petition alleges sufficient facts under the Administrative Standard, Plaintiff was entitled to an administrative hearing under the Procedure Act to challenge the Manual and the Defendant's invalid administrative hearing rules.

b. Plaintiff is entitled to a hearing under 89 Ill. Admin. Code § 230.440(a) and 89 Ill. Admin. Code § 220.502

As discussed for Count II above, both of these regulations require Defendant to provide a hearing if an aggrieved agency submits a request in writing. Since the APS Petition satisfies these requirements, Plaintiff was entitled to an administrative hearing for the APS Petition under these two regulations.

c. Plaintiff is entitled to a hearing under 89 Ill. Admin. Code § 270.215

Plaintiff was entitled to a hearing under 89 Ill. Admin. Code § 270.215, which states that the Defendant will not reject Plaintiff's designation of the APS providers "unreasonably." As discussed above, under *Logan*, once a state confers a legal right such as this to Plaintiff, then the Defendant cannot infringe on that right

without affording due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). The APS Petition alleges in ¶:

- 12 that Illinois law states that NIAAA is given the authority to designate APS provider agencies (C.33);
- 14 the Department's own manual states that NIAAA is responsible for designating APS providers (C.33);
- 46-49 that the Department has unlawfully rejected NIAAA's designation of APS provider agencies (C.37);
- 50-53 that the Department has unreasonably rejected NIAAA's designation of APS provider agencies (C.37); and
- 54-56 the Department has improperly interfered with NIAAA's responsibilities to designate APS provider agencies (C.37).

Further, the Defendant is now effectively conceding that Plaintiff has a right to a hearing as it is currently trying to impose an administrative regulation upon itself that explicitly gives Plaintiff the right to a hearing if the Defendant rejects Plaintiff's APS designation. DE Br.16 n 5. Under *Logan* and *Mathews*, therefore, Plaintiff has a protectable property interest under Illinois law in designating APS provider agencies. Since the APS Petition alleges that the Defendant has improperly infringed on that right, Plaintiff is entitled to a hearing on the APS Petition. Therefore, the Dismissal of Count III should be vacated.

Regarding the trial court's unnecessary delay, if the Dismissal is vacated and this case is remanded, then Plaintiff requests that this Court instruct the trial court to handle further proceedings expeditiously.

CONCLUSION

In conclusion, for the reasons stated above, the Dismissal should be vacated. If the Dismissal stands, then Defendant will continue to close the entire administrative hearing process to our most vulnerable citizens and will be

rewarded for covering up the Department's misconduct as alleged in the Initial Petition. The Dismissal, therefore, is a miscarriage of justice that should be reversed.

Dated: April 26, 2021

Respectfully submitted,

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APPELLATE COURT 2ND DISTRICT

SUPPLEMENTARY APPENDIX

Table of Contents to the Supplementary Appendix

State of Illinois
Department of Human Services

APPEAL REQUEST FORM (SNAP, Medical Assistance, Cash Assistance, Child Care)

Use this form only if you want to file an appeal (this is a request for a hearing). Your Family Community Resource Center (FCRC or local office) may help you fill out this form. You may file this form with your FCRC or with the Bureau of Hearings at 69 W. Washington, 4th Floor, Chicago, IL 60602 or via email at DHS.BAH@Illinois.gov, Fax at (312) 793-3387 or by Telephone at (800) 435-0774.

Appellant First Name	Appellant Last Name	Telephone Number
Address (No. & Street, Apt. No.)	City, County	State, Zip Code
Name Case is Under	Case Number	Social Security Number

Will you need an interpreter in the hearing? ☐ Yes ☐ No If Yes, what language? _____

I am appealing action taken on: (check all that apply) ☐ SNAP ☐ Long Term Care ☐ Medical Assistance ☐ AABD Cash Assistance ☐ TANF ☐ Child Care

Application/Request Date: _____

Department Date of Notice from which you are appealing: _____

I AM REQUESTING A FAIR HEARING BECAUSE:

___ My application/request was denied and I disagree with this
___ IDHS says I am not disabled and I disagree with this
___ I was enrolled in spenddown and I disagree with this
___ A penalty period was imposed and I disagree with this
___ I disagree with the benefit amount
___ I disagree with the beginning eligibility date
___ My benefits were stopped or reduced and I disagree with this
___ I was charged with an overpayment and I disagree with this
___ My SNAP benefits were recouped for a previous overpayment claim(s) and I disagree with this
___ Money was recovered on an overpayment claim(s) and I disagree with this
___ A sanction was imposed and I disagree with this
___ I asked to be exempt from the Department's work and training activities and I was denied
___ I requested Crisis Assistance and I was denied
___ IDHS has not taken action on my application or a request

Other Reason _____

State of Illinois
Department of Human Services

APPEAL REQUEST FORM (SNAP, Medical Assistance, Cash Assistance, Child Care)

Please Check One:
Under some programs, benefits may continue while the hearing decision is pending. If possible,

____ I WANT my benefits to continue until the hearing decision is made. I understand that if the decision is not in my favor, I may have to pay back the benefits. I want the following benefits to continue:

☐ Cash ☐ SNAP ☐ Cash and SNAP ☐ Medical Assistance

____ I DO NOT WANT my benefits continued while the hearing decision is pending.

Do you want someone else to represent you at the hearing? If yes, provide their information in the space below.

Approved Representative First Name, Last Name	Telephone Number	Email Address
Address (No. & Street, Apt. No.)	Representative's Firm (if applicable)	City, State, Zip Code

(If signed by a person other than the customer, you must attach written authorization to file an appeal on behalf of customer. Please note: the Bureau of Hearings does not have a standardized authorization form and the "Approved Representative Consent Form" (IL 444-2998) is not accepted for appeal representation, as its scope is limited to applying for benefits.)

_____ _____
Your Signature (or Signature of Approved Representative) Date

(if signed by a person other than the customer, attach written authorization to file an appeal on behalf of customer)

Please Note: You are entitled by law to a final decision on your appeal and to full implementation of a decision favorable to you within 90 days from the time you requested the appeal, unless you have requested a delay of your hearing. For SNAP benefits only, you are entitled by law to a final decision on your appeal within 60 days and full implementation of a decision favorable to you within 10 days of receipt of the hearing decision.

For IDHS Office Use Only: To be completed by the FCRC or Hearings

Date Notice of Appeal Received:	Date of Postmark, if mailed (attach envelope):	Date of written request for hearing, if preceding this form:
Date of Decision Being Appealed:	Case Name:	Case Number:

No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois Case No. 19MR1106 The Honorable DONNA R. HONZEL, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: April 26, 2021

/s/ Timothy Scordato
Timothy Scordato
Attorney for Plaintiff-Appellant

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APPELLATE COURT 2ND DISTRICT

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 26, 2021, the foregoing **Reply Brief and Supplementary Appendix of Plaintiff-Appellant Grant Nyhammer** was electronically filed with the Clerk, Appellate Court of Illinois, Second Judicial District, and served upon the following by email:

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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois No. 19-MR-1106 The Honorable DONNA R. Honzel, Judge Presiding.

Motion for Publication and Attorney Fees

Plaintiff, Grant Nyhammer as the Director of the Northwestern Illinois Area Agency on Aging (NIAAA), through his attorney Timothy Scordato, files this Motion for Publication and Attorney Fees pursuant to Illinois Supreme Court Rule 23(f) and 735 ILCS 5/14-105, which Defendant Basta intends to oppose. In support of this motion the Plaintiff states the following:

1. On February 8, 2022 this court entered an order (Order) in this matter in favor of the Plaintiff pursuant to Illinois Supreme Court Rule 23(b) in 2022 IL App (2d) 20001460-U.

Publication of Order

2. The Order should be published pursuant to Illinois Supreme Court Rule 23(a) because the Order explains an existing rule of law to the Defendant and to future courts confronted with the issue of a state agency denying access to the administrative hearing process.

3. It is crucial that Defendant understand her statutory duties as she administers a billion-dollar state agency upon which hundreds of thousands[1] of vulnerable older adults are reliant for essential services.

[1] Over 500,000 Illinois residents annually receive services from Department funded programs. Paula Basta, *Illinois Department on Aging FY21 Strategic Budget Overview*, https://www.icmha.org/wp-content/uploads/2020/03/IDoA_FY21_StrategicBudgetPresentation_Overview2020.pdf

4. This litigation was necessary because the Defendant ignored her "patently obvious" statutory responsibilities ("it is patently obvious that NIAAA was seeking a determination of its rights…[and] the Department failed and refused to provide a means for administrative review for the determination of the NIAAA's rights…."). Order ¶ 42-43.

5. By blatantly ignoring her statutory duties the Defendant has for years effectively closed the administrative hearing process to 2.3 million vulnerable older adults in Illinois. C 52.

6. It is likely the Defendant will just continue denying access to the administrative hearing process for everyone if the Order remains unpublished.

    a. For example, on or about September 29, 2021, NIAAA again requested an administrative hearing with the Defendant in the attached *Request for Appeal for Failing to Comply with the OAA* with the Department. The request is attached and labelled as Exhibit A. The Defendant again has refused to give NIAAA an administrative hearing by sending NIAAA a letter dated December 15, 2021. The letter is attached and labeled as Exhibit B.

7. The Defendant, unfortunately, has demonstrated she will continue denying access to the administrative hearing process on other issues unless the Order is published.

8. Finally, the Order should be published because the circuit court's decision dismissing the case demonstrated a complete misunderstanding about the nature of a mandamus and the responsibilities of the Defendant.

9. Since a "mandamus is an extraordinary remedy" (Order ¶ 30), and therefore not well known, other Illinois courts are also likely confused about mandamus actions, so publishing the Order would be a beneficial guide for all future courts adjudicating state officials' refusal to perform their statutory duties.

<u>Attorney Fees</u>

10. To prevent the Defendant from continuing to violate NIAAA's rights, this court should order that NIAAA be awarded its attorney fees under the mandamus statute (Mandamus Statute) which states that "If judgment is entered in favor of the plaintiff, the plaintiff *shall* recover damages and costs." 735 ILCS 5/14-105.

11. The Mandamus Statute allows for the prevailing party to recover fees "if independently authorized elsewhere by [another] law." *Shempf v. Chaviano*, 2019 IL App (1st) 173146.

12. In other words, if the statute under which the mandamus is sought specifically allows for the recovery of attorney fees against the state agency, then the Mandamus Statute *requires* that the prevailing plaintiff be awarded damages and costs.

13. NIAAA sought the mandamus under the Illinois Administrative Procedure Act (Procedure Act), 5 ILCS 100/1-1 *et.seq.* because the Defendant has invalid administrative hearing regulations ("count one [of NIAAA's mandamus complaint] alleged that the Department had a legal duty to enact administrative rules for hearings that complied with the article 10 of the [Procedure] Act"). Order ¶ 19.

14. The Defendant conceded that the Department's administrative hearing rules when this litigation was initiated were "outdated, confusing, duplicative, unnecessarily overlapping, unnavigable" and therefore invalid. 5 ILCS 100/10-55(c).

    a. During the pendency of this litigation on August 27, 2021, the Defendant published a new hearing regulation that repealed and amended the prior Department rules for hearings. 45 Ill. Reg. 10,767 – 793 (Aug. 27, 2021) (https://www.cyberdriveillinois.com/departments/index/register/volume45/register_volume45_issue_35.pdf).

    b. In an explanation to Illinois Joint Committee on Administrative Rules about why the Defendant needed to change its hearing regulations, the Defendant stated:

> Upon reviewing current departmental rules for appeals and hearings, it was determined that the rules were outdated, confusing, duplicative, unnecessarily overlapping, and unnavigable. Supplement to Motion for Sanctions, E 4 – 6.

15. The Order determined that the Department's administrative hearing rules are invalid under the Procedure Act, as it stated:

    a. "The Procedure Act provides that…[the Department] shall adopt rules of practice setting forth the nature and requirements for all formal hearings." Order ¶ 37.

b. "Defendant does not dispute that the Department failed to enact the rules [required by the Procedure Act for administrative hearings]." Order ¶ 39.

c. "The Department [improperly] dismissed the petitions without providing any means to effectively appeal or review the decisions and without enacting rules [under the Procedure Act] to even validate its actions." Order ¶ 43.

16. Since the Order deems the Department's hearing rules invalid, then the Procedure Act specifically *requires* this court to award attorney fees ("in any case in which a party has any administrative rule invalidated by a court for any reason…the court *shall* award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees [emphasis added].") 5 ILCS 100/10-55(c).

17. The reason the Procedure Act mandates awarding attorney fees is to discourage state agencies from using invalid administrative rules and to give a financial incentive for parties to challenge those invalid administrative rules:

> The purpose of the fee-shifting provisions of…[Procedure Act] is to discourage enforcement of invalid rules and give those subject to regulation an incentive to oppose doubtful rules where compliance would otherwise be less costly than litigation. If you are a party who has brought *any* case and you succeed in that case in having *any* administrative rule invalidated by a court for *any* reason, you are entitled to recover all of your reasonable litigation expenses, including attorney fees. It is difficult to see how any law could be more straightforward or less encumbered by qualification or restriction. (Emphases in original.) *Rodriquez v. Dep't of Fin. & Prof'l Regulation*, 2011 IL App (1st) 102775.

18. Since the Procedure Act allows for the recovery of attorney fees, NIAAA is, therefore, entitled to be awarded fees and costs under the Mandamus Statute.

19. Further, NIAAA should be awarded attorney fees because there have been no consequences for the Defendant forcing NIAAA to engage in three years of costly litigation just to get what the Order deems a "patently obvious" right. Order ¶ 42 - 43.

20. Further, the Defendant denying NIAAA hearings on the petitions for nearly three years has benefited the Defendant and significantly damaged NIAAA.

a. Regarding NIAAA's Second Petition (Order ¶ 14) about NIAAA designating the Adult Protective Service (APS) providers from a public bid process in June 2019 (Order ¶ 15), the Defendant delaying a hearing on the Second Petition has made NIAAA's 2019 designation irrelevant as the results from the 2019 process are not a valid basis for NIAAA designating APS providers in 2022. NIAAA using the 2019 bid process to award contracts in 2022 would almost certainly result in a legal challenge from one of the losing bidders, so the Department delaying a hearing on the Second Petition has forced NIAAA to conduct a new public bid process for APS providers in 2022.

b. Regarding NIAAA's First Petition (Order ¶ 8), the circumstances of the Department improperly withholding funding from NIAAA now date back to at least eight years to 2013 (Order ¶ 10) when the Department illegally terminated NIAAA from the APS program. Many of the Department employees who could provide evidence about the Department's misconduct starting in 2013 have now been gone from the Department for years which decreases the likelihood of NIAAA being able to prove the misconduct and prevailing on the First Petition.

21. While the Defendant delaying hearings on the petitions for years has injured NIAAA, it has had no impact on the Defendant as she has not even had to pay the costs of hiring counsel to delay resolution of the petitions.

22. Attorney fees should be awarded to NIAAA, therefore, so that there is some incentive for the Defendant to stop denying access to the administrative hearing process for NIAAA and millions of older adults.

23. Plaintiff has incurred $229,525 in attorneys' fees (401.75 hours from attorney Tim Scordato and 218 hours from attorney/attorney supervisor Grant Nyhammer) and $497.32 in court costs from all litigation of this matter in this Court and previous courts.

a. NIAAA's mission is to provide free services to vulnerable older adults and is a nonprofit with limited resources.

b. Any fee award to Plaintiff will be given to NIAAA to provide services to older adults consistent with NIAAA's mission.

c. NIAAA would agree to make any fee award subject to any condition this court deems appropriate.

Wherefore, Plaintiff requests that this Court:

A. Publish the Order, 2022 IL App (2d) 20001460;
B. Award Plaintiff fees and costs;
C. Any just order this court deems appropriate.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Respectfully submitted,

/s/ Timothy Scordato
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No. 2-20-0460
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging, Plaintiff-Appellant, v. Paula Basta, in her capacity as Director of the Illinois Department on Aging, Defendant-Appellee.	)	Mandamus on Appeal from the Seventeenth Judicial Circuit, Winnebago County, Illinois No. 19-MR-1106 The Honorable DONNA R. Honzel, Judge Presiding.

Order

This cause coming to be heard on Plaintiff-Appellant's Motion for Publication and Attorney Fees, due notice having been given, and this Court being fully advised,

IT IS HEREBY ORDERED that the motion is GRANTED/DENIED.

Enter: _____
Justice

_____
Justice

_____
Justice

Dated :_____

Timothy Scordato
Counsel for Plaintiff

E-FILED

Transaction ID: 2-20-0460
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APPELLATE COURT 2ND DISTRICT

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 15, 2022, Plaintiff emailed Defendant, at CGriffis@atg.state.il.us and Carson.Griffis@ilag.gov, the foregoing **Motion for Publication and Attorney Fees** pursuant to Local Rule 102(b), and Counsel for Defendant stated that he plans to oppose the motion. Further, on February 16, 2022 the foregoing **Motion for Publication and Attorney Fees** was electronically filed with the Clerk, Appellate Court of Illinois, Second Judicial District, and served upon the following by email:

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/s/ Timothy Scordato
Timothy Scordato
Counsel for Plaintiff

Northwestern Illinois Area Agency on Aging,)
Petitioner,)
v.)
The Illinois Department on Aging,)
Respondent

Request for Appeal for Failing to Comply with the OAA

The Petitioner, the Northwestern Illinois Area Agency on Aging (NIAAA) through its' attorney, Grant Nyhammer, is requesting an administrative hearing with a hearing officer for this *Request for Appeal for Failing to Comply with the OAA* (Request). In support of this Request, NIAAA states the following:

Authority relied upon for Request

1. This Request is being made because the Illinois Department on Aging's (Department) 2022-2024 State Plan[1] (State Plan) fails to comply with the Older Americans Act[2] (OAA).

    a. The OAA requires that:

        > The [State] plan contains assurances…that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter [of the OAA].[3]

    b. This provision in the OAA is a restriction on using funding (Restriction on Using Funding) that requires that OAA funding be used only if an OAA legal services provider (Legal Provider) has no other funding sources available to serve an older adult.

        i. This means, for example, that the three Illinois Legal Providers who are currently getting the vast majority of OAA funding (Prairie State Legal Services, Land of Lincoln Legal Services, and Legal Aid Chicago) and funding from the Legal Services Corporation[4], generally may not use OAA funding to serve low-income older adults.

    c. The purpose of the Restriction on Using Funding is to ensure that the maximum level of legal services are being provided to older adults by requiring that OAA funding be used only as a last resort by Legal Providers.

    d. Since the Legal Providers typically have multiple other sources of funding to serve older adults, the State Plan must contain, therefore, assurances that the Legal Providers will be required to account for how they will comply with the Restriction on Using Funding.

[1] The State Plan is available at: https://www2.illinois.gov/aging/Documents/State-Plan_2022-2024_July2021_FINAL-VERSION.pdf , last visited on September 28, 2021.
[2] 42 U.S.C. § 3001 *et.seq*.
[3] 42 USC 3027(a)11(D).
[4] The Legal Services Corporation is a federal agency which provides funding to legal service organizations to provide free legal services to low-income clients which includes older adults. See 42 U.S.C. 2996f.

e. The State Plan, as alleged below, does not contain adequate assurances regarding the Restriction on Using Funding.

f. The ongoing failure of the Legal Providers to comply with the Restriction on Using Funding likely deprive vulnerable older adults from receiving potentially millions of dollars of legal services over the next three years.

g. This failure has potentially dire impacts for Illinois older adults as "legal assistance provided under…[the OAA] is part of the essential core of…[the federal government's] legal assistance and elder rights programs."[5]

Parties

2. The Department has designated NIAAA as the area agency on aging[6] (AAA) for planning service area 1 (Area 1). [7]

a. NIAAA is the "public advocate" [8] for older adults (Clients) living in Area 1 and as such is required by both federal and Illinois law to "represent the interests of older persons to public officials [and] public…agencies."[9]

b. NIAAA contracts with Prairie State Legal Services (Prairie State) to provide OAA legal services to older adults in Area 1.

c. NIAAA has submitted to the Department a 2022-2024 area plan (NIAAA Area Plan), which is slated to begin on October 1, 2021.

i. The local initiative in the NIAAA Area Plan is to evaluate Prairie State's performance for the purpose of improving and increasing the delivery of legal services to older adults in Area 1 in 2022-2024.

d. Grant Nyhammer is the Executive Director & General Counsel of NIAAA and is the authorized representative of NIAAA.

e. NIAAA's and Mr. Nyhammer's contact information is below.

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[5] The Administrative on Community Living, https://acl.gov/programs/legal-help/legal-services-elderly-program , last visited on September 28, 2021.

[6] An area agency on aging "means any public or non-profit private agency in a planning and service area designated by the Department." 20 ILCS 105/3.07.

[7] The Planning and Service Area "means a geographic area of the State that is designated by the Department for the purposes of planning, development, delivery, and overall administration of services under the area plan. Within each planning and service area the Department must designate an area agency on aging." 20 ILCS 105/3.08.

[8] 45 CFR § 1321.61(a).

[9] 45 CFR § 1321.61(b)(1). Similarly, Illinois law states that "an area agency on aging shall throughout the planning and service area…monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions which affect older persons…[and] represent the interests of older persons to public officials, public and private agencies or organizations." 89 Ill.Adm.Code §230.150(a)(1)-(3).

3. The Department is the state agency responsible for the State Plan,[10] complying with the OAA[11], and for providing hearings to NIAAA.[12]

Authority relied on for requesting an Administrative Hearing

4. NIAAA is entitled to an administrative hearing under the OAA which requires the Department to give NIAAA a hearing if requested.[13]

    a. The only condition for NIAAA getting a hearing under the OAA is that NIAAA has submitted an area plan to the Department.

    b. Since NIAAA has submitted an area plan to the Department, NIAAA is entitled to a hearing under the OAA.

        i. While the OAA does not require NIAAA to state the grounds for the hearing request, NIAAA is asking for a hearing because, as alleged in this Request, the State Plan violates the OAA.

5. Since the only Department regulation under which NIAAA can now request a hearing regarding the OAA is the Department's new hearing regulation[14] (Hearing Regulation), NIAAA is requesting a hearing under a provision of the Hearing Regulation for protecting the welfare of older adults.

    a. The Hearing Regulation applies to hearings regarding OAA services.[15]

    b. The Hearing Regulation states the Department will give a hearing to protect the welfare of older adults.[16]

        1. As alleged in this Request, the State Plan failing to comply with the Restriction on Using Funding has potentially dire consequences for older adults.

        2. NIAAA entitled to a hearing, therefore, to protect the welfare of older adults under 89 Ill. Admin. Code § 230.450(b).

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[10] Department "shall develop and administer any State Plan for the Aging required by [the OAA]." 20 ILCS 105/4.01

[11] *Id.*

[12] 89 Ill.Adm.Code §230.400.

[13] The Department "will…afford an opportunity for a hearing upon request…to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. §3027(a)(5).

[14] 89 Ill.Adm.Code §230.400 *et.seq.*

[15] "The purpose of this Subpart E is to set forth grievance and appeal requirements for entities…that administer…services…under an area plan." 89 Ill. Admin. Code § 230.400.

[16] 89 Ill. Admin. Code § 230.450(b). Since the OAA requires that NIAAA be given a hearing, reading the Hearing Regulation consistent with this federal requirement means that there must be some provision in the Hearing Regulation that requires NIAAA be given a hearing. That provision in the Hearing Regulation appears to be Section 230.450(b). If the Department disagrees, then it should substitute another provision in the Hearing Regulation (or any other source it wishes to use) which affords NIAAA a hearing as required by the OAA.

6. Further, NIAAA should be given an administrative hearing because it is preferred by courts in resolving disputes such as this so that the Department can:

    a. Develop and consider all relevant facts;
    b. Use their expertise in resolving differences;
    c. Settle differences in an informal setting;
    d. Protect state agency operations by avoiding interruptions;
    e. Correct mistakes; and
    f. Converse judicial time by avoiding piecemeal appeals.[17]

Alleged Facts

7. The following alleged facts are based on belief and/or knowledge of Mr. Nyhammer.

8. Mr. Nyhammer worked as a Staff Attorney at Prairie State between 2000-2004 and has supervised NIAAA's OAA funding to Prairie State since 2009 as Executive Director of NIAAA.

9. NIAAA has repeatedly requested since 2010 that Prairie State account for how it is complying with the Restriction on Using Funding.

    a. In the judgment of NIAAA, Prairie State has never complied with the Restriction on Using Funding.

    b. NIAAA has been unable to enforce the Restriction on Using Funding on Prairie State because, in large part, it has not been included in the past State Plans.

10. On October 30, 2020, therefore, NIAAA sent an email to the Department requesting that the State Plan address the Restriction on Using Funding. The email is attached and labelled as Exhibit A.

11. On September 13, 2021, in a virtual meeting between Department and the AAAs, Amy Lulich, Senior Policy Advisor with the Department, stated that the State Plan had been approved and the Department would soon be sending a copy of the State Plan to the AAAs.

    a. To date, the Department has not sent the State Plan to NIAAA.
    b. To date, the Department has not sent the State Plan to any AAA.

12. Despite the Department's promise, NIAAA first discovered the approved State Plan when Mr. Nyhammer checked the Department's website on September 27, 2021.

    a. It is believed that the State Plan was made public when it was posted on the Department's website sometime within the past 15 days.

[17] *Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 547 N.E.2d 437, 439 (1989).

b. The Department posting the State Plan on the website is an adverse action[18] as it is the Departments final decision refusing NIAAA's request that the State Plan address the Restriction on Using Funding.

13. On September 27, 2021, NIAAA asked the Department to explain its adverse action of failing to include the Restriction on Using Funding in the State Plan.

14. On September 27, 2021, Ms. Lulich responded claiming that Objectives 1.3 and 5.5 of the State Plan address the Restriction on Using Funding. Ms. Lulich's email is attached and labelled as Exhibit B. Objectives 1.3 and 5.5 are detailed in Exhibit B.

Reasons for Relief Requested

15. Objectives 1.3 and 5.5 are not adequate assurances in the State Plan that the Restriction on Using Funding will be followed by the Legal Providers.

16. The Restriction on Using Funding is a specific rule imposed on Legal Providers which mandates that they account for using other funding sources before using OAA funding to provide legal services to older adults.

17. Objectives 1.3 and 5.5, unfortunately, do not address the Restriction on Using Funding.

a. Funding is not mentioned in Objective 1.3 so it is irrelevant.

b. The only mention of funding in Objective 5.5 is that the Department vows it will "work with Legal Providers…and others to advocate for funding".

i. The Department's vague promise to work with Legal Providers to seek more funding is obviously immaterial to how the Legal Providers account for expending OAA funding as required by the Restriction on Using Funding.

18. Objectives 1.3 and 5.5, therefore, are not adequate assurances that the Restriction on Using Funding will be followed by Legal Providers.

19. The State Plan, consequently, does not comply with the OAA regarding the Restriction on Using Funding.

Relief Requested

20. For the reasons stated above, NIAAA is requesting an administrative hearing before a hearing officer to determine if the State Plan contains adequate assurances regarding the Restriction on Using Funding.

[18] 89 Ill.Adm.Code §230(a)(2).

21. If the hearing officer determines that the State Plan is deficient, then NIAAA is requesting that the hearing officer recommend to the Director of the Department that the State Plan be revised to be compliant with the OAA.

Proof of Service

On September 29, 2021, this *Request for Appeal for Failing to Comply with the OAA* was served by email to Aging.OAS@illinois.gov, Office of General Counsel, Illinois Department on Aging.

Respectfully submitted,

/s/ Grant Nyhammer
Grant Nyhammer,
Attorney Registration #6239576
Executive Director & General Counsel for the Petitioner
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108
gnyhammer@nwilaaa.org
(815) 226-4901
(815) 226-8984 fax

From: Grant Nyhammer <gnyhammer@nwilaaa.org>
Sent: Friday, October 30, 2020 12:35 PM
To: aging.feedback@illinois.gov
Subject: State plan

The Northwestern Illinois Area Agency on Aging (NIAAA) is asking that an Older Americans Act (OAA) legal services obligation be added to the proposed Illinois Department on Aging State Plan (Plan). The OAA requires that funding be used only if a Legal Provider has no other funding sources available to serve the client by stating:

> The [State] plan contains assurances…that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter [of the OAA]. 42 USC 3027(a)11(D).

This means, for example, that the three legal service providers (Providers) who are currently getting OAA funding (Prairie State Legal Services, Land of Lincoln Legal Services, and Legal Assistance Foundation) and funding from the Legal Services Corporation under 42 USC 2996f, may not use OAA funding to serve low-income older adults. The Providers also have multiple other sources of funding to serve older adults which must be used before the Providers can use OAA funding so the State Plan should detail a process that the Providers should use to fulfill the above OAA obligation. Since this OAA legal services requirement is missing from the current Plan (and has been missing from the State Plan the past four decades), NIAAA asks that it be added.
Sincerely,

Grant Nyhammer*,
Executive Director & General Counsel,
Northwestern Illinois Area Agency on Aging

From: Lulich, Amy <Amy.Lulich@Illinois.gov>
Sent: Monday, September 27, 2021 1:56 PM
To: Grant Nyhammer <gnyhammer@nwilaaa.org>
Cc: Ackermann, Desirey <Desirey.Ackermann@Illinois.gov>; Salmon, Willis <Willis.Salmon@Illinois.gov>; Peters, Chelsey <Chelsey.Peters@Illinois.gov>
Subject: RE: Suggestion for State Aging Plan

Grant,

Thank you for your feedback on the FY22-24 State Plan on Aging. We received your comment during our stakeholder feedback process last year. We included the below feedback to your comment, which is included in the final plan "summary of stakeholder feedback." As you know, we received final approval for the plan from ACL earlier this month on September 3. ACL did not provide any specific feedback about the comment you submitted.

I've included our response to your comment below, and the sections of the plan that we reference. If you have any further questions, please let me know.

Best,
Amy

Northwestern Illinois Area Agency on Aging	Potential new objective (and strategies) under Goal 5 or 7	The Northwestern Illinois Area Agency on Aging (NIAAA) is asking that an Older Americans Act (OAA) legal services obligation be added to the proposed Illinois Department on Aging State Plan (Plan). The OAA requires that funding be used only if a Legal Provider has no other funding sources available to serve the client by stating…	Thank you for this comment. Several comments were submitted related to legal services for older adults. In response to comments regarding legal services, IDoA has added objectives 1.3 and 5.5.

Objective 1.3: Evaluate current legal services offerings in order to maximize services for those with the greatest economic and social needs.

Strategy 1.3a: Utilize the findings from the recently completed survey of Older Americans Act Title III Legal Providers to identify priority areas for the legal services working group.

Strategy 1.3b: Convene working group of AAA representatives to identify gaps and barriers that older adults are experiencing when accessing legal services.

Strategy 1.3c: Continue to work with Area Agencies on Aging and Legal Providers to prepare for Federal Fiscal Year 2022 reporting changes and recognize legal concerns about chilling effects in capturing additional sensitive personal information unless related to underlying request for assistance.

Strategy 1.3d: Continue use of brief surveys on specific topics to increase understanding of needs and issues affecting legal service providers in order to advocate for system improvements.

Outcomes for Objective 1.3

- Workgroup convened.
- Surveys are conducted annually.
- Prioritization of recommendations from legal services survey.

Objective 5.5: Work with Legal Providers, legal advocacy organizations and others to advocate for funding and resources to provide legal assistance to older adults so they can access social services that allow them to live independently.

Strategy 5.5a: Establish subcommittee of the Older Adult Services Advisory Committee to identify gaps and barriers that older adults are experiencing when accessing legal services.

Strategy 5.5b: Revise the listings under the provider profile to include legal service providers. Ensure this information is also shared with staff on the Senior HelpLine.

Strategy 5.5c: Explore options for education and training on legal issues spotting for Aging network.

Outcomes for Objective 5.5

- Subcommittee established.
- IDoA website is updated with listings of legal service providers.
- At least one legal services training module is developed.

Amy C. Lulich, MHA (*she/her/hers*)
Senior Policy Advisor
Illinois Department on Aging

JB Pritzker, Governor
Paula A. Basta, M.Div., Director

One Natural Resources Way, Suite 100, Springfield, Illinois 62702-1271
Phone: 800-252-8966 • 888-206-1327 (TTY) • Fax: 217-785-4477

December 15, 2021

Via email: gnyhammer@nwilaaa.org
Grant Nyhammer, Executive Director
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

RE: Appeal Request

Mr. Nyhammer,

The Illinois Department on Aging ("IDoA") conducted a review of your appeal request regarding your allegation that IDoA's State Plan does not comply with the Older Americans Act.

After reviewing the record, IDoA determined that your request does not meet the requirements established in Administrative Rule. Rules governing Grievances, Appeals, and Hearings may be found in 89 Ill. Adm. Code 230.400 – 230.495. Specifically, 89 Ill. Adm. Code 230.420(d) provides that IDoA will allow an appeal from an Area Agency on Aging ("AAA") when the Department proposes to 1) disapprove the area plan or any amendment to the area plan that has been submitted to the Department by the AAA, or 2) reject the AAA's recommendation to designate a service provider. Here, your request involves allegations concerning the State Plan, rather than, the Area Plan or a service provider designation.

Accordingly, pursuant to 89 Ill. Adm. Code 230.440(b), your appeal is dismissed for not meeting the requirements of 89 Ill. Adm. Code 230.420. You may seek judicial review, if available.

Sincerely,

Paula Basta, Director
Illinois Department on Aging

cc: Desirey Ackermann, IDoA; Desirey.Ackermann@illinois.gov