IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE OFFICE PLANNING GROUP, INC.,

Plaintiff/Appellee

vs.

BARAGA-HOUGHTON-KEWEENAW
CHILD DEVELOPMENT BOARD, INC.,

Defendant/Appellant

Supreme Court No. ~~125502~~ 125448

Court of Appeals No. 245155

Lower Court Case No. 01-11593-CZ

/

PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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JURISDICTIONAL SUMMARY

The Statement of Basis of Jurisdiction set forth in Appellant's Brief is accurate and complete.

STANDARD OF REVIEW

The Standard of Review contained at page 1 of Appellant's Brief is accurate and complete.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE HEAD START ADMINISTRATIVE PROVISION, 42 USC §9839(a), WHICH REQUIRES HEAD START AGENCIES TO PROVIDE REASONABLE PUBLIC ACCESS TO ITS BOOKS AND RECORDS INVOLVING THE USE OF FUNDS FOR WHICH IT IS RESPONSIBLE, REQUIRES A HEAD START AGENCY TO PROVIDE THE PUBLIC WITH ACCESS TO BIDS SUBMITTED FOR THE AGENCY'S PURCHASE OF OFFICE FURNITURE.

Appellant, BHK states:	"No."
Appellee, OPG states:	"Yes."
Trial Court states:	"Yes."
Court of Appeal states:	"Yes."

II. WHETHER THIS COURT HAS JURISDICTION OVER A DISPUTE UNDER 42 USC §9839(a) FOR REASONABLE PUBLIC ACCESS TO THE BOOKS AND RECORDS OF A HEAD START AGENCY INVOLVING FUNDS FOR WHICH IT IS RESPONSIBLE.

Appellant, BHK states:	"No."
Appellee, OPG states:	"Yes."
Trial Court states:	"Yes."
Court of Appeal states:	"Yes"

III. WHETHER A PRIVATE CAUSE OF ACTION IS PROVIDED BY IMPLICATION UNDER 42 USC §9839(a) SINCE A RIGHT HAS BEEN EXPLICITLY GRANTED TO THE PUBLIC AND NO OTHER MEANS OF ENFORCEMENT OF THAT RIGHT EXISTS.

Appellant, BHK states:	"No."
Appellee, OPG states:	"Yes."
Trial Court states:	Issue was not presented at trial court level.
Court of Appeal states:	"Yes."

COUNTER-STATEMENT OF FACTS

This case concerns the refusal of Defendant/Appellant, Baraga-Houghton-Keweenaw Child Development Board, Inc. ("BHK"), an head start agency, to provide any public inspection of the bids received for the purchase of office equipment even though federal law requires an head start agency to provide reasonable public access to the books and records of the agency involving funds for which it is responsible. 42 USC §9839(a).

Contrary to the assertion at page 2 in BKH's Brief, Statement of Facts, Plaintiff/Appellee, Office Planning Group, Inc., ("OPG"), a bidder, was not informed that the bids here in question were to be opened at a public meeting. (10/15/02 hrg., p. 142, APX p. 160a). Further, even though BHK claims that the bidders were advised that the bids would be opened at a meeting of the building committee, the bids were, in fact, opened by Rodney Liimatainen, the Director of BHK, in advance of the building committee meeting. (10/15/02 hrg., p. 81, APX p. 99a).

Following the opening of the bids, Mr. Ham, the person who formulated the bid from OPG, received a telephone call from BHK Director, Liimatainen, advising him that OPG's bid was $10,000.00 high. (10/15/02 hrg. p. 133, APX p. 151a). Mr. Ham was incredulous at the reported disparity between his bid and that of the purported low bidder and, thus, he requested the opportunity to examine the bids to verify that he was bidding on the same items as were the other bidders. (10/15/04 hrg. p. 133, APX p. 151a).

In response to Mr. Ham's request, BHK Director, Liimatainen, said: "Well, we don't ordinarily do that." (10/15/02 hrg., p. 87, APX p. 105a).

Mr. Ham's oral request was followed by a series of written requests for access to the bids, all of which were refused by BHK.

Eventually, in April of 2001, suit was filed in the Houghton County Circuit Court requesting issuance of an order requiring BHK to provide the bid information which had previously been requested and refused.

In discovery, OPG submitted Interrogatories to BHK, dated June 8, 2001 and July 30, 2001, requesting disclosure of the sources of funds used to consummate the purchase which had been the subject of the above-mentioned bidding process. (Interrogatories 7/30/01, APX 1b). BHK refused to respond to this Interrogatory but, instead, BHK obtained a Protective Order excusing non-disclosure. (Order for Discovery 9/28/01, APX 4b).

Since the applicable federal statute, 42 USC §9839(a), requires an Head Start Agency to adopt rules to carry out the law providing for reasonable public access to its books and records pertaining to funds for which it is responsible, OPG, by Interrogatories dated November 19, 2001, requested BHK to disclose any policy that it may have pertaining to this obligation. (Interrogatory No. 1, Interrogatories and Request for Production, 11/19/01, APX 6b). BHK's response to these Interrogatories dated February 25, 2002, failed to identify any policy pertaining to the provision of public access to its books and records involving use of funds for which it is responsible. (Ans to Interrogatories dtd 2/25/02 with relevant attachment, APX 32b, et seq)

Ultimately, BHK filed its Motion for Summary Disposition dated June 20, 2002, pursuant to MCR 2.116(C)(10) – No genuine issue of any material fact. (Defs Motion for S/D, 6/20/02, APX 9b).

At the continued hearing on Defendant's Motion on October 15, 2002, in response to questions by the Court, BHK Director, Liimatainen, explicitly acknowledged that OPG's representative could examine the bids:

> THE COURT: But is the actual bid on a piece of paper?
>
> THE WITNESSES: Yes.
>
> THE COURT: We propose to provide the equipment under bid proposal 1, 2, 3 for a total cost of $5,000.00 in accordance with the attached specifications. Is that the way it is?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay. Are the members of the public, should there be members of the public there, able to see the piece of paper that has the amount of the bid on it? I understand your practice is not to circulate all the supplementation.
>
> THE WITNESS: Yeah, we don't. But - - but - - the question actually has never come up. The - - but I'm sure - - yeah. I guess the - - what each person, each bidder was asked to do was submit this.
>
> THE COURT: Right.
>
> THE WITNESS: Now you're saying for instance in this case, would ever - - someone be able to see this.
>
> THE COURT: Yeah. If I happen to decide that I want to go to the meeting, and I happen to know here it is, and I show up. And somebody gets up and they read the bids, and they go through five different numbers. And I say well Mr. Chairman, can I see the bid of the Office Planning Group.
>
> THE WITNESS: Yes.
>
> THE COURT: And you would, under your practice, I assume, say well, we - - it's our practice not to provide you with all of the brochures and the supplementation, but with respect to the actual bid document, yes or no?

> THE WITNESS: I would say that the person could see them. I don't think the person could take them from the room, or away from the table; but they could certainly look at the bids, sure.
>
> THE COURT: All right. Can Mr. Ham look at the piece of paper that has the bid on it?
>
> THE WITNESS: Yes.
>
> THE COURT: All of them? All of the bids?
> THE WITNESS: I guess he could. But he hadn't asked for the others, I don't think, as far as I am aware.
>
> THE COURT: Okay. Mr. Daavettila?
>
> MR. DAAVETTILA: Sounds - - we may have resolved our matter. Mr. Ham wants to look at the bid. We don't care about the brochures, and the flyers, and the catalogs and the fabric. We want to see what the numbers are.
> (10/15/02 hrg. p. 113, 114, 115, APX p. 131a, 132a, 133a)
> (Emphasis added).

This would have resolved the dispute but for the interjection by BHK's attorney who then said:

> MR. LANDREVILLE: Did you understand the Judge's question? I mean, he's as - - what they are asking for is, they want to see the bid, and you've said no, the Judge says can I see it, and you said yes. I mean, is that - - if that's it, we're done.
> (10/15/02 hrg. p. 115, APX, 133a).

This interjection by counsel caused Director Liimatainen to retreat.

Later, in the same hearing, the Judge asked Director Liimatainen the following:

> THE COURT: Getting past that, my simple question is, as a member of the public, can I look at a bid. And I thought the answer was yes.
>
> THE WITNESS: I believe if he were a member of the public, if you're present at the bid opening, you could look at those.
>
> THE COURT: Okay. And if I walked into your office two weeks later and I say Mr. Liimatainen, I'm sorry to trouble you, but I'm here now, could I look at the bid?

> THE WITNESS: I would probably say why and - - why didn't you come to the bid opening.
>
> THE COURT: Okay. And after I - - and after you batted me around a little bit verbally, would you then let me look at the bids?
>
> THE WITNESS: You, yes.
> (10/15/02 hrg. 121, APX p. 139a) (Emphasis added).

By its Order Following Consideration of Defendant's Motion for Summary Disposition dated November 7, 2002, the Houghton County Circuit Court ruled that the applicable federal statute, 42 USC §9839(a), which mandates that each head start agency provide for reasonable public access to its books and records involving use of funds for which it is responsible, required BHK to provide copies of the desired bids to OPG subject to payment of reasonable costs of reproduction. (Court Order, APX p. 166a, et seq.).

This ruling was unanimously affirmed by the Court of Appeals in its published decision dated November 4, 2003, in Docket No. 245155. (COA Opinion, APX 169a, et seq.).

ARGUMENT

I. THE HEAD START ADMINISTRATIVE PROVISION, 42 USC §9839(a), WHICH REQUIRES HEAD START AGENCIES TO PROVIDE REASONABLE PUBLIC ACCESS TO THEIR BOOKS AND RECORDS INVOLVING THE USE OF FUNDS FOR WHICH THEY ARE RESPONSIBLE, REQUIRES BHK TO PROVIDE OPG WITH REASONABLE ACCESS TO THE BIDS SUBMITTED TO IT FOR THE PURCHASE OF OFFICE FURNITURE.

BHK is a Head Start agency entrusted with the administration of the Head Start program operated in Baraga, Houghton and Keweenaw Counties in Michigan's Upper Peninsula. As such, BHK, and all other Head Start agencies, must adhere to the requirements of law applicable Head Start agencies.

Among the responsibilities imposed upon Head Start agencies are those stated in 42 U.S.C. § 9839(a) which reads:

> Each Head Start Agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter [42 U.S.C. § 9831 et seq] and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.* Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to (1) establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits; (2) assure that only persons capable of discharging their duties with competence and integrity are employed and that employees are promoted or

> advanced under impartial procedures calculated to improve agency performance and effectiveness; (3) guard against personal or financial conflicts of interest; and (4) define employee duties in an appropriate manner which will in any case preclude employees from participating, in connection with the performance of their duties, in any form of picketing, protest, or other direct action which is in violation of law. *(italics added)*

The portion of this statute most relevant to the present matter, stripped of excess language, reads as follows:

> "Each agency shall also provide for reasonable public access*to books and records of the agency*involving the use of*funds for which it is responsible."

It is the interpretation and application of this provision which is at issue here. BHK's refusal to allow <u>any</u> public access to the competitive bids for BHK's purchase of office furniture is in blatant breach of its duty under this statute.

Statutory Construction

The first goal of judicial interpretation of statues is to ascertain and give effect to the legislature's intent. <u>Frankenmuth Mutual Ins Co</u> v <u>Marlette Homes, Inc,</u> 456 Mich 511, 515; 573 NW2d 611 (1998). The primary criterion used to determine intent is the specific language of the statute. <u>People</u> v <u>Borchard-Ruhland</u>, 460 Mich 278, 284; 597 NW2d 1 (1999). The legislature is presumed to have intended the meaning it plainly expressed. <u>People</u> v <u>Venticinque</u>, 459 Mich 90, 99; 586 NW2d 732 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. <u>Heinz</u> v <u>Chicago Rd Investment Co</u>, 216 Mich App 289, 295; 549 NW2d 47 (1996).

Since the language is 42 USC §9839(a) is quite clear, very little judicial construction is required here. An examination of the specific language of the statute

leaves little question regarding the intent of Congress. Congress intended that Head Start agencies provide reasonable public access to their books and records involving the use of public funds. This is what the statute plainly requires.

The broader intent of Congress in the enactment of 42 USC §9839(a) was to require public financial accountability of Head Start agencies. This congressional intent cannot be satisfied by Appellant's interpretation.

The public accountability created by Congress in the enactment of this provision was intended to promote the effective and efficient administration of the funds entrusted to the Head Start program free of any taint or partisan political bias or personal or family favoritism. This goal of effective and efficient administration is explicitly stated in the first sentence of this provision. It states:

> "Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this sub-chapter and the objective of providing assistance effectively, efficiently, and free of any taint or partisan political bias or personal or family favoritism." 42 USC §9839(a).

A statutory term must be viewed in accordance with its context. Tyler v Livonia Pub Schools, 459 Mich 382, 390-391; 590 NW2d 560 (1999).

Efficient administration is advanced by providing financial information to the public as required by law. Possible public detection and exposure of wrongdoing or inefficiency inspires greater honesty and diligence. Sunlight on the books and records of an organization in its expenditure of public money is one of the methods selected by Congress to assure that the goals described above are fulfilled. Nothing can foster greater trust in the fiscal responsibility of government than providing the public with a means to

ascertain and verify the appropriate expenditure of its tax dollars. Little can foster greater distrust of government than withholding from the public the right to ascertain and verify the appropriate expenditure of public monies when no justification for secrecy exists. A free, democratic, government which cherishes the preservation of its public trust, must provide the citizenry with full access to all information concerning expenditure of taxpayer monies absent national security concerns or similar needs for secrecy. The purifying light of public scrutiny is the best antidote for the infection of fiscal corruption. All three branches of government should promote, and not obstruct, this principle as a matter of primary public policy.

Application of the rules of statutory construction here leads inescapably to the conclusion that 42 USC §9839(a) requires BHK to provide reasonable public access to the bids sought by OPG. By its plain language, the statute applies to "each agency". Since BHK is a Head Start agency, the statute applies to it. This is conceded by BHK. See BHK Brief p. 30, second sentence.

The statute is mandatory. It says that each agency "shall" provide reasonable public access to books and records of the agency. Thus, if BHK wishes to enjoy the privilege of administering public funds as a Head Start agency, it must allow reasonable public access to its books and records pertaining to the use of such funds.

The statute is unequivocal in its requirement that access be provided to the public, not merely to auditors, officials of the Department of Health and Human Services (HHS), judges or other dignitaries. Congress plainly here granted a right to the public. OPG, a corporation, is recognized as a legal person and a member of the public within the

meaning of the Fourteenth Amendment to the U.S. Constitution. Santa Clara County v Southern P.R. Company, 118 US 394, 6 S Ct 1132, 30 L Ed 118 (1886).

The reasonable public access given to the public statute is to "books and records of the agency * involving the use of * funds for which it is responsible." These are common terms. "Books and records involving the use of funds" can only mean those items which are kept as evidence of official, financial transactions. It means the actual books. It means the actual records. It does not mean mere abstracts, compilations, summaries or audits.

The bids to which OPG seeks reasonable access were submitted to the agency in connection with competitive bidding. When submitted to the agency, these bids became agency records. They remain on file with BHK. (10/15/02 hrg. p. 96, APX p. 114a). They are maintained as agency records.

No bidder was told that its bid would be returned to it following opening. No reasonable expectations of privacy could have been reasonably assumed. (See request for bids dtd 1/4/01, APX p. 181a-182a).

The bids obviously pertained to the "use of funds for which it (the agency) is responsible". The bids were an integral part of the process culminating in expenditure of agency funds.

Given the clear language of 42 USC §9839(a), it is not difficult to ascertain the intent of Congress. It is now for this Court to give effect to the intent of Congress. Frankenmuth Mutual Ins Co v Marlette Homes, supra.

The only portion of 42 USC §9839(a) which may require judicial construction is the interpretation of "reasonable" in the context of "reasonable public access". The

construction given by the lower courts is entirely appropriate. A demand made after normal hours is not reasonable. A demand for an exhaustive search for a financial record which has not been adequately identified is not reasonable. A demand to create a non-existent record is not reasonable. Further, it is reasonable that the requesting party pay the reasonable costs of the Head Start agency in responding to the request. (Order Following Consideration of Defendant's Motion for Summary Disposition, "SD Order", APX p. 166a, et seq.).

II. STATE COURTS HAVE FULL CONCURRENT JURISDICTION OVER A DISPUTE UNDER 42 USC §9839(a) FOR REASONABLE PUBLIC ACCESS TO THE BOOKS AND RECORDS OF A HEAD START AGENCY INVOLVING THE USE OF FUNDS FOR WHICH IT IS RESPONSIBLE.

This Court shares subject matter jurisdiction concurrently with the Federal Courts since the Head Start Act (HSA) does not provide for exclusive federal jurisdiction. Bowles v Willingham, 321 US 503, 511-12, 64 S Ct 641, 645, 88 L Ed 892 (1944). BHK concedes at p. 9 of its Brief that "no exclusive jurisdiction provision exists in the text of the HHS statute, Title 42 USC 9831 et seq." As stated in Billy Jack for Her, Inc v New York Coat, Suit, Dress, Rainwear and Allied Workers Union, 511 F Supp 1180 (SD NY 1981) at p. 1187:

> "As a general matter, of course, the mere fact that an action 'arises under' federal law does not mean that only federal instrumentalities may hear the case. Congress determines whether the federal courts and agencies that it has established should have exclusive original jurisdiction of cases arising under the laws of the United States, or whether these instrumentalities should exercise their jurisdiction concurrently with state courts. (citations omitted)
>
> ***
>
> In the absence of an express directive, the state courts have jurisdiction over federal question cases concurrently with the

federal courts. 13 C Wright, A. Miller & E. Cooper, Federal Practice & Procedure §3527, at 124 (1975)."

HHS Has No Primary Jurisdiction.

BHK claims, however, that this court lacks jurisdiction under the notion that HHS has primary jurisdiction and that this court must defer to that agency. We disagree.

Primary jurisdiction is considered when an issue arises which is both within the original jurisdiction of a court and the special competence of an administrative body under an established regulatory scheme. Travelers Ins Co v Detroit Edison Co, 465 Mich 185; 631 NW 2d 733 (2001). Under application of primary administrative jurisdiction, the court exercises its discretion and defers to the recognized expertise of the administrative body to resolve issues which are within the area of the special competence of the administrative body. Dominion Reserves, Inc v Michigan Consolidated Gas Co, 240 Mich App 216; 610 NW 2d 282 (2000). Application of primary jurisdiction is decided on a case-by-case basis and depends upon whether the reasons for and purposes of the doctrine will be well served by the exercise of discretionary deferral to the administrative body. Rinaldo's Construction Corp v Michigan Bell, 545 Mich 65; 559 NW 2d 647 (1997).

Three major factors have been identified which determine whether deferral to an administrative body is appropriate:

1. The extent to which the agency's specialized expertise makes it the preferred forum.

2. The need for uniform resolution of the issue.

3. The potential that judicial determination will have an adverse impact upon the agency's ability to fulfill its regulatory

responsibilities. Rindaldo's Construction Corp v Michigan Bell, supra, p. 220, 221.

None of the factors supporting administrative deferral are present here.

Agency's Special Expertise.

The issue here is whether a Head Start agency must allow reasonable public access to bids received in connection with competitive bid purchasing. The administrative body, HHS, has no recognized special expertise on this question. Certainly, BHK has not shown that HHS has any such special expertise. BHK merely makes the bald assertion that failing to allow HHS to make the decision as to what constitutes "reasonable public access" "may create an imbalance in its administration." (BHK Brief p. 19) In this case, there is no pervasive regulatory scheme pertaining to the handling of competitive bids which might be thrown out of balance by judicial determination of the public's right to reasonable access.

The issue here presented is relatively simple, even though BHK struggles mightily for complication. It is in no way equivalent to the establishment of tariffs by the Interstate Commerce Commission, interest rates by the Federal Reserve or utility rates by the Public Service Commission. Those areas, and many others, require use of an administrative agency's special expertise. While HHS may be in a better position to evaluate the quality of the educational process delivered by BHK, it is not expert in the arena of public disclosure.

Courts are routinely called upon to decide questions of reasonableness in various and sundry contexts. No issue is raised here which is outside the conventional experience of judges. There is no technical complexity requiring an agency's special expertise.

If the various letters from HHS officials which have been presented by BHK are any measure of the expertise of HHS in this realm, HHS is, indeed, poorly equipped to resolve the question. The letters presented by BHK from HHS officials express the view that merely providing BHK's procurement policy adequately satisfies the requirement that reasonable public access to books and records be provided. This view completely ignores the requirement that access be provided to "books and records". The letters presented equate "reasonable public access" with "no public access". This is a contortion beyond the limits of reason and plain meaning of the language.

Need for Uniform Resolution.

The success or failure of the Head Start program on a nationwide basis does not hinge of the issue before the court. The law is clear and it ought to be uniformly applied as written in the Federal Statute by allowing reasonable public access. If, however, an Head Start agency in another state should hereafter refuse public access in circumstances identical to those presented here, no disruption in the delivery of Head Start services will result. The resulting harm will be to the public in the deprivation of information to which it is entitled regarding the integrity of the process by which its money is expended.

While three officials of HHS have expressed their opinions that BHK need not provide access to the bids, none have suggested that HHS or any other agency forbids BHK from providing access to the bids. This is a significant distinction. Thus, the lower court rulings have not undermined or contradicted these officials nor have these rulings run counter to any express rule or policy of the agency or HHS. The ruling of the lower courts have only required that BHK go further than these officials have opined that it must.

At the hearing on BHK's Motion for Summary Disposition, BHK Director Liimatainen, at one point in his testimony, acknowledged that members of the public should be able to see the bids. (10/15/02 hrg. p. 114, 115, APX p. 132a, 133a) Thus, uniformity and consistency appears to be of little significance to BHK. The ad hoc approach of Director Liimatainen demonstrates that there is no consistent policy at BHK but, rather, only the whim of the director which controls what and when the public may have access, regardless of the requirements of federal law. In fact, Director Liimatainen testified that the reason he objected to providing access to the bids was that he simply did not want to bother. He testified:

> "If your question included why I objected to it, I objected to just having to go through and produce a lot of material. *** And I don't want - - I wouldn't want to have to reproduce this for - - in general for competitive bidders. I don't think I should have to." (10/15/02 hrg. p. 91, 92, APX p. 109a, 110a)

Thus, there is no high-minded principle or positive public purpose behind BHK's refusal to adhere to the statute.

Since the obligation to provide reasonable public access is directed by statute to the Head Start agency and not to HHS, the application of this provision should have no bearing on the regulatory actions of HHS. While there may be very legitimate reasons to establish rules governing access to competitive bids prior to the time of bid opening, there is no logical reason to regulate access to bids afterward. Competitive bidding is customarily used by public entities to make purchases. After bid opening, these bids are available for public inspection under the Michigan of Freedom of Information Act. MCL §15.232(c); MCL §15.233; MCL §15.243(j). There has been no demonstrated "chilling

effect" or shortage of bidders on public competitive bidding projects where full disclosure of bids is available after opening under MFOIA.

Potential Adverse Effect on Agency Ability to Regulate.

Here, too, it is difficult to conceive of any possible adverse effect that might result to the ability of HHS to regulate the Head Start program if the lower court rulings requiring public access to bids is affirmed. The lower court decisions have denied HHS nothing. They continue to have the same regulatory authority as prior. The lower court decisions are not in conflict with any administrative rule or policy of either HHS or BHK. Neither HHS nor BHK have any rule or policy forbidding public access to bids received in connection with competitive bidding. The lower court decisions do not require BHK to take actions which have been forbidden by HHS. Thus, the agency's ability to regulate has not been adversely affected.

Courts are not required to defer jurisdiction to administrative agencies in all instances where an activity or industry is subject to regulation. Attorney General v Diamond Mortgage Co., 414 Mich 603; 227 NW2d 805 (1982). Where, as here, there is no pervasive regulatory scheme which might be disrupted by judicial review, the justification for primary jurisdiction disappears. United States v Radio Corp of America, 358 US 334, 348, 350; 79 S Ct 457; 3 L Ed2d 354 (1959). When, as here, the reasons underlying the doctrine of primary jurisdiction do not support its application, deferral to an administrative agency is inappropriate. Attorney General v Diamond Mortgage Co, supra.

Timeliness.

Since the doctrine of primary jurisdiction is applied on a deferential, discretionary basis, there have not been any hard or certain rules established regarding when the doctrine must be first asserted. We presume that this issue, too, is to be decided on a case-by-case basis.

It has been stated, however, that the doctrine may not be available if judicial proceedings have advanced to a point where it would be unfair to remit the Plaintiff to another duplicative procedure before the doctrine is asserted. White Lake Assn v White Hall, 22 Mich App 262 at 282; 177 NW 2d 473 (1970). Thus, there appears to be a certain point where equity will no longer countenance the assertion of the doctrine. We respectfully submit that we have well passed that point in this case.

Plaintiff filed its Complaint on April 30, 2001. Defendant, BHK, filed its Answer and Affirmative Defenses, dated July 26, 2001. These pleadings contain no reference to primary jurisdiction or any other objection to jurisdiction. (Ans/Affrm Def. dtd 7/26/01, APX 16b).

Plaintiff filed its Amended Complaint, dated August 3, 2001. Defendant filed its Answer and Affirmative Defenses, dated August 20, 2001. Again, these pleadings contain no reference to primary jurisdiction. (Ans to Amended Complaint/Affirm Defs dtd 8/20/01, APX 19b).

BHK filed Defendant's Motion for Summary Disposition, dated June 20, 2002. (Defs. Motion for S/D 6/20/02, APX 9b) This Motion, the Statement of Facts, Procedural History, and Argument incorporated therein contain no reference to administrative primary jurisdiction and contained no other objection on jurisdictional grounds.

Oral arguments were presented in the Circuit Court on BHK's Summary Disposition Motion on August 16, 2002. Again, the phrase "primary jurisdiction" never passed the lips of counsel for BHK. (8/16/02 hrg. p. 39-68, APX p. 55a-84a) At this hearing, counsel for BHK did allege that the "matter is not ripe" because no complaint had been filed with "HUDD" (sic). Ripeness and exhaustion of administrative remedies are not equivalent with primary jurisdiction. Travelers Ins. v Detroit Edison, supra, at 196-197.

BHK then filed its Supplemental Brief in Support of its Motion for Summary Disposition, dated August 27, 2002, and this Brief also failed to mention the doctrine of primary jurisdiction or any other jurisdictional issue. (BHK Supp Brief in Spt of S/D, dtd 8/27/02, APX 24b).

At the October 15, 2002 continued hearing on BHK's Motion for Summary Disposition, primary jurisdiction was not asserted or even mentioned. (10/15/02 hrg. p. 71-146, APX 89a-164a).

After the Circuit Court Order granting reasonable public access to the bids, this matter proceeded to the Court of Appeals. In its Statement of Questions Presented in its Brief in the Court of Appeals, BHK still made no reference to the doctrine of primary jurisdiction. (BHK Stmt of Questions Presented, APX 31b). In fact, the phrase "primary jurisdiction" can be found nowhere in BHK's Brief to the Court of Appeals.

BHK also filed in the Court of Appeals its Reply Brief, under date of August 11, 2003. This Brief, too, fails to mention primary jurisdiction.

Only after oral arguments in the Court of Appeals had been concluded did BHK finally raise the issue of primary jurisdiction. This occurred in BHK's Motion for

Reconsideration in the Court of Appeals, dated November 11, 2003, more than two and a half years after this action had been filed and after this matter had been fully submitted to the Court of Appeals for determination.

While there is no firm date when it is too late to raise the issue of primary jurisdiction, we respectively submit that it is too late here.

Since the Department of HHS does not have primary jurisdiction, there is no need or legal requirement that this controversy be presented to that agency. The statute with which we are concerned is directed to Head Start agencies and not to HHS. Therefore, it is appropriate that the focus of this action be upon the offending agency and not HHS. The rulings of the lower court concern BHK's violation of federal statute, not any administrative rule or standards created by HHS.

The Facts of this Case do not Require this Court to Defer to HHS Under the Chevron Doctrine.

The doctrine pronounced by the U.S. Supreme Court in Chevron USA, Inc v Natural Resources Defense Counsel, Inc, et al, 467 US 837, 104 S Ct 2778; 81 L Ed2d 694 (1984) is, like primary jurisdiction, a principle of judicial deference to administrative interpretation when a statute is ambiguous and the special expertise of the regulatory agency is required fully to understand the force of the statutory policy to be applied in a given situation. Chevron v NRDC, supra, at p. 844.

Chevron v NRDC, supra, involved the Clean Air Act and its various amendments. The Supreme Court in Chevron, states at p. 848: "The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." The highly complex and technical issues involved in Chevron justified the

court's deferral to the EPA interpretation of statute which had been set forth in the various rules which had been enacted by that agency.

The issue here before the Court is not lengthy, detailed, technical or complex requiring deferral to HHS. Further, HHS has no recognized special expertise on this subject. Therefore, the essential foundational underpinnings required for the deferral under Chevron are lacking here.

Further, in Chevron, the regulatory agency had spoken through the enactment of administrative rules. Here, at best, certain officials with HHS have offered their opinion but no administrative rule enacted by HHS supports the conclusion that the public is not entitled to reasonable access to the bids here in question.

The opinion expressed by the employees of HHS upon which BHK relies states that providing OPG with BHK's procurement policy is adequate compliance. (Frank Marfia's 9/01 ltr, APX p. 221a; R. Cirrincione's ltr., 4/02, APX p. 229a; K. Willmoth 5/02 ltr, APX 230a). The Court of Appeals properly rejected this view since it is not clear that these letters and the opinion therein expressed constitute a definitive ruling of HHS and, more importantly, this interpretation is clearly wrong. (COA Opinion dtd 11/4/03, APX 169a at 177a-178a).

First, there is nothing in the record compiled to date which suggests that the view expressed in the above-mentioned letters is anything more than the personal opinion of the authors.

The letter of Franklin Marfia dated September 28, 2001, makes no reference to the statute with which we are concerned. Further, his letter was not submitted to OPG.

Likewise, the letter of Rosario Cirrincione, dated April 2, 2002, does not address 42 USC §9839(a) and the letter of Kay Willmoth, dated May 22, 2002, was, likewise, not submitted to OPG or its counsel.

These letters do not claim to be a definitive ruling of HHS and there is nothing in law which requires OPG to seek a final determination from HHS prior to asserting at law its right to reasonable public access to the books and records of the Head Start agency as promised by statute.

Even if the HHS authors mentioned above did have the authority to speak for HHS, the interpretation which they provided is not entitled to deference because it is clearly wrong. In its statement to this effect, the Court of Appeals is plainly correct. 42 USC §9839(a) requires that BHK provide reasonable public access to its books and records pertaining to the use of its funds. Providing a copy of BHK's procurement policy is a far cry from providing reasonable public access to books and records involving the use of the funds entrusted to the agency. The obvious intent of Congress in the enactment of this statute was to provide for public oversight in the expenditure of public monies by a Head Start agency. Delivery of a copy of the agency's procurement policy abjectly fails to fulfill this objective. The statute refers to "books and records of agency involving the use of funds". Thus, the grant of reasonable public access extends beyond statements of policy. If Congress had intended that public disclosure of policy was sufficient, it could have, and would have, said so.

BHK's Claim of Tangential Use of Head Start Funds.

In its Brief, BHK suggests that Head Start funds were not used or may have been used only tangentially in the purchase of office furniture involved in this dispute.[1] These representations are at least curious given the fact that BHK refused to answer an Interrogatory which sought the source of the funds used to make the subject purchase. (Interrogatory No. 4, Plaintiff's Interrogatories to Defendant and Request for Production of Documents, dtd 7/30/01, APX 1b) Instead of responding to this straightforward Interrogatory, BHK sought and obtained a protective order which sheltered it from the obligation to respond. (Order for Discovery, dtd 9/28/01, APX 4b) It is quite inappropriate for BHK to now claim that the purchase was of a "general fund" type expenditure or that Head Start funding was only "tangentially" involved as an excuse for non-disclosure.

Exhaustion of Administrative Remedies.

BHK claims that this Court lacks subject matter jurisdiction because OPG failed to exhaust administrative remedies. BHK Brief p. 25. Exhaustion of administrative remedies is generally required before courts may assume jurisdiction. The principle of exhaustion of administrative remedies applies when the claim can originally be brought only before an administrative agency. Rinaldo's Construction Corp v Michigan Bell, supra, at p. 71, footnote 7 citing Attorney General v Diamond Mortgage, supra, at p. 613. There is no applicable principle of law which suggests that the claim of OPG for reasonable access to a Head Start agency's books and records can originally be brought

[1] BHK Brief p. 21 "The purchase of office furniture was a 'general fund' type expenditure."; BHK Brief p. 25 "The expenditure at Issues was not Directly Related to Head Start funding...."; BHK Brief p. 30: "The purchase and the cost of office equipment or furniture tangentially relates to the receipt of any Head Start payments from the federal government."

only before an administrative agency. In fact, no administrative procedure exists whereby OPG might assert the claims it has brought in this action.

It seems obvious that before the exhaustion of remedies doctrine may be asserted as a challenge to jurisdiction, an administrative remedy must exist. As stated by the court in Michigan Supervisor's Union OPEIU Local 512 v Department of Civil Service, 209 Mich App 573 at 576-577; 531 NW 2d 790 (1995): "...it is well settled that where an administrative grievance procedure is provided, exhaustion of that remedy is required before the Circuit Court can review the case." (Further citations omitted.) (emphasis added)

No administrative process for appeal exists under 42 USC §9839(a). This appears to be conceded by BHK. See BHK Brief p. 15: "42 USC §9839(a) does not expressly contain guidelines or a direct right to appeal administrative type decisions."

The only administrative remedy provided under HHS rules is limited to those matters involving the rejection, termination, reduction, or suspension of a Head Start agency's application for funding. These matters are not at issue here.

In the absence of available administrative remedy, there can be no rational claim of a failure to exhaust a remedy which does not exist.

The statute under which the present matter has been brought is directed to Head Start agencies, including BHK. Under the facts here presented, there is no requirement that OPG have named HHS as a defendant. BHK made no effort to add HHS as a party and for good reason: the statute which we are concerned imposes a duty upon BHK and not upon HHS.

III. A PRIVATE CAUSE OF ACTION IS PROVIDED BY IMPLICATION UNDER 42 USC §9839(a) IN THAT A RIGHT IS EXPLICITLY GRANTED TO THE PUBLIC AND NO ADEQUATE MEANS OF ENFORCEMENT OF THAT RIGHT OTHERWISE EXISTS.

The black letter of 42 USC §9839(a) grants the public a right of reasonable access to the financial books and records of a Head Start agency. This right was given to provide the public with the means to verify the honest application of its tax monies. This is not an insignificant right. There is no better or more cost effective means of assuring adherence to our professed principles of fairness, honesty and openness in government than to allow the public a means of independent verification that those principles are being applied. Recognition of this fact is the foundation of the Freedom of Information of Act which explicitly declares this public policy:

> "It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." (MCL 15.231(2)).

Even though BHK is a private, non-profit corporation, it is performing a governmental function and is spending taxpayer dollars as a Head Start agency. Since private, non-profit corporations are explicitly authorized by act of Congress to serve as Head Start agencies, Congress also wished to provide public accountability in the discharge of this function by such entities.

42 USC §9839(a) contains no explicit provision for its enforcement but Michigan law has long held that a private cause of action may be inferred from the fact that no other adequate means of enforcement exists. Bell v League Life Ins Co, 149 Mich App 481 at 483; 387 NW2d 154 (1986).

If a Head Start agency is able to deny reasonable public access to its books and records involving use of funds entrusted to it, 42 USC §9839(a) becomes an empty promise. It should not be assumed that Congress intended that the right it granted to the public should so easily be rendered a nullity.

The purpose for providing public access to the financial books and records of a Head Start agency is to encourage efficiency and discourage waste, fraud, bias and nepotism. 42 USC §9839(a).

In the absence of a an explicitly granted right of action, it is fair to infer that a private right to obtain reasonable public access was intended to fulfill this congressional purpose. This private right of action promotes and fosters program fairness and efficiency since administrators will be more inclined to devote scrupulous attention to these issues since a failure to do so may be exposed to public scrutiny and consequent embarrassment or discipline.

It is also important to recognize the strict limitations on the private right action inferred under 42 USC 9839(a). Action under this section can only result in fulfillment of the statutory promise: reasonable public access to financial books and records. The statute makes no suggestion that money damages, other compensation or even the recovery of actual costs is possible. Thus, there is little, if any, financial incentive to pursue reasonable public access under 42 USC 9839(a) through legal action. Under the Michigan Freedom of Information Act (MFIOA) there is sometimes an opportunity to recoup compensatory damages, limited punitive damages and actual reasonable attorney's fees, costs and disbursements. MCL 15.240(4) and (5). None of these items are recoverable under 42 USC 9839(a). Thus, BHK's assertion that the lower court's

interpretation of 42 USC 9839(a) "opens the flood gates to litigation for disclosure of records or documents" is not supported by the economics of the undertaking. (BHK Brief p. 25) Neither is this assertion supported by history since neither OPG, BHK nor the Court of Appeals have found any other case where 42 USC 9839(a) has been considered.

At pages 10, 12, and 13 of its Brief, BHK suggests that Gillis v HHS, 759 F 2d 565 (CA 6, 1985), supports its argument that a regulatory provision granting public access to records does not carry with it a private cause of action for enforcement. Gillis v HHS, supra, involved the enforcement of the Hill-Burton Act, 42 USC 300s-6, which pertains to the obligation of certain hospitals to provide reduced cost services. The regulation providing public access to records in Gillis is 42 CFR 124.605(b):

> "A facility shall maintain, *make available for public inspection* consistent with personal privacy, and provide to the secretary on request, any records necessary to document its compliance requirements with this sub-part in any fiscal year, including documents from which information required to be reported under paragraph (a) of this section was obtained." (Emphasis added.)

While the Gillis court did not find an implied cause of action against HHS, it did find that a private cause of action existed against the involved hospitals:

> "The regulations provide that the reporting and records maintenance requirements imposed on participating facilities run to the public as well as the secretary. 42 CFR §124.510(b)(1) and 124.605(b)(1). Hence, they are effectively subject to enforcement by means of private suits brought directly against facilities." (Gillis v HHS, supra, at p. 577.)

Thus, the Gillis decision suggests that although OPG may not have an implied right of action against HHS, it clearly does have a private right of action against BHK.

The duty imposed by law to provide public access runs to "a facility" in Gillis and to the Head Start agency, BHK, here.

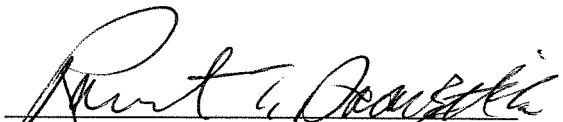
Congress explicitly vested a right in the public to reasonable access to the financial books and records of a Head Start agency. In so doing, Congress could not have intended that the public's right would be mere window dressing.

CONCLUSION

Upon consideration of the issues here presented, the Office Planning Group, Inc., respectfully requests that this Court affirm the lower court's decisions.

Respectfully submitted.

TERCHA & DAAVETTILA



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Date: September 21, 2004