For Opinion See 2006 WL 3230162, 445 F.Supp.2d 400, 2006 WL 453215, 414 F.Supp.2d 469

United States District Court, S.D. New York.
M.K.B., O.P., L.W. M.A., Marieme Diongue, M.E., P.E., Anna Fedosenko, A.I., L.A.M., L.M., Denise Thomas, and J.Z., on their own behalf, and on behalf of their minor children and all others similarly situated, Plaintiffs,
v.
Verna EGGLESTON, as Commissioner of the New York Human Resources Administration, Robert Doar, as Commissioner of the New York State Office of Temporary and Disability Assistance, Antonia C. Novello, as Commissioner of the New York State Department of Health, Defendants.
No. 05 Civ 10446 (JSR).
May 5, 2006.

City Defendant's Post Hearing Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction

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PRELIMINARY STATEMENT

Defendant Verna Eggleston, as Commissioner of the Human Resources Administration (“HRA”), (the “City Defendant”), submits the within Post Hearing Memorandum of Law in further opposition to the plaintiffs' motion for a preliminary injunction and Class Certification. The Court is also respectfully referred to the accompanying Supplemental Declarations: the Supplemental Declaration of James Whelan, dated May 5, 2006 (“Supp. Whelan Dec.”); the Supplemental Declaration of Michele Shepard, dated May 5, 2006; (“Supp. Shepard Decl.”); the Supplemental Declaration of Elaine Whitty, dated May 5, 2006 (“Supp. Whitty Decl.”); and the Supplemental Declaration of David Lock, dated May 5, 2006 (“Supp. Lock Dec.”) which address certain developments since the close of the hearing, and are offered to supplement the record.

The record establishes that plaintiffs' request for a preliminary injunction should be denied as they have not met the heightened standard for a mandatory preliminary injunction. Additionally, the application for class certification should be denied as plaintiffs have not established that they meet the requirements for class certification pursuant to Fed. R. Civ. Proc. 23.

STATEMENT OF FACTS

The facts are fully set forth in the testimony of the hearing on the preliminary injunction before this Court on March 14, 2006 - March 24, 2006 and the City defendants' declarations and supplemental declaration filed in opposition to the plaintiffs' motion for a preliminary injunction and the supplemental declarations of Michele Shepard, James Whelan, Elaine Witty and David Lock which accompany this post hearing Memorandum of Law.

POINT I

PLAINTIFFS HAVE NOT MET THE BURDEN OF PROOF NECESSARY TO ENJOIN GOVERNMENTAL ACTION AND THEIR MOTION FOR A PRELIMINARY INJUNCTION INCLUDING THE ADDITIONAL RELIEF REQUESTED POST HEARING FROM THIS COURT SHOULD BE DENIED IN ITS ENTIRETY

A. The Plaintiffs Must Meet a Heightened Standard In Order to Obtain Mandatory Injunctive Relief Against the City Defendant

Plaintiffs are seeking a mandatory preliminary injunction against the City defendant but have not established that they have met the extraordinarily high standard for the issuance of such an injunction. *See* *Mastrovincenzo v. The City of New York, 435 F.3d. 78 (2d Cir. 2006)*. By asking the Court to compel government action by directing the City defendant to perform the tasks that are listed in their post hearing brief and in the complaint, the plaintiffs are seeking mandatory injunctive relief, as defined by the Second Circuit. "A mandatory injunction, in contrast [to a prohibitory injunction] is said to alter the status quo by *commanding some positive act ...*" A prohibitory injunction seeks to maintain the status quo pending a trial on the merits. *Mastrovincenzo, 435 F.3d 78, 90*.

"A district court may enter a *prohibitory* preliminary injunction staying 'government action taken in the public interest pursuant to a statutory or regulatory scheme' only when the moving party has demonstrated that (1) absent injunctive relief, he will suffer 'irreparable injury,' and (2) there is 'a likelihood that he will succeed on the merits of his claim' " " '[A] preliminary injunction is an extraordinary remedy that should not be granted as a routine matter.' *J.S.G. Trading Corp. v. Tray Wrap, Inc., 917 F.2d 75, 80 (2d Cir. 1990)*. To prevail on a motion for a preliminary injunction, a plaintiff ordinarily must demonstrate: (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) 'sufficiently serious questions' on the merits and a balance of hardships 'tipping decidedly' in the movant's favor. *Brooks v. Giuliani, 84 F. 3d 1454, 1462 (2d Cir.)*, cert. denied 519 U.S. 992 (1996) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)*.

However, a party moving for a mandatory injunction which alters the status quo by commanding some positive act must meet a higher standard. *Tom Doherty Assocs., Inc. v. Saban Entm't., Inc., 60 F.3d 27, 33-35 (2d Cir. 1995)*. To obtain a mandatory injunction, the moving party must demonstrate "a greater likelihood of success on the merits," or that it will suffer extreme or very serious damage if denied preliminary relief. *Mastrovincenzo v. The City of New York, 435 F. 3d 78 at 89,* citing *Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F. 3d 27, 34 (2d Cir. 1995)*; *Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)*; *Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985)*; *D.D. v. N.Y.C. Board of Education,* 03 CV 2489, 2004 U.S. Dist LEXIS 5189, *72-73, (E.D.N.Y. March 30, 2004). The Court is also respectfully referred to "City Defendant's Memorandum of Law In Opposition to Plaintiffs' Motion For a Preliminary Injunction And Class Certification," dated January 25, 2006 ("City Def. Op. Mem."), at Point I.

"A heightened "substantial likelihood" standard may also be required when the requested injunction (1) would provide the plaintiff with "all the relief that is sought and (2) could not be undone by a judgment favorable to defendants on the merits at trial. *Mastrovincenzo,* 435 F.3d at 90." Additionally, injunctive relief is not warranted if the defendant has initiated efforts to substantially comply with statutory mandates, and the Court may consider extrinsic factors and the defendants' activities and efforts in determining that plaintiffs have not demonstrated a clear or substantial likelihood of success. *See D.D. v. N.Y.C. Board of Education,* 03 CV 2489, 2004 U.S. Dist LEXIS 5189 (E.D.N.Y. March 30, 2004)

All of the preliminary relief sought by the plaintiffs is mandatory in nature. In the original motion for a preliminary injunction they sought the following mandatory relief, in sum: (1) the establishment of a procedure for plaintiffs counsel to contact a liaison to handle erroneous assessments of immigrant eligibility(¶A); (2) a process to address the entry of the correct ACI indicator in POS for all class members who apply for public benefits and maintain immigration documentation submitted by class members (¶B); (3) development of a plan to identify POS problems and a method and timeline to fix them; (4) issuance of certain notices (5) make certain referrals for disability Medicaid determinations; (6) assist class members applying for federal food stamps in applications for social security benefits.[FN1]

FN1. In their complaint Plaintiffs ask the Court to issue "a preliminary injunction as requested in plaintiffs' Order to Show Cause submitted in conjunction with [their] complaint." Class Action Complaint at p.95 ¶3. This Court refused to sign plaintiffs' proposed Order to Show Cause, and plaintiffs proceeded instead by Notice of Motion.

Plaintiffs' post hearing demand for relief contains additional requests which are explicitly mandatory in nature. Plaintiffs now ask the Court to direct the City to:
1. issue a correct and comprehensive policy directive bulletin regarding the need for Social Security numbers for federal and State public benefits programs for all categories of immigrants affected by this case.
2. correct all policy directives that relate to immigrant eligibility for benefits and that omit reference to the eligibility of the I-130 group of immigrants;
3. issue a policy bulletin on PRUCOL eligibility for benefits and train;
4. include the cases concerning eligibility of green card holders who have had their green cards for less than 5 years to the immigrant liaisons, or in the alternative to conduct trainings regarding the eligibility of immigrants in this category and the number of years of qualified status they have accrued;
5. conduct trainings on how to open cases for aliens directly in WMS, focusing on multi-suffix cases;
6. issue a policy directive or bulletin and conduct training regarding the issuance of a notice of acceptance or denial to mixed immigrant/citizen households where only some household members may be entitled to benefits;
7. refer certain cases to immigrant liaisons or alternatively conduct training;
8. revise POS to add information to POS in the initial menu on immigrant statuses; eliminate a question in POS regarding prima facie notices; revise list of PRUCOL documentation; address the issue of the number of years a green card holder in qual-

ified status has accrued.

Plaintiffs' Post Hearing Memorandum of Law In Support of Motions for Preliminary Injunction and Class Certification (“Pl. Post Hearing Mem.”) at pp. 42-46.

B. Plaintiffs Have Failed To Prove That They Will Suffer Extreme Or Very Serious Damage If Denied Preliminary Relief

Plaintiffs are not entitled to any relief beyond that which the City has implemented voluntarily and is continuing to implement. The City has or is in the process of voluntarily providing plaintiffs with essentially all of the relief they have sought. (See the discuss *infra* at Subparagraph D. As noted in the Court's Memorandum Order dated February 16, 2006, granting “provisional relief necessary to avoid irreparable harm,” the relief granted was “essentially on consent.” Thereafter the City implemented, and is in the process of implementing, additional improvements to its computer system (POS), new policy directives and bulletins clarifying the procedures required to timely and accurately process immigrants' claims for public benefits, training of all personnel involved in making determinations of immigrants' eligibility for benefits, creation of a special immigrant liaison to serve as a specialist in immigrant eligibility issues, and creation of an immigrant eligibility help desk within the HRA Office of Refugee and Immigrant Affairs (“ORIA”).

Moreover, with respect to those processes and procedures which it could not implement without clarification or instructions from the State, it has sought and continues to seek such “clearances” so that it can implement the improvements to facilitate the delivery of benefits to the putative class.

The evidence at the hearing before this Court does not disclose a single instance in which any HRA employee sought to deny benefits to an eligible applicant. Moreover, the plaintiffs actually complained that many HRA employees used “work arounds” to bypass roadblocks in the State's mainframe computer system “WMS” in order to allow benefits to be delivered. To the extent that these ad hoc measures were required, they do not constitute evidence of deliberate indifference to the rights of immigrant applicants; rather, they demonstrate a positive desire to deliver the benefits.

All of the evidence presented by plaintiffs was anecdotal, and at most, demonstrated that inherently complex alien eligibility rules and regulations were beyond the capacity of individual job center workers. On the other hand, more sophisticated workers, such as Sara Mathew, were able to obtain benefits for clients with the most factually complex cases, and in the face of inherent limitations in WMS. Moreover, although plaintiffs' counsel started working on this “impact litigation” in September, 2004, and solicited clients through advocacy groups, the universe of applicants who actually suffered denial or delay in receipt of benefits is exceedingly small, and each named plaintiff or declarant, as well as subsequent introduced informal intervenors, has received the benefits to which she is entitled.

The actual and proposed allocation of resources by HRA to the concerns raised by counsel is more than adequate to provide relief for eligible immigrants who seek benefits, without further intervention of the Court. Although the City does not con-

cede that it is required to provide the additional relief sought by plaintiffs in their post hearing memorandum, it is, in fact, doing just that. The evidence at the hearing demonstrates that HRA issues policy directives (“P.D.'s)” and policy bulletins (“P.B.'s”), trains on them, and continues to train as issues come up, does “back to basics” training as refresher courses for all Job Center workers, and trains on updates and improvements to POS and to WMS.

POS is regularly updated across the board and where appropriate special updates are created. When plaintiffs' counsel raised legitimate issue with regard to POS and the policy directives underlying the POS instructions and procedures (only in the context of this litigation although they had been gathering their “evidence” for 14 months), Michele Shepard, POS chief designer, immediately set out to make corrections and updates to enable the Job Center workers to more accurately process immigrants' applications.

The picture of POS that emerged after the hearing was of a City designed “front end” application that delivers information to the State WMS system. For the most part it works well, and is compatible with the archaic State mainframe. There are instances where POS doesn't work or WMS doesn't work (such as multi suffix cases). In that case the workarounds are used to obtain benefits for applicants. These are not uncommon in the arcane world of immigrant eligibility. Those fixes that can be implemented are and will be implemented.

It should be noted that the parade of horribles that were presented to the Court were for the most part contained in declarations of plaintiffs' attorneys and their employees and that no true “emergency” existed which required such submissions after 14 months of preparation.. (Moreover, these attorney declarations which attest to the so called “facts” should be stricken from the record as improper advocate/witness testimony.) It is clear from the testimony that plaintiffs' counsels' interaction with HRA employees was designed more to “set up” this action than to obtain benefits for their clients. The evidence at the hearing, however, showed overall success on the part of HRA in delivering services to immigrants, as demonstrated by the small universe of aggrieved parties.

C. Plaintiffs' Have Not Demonstrated a Clear Or Substantial Likelihood of Success On The Merits

Plaintiffs' have not met their burden to show a heightened substantial likelihood of success on the merits. The testimony at the preliminary injunction hearing established that the City does not have a custom, policy or practice in violation of plaintiffs' constitutional or statutory rights as demonstrated in below and previously argued in the City Def. Op. Mem. filed in advance of the hearing. Additionally, plaintiffs do not have a clearly enforceable right to enforce the Food Stamp Act and regulations and Medicaid Act and regulations upon which they rely. The Court is respectfully referred to the discussion in the City Def. Op. Mem. in addition to the testimony discussed herein.

1. The Plaintiffs And Will Not be Able to Establish Monell Liability

Plaintiffs' have not met their burden to show a clear or substantial likelihood of success on the merits, or that they will suffer extreme or very serious damage if denied preliminary relief. *Matrovicenzo v. City of New York,* 435 F. 3d 78; *Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir. 1996); *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025 (2d Cir. 1985).' " *D.D. v. N.Y.C. Board of Education,* 03 CV 2489, 2004 U.S. Dist LEXIS 5189, *72-73, (E.D.N.Y. March 30, 2004).

Plaintiffs have not established liability pursuant to 42 U.S.C. §1983 by demonstrating that the City has a custom policy or practice which has caused plaintiffs' alleged injuries and that City defendant is deliberately indifferent to the constitutional or statutory rights of the putative plaintiff class. Instead, the record establishes that the City defendant:
• has issued and implemented policies and procedures including alien eligibility requirements for public benefits, consistent with the policy of the State defendants and with their approval;
• has an established policy and practice of regularly training its FIA Job Center workers each month on its policies and procedures which include alien eligibility requirements for public benefits;
• has developed and implemented a computerized software system (the "Paperless Office System" or POS) which is regularly utilized in the Job Centers as a front end application to the State WMS computer system, and which represents a significant improvement in processing applications;
• has established an Office of Immigrant Affairs which regularly provides information, guidance and training to FIA staff on issues concerning immigrant eligibility for public benefits and acts as an internal advocate in individual cases concerning immigrant eligibility for public benefits;
• has a variety of resources which are made available and are utilized by its FIA staff in dealing with questions including questions regarding alien eligibility for public benefits.

"[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents" under a respondeat superior theory. *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978) "[I]nstead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*. Plaintiffs must "identify a municipal 'policy' or 'custom' that caused their injuries," *Board of County Comm'rs. v. Brown,* 520 U.S. 397 (1997) (citing *Monell,* 436 U.S. at 694); "It is only when the 'execution of the government's policy or custom ... inflicts the injury' that the municipality may be held liable under §1983." *City of Canton v. Harris,* 489 U.S. 378, 385 (1989).

A claim of "policy" involves a "deprivation[] resulting from the decisions of [the municipality's] duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality," whereas a " 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Brown,* 520 U.S.at 403-404 (citing *Monell,* 436 U.S. at

690-691, 694). A § 1983 plaintiff must not merely "identify conduct properly attributable to the municipality"; the plaintiff "must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury." *Brown,* 520 U.S. at 404. Moreover, suing a government official in his official capacity is the equivalent of suing the government entity itself, so that the City defendant, Commissioner Verna Eggleston, may not be held liable in her official capacity without proof of an official policy or custom, as in *Monell. See Patterson v. County of Oneida,* 375 F.3d 206, 226 (2d Cir. 2004).

There are only "limited circumstances" in which allegations of a failure to train or supervise can be the basis of liability under §1983. *See City of Canton,* 489 U.S. at 387. These "limited circumstances" occur only where the municipality inadequately trains or supervises its employees, this failure to train or supervise is a city policy, and that city policy causes the employees to violate a citizens constitutional or statutory rights. *Id.* at 389-91; *Brown,* 520 U.S. 397. Plaintiffs' may prove a city policy or custom, as the Supreme Court has explained in *City of Canton,* by showing that the municipality's failure to train evidenced a "deliberate indifference" to the rights of plaintiffs as follows:

"We hold today that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to the deliberate indifference to the rights of persons with whom the police come into contact. This rule is consistent with our admonition that a municipality can be liable under §1983 only where its policies are the 'moving force' [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under §1983... "Municipal liability under §1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality -- a "policy" as defined by our prior cases -- can a city be liable for such a failure under §1983.

City of Canton, 489 U.S. at 388-89 (internal citations omitted).

Thus, the City defendant is not automatically liable under §1983 even if it inadequately trained or supervised its employees and those employees violated plaintiffs' statutory or constitutional rights. To establish a "deliberate or conscious choice" or such "deliberate indifference," plaintiffs must prove that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action. *See Brown,* 520 U.S. 39. As the Supreme Court explained in *City of Canton:*

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under §1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city "could have" done to prevent the unfortunate incident. Thus, permitting cases against cities for their "failure to train" employees to go forward under §1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities....

City of Canton, 489 U.S. at 391-92;

In *Ricciuti v. New York City Transit Authority,* 941 F.2d 119, 123 (2d Cir. 1991), the Second Circuit held that a municipal policy may be inferred from "evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights." In *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 128 (2d Cir. 2004) the plaintiff alleged that the police chief failed to supervise officers to prevent use of excessive force, and claimed that a failure to train officers in not using excessive force in making arrest constituted deliberate indifference within the meaning of *City of Canton and Walker v. City of New York,* 974 F.2d 293 (2d Cir. 1992). Plaintiffs' while relying upon the three pronged test in *Walker* for demonstrating deliberate indifference in the context of a failure to train claim, don't discuss or even mention the Second Circuit's later decision in *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113. In *Amnesty Am.* the Second Court required a plaintiff to prove that "a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' " and that "the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction." The Court held that in establishing deliberate indifference in the context of a failure to train claim, plaintiff's failure to offer any evidence as to the purported inadequacies of the Town's training program and the causal relationship between those inadequacies and the alleged constitutional violation was a basis for affirming the district court's grant of summary judgment. The Court stated:
City of Canton requires that plaintiffs establish not only that the officials' purported failure to train occurred under circumstances that could constitute deliberate indifference, but also that plaintiffs identify a specific deficiency in the city's training program and establish that that deficiency is 'closely related to the ultimate injury, 'such that it 'actually caused' the constitutional deprivation. [citation omitted]... Thus the Supreme Court emphasized in *City of Canton* that plaintiffs must establish that 'the officer's shortcomings resulted from ... a faulty training program' rather than from the negligent administration of a sound program or other unrelated circumstances.''

Amnesty Am., 361 F.3d at 129 - 130. The Court noted that its holding in *Walker v. City of New York* is not to the contrary, given that *Walker* case was dismissed at the motion to dismiss stage.. *Id.* at 130, n.10. Plaintiffs, here offer no evidence of a faulty training program on the part of the City defendant, and the evidence as to the City's training establishes the contrary proposition.

(a) *Notice*

There is not a shred of evidence that the plaintiffs' provided Commissioner Eggleston, herself, with notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' " and that "the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction."

Plaintiffs' base their argument on notice on the testimony regarding Reena Ganju's opinion that such notice was necessary. Plaintiffs argue that Ms. Ganju, an advocate attorney, placed the City defendant on notice of “the need for additional training regarding immigrant eligibility issues” because Ms Ganju, expressed her personal opinion and belief that additional training of so-called ADVENT workers was necessary on issues of immigrant eligibility for benefits in a letter to HRA's Deputy Commissioner for Domestic Violence Emergency Services, Cecile Noel which she also copied to Elaine Witty, the Director of HRA's Office of Refugee and Immigrant Affairs (“ORIA”). See Pl. Post Hearing Op. Mem. at p. 29.. However, the Court recognized during the hearing that such testimony is irrelevant (in the context of plaintiffs trying to elicit that senior staff at HRA would have been on notice of the need for additional training). During plaintiffs' counsel questioning of the City's Deputy Commissioner of the Family Independence Administration Office of Policy Procedures and Training, James Whelan, the Court noted that such notice would only be “that a particular advocacy group was taking a particular position.” (Tr. 1223 - 1225:19.) Further, even if Ms. Noel and Ms. Witty received such a letter from Ms. Ganju, according to Mr. Whelan's testimony, Ms. Noel does not deal with FIA job center applicants for eligibility but is “over domestic violence” advent workers who are not part of FIA and who report to Cecile Noel and are trained by her staff. (Tr. 1223:25 - 1224:16.) Ms. Witty also testified that her office does not, and is not responsible for making eligibility determinations.

(b) *Deliberate Indifference*

The evidence does not show that the City defendant is deliberately indifferent to any rights of the plaintiffs by failing to train or that its policies are the “moving force” [behind] any alleged constitutional or statutory violation. Instead, the evidence establishes that the City has an ongoing training program which includes training on immigrant eligibility issues in new hire training, on the job training, monthly training, and specialized training. Further, the City has issued policy directives (“PD”) and policy bulletins (“PB”) in accordance with and pursuant to the policies and procedures of the State defendants and has provided training on each of these.

The testimony of the Deputy Commissioner of the Family Independence Administration (“FIA”) Office of Policies and Procedures, James Whelan, established that the City has a custom, policy and practice of regular and ongoing training of its Job Center workers and supervisors and other staff (including its immigrant eligibility specialists) on various topics which include immigrant eligibility benefits and the issues raised in this litigation. Mr. Whelan also testified to the process that FIA utilizes to issue policies and procedures in accordance with and based upon the policies and procedures set forth by the New York State defendants in their Informational, GIS document or an ADM.

The FIA Office of Policy and Procedures consists of several divisions - the Office of Procedures, the Office of Training, the Office of Policy and Research and the Office of Logistical Support that report to Deputy Commissioner Whelan. (Tr. 1185: 18 - 24.)

Policies and procedures are developed by the New York State defendants and issued to the City defendant in the form of a State Informational (“INF”), ADM and/or GIS document. After an ADM, INF or GIS is issued, the FIA Office of Procedures will develop a policy bulletin (“PB”) or policy directive (PD) based on the State document which will nearly mirror the State INF, ADM or GIS. For example, when the State defendant OTDA issued its alien eligibility desk guide, in the past, the City issued its equivalent of the state desk guide. Similarly when the State OTDA issued its INF on battered aliens' eligibility for benefits, in March 2006, and the State alien eligibility desk guide (State defs. Exhs. WW and XX) Mr. Whelan testified that in response his office would issue a policy directive incorporating the information contained in the informational letter. Based on the alien eligibility desk guide, the City would issue its alien eligibility desk aid and when the procedure is completed train all job center staff on the completed policy directive. (Tr. 11:22 - 12:13; 12:23 - 13:13.)

Policy directives are comprehensive documents that could cover a variety of policy matters relating usually to one issue. A policy bulletin is generally a shorter document than a policy directive and less comprehensive. The Office of Training is responsible for developing curricula for training around each PD or PB and conducting the training. (Tr. 1188:6 - 20; Tr. 1192:16 - 22;)

James Whelan testified to a system whereby over 4,000 workers were trained each month. Trainers from a centralized training unit train center based trainers, who are stationed in job centers. Center based trainers then train all job center workers, each month. (Tr. 1194:6 - 1195:18; 1204:3-10; 1247: 2 - 1248:7; City Def. Exh. HHHH at C15784 - C15787.) Sara Mathews, Administrative Assistant to the Director of the Bay Ridge Job Center (a center which services a large immigrant population) testified regarding the extensive training which is given each month to Job Center personnel who are required to attend, and the resources available to job center workers. (Tr. 3/24/06 1306:13 - 23; 1308:5 - 1311:7.)

Every month in a job center in addition to training on the new policy bulletins and policy directives a topic is selected which will be reinforced with staff through training known as “Back to Basics.” (Tr. 1279:19 - 24.) The topics for back to basics training are determined in a variety of ways. As James Whelan testified:

Q. How are those topics chosen?

A. In a variety of ways. They could be something that either a Pert audit, or FIA office of operations have determined this is something they would like to see retrained or that they think there is a weakness or staff needs a refresher. There is no formal path or something to be chosen as back to basic. It could be a request met by FIA operations or requests from another part of FIA or could be based on Pert audit or something Trainings has decided it would be good to retrain staff on.

(Tr. 1279:25 - 1280:9.)

In addition to the monthly training and back to basics training for FIA staff, HRA conducts new hires training. (Tr. 1279:14 - 18.) Outside of the training sessions

there are a number of additional resources which FIA staff members utilize in order to have their questions answered. Such resources include the FIA call center, the HRA intranet (where policy bulletins, policy directives, FIA forms, state forms, policy manuals are all posted on the web) and a message board which is accessed primarily by trainers for clarification of policy. (Tr. 1280:10 - 1281:4; 1282:11 - 15; Tr. 3/24/06 1308:5 - 1311:7; City Def. Exhs. HHHH; NNN; AAAA.)

Training has been conducted on a number of specific issues related to this litigation both as part of the monthly training, back to basics, new hires training and specialty trainings. Such trainings include alien eligibility for public benefits, PRUCOL, Social Security Numbers for Aliens, the New York State Welfare Management System (“WMS”), the City's Paperless Office System (“POS”), FIA's informational resources for Job Center staff including the FIA Intranet, message board, and call center, notice to clients, and lost or expired documentation.

Alien eligibility trainings have been conducted at various times in the past particularly after changes in legislation regarding immigrants' eligibility (or ineligibility) for food stamps. (Tr. 1220:6 - 1221:17.) The City has also issued policy directives and trained its FIA workers on food stamp eligibility for aliens, in accordance with and pursuant to State defendant OTDA's policy and procedures. (Tr. 1278:6 - 1279: 13; City Def. Exhs. QQQ, YYY, RRR and ZZZ.) Staff has been trained and retrained on these and other issues. (Tr. 1223:17.)

According to James Whelan, additional training on PRUCOL's is planned and will be conducted after the implementation of the changes in POS that were the subject of Michele Shepard's testimony during the hearing. (Tr. 1234 15-20.)

As of the date of James Whelan's testimony a revised policy directive on Social Security numbers was in process and retraining on Social Security numbers for immigrants was planned for all of the 4000 workers at FIA job centers. (Tr. 1246:16-1247:4.) Since the conclusion of the hearing, a revised policy directive on social security was issued and training. will be conducted in accordance with the HRA's policy to train on all PD's. (*See* Supp. Whelan Decl.). Workers have been trained on the Social Security Administration's requirements for Social Security numbers or the necessity or not of a Social Security number for benefits, in accordance with State defendants' policies and procedures as they have evolved. (Tr. 1245:21 - 1246:10; 1273:2 - 12; 1273:16 - 1276:21; 1277:18 - 1278:5; City Def. Exhs. BBBB; CCCC; NNN; DDDD.)

The WMS software has been the subject of policy directives and is trained periodically and in particular as it relates to Food Stamp eligibility and Public Assistance. (Tr. 1281:5 - 6.; City Def. Exhs. GGGG, IIII..) The City also provides training on turn-around documents (“TAD”). (City Def. Exh. FFFF.)

Disability Medicaid determinations were recently addressed in Policy Bulletin #06-33-ELI dated March 8, 2006 in order to provide Job Center staff with information regarding the circumstances under which a Disability Medicaid review is to be performed. (City Def. Exh. MMMM..

Policy Directive 03-66-ELI revision to lost and expired documentation was issued by FIA based upon State OTDA defendant's Informational Letter 03 INF 19, and also trained to FIA staff. (Tr. 1784:17-20; 1285:1-9; City Def. Exhs. VVV; WWW.) James Whelan described the relationship between a policy directive such as City Def. Exh. VVV and the State Informational upon which the particular policy directive is based, such as 03-Inf-19 (City Def. Exh. WWW) as one in which the FIA policy directive tracks and mirrors the State informational. (Tr. 1286: 15 - 18.)

The record of the hearing is replete with testimony of the extensive policies and procedures issued in regard to every issue in this litigation. Additionally, the record establishes the custom, policy and practice of HRA to engage in regular, monthly training of all its FIA staff, and to provide training to new hires, training on special topics, and back to basics training as well. Additionally, Deputy Commissioner Whelan has described efforts at quality control, and review and a system whereby topics that require further attention are discussed among staff, brought to the attention of HRA's Office of Policy and Procedures and are the subject of further training and retraining.

The largely anecdotal evidence that the plaintiffs' have presented of their perceptions that workers did not understand immigrant eligibility rules, oftentimes based upon observations reported to an individual who testified (such as Reena Ganju) does not negate or undercut in any way the extensive policy and procedures of the City defendant and its extensive training of FIA workers.

Plaintiffs' hearsay accounts are belied by the testimony of Sarah Mathews, a supervisor at a busy Brooklyn Job Center with a large immigrant clientele. Ms. Mathews is knowledgeable of the alien eligibility requirements for benefits and has been trained repeatedly on them. She also has been appointed one of the Immigrant Liaisons and is one of the so-called Job Center immigrant eligibility experts who will handle certain immigrant cases and will be a resource for other job center personnel in handling their cases. (Tr. 3/24/06 1311:19- 24.) Significantly, Ms. Mathews had a number of contacts with plaintiffs' counsel prior to the inception of the lawsuit, and in connection with their immigrant clients. (Tr. 3/14/06 1306:13 - 1307:6.) It is significant to note that after plaintiffs took Ms. Mathew's deposition but they did not call her as a witness for the hearing. And after listening to her testimony, we conclude that plaintiffs selectively presented workers testimony.

They called Mr. Sosa, who does *not* handle initial applications for immigrant eligibility at FIA. Rather, he is an ADVENT worker who does recertifications for individuals whose eligibility had previously been determined Similarly, Ms. Pierre, is involved with supervising a control unit that does data entry, and is not a supervisor of front line job center workers who are responsible for taking immigrant applications for benefits. The testimony from the plaintiffs as to particular job center workers not understanding the rules for immigrant eligibility are just observations reported by individual litigants who are themselves not trained in any way on the requirements and are based largely in part on what they have been told by their counsel. Also, the testimony of plaintiffs that to the extent it suggested that an applicant was not being handled correctly, is meaningless in the absence of a clear

statement of the documentation that was actually provided to the job center at the time of the initial application (both at the initial meeting and subsequent requests made of the applicant for original documentation (such as an I-130 receipt or I-360 prima facie notice or notice of approval) over the 45 days period during which the documentation is submitted and reviewed and the determination of eligibility for benefits is made. Additionally, as we know from the testimony of the POS director, Michele Shepard, given the specific menus in POS, isolated comments of individual workers as to a clients potential eligibility are meaningless to the suggested determinations made in POS and finally made in the State WMS computer system. A worker's comments have no effect on the information that is entered into POS through the applicant's responses to the specific questions set forth in the POS modules. (Tr. 805:13-19.)

Only where a municipality's failure to train its employees in a relevant respect evidences a “deliberate indifference” to the rights of its inhabitants can such a shortcoming be properly thought of as a city “policy or custom” that is actionable under §1983... “Municipal liability under §1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives” by city policymakers. Only where a failure to train reflects a “deliberate” or “conscious” choice by a municipality and such conduct is the moving force behind the statutory or constitutional violation sought to be enforced under Section 1983, and the record establishes defects in the training may this court find *Monell* liability. This record establishes that the plaintiffs' have not proven deliberate indifference on the part of the City defendant and do not have a substantial likelihood of success on the merits of their Monell claims. Plaintiffs have not proven that they have a clear and substantial likelihood of success on the merits of their failure to train claims, and a preliminary injunction should not be issued applying the rigorous standard for issuance of a mandatory injunction.

(c) The City Defendant, as the Agent of the State Is Not The Moving Force Behind The Injury, if any to Plaintiffs *or the Purported Plaintiff Class*

As the plaintiffs state “[a]s a matter of law and fact, HRA serves as the agent of State OTDA with regard to the food stamp and public assistance programs, and the agent of State DOH with regard to the Medicaid program.” Pl. Post Hearing Mem. pp. 30 - 31. Plaintiffs have argued to the Court that “Inasmuch as the local commissioners are agents of the State department they may not substitute their interpretations of the regulations of the State department for those of the State department or the State commissioner” citing the New York State Court of Appeals language in *Beaudoin v. Toia,* 45 N.Y.2d 343, 408 N.Y.S. 2d 417 (1978). Pl. Post Hearing Mem. at 31. Moreover, the testimony of the State witness, Paul Dichian, which plaintiffs quote to the Court, more than established that as to the entitlement to public benefits HRA was not free to implement or establish policy:

Q. [D]oes HRA have the authority to issue policy directives and bulletins without the approval of OTDA?

A. No.

Q. And if OTDA sets the parameters for inclusion within a specific class of persons entitled to benefits, does HRA have the authority to expand that category?

A. No.

(Tr. 728:7-13.)

To the extent that the injuries, if any, are caused by the State defendant's own policies and procedures, the City defendant may not be held liable for the implementation or interpretation of policies of the State which, by law, the City defendant must implement.. Accordingly, the City is bound to follow the requirements set forth by the State for administering public benefits to the plaintiffs and the purported plaintiff class and implement the policies of the State in accordance with the State defendants' own mandates to the City and the State defendants' interpretations of applicable law. The City defendant is not the moving force behind the injuries, if any to plaintiffs or the purported class, which have been caused by the State defendants' own policies and practices in the following areas, discussed below, over which the City has no control.

(i) *Social Security Number Requirements for Aliens*

Allegations that the State defendants policies and practices with regard to the requirements for Social Security numbers in connection with an application by an alien for public benefits do not comport with federal and/or state law are simply beyond the control of the City defendant who may not change these policies or implement different ones unilaterally. There is no question that the state regulations governing the requirements for social security numbers for immigrants are contradictory and appear irreconcilable. Paul Dichian testified as to the contradiction found in two state regulations: 18 NYCRR §351.2 and 18 NYCRR §369.2. The State defendants have not issued an updated INF, ADM, or GIS to address the issues concerning the requirements for a Social Security Number for aliens who are seeking public benefits. While Mr. Dichian testified that he had sent an e-mail and thereby informally communicated to FIA's Ivelia Cisco, a statement that an alien who would not be entitled to a Social Security Number through no fault of her own (based on her immigrant status) should not be denied public benefits, the regulations of the State OTDA belie Mr. Dichian's informal conclusion and expose the City defendant to potential liability for payment of benefits in contravention of the state regulations. (City Def. Exh. W; 18 NYCRR §351.2 and 18 NYCRR §369.2.) In fact, in the instance of M.E., the state defendant directed that the benefits to M.E. be terminated because she did not obtain a social security number. While the cross-examination of M.E. showed that she did not cooperate with the City's repeated requests for her to apply for a social security number and provide evidence that she had applied for one, the City did not require M.E. to obtain a social security number in order to begin the issuance of benefits to her. (City def. Exhs. E, F, G, I, K.)

After the hearing, the FIA developed the following Policy Directives which address the need for Social Security Numbers:

Policy Directive (“PD”) #06-09, Social Security Numbers for Non-Citizens, dated ex-

plains that “Furnishing a Social Security number (SSN) is a condition of eligibility for public assistance (PA), food stamps (FS) and medical assistance (MA). (PD#06-09 is annexed to the Supp. Whelan Decl. as Exhibit A.) Each member of a household who is applying for any of these programs must furnish, or apply for, an SSN.” This PD indicates that “when a lawfully admitted non-citizen applies for PA/NPA/FS but does not have an SSN, it must be determined whether or not the applicant is otherwise eligible before addressing the SSN issue.” The PD goes on further to give specific instructions on how to direct otherwise eligible applicants to apply for an SSN. See Supp. Whelan Decl. at Exh. A at pp. 1-2. The PD also indicates that “if the non-citizen is denied an SSN for this reason (non-citizen is without lawful immigration status or work authorization), do not request that s/he apply again until s/he has obtained lawful immigration status and or/or work authorization. *Id* at p. 4

Importance of Accurate Social Security Numbers in the Welfare Management System (WMS) was addressed in P.D. #06-10. (P.D. #06-10 is annexed to the Supp. Whelan Decl. as Exhibit B.) The P.D. states that “[a]s a condition of eligibility for public assistance (PA) and food stamps (FS) benefits, the applicant/participant and all members of the PA and/or FS household must have a valid SSN or show proof of having applied for one.” See Supp. Whelan Decl. Exh. B, p.1. This extensive P.D. addresses the required actions by Job/Model Centers/Non-Public Assistance Food Stamp Offices and their staff towards ensuring that all SSN discrepancies are appropriately addressed. In cases of non-citizens coded “B” (Certain Battered Aliens) and “O” (PRUCOL) where the SSN indicator is 3(Closed, Denied, or Suspended), staff is directed to review the case to determine the circumstances of denial. The P.D. further explains the necessary actions for the varying reasons for a denial. See Supp. Whelan Dec. at Exh. B, p. 6.

P.D. #06-09 is accompanied by Policy Bulletin (P.B.) #06-63, Denial of Social Security Numbers for Non-Citizens. P.B. #06-63 is annexed to the Supp. Whelan Decl. as Exhibit C. This P.B. provides staff with a clearance regarding applications for Social Security Numbers for non-citizens who have been deemed eligible for public assistance (PA) and/or food stamps (FS). The P.B. specifically addresses the many ways a non-citizen could be a qualified alien under the “B” and “O” categories. It further explains that the only responsibility for applicants in this category is to apply for an SSN. See Whelan Supp. Decl. Exh. C, p. 2.

(ii) *PRUCOL Status*

The Office of Procedures developed the proposed P.D., Project #1576, entitled Determining Qualified Alien Status for Battered/Abused Non-citizens and PRUCOL Eligibility. Project #1576 provides for guidance for those instances in which a noncitizen who has been battered or subjected to extreme cruelty by a spouse or parent, who is either a U.S. citizen or a Lawfully Permanent Resident (LPR may be considered a “qualified alien” for purposes of receiving public benefits. Noncitizens, who do not meet the “qualified alien” criteria may be eligible for public benefits if they are permanently residing under the color of law (PRUCOL). While plaintiffs have raised on numerous occasions the differing definitions by the State defendants on who is a PRUCOL as a basis for their claims that individual purported class members were not

properly classified as PRUCOL, the City defendant does not define who is or is not a PRUCOL and may not alter or conform the State defendant's differing PRUCOL definitions. Project #1576 is currently awaiting state approval.

(iii) *Multi Suffix cases, Alien Registration Numbers*

On February 28, 2006 The Office of Procedures published P.B. #06-31, Battered Immigrants and Immigrants who are Permanently Residing in the U.S. under Color of Law (PRUCOL). P.B. # 06-31 is annexed to the Supp. Whelan Decl. as Exh. E. This P.B. was released in an effort to "provide the Job Center staff with information regarding a new initiative to better serve immigrant applicants applying for Public Assistance (PA), Medicaid (MA) and/or Food Stamps (FS)." This P.B. describes the role of the immigrant liaison and when staff members should seek their help. It also notified staff of the deletion in WMS of the requirement to enter an alien registration number.

The testimony clearly delineated the State WMS computer system from the City defendant's POS system. The City defendant has no control over the State WMS system, unlike the control that it may exercise over its own POS system. The City was powerless to delete the requirement for an alien registration number from WMS. However, according to P.B. #06-31, the FIA staff was alerted that "effective April 1, 2006, the New York State Office of Temporary and Disability Assistance will remove from the Welfare Management System (WMS) the requirement for entering an Alien Registration Number in Element 381 of the Turn-Around Document (TAD) for children of applicants/participants with Alien/Citizenship Indicator (ACI) "B."

Much of the testimony of Rochelle Eisenstein centered on flaws in the State's WMS system whereby cases would "error out" or not pass edits in the State's computer system thereby delaying or in some instances preventing the opening of plaintiffs' cases or their addition to ongoing cases. The evidence showed that although some instructions were contained in the State's authorization of grants manual there were no explicit instructions on how to open a case in which there was a mixed household (one person entitled to benefits as an immigrant and the other entitled to different benefits as a citizen). Such cases proved unwieldy at best and could not be opened in the POS system. Additionally, when asked how to open such a case, the instructions from Rochelle Eisenstein differed from the instructions to which Michele Shepard testified. The record however, is clear that it is difficult to open such a case and that unless and until the State defendant issues clear instructions, the task for opening such a case will continue to pose challenges to job center workers. This is an issue over which the City defendant has no control as it is not the City's system that is at fault. (See, e.g. Tr. 3/24/06 7:3 - 15.). However, it should be noted that multi suffix cases are not limited to immigrant applicants only, and the total number of such cases in the system is approximately 1100.

Even if opening multi-suffix cases is challenging, Sara Mathews testified: that as she has become familiar with multi-suffix cases through training and through seeing more of those types of cases, she will be able to resolve them quickly and would be able to do so in her capacity as an immigrant specialist. (Tr. 3/24/06 1318:21 -

1319:5.)

(iv) *Disability Medicaid Determinations*

Disability Medicaid determinations were recently addressed in Policy Bulletin #06-33-ELI dated March 8, 2006 in order to provide Job Center staff with information regarding the circumstances under which a Medicaid disability review is to be performed. (City Def. Exh. MMMM.) The City defendant is here implementing existing State policy. Plaintiffs' however are urging the Court to change the policy of the State in regard to when a disability Medicaid referral will be made. The City defendant may not alter or change the State's policy and P.B. #06-33-ELI is based upon the State's existing policy in regard to Disability Related Medicaid determinations.

D. Injunctive Relief Is Not Warranted If The Defendant Has Initiated Efforts To Substantially Comply With Statutory Mandates

"A heightened "substantial likelihood" standard may also be required when the requested injunction (1) would provide the plaintiff with "all the relief that is sought and (2) could not be undone by a judgment favorable to defendants on the merits at trial. *Mastrovincenzo,* 435 F.3d at 90." Injunctive relief is not warranted if the defendant has initiated efforts to substantially comply with statutory mandates, and the Court may consider extrinsic factors and the defendants' activities and efforts in determining that plaintiffs have not demonstrated a clear or substantial likelihood of success. *See D.D. v. N.Y.C. Board of Education,* 03 CV 2489, 2004 U.S. Dist LEXIS 5189 (E.D.N.Y. March 30, 2004). As discussed below, given the substantial efforts and measures which the City Defendants have in place, or are in the process of implementing, plaintiffs' cannot demonstrate that they meet the heightened standard for clear and substantial likelihood of success.

Moreover, given the measures that have been implemented and that are in process, plaintiffs have not demonstrated that they will suffer extreme or very serious damage if denied preliminary relief. As discussed below: (1) the City voluntarily has undertaken measures prior to the preliminary hearing; (2) the City has complied with its obligations as further directed in a Memorandum Order of this Court, dated February 16, 2006, (3) the City has voluntarily undertaken and has implemented or is in the process of implementing measures that are fully responsive to the requests plaintiffs now make for additional preliminary relief. Accordingly, plaintiffs will not suffer extreme or very serious damage if denied preliminary relief. *Mastrovincenzo v. The City of New York,* 435 F. 2d 78 at 89, citing *Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F. 3d 27, 34 (2d Cir. 1995.)* In the absence of such a showing, they have not met their burden for the issuance of mandatory injunctive relief. *Id.; Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir. 1996); *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025 (2d Cir. 1985).

The City defendants have voluntarily undertaken a number of measures since the inception of this litigation which would obviate the need, if any, for preliminary injunctive relief. As set forth in the Declaration of Seth Diamond, dated January 24, 2006, filed prior to the hearing in opposition to plaintiffs' motion for a preliminary injunction and class certification, HRA voluntarily undertook to:

• Establish immigrant liaisons at each job center;
• To upgrade POS;
• To communicate with the State Defendants to clarify the City's authority to make eligibility determinations for disability related Medicaid where necessary to establish eligibility for Food Stamps;
• To issue a revised procedure on battered aliens and PRUCOLS and to conduct additional training on these two categories.

HRA has established immigrant liaisons at each job center and has conducted training for them. As set forth in the testimony of Michele Shepard at the hearing and in the Supp. Shepard Decl. substantial changes to POS are in process and will be completed by June 5, 2006. HRA, based on a communication with State defendants regarding disability related Medicaid has issued P.D. #06-33-ELI dated March 8, 2006 (City Def. Exh. MMMM.) consistent with that authority. As discussed above, and in the Supp. Whelan Decl., the Office of Procedures developed the proposed P.D., Project #1576, entitled Determining Qualified Alien Status for Battered/Abused Non-citizens and PRUCOL Eligibility, for which it is awaiting State defendant OTDA's approval. Once approved, and the P.D. then issued, it will be trained to all FIA Job Center staff.

By Memorandum Order of this Court, dated February 16, 2006, the City was ordered additionally to publish a revised Policy Bulletin on Disability Medicaid by March 8, 2006. The City complied fully in its issuance of PD #06-33-ELI dated March 8, 2006 (City Def. Exh. MMMM.) The modifications to POS directed by the Court in its Feb. 16th Order are included in the POS revisions discussed in the Supp. Shepard Decl and will be completed by June 5, 2006. Following the issuance of the POS revisions, the City defendant will conduct training on the revisions.

On February 28, 2006 the City defendant published P.B.#06-31, which not only describes the role of the new immigrant liaison and when staff should seek their help, but also informs staff of a change in the WMS requirement to enter alien registration numbers for certain immigrants. (City def. Exh. LLL; Supp. Whelan Decl.)

As discussed above, and in the Supp. Whelan Decl., the Office of Procedures developed the proposed P.D., Project #1576, entitled Determining Qualified Alien Status for Battered/Abused Non-citizens and PRUCOL Eligibility, for which it is awaiting State defendant OTDA's approval. Once approved, and the P.D. then issued, it will be trained to all FIA Job Center staff.

In response to item number 6 of the Court's February 16th Order, the City defendants have established an informal relief system in that HRA counsel has designated an Assistant Agency Counsel as an individual who may be contacted on behalf of plaintiffs or members of the proposed class whose eligibility has been erroneously assessed. The City defendant is in full compliance with the Court's February 16th Order.

In response to the Court's direction to the plaintiffs to identify what, if any additional relief they would like having heard the testimony of the City's witnesses including James Whelan and Michele Shepard as well as the other City witnesses, plaintiffs identified a limited list of additional items (see Pl. Post Hearing Mem. at pp. 42 - 46), most of which have been completed or are in process of being com-

pleted as follows:

1. Social Security number requirements: Specifically, the City has issued the policy directives as to Social security which are described above and in the Supp. Whelan Decl. and in accordance with its ongoing training of FIA staff has provided training on these P.D.'s.

2. Eligibility for benefits of battered qualified immigrants and PRUCOL immigrants: The battered alien and PRUCOL P.D. has already been submitted to the State defendant and is awaiting approval by OTDA. (Supp. Whelan Decl..) Once approved, it will be trained consistent with the process for FIA training which was described to the Court by James Whelan in his testimony.

3. Green card holders who have had their green cards for less than five years: The issue concerning Galina Rybalkov (a proposed intervenor) has been resolved through correspondence issued by the State defendant OTDA.. By letter dated March 28, 2006, from John. D. DiBari, Associate Attorney for OTDA to Deputy General Counsel for HRA, David Lock, HRA was informed that the issue concerning Galina Ryblakov should be resolved by adding the applicant's time as a parolee to the applicant's time as a legal permanent resident to determine the time in which Ryblakov has been a “qualified” alien. As the Court noted, Ms. Rybalkov “is the only one who fit [the] category” of plaintiffs' proposed class category of “green card holders who have had that status for less than five years.” (Tr. 3/24/06 1231:12 - 22.) However, the March 28th letter to HRA addressed the issue also as a general matter, whereby the State defendant advised that “the date that the applicant first obtains ‘qualified’ status (assuming the applicant continuously remains in a ‘qualified’ status) is the date that must be used for purposes of determining whether an applicant has met the food stamp alien eligibility requirement of five years in ‘qualified’ status. (A copy of the March 28, 2006 correspondence is annexed to the Supp. Lock Decl. as Exhibit A.)

As set forth in the accompanying declaration of Michele Shepard, changes have been made to the WMS system in order to preserve the earlier date of qualified status, workers will be trained on that change and the earlier date of qualified status will continue to be preserved in the POS system. (Supp. Shepard Decl. ¶¶ 7-8 and Exhs. E; F thereto.)

4. Training on opening cases on aliens in WMS: The City defendant requests that the State defendant issue specific direction on opening cases on aliens in WMS. The record supports the request in that the State defendants' authorization of grants manual [INSERT EXHIBIT NO.] admittedly does not contain specific directions on opening multi-suffix cases in WMS for aliens. HRA conducts periodic training on WMS and will include a segment on training on opening cases on aliens in WMS after issuance of the State directions as requested above. In the interim, the immigrant liaisons in each center have been trained and are one of the appropriate resources for questions (in addition to other HRA resources) including the help desk (both HRA and State), job center trainers, ORIA and OPPD and the HRA intranet. (Tr. 3/24/06 1319: 9 - 1319:5); Tr. 3/23/06 1205: 6 - 1207:1; Tr. 3/24/06 1228:16 - 1229:13; Tr. 03/23/06 1132:17 - 23.)

5. Issuance of Notices: The City has undertaken to reinforce the requirements to issue notice(s) of acceptance and/or denial of benefits and to amend POS to generate such notice. The record establishes that the City has issued and conducted training on P.D. #05-41-SYS, dated November 28, 2005, informing staff that the CNS system has been modified, effective November 21, 2005 so that "CNS will generate notices for case level denials for PA/FS [Public Assistance/Food Stamp] cases when both PA and FS are *denied at the same time* (the case status must be AP [applying] for both PA and FS) and on PA-only cases when PA is denied. (City Def. Exh. IIII at p. 7, Bates No. C15795; Tr.-3/24/06, 17:21 - 18: 21;.) Additionally, HRA issued and provided training on P.B.06-08-ELI/Registering all members of the mandatory filing unit in WMS, dated January 31, 2006, provided:
The purpose of this policy bulletin is to remind all staff that when an applicant applies for Public Assistance (PA), all members of the mandated filing unit must be placed in applying (AP) status for all three programs (PA, Medical Assistance (MA) and Food Stamps (FS)) in the Welfare Management System (WMS). This must be done even in instances where there is a clear indication that one or more members of the applying household (h/h) will not be eligible for any of the programs.

(City Def. Exh. KKK, at Bates No. C15662.) The effect of placing all members in applying status is that POS will now generate case level notices which will list applicants and the disposition of their applications (acceptance/denial) separately. (See Supp. Shepard Decl. at ¶¶ and Exh.[3/20/06 pd INSERT], thereto.)

6. Cases Not Handled by Immigrant Liaisons: The City defendant will provide training to all staff on battered qualified immigrants and PRUCOL immigrants after the State has approved the PD discussed in item 2 above. See item No. 1 above with regard to Social Security and Alien registration numbers noting that the City has provided training on Social Security and Alien Registration No. P.D.'s in accordance with its regularly scheduled training program for all FIA staff. Cases involving fair hearing compliance are handled by the fair hearing group, as described in the testimony of Sara Mathews, who provides supervision on fair hearing complaints and resolves each complaint through follow-up. (Tr. 3/23/06 1307:14 - 1308:4.)

7. POS revisions: The Court is respectfully referred to the changes to POS are described, in detail in the Supp. Sheppard Decl. submitted herewith. In sum, the changes that are requested by the plaintiffs are incorporated in the revisions to POS that Ms. Shepard describes in her supplemental declaration and in her testimony during the hearing.

POINT II

THIS ACTION SHOULD NOT BE CERTIFIED AS A CLASS ACTION PURSUANT TO FED. R. CIV. P. RULE 23

Plaintiffs are seeking class certification pursuant to Fed. R. Civ. P. 23 (a) and (b)(2) and (b)(3). The City defendant respectfully refers the Court to its discussion at Point II of the "City Defendant's Memorandum of Law In Opposition to Plaintiffs' Motion for a Preliminary Injunction and Class Certification.," dated January 25, 2006, on file with the Court. In addition, plaintiffs have not demon-

strated that they meet the requirement of Fed. R. Civ. P. Rule 23 (a) and the definition of the class is overbroad.

A. Plaintiffs Have Not Demonstrated That They Meet the Requirements of Rule 23(a)

Fed R. Civ. P. 23 (a) sets forth four prerequisites for class certification. Specifically, the rule provides that:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. Rule 23 (a).

The Supreme Court has emphasized that a class action may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. *General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982)*. The party seeking certification as a class bears the burden of demonstrating that all of the criteria of Rule 23(a) have been met; in the wake of *Falcon,* courts have been generally strict in the application of Rule 23(a) criteria. *Bishop, et al., v. New York City Dept. of Hous. Preservation and Development, et al., 141 F.R.D. 229, 234 (S.D.N.Y. 1992)*, citing *Rossini v. Ogilvy & Mather, Inc., 798 F. 2d 590, 597 (2d Cir. 1986)*.

Plaintiffs define the proposed class as:
All Affected Immigrants who are, have been, or will be eligible for State or federally funded public assistance, Medicaid, and/or food stamps, and who either (a) have been or will be denied public benefits in whole or in part; (b) had or will have public benefits discontinued or reduced; (c) have been or will be discouraged or prevented from applying for public benefits; and (d) have been or will be encouraged to withdraw an application for public benefits by a New York City job center because of a misapplication of immigrant eligibility rules.
For purposes of the foregoing paragraph, the term “Affected Immigrants” means (1) battered spouses and battered children of U.S. citizens or lawful permanent residents who are Qualified Aliens as defined in 8 U.S.C. §1641 (c); (2) their immigrant children or, in the case of battered children, their immigrant parents, provided that they too are Qualified Aliens as defined in 8 U.S.C. §1641 (c); (3) lawful permanent residents who have been in that status for less than five years; and (4) persons who are Permanently Residing Under Color of Law (PRUCOL).

Complaint, Request for Relief, ¶ 1, pp. 90-91.

As set forth below, plaintiffs have failed to demonstrate that the proposed class meets all of the requirements of Rule 23 for certification.

A. Plaintiffs Have Not Established that Joinder of all Members is Impracticable

Under Rule 23(a)(1), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if the class is so numerous that joinder of all members is impracticable ...." The determination of whether plaintiffs' meet their burden to show impracticability of joinder is a practical one which is not based merely on numbers and must be determined in the context of the particular litigation. "By its express language, Rule 23(a)(1) is not a numerosity requirement in isolation. The words of this test, 'the class is so numerous,' are immediately followed by the limiting phrase 'that joinder of all members is impracticable.' ... The practicability of joinder must be evaluated in light of the circumstances of the particular litigation." Conte and Newberg, *Newberg On Class Actions*, §3:3, p. 218 (2002).

Plaintiffs' rely heavily on the testimony of Reena Ganju to attempt to establish numerosity. They argue in their post hearing brief "that she represented 50 to 60 battered immigrant clients" applying to HRA for public benefits during her tenure at Sanctuary for Families which Ms. Ganju testified was "one of the largest immigration projects in the city that provide legal services to indigent battered women." (Tr. 474:21 - 475:2.) Despite the size of the Sanctuary immigration project, the 50-60 cases included referrals from domestic violence shelters and community based organizations that dealt with domestic violence populations, as well, and thereby represented a segment of the population which went beyond that of the Sanctuary immigration project. (Tr 475:3 - 14.) According to Ms. Ganju's testimony, not all of the 50 or 60 battered immigrants are members of the proposed class. Of the 50 to 60 battered immigrant clients that Ms. Ganju represented, she testified that "[t]here was one section of the population [she] served who had been previously denied [public benefits] or told they were ineligible and deterred from applying." The other section were people who "may well have fully known how to apply on their own." (Tr.:475:15 - 476:1.) Of the subset previously denied benefits, Ms. Ganju testified that "[a]l of them with [her] assistance ended up receiving benefits."

Plaintiffs have not put forth any evidence that joinder of the individuals is impracticable, and to the extent that they suggest that there are numbers beyond the group Ms. Ganju identified is simply speculative.[FN2] Certainly all of the individuals identified as being part of the section of 50-60 individuals who may be members of the proposed class are known to the plaintiffs counsel, as are the "24 class members" referenced by counsel in their brief. Moreover, in evaluating whether joinder is impracticable in the circumstances of this litigation, the Court should take note that plaintiffs' counsel solicited clients for this lawsuit beginning in September 2004 and still only came up with the segment that Ms. Ganju referenced in her testimony. Plaintiffs presume, without any evidence that future class members would be similarly situated to the named plaintiffs. This simply is not the case, given the facts of this litigation to date and the steps initiated by the City defendants to ameliorate any alleged problems. Moreover, the resources that currently exist to deal with immigrant eligibility issues appear to be adequate to the needs of this group, as Ms. Ganju testified that all of her individual clients received their benefits.

FN2. Plaintiffs argument that defendants are bound to proffer additional evid-

> ence on numerosity when plaintiffs' have failed to meet their burden to establish numerosity is illogical and would improperly shift the burden from the movant for class certification. Additionally any suggestion that the City defendant considers the matters at issue to be anything more than isolated cases readily capable of resolution within the existing parameters of relief available to individual claimants is simple wishful thinking on the part of plaintiffs' counsel.

B. Plaintiffs Cannot Establish Commonality and Typicality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. The commonality prerequisite and the impracticability of joinder requirement under Rule 23(a)(1) are interdependent. 1 Herbert Newberg, *Newberg on Class Actions* § 3-47 (3d Ed. 1992). "Consideration of the common questions issue requires an answer to the question: 'Common to whom?' Correspondingly, when one considers the impracticability of joinder, one necessarily perceives this issue with respect to the common questions raised for adjudication." *Id.* In other words, the "commonality" requirement "requires that a plaintiff show the existence of an aggrieved class of plaintiffs by showing that there are questions of law and fact common to the class." *Bishop,* 141 F.R.D. at 236. As the Supreme Court noted in *General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147 (1982):

Conceptually there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [the plaintiff] to bridge that gap, he must prove much more than the validity of his own claim.

Falcon, 457 U.S. at 157, n. 13; *see also Bishop,* 141 F.R.D. at 229.

A named representative plaintiff's claim is typical within the meaning of Rule 23(a)(3) if it arises from the same event, practice or course of conduct that gives rise to the claims of other class members, and is based on the same legal theory. *In re: Prudential Securities Incorporated Limited Partnerships Litigation,* 163 F.R.D. 200, 208-209 (S.D.N.Y. 1995), citing, *inter alia, In re: The Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir. 1992). However, "if a court must make highly fact-specific or individualized determinations in order to establish a defendant's liability to each class member, typicality will not be met..." 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.24 [4] (3d Ed. 1997). "[W]here there are particularly unique fact patterns, employment circumstances, or defenses with respect to a named plaintiff, the claims of that plaintiff may not be typical of the class, and he or she may be an inappropriate class representative." *Bishop,* 141 F.R.D. at 238; *Sheehan v. Purolator, Inc., et al.,* 103 F.R.D. 641, 652 (E.D.N.Y. 1984), *aff'd,* 839 F.2d 99 (2d Cir. 1988), *cert. denied,* 488 U.S. 891 (1988).

Moreover, the "satisfaction of this requirement may not be based on any conclusory assumption that the litigation involves inherent class claims..." 1 Herbert Newberg,

Newberg on Class Actions § 3-84 (3d Ed. 1992). Courts have noted that there is a wide gap between an individual who alleges a violation of his rights pursuant to an alleged policy of defendants to deny those rights, and the existence of a class of persons who have suffered the same injury. *See id.* at § 3-84 and nn. 216, 217.

Plaintiffs have simply failed to bridge the gap. The legal and factual issues that are relevant to a determination of whether an individual alien is entitled to public benefits abound are numerous and particular to the individual. To suggest that they are common to the class is merely to say that the same law and policy (which plaintiffs do not challenge as unconstitutional) is applied to each purported member of the class.. The crux of plaintiffs' argument is that the law is applied incorrectly (because there are instances when alien eligibility determinations are made incorrectly, in their view), and that in certain respects state policy, in their opinion, should be changed.

There is no issue that city defendant does not establish state policy and is bound to apply applicable federal and state law. Issues concerning the WMS system, or State Defendants' policies regarding the need for social security numbers for federal and state benefits, the definition of who is a PRUCOL, who should be referred for a disability Medicaid determination all concern State policies that are not within the purview of the City defendant to change.

The factual issues that arise in the context of each application for public benefits are unique to each application. Eligibility for public benefits depends in large part on the documentation an applicant provides (or fails to provide); the information an applicant provides (or fails to provide; when documentation or information is furnished by the applicant (and whether it is provided timely and at relevant times during the application process); the nature of the benefit sought, and compliance with all of the multitude of application requirements that may be wholly unrelated to an immigrant's status.

As the Court may appreciate from the testimony of each plaintiff, and the Job Center workers, the determination of whether an immigrant is eligible for benefits varies radically from applicant to applicant and is dependent on numerous factors that are not at issue in the litigation. The determination may turn on whether the applicant has cooperated in providing the requested information in a timely way; whether the applicant has submitted original documentation; whether an applicant has kept mandatory appointments (such as those for Child Support Enforcement); whether the individual has been truthful in representations to the agency in connection with an application for benefits.

In addition there are numerous individual circumstances in connection with issues raised in the litigation which would require minihearings even if one could categorize immigrants in a particular status. The testimony in regard to M.E.'s failure to cooperate in applying for a social security number and presenting proof that she had applied for one is one such example. Therefore in order to determine who would be a member of the class, the Court would have to conduct a minihearing to ascertain the precise reasons why a decision was made at the relevant time that the applicant

would be denied benefits, before any conclusion could be drawn that an individual would be a member of the proposed class -- an individual who had been or will be denied benefits in whole or in part because of a misapplication of immigrant eligibility rules.

As this Court noted, under circumstances such as these, denial of a motion for class certification is “obvious: the rights of the individual[s] ... vary radically and often require resort to complicated and hoary documents to make any kind of determination. Thus, ‘each of the Claimants' claims is based on facts specific to that Claimant’ and the ‘facts and legal and legal arguments are separate and distinct from one another.” See In re Worldcom, Inc., M-47 (JSR) 2005 U.S.Dist. LEXIS 9695, (S.D.N.Y.)

C. Plaintiffs Fail to Satisfy the “Adequacy of Representation” Requirement of Rule 23(a)(4)

Rule 23(a)(4) of the Federal Rules of Civil Procedure states that one or more members of a class may sue or be sued as representative parties on behalf of all only if the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). Of the four elements of Rule 23(a), it is widely agreed that adequacy of representation is the most important factor to be considered. *See In re: LILCO Securities Litigation,* 111 F.R.D. 663, 672 (E.D.N.Y. 1986) (citations omitted). The Court's obligation to examine a proposed class representative's adequacy is even more significant in light of the constitutional defect that attaches to the choice of an inadequate class representative. *See id.*

The inquiry into adequacy of representation examines both the plaintiff representatives and their counsel. As to the plaintiffs themselves, it is necessary to eliminate as far as possible the likelihood that the representative plaintiffs have interests antagonistic to those of the remainder of the class. *See id.; see also In Re: The Drexel Burnham Lambert Group, Inc., et al.,* 960 F.2d 285 (2d Cir. 1992); *Irene S. Lo Re, et al., v. The Chase Manhattan Corporation, et al.,* 431 F. Supp. 189 (S.D.N.Y. 1977); *Goodwin, et al. v. Louis LaPolla, et al.,* 589 F. Supp. 1423 (N.D.N.Y. 1984) (denying class certification where, among other defects, as to the issue of adequacy of representation, plaintiffs did not show an absence of potential conflicts of interest between the class members, nor did they show that their counsel was capable of representing the interests of the class). With respect to counsel, courts consider whether or not plaintiffs' attorneys are qualified, experienced and generally able to conduct the proposed litigation. *See Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968).

Here, both the representative plaintiffs and their counsel fail to meet the adequacy of representation requirement. To the extent that individual plaintiffs are active recipients of public benefits, their willingness to continue in a representative capacity has not been shown. Nor does the record contain adequate evidence that plaintiffs' understand the nature of the litigation and their duties as class representatives.

As to plaintiffs counsels' request to be class counsel, the City defendant incorpor-

ates by reference and renews its arguments in support of its motion to disqualify counsel in opposition to this class certification motion. The trial testimony of Reena Ganju demonstrated that this litigation was set up by counsel who advertised for clients through solicitations to advocacy groups and on the internet, long before the litigation was commenced. While seeking clients for the lawsuit, counsel for the plaintiffs engaged in repeated contacts with HRA staff, in a blatant effort to "set up" the facts that they would later argue to the Court, through their written attorney declarations filed in support of their motion for a preliminary injunction and class certification. Their lack of candor to the Court about when and how they came to represent the individual plaintiffs' is certainly a factor which should weigh heavily in this Court's determination of whether they would be adequate counsel for a class, in the event one were to be certified. Despite specific and repeated questioning by the Court, only days before Ms. Ganju testified at the preliminary injunction hearing did counsel for the City defendants learn that she continued to represent the first named plaintiff, M.K.B. after this action was commenced. While Ms. Saylor represented to the Court that Ms. Ganju was not employed by any of defendants' counsel, only on the date Ms. Ganju testified at the hearing did plaintiffs' counsel produce the retainer agreement between the New York Legal Assistance Group ("NYLAG") (one of the counsel representing plaintiffs in this lawsuit), and M.K.B. *which was signed by Reena Ganju on behalf of NYLAG.* For the Court to reward this marginal behavior by finding plaintiffs' counsel adequate under Rule 23 and granting counsels' request to be named class counsel would be inappropriate on the record before the Court.

D. Plaintiffs' Definition Of The Class Is Overbroad And Encompasses Members Of The Proposed Class Who are Members of the Class Certified in Reynolds v. Giuliani

"The definition of the class is of primary importance, since it 'enables courts to accurately determine whether the proposed class satisfied the other requirements of Rule 23.' " *Wright, et al. v. Giuliani, et al.,* No. 99 Civ. 10091, 2000 U.S. Dist. LEXIS 8322, at *28-29 (S.D.N.Y. June 14, 2000) (quoting 5 James Wm. Moore, et al., *Moore's Federal Practice* § 23.21 [3] (1999)), *aff'd on other grounds,* 230 F.3d 543 (2d Cir. 2000); *see also* 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1759-61 (2d ed. 1986) (explaining that the court must determine whether the definition of a class is workable prior to beginning its analysis under Rule 23). "In addition, defining the class identifies the persons who would be (1) entitled to relief, (2) bound by the judgment and (3) entitled to notice [if applicable]." 5 James Wm. Moore, et al. *Moore's Federal Practice* §23.21 [3] (1999). (A copy of the Wright v. Giuliani decision is annexed as Appendix A.)

The putative class should not be certified because the definition of the class is overbroad.

Plaintiffs' definition of the class includes within it members of the class certified in *Reynolds v. Giuliani,* 118 F. Supp. 2d 352, 293 (S.D.N.Y.). The *Reynolds* class is defined as a class consisting of "all New York City residents who have sought, are seeking, or will seek to apply for food stamps, Medicaid, and/or cash assistance at a Job Center." To the extent that the two classes are overlapping, the

Court would run the risk that the relief sought in this action would or may be in direct contravention of the permanent injunction, monitoring, and notice afforded the class in *Reynolds.* (*See* the Declaration of David Lock, dated January 24, 2006, and Exhibit C, thereto, which City defendant submitted in the instant. action in opposition to plaintiffs' motion for a preliminary injunction and class certification, and discussion in the City Defendant's Op. Mem. at pp. 11 - 15.) Additionally, plaintiffs seek to have future applicants included within the class without any cut-off for inclusion whatsoever. There would be no way to determine, who would be bound by the judgment.

Because plaintiffs have utterly failed to demonstrate the numerosity, commonality, typicality and adequacy of representation required under 23(a), they cannot meet the requirements of 23(b)(2). Where the class itself cannot be defined; where the members cannot be shown to be sufficiently numerous, where they do not share common issues of law or fact, plaintiffs cannot show that defendants have acted on grounds generally applicable to the class they have defined.

POINT III

GALINA RYBALKOV'S APPLICATION TO INTERVENE IN THIS CASE SHOULD BE DENIED

Plaintiffs seek to add Ms. Rybalkov as a plaintiff in this case, purportedly to represent a subclass consisting of lawful permanent residents who have been in that status for less than five years. The issue raised at the hearing with respect to Ms. Rybalkov was the failure to add together the time she had the immigration status as a parolee with the time she has been a lawful permanent resident. The import of the claim is that the combination of the two time periods will enable Ms. Rybalkov to obtain additional public benefits.

The issue concerning Galina Rybalkov has been resolved through correspondence issued by the State defendant OTDA.. By letter dated March 28, 2006, from John. D. DiBari, Associate Attorney for OTDA to Deputy General Counsel for HRA, David Lock, HRA was informed that the issue concerning Galina Ryblakov should be resolved by adding the applicant's time as a parolee to the applicant's time as a legal permanent resident to determine the time in which Ryblakov has been a “qualified” alien. As the Court noted, Ms. Rybalkov “is the only one who fit [the] category” of plaintiffs' proposed class category of “green card holders who have had that status for less than five years.” (Tr. 3/24/06 1231:12 - 22.) The March 28th letter to HRA addressed the issue also as a general matter, whereby the State defendant advised that “the date that the applicant first obtains ‘qualified’ status (assuming the applicant continuously remains in a ‘qualified’ status) is the date that must be used for purposes of determining whether an applicant has met the food stamp alien eligibility requirement of five years in ‘qualified’ status. (Supp. Lock Decl; and Exh. A, thereto.)

As set forth in Exh. E to the Suppl. Shepard Decl., changes have been made to the WMS system in order to preserve the earlier date of qualified status, workers will be trained on that change and the earlier date of qualified status will continue to be preserved in the POS system.

Accordingly, not only is there no case or controversy affecting, Ms. Rybalkov, there is no subclass facing potential damage to be represented. Ms. Rybalkov's application to intervene should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny plaintiffs' Motion for a Preliminary Injunction and Class Certification in its entirety.

M.K.B., O.P., L.W. M.A., Marieme Diongue, M.E., P.E., Anna Fedosenko, A.I., L.A.M., L.M., Denise Thomas, and J.Z., on their own behalf, and on behalf of their minor children and all others similarly situated, Plaintiffs, v. Verna EGGLESTON, as Commissioner of the New York Human Resources Administration, Robert Doar, as Commissioner of the New York State Office of Temporary and Disability Assistance, Antonia C. Novello, as Commissioner of the New York State
2006 WL 1793013 (S.D.N.Y.)

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