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 City Human Resources Administration; Robert Doar, as Commissioner of the New York State Office of Temporary and Disability Assistance; and Antonia C. Novello, as Commissioner of the New York State Department of Health, Defendants.

No. 05 CV 10446 (JSR).

January 30, 2006.

State Defendants' Memorandum of Law in Opposition to Motion for Preliminary Injunction And Class Certification.

Eliot Spitzer, Attorney General of the State of New York, Attorney for State defendants, 120 Broadway, 24th Floor, New York, New York 10271, (212) 416-8632.Robert L. Kraft, Assistant Attorney General of Counsel.

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of defendants ROBERT DOAR, as Commissioner of the New York State Office of Temporary and Disability Assistance (“State OTDA”), and ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health (“State DOH” collectively “State defendants”), in opposition to plaintiffs' motion for A preliminary injunction against the State defendants and for class certification. The Court should deny plaintiffs' request for a preliminary injunction against State defendants because, as discussed in Point I below, plaintiffs' claims against the State defendants would be barred by the Eleventh Amendment and various jurisdictional grounds, and thus plaintiffs would not likely even succeed in ultimately obtaining a similar permanent injunction against State defendants. Also, plaintiffs have not demonstrated that, in the absence of the sought-after preliminary injunction against the State defendants, plaintiffs would suffer irreparable harm. Similarly, the Court should decline to grant plaintiffs' request that it certify a class since, as discussed in Point II below, plaintiffs have not demonstrated the prerequisites for certification of the proposed class, in particular against the State defendants.

Submitted herewith are the Declaration of Robert L. Kraft dated January 25, 2006 (“Kraft Dec.”) with exhibits; the Affidavit of Linda LeClair sworn to January 24, 2006 (LeClair Aff.”) with exhibits; the Affidavit of Rochelle Eisenstein sworn to January 25, 2006 (Eisenstein Aff.”) with exhibits; the affidavit of Stephen Ptak (“Ptak Aff.”) sworn to January 25, 2006, with exhibits; and the affidavit of Pamela F. Hopkins sworn to on January 25, 2006 (“Hopkins Aff.”) with exhibits.

STATEMENT OF THE CASE

A. NEW YORK STATE PARTICIPATES IN FEDERALLY FUNDED ASSISTANCE PROGRAMS AND MUST COMPLY WITH ELIGIBILITY LIMITATIONS CONTAINED IN FEDERAL LAW

New York State participates in three programs that are wholly or partially federally funded: the Medical Assistance program codified at 42 U.S.C. § 1396 *et seq.* ("Federal Medicaid"), the Temporary Assistance to Needy Families program codified at 42 U.S.C. § 601 *et* seq. ("Family Assistance"), and the Food Stamp program codified at 7 U.S.C. § 2011 *et seq.* ("Food Stamps"). As their names suggest, these three federally funded programs address the need of individuals and families with low incomes and limited resources for medical assistance, cash assistance, and food stamp assistance. These federal programs require participating states to operate the programs in accordance with requirements found in federal statutes and regulations. *See* 42 U.S.C. § 1396a, 42 U.S.C. § 602, and 7 U.S.C. § 2020.

The Family Assistance program, the Medicaid program and the Food Stamp program each set forth certain requirements that an applicant must meet to be eligible for benefits under the respective federal program. The eligibility requirements include financial (income and resources) and non-financial (such as work rules) requirements. The application process for an applicant applying for Family Assistance, Medicaid Assistance and Food Stamps at a New York City Job Center is a joint process whereby a single interview is conducted for all three programs. However, as certain eligibility requirements are unique to each program, separate eligibility determinations must be made for each program.[FN1]

FN1. It is possible to apply for Federal Medicaid only, or for Food Stamps only. However, this lawsuit "does not challenge the policies or procedures at Medicaid-only and food stamp-only centers." Declaration of Elizabeth S. Saylor dated December 12, 2005 „ 4.

1. PROVIDING A SOCIAL SECURITY NUMBER IS A CONDITION OF ELIGIBILITY FOR FEDERALLY FUNDED BENEFIT PROGRAMS

States "shall require, as a condition of eligibility for benefits under [Federal Medicaid, Family Assistance and Food Stamps], that each applicant for or recipient of benefits under that program furnish to the State his social security account number (or numbers, if he has more than one such number), and the State shall utilize such account numbers in the administration of that program so as to enable the association of the records pertaining to the applicant or recipient with his account number." 42 U.S.C. § 1320b-7(a)(1), (b)1), (2), (4).[FN2]

FN2. Federal regulations applicable to the Federal Medicaid program provide that "[t]he agency must require, as a condition of eligibility, that each individual (including children) requesting Medicaid services furnish each of his or her social security numbers (SSNs)." 42 C.F.R. § 435.910(a). "If an applicant cannot recall his SSN or SSNs or has not been issued a SSN the agency must- (1) Assist the applicant in completing an application for a SSN; (2) Obtain evidence required under SSA regulations to establish the age, the citizenship or alien status, and the true identity of the applicant; and (3) Either send the application to SSA or, if there is evidence that the applicant

has previously been issued a SSN, request SSA to furnish the number." 42 C.F.R. § 435.910(e). Federal regulations applicable to the Food Stamp program provide that "[t]he State agency shall require that a household participating or applying for participation in the Food Stamp Program provide the State agency with the social security number (SSN) of each household member or apply for one before certification." 7 C.F.R. § 273.6(a). "For those individuals who do not have an SSN, ... an individual must apply at the SSA, and the State agency shall arrange with SSA to be notified directly of the SSN when it is issued. The State agency shall inform the household where to apply and what information will be needed, including any which may be needed for SSA to notify the State agency of the SSN. The State agency shall advise the household member that proof of application from SSA will be required prior to certification." 7 C.F.R. § 273.6(b)(2).

2. ALIEN STATUS AFFECTS ELIGIBILITY TO RECEIVE BENEFITS THROUGH FEDERALLY FUNDED PROGRAMS

Aside from the foregoing eligibility requirements that are applicable to citizens and aliens alike, Congress has enacted additional eligibility restrictions only applicable to aliens. *See* 8 U.S.C. § 1601 et *seq.* When enacting these provisions Congress provided that "[i]t continues to be the immigration policy of the United States that-- (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States." *See* 8 U.S.C. § 1601(2). New York State must apply these eligibility restrictions to alien applicants requesting Federal Medicaid, Family Assistance, or Food Stamps.

The first step when applying the federal alien eligibility restrictions is to determine whether the applicant is a "qualified alien" as defined in 8 U.S.C. § 1641. The term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is in one of two distinct groups. The first group consists of aliens who either entered the United States pursuant to certain provisions of law or remain in the United States pursuant to certain provisions of law. *See* 8 U.S.C. § 1641(b).[FN3] A second group of "qualified aliens" consists of certain battered aliens. See 8 U.S.C. § 1641(c).[FN4]

FN3. (1) an alien who is lawfully admitted for permanent residence ...,
(2) an alien who is granted asylum ...,
(3) a refugee who is admitted to the United States ...,
(4) an alien who is paroled into the United States ... for a period of at least 1 year,
(5) an alien whose deportation is being withheld ...,
(6) an alien who is granted conditional entry ...; or
(7) an alien who is a Cuban and Haitian entrant .... 8 U.S.C. § 1641(b), citations to other provisions of the Immigration Act omitted.

FN4. (c) Treatment of certain battered aliens as qualified aliens For purposes

of this chapter, the term “qualified alien” includes--
(1) an alien who--
(A) has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; *and*
(B) *has been approved or has a petition pending which* sets forth a prima facie case for--
(i) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act,
(ii) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) of the Act,
(iii) suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).
(iv) status as a spouse or child of a United States citizen pursuant to clause (i) of section 204(a)(1)(A) of such Act, or classification pursuant to clause (i) of section 204(a)(1)(B) of such Act;
(v) cancellation of removal pursuant to section 1229b(b)(2) of this title;
(2) an alien--
(A) whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and
(B) who meets the requirement of subparagraph (B) of paragraph (1); or
(3) an alien child who--
(A) resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent and the spouse consented or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and
(B) who meets the requirement of subparagraph (B) of paragraph (1).
This subsection shall not apply to an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual subjected to such battery or cruelty. 8 U.S.C. § 1641(c), parallel citations omitted.

Being a qualified alien does not, in and of itself, automatically permit him or her to receive Federal Medicaid, Family Assistance, or Food Stamps. Because Congress has defined the Food Stamp program as a "specified federal program," 8 U.S.C. § 1612(a)(3)(B), the eligibility restrictions based on alienage contained in 8 U.S.C. § 1612(a)(1) and the exceptions contained in § 1612(a)(2) are applicable to applicants for Food Stamps. That is, paragraph 1612(a)(1) provides that qualified aliens are not eligible to receive Food Stamps unless they are covered by one of the exceptions listed in paragraph 1612(a)(2). Three of the exceptions to the general rule prohibiting qualified aliens from receiving food stamps are raised in this case. The eligibility restrictions based on alienage contained in 8 U.S.C. § 1612(a)(1) "shall not apply to any qualified alien who has resided in the United States with a status within the meaning of the term 'qualified alien' for a period of 5 years or more beginning on the date of the alien's entry into the United States." *See* 8 U.S.C. § 1612(a)(2)(L) The eligibility restrictions based on alienage contained in 8 U.S.C. § 1612(a)(1) do not apply to applicants for Food Stamps who are under 18 years of age. *See* 8 U.S.C. § 1612(a)(2)(J). The provisions described in the preceding two sentences lead to the result that there are households where some members (qualified alien children) are eligible for Food Stamp benefits and other members (qualified alien parents who have not had five years in qualified status) are not. In addition, a qualified alien may receive Food Stamps if he or she "is receiving benefits or assistance for blindness or disability (within the meaning of section 2012(r) of Title 7)." *See* 8 U.S.C. § 1612(a)(2)(F)(ii).[FN5]

> FN5. Certain qualified aliens may receive Food Stamps only during the first seven years after they enter the United States. *See* 8 U.S.C. § 1612(a)(2)(A). Qualified aliens who are lawful permanent residents or veterans, or members of veterans' families, may receive food stamps without either a five year waiting period or a seven year limit. *See* 8 U.S.C. § 1612(a)(2)(B), (C).

Because Congress has defined Family Assistance and Federal Medicaid as "designated federal programs," 8 U.S.C. § 1612(b)(3)(A) and (C), the general rule of alien eligibility contained in 8 U.S.C. § 1612(b)(1) and the prohibitions contained in § 1612(b)(2) are applicable to applicants for Family Assistance and Federal Medicaid. That is, states are permitted to determine qualified aliens eligible for Federal Medicaid and Family Assistance but only if those qualified aliens are not covered by the prohibitions in paragraph 1612(b)(2) or the general prohibition in 8 U.S.C. § 1613, which provides that qualified aliens may not receive federally funded means tested public benefits for a five year period after being in a qualified status.

B. NEW YORK'S STATE-FUNDED PUBLIC ASSISTANCE PROGRAMS MEET THE NEEDS OF SOME PERSONS INELIGIBLE TO RECEIVE FEDERALLY FUNDED BENEFITS BUT HAVE THEIR OWN ELIGIBILITY REQUIREMENTS

New York State has established two programs-Safety Net Assistance and State Medicaid- that are completely state and locally funded to meet the needs of persons not eligible to receive federally funded benefits. The Safety Net Assistance program ("SNA") provides cash public assistance to individuals and households ineligible to receive federally funded Family Assistance.[FN6] *See* New York Social Services Law ("NY SSL")§ 158(1). The SNA program applies the same standard of need, the same in-

come and resource disregards and the same exemptions as the Family Assistance program, and provides SNA recipients the same grant levels and types of grants available through the Family Assistance program. NY SSL § 131-a. Examples of persons who are not eligible to receive Family Assistance and are eligible to receive SNA are adults with children in the household who have exhausted the adult's five year time limit on Family Assistance and adults living in households that do not include children. *See* NY SSL § 158(1)(a), (B).

> FN6. Effective August 20, 1997, New York State changed the names of its two cash public assistance programs from Aid to Dependent Children and Home Relief to Family Assistance and Safety Net Assistance, respectively. Except when the context and purpose indicates otherwise, references in any chapter of law or in any regulation of a state agency or in any state agency form or contract to "home relief" shall refer to the safety net assistance program and references to "aid to dependent children" or "aid to families with dependent children" shall refer to the family assistance program. *See* L. 1997 C. 436 Part B § 141.

If otherwise eligible, a person who is a qualified alien who is ineligible to receive Family Assistance solely because of the Federal restrictions based on alienage, or who is an alien who is permanently residing under color of law but is not a qualified alien, is eligible to receive SNA. *See* NY SSL § 158(1)(g).

A person who is eligible for Family Assistance shall be granted family assistance and while receiving such aid shall not be eligible for safety net assistance. *See* NY SSL § 158(2). The preceding sentence leads to the result that a household consisting of a citizen child (who is eligible to receive Family Assistance) and qualified parent and qualified alien children who are not eligible to receive Family Assistance, will receive cash public assistance through both the federally funded Family Assistance and the state funded SNA programs.

The State Medicaid program ("State medicaid") expands the coverage of the federal Medicaid program to cover categories of persons who are not eligible to receive federal Medicaid. *See e.g.,* NY SSL § 366(1)(a)(1) (SNA recipients).

New York State does not apply the federal eligibility restrictions based on alienage to the SNA and State Medicaid programs. The New York State legislature adopted Social Services Law § 122 to set forth the rights of aliens in New York State to receive various benefits. Although Social Services Law § 122, as written, restricts eligibility for State Medicaid to certain aliens, that restriction was declared unconstitutional by the New York Court of Appeals in *Aliessa v. Novello,* 96 N.Y.2d 418 (2001). Since 2001, an alien who is a lawful permanent resident ("LPR") or who is permanently residing under color of law ("PRUCOL")[FN7] if financially and/or medically eligible, receive State Medicaid. State DOH, in compliance with the final order in *Aliessa,* ("Aliessa *Order")* has provided written instructions and training materials to local social services districts and has directed local social services districts not to use an alien's LPR or PRUCOL status as a reason for denying State Medicaid. *See Aliessa* Order, a copy of which is annexed to the Kraft Decl. *See also* LeClair Aff. „„ 11-24.

FN7. “As distinguished from illegal aliens subject to deportation, this designation [PRUCOL] is used to classify aliens of whom the INS [now U. S. Citizenship and Immigration Service] is aware, but has no plans to deport.” *Aliessa v. Novello,* 96 N.Y.2d at 422 n. 2.

In addition to these two state programs, New York had in effect a Food Assistance Program (“FAP”) that provided State-funded Food Stamp benefits to certain aliens not eligible to receive federally funded Food Stamps. NY SSL § 95(10). The FAP program expired on September 30, 2005. NY SSL § 95(10(k).

C. STATE DEFENDANTS SUPERVISE THE ADMINISTRATION OF PUBLIC BENEFIT PROGRAMS BY LOCAL SOCIAL SERVICES DISTRICTS

States are given the option of administering Federal Medicaid, Family Assistance, and Food Stamps through state agencies or having State agencies supervise the administration of these programs by agencies of local government. *See* 42 U.S.C. § 1396a(a)(5), 42 U.S.C. § 602(a)(4), and 7 U.S.C. § 2012(n)(1). New York State has adopted the latter option. New York State is divided into 58 local social services districts, with the City of New York constituting one district. *See* NY SSL §§ 56 and 61. The New York City Human Resources Administration (“HRA” or “City defendant”) administers public assistance programs for residents of New York City. State DOH supervises the provision of Federal Medicaid and State Medicaid in New York State. *See* NY SSL § 363-a; LeClair Aff. State OTDA *inter alia,* supervises the administration of the Family Assistance, SNA and Food Stamp programs in New York State. *See* NY SSL §§ 358, 95(1).[FN8] *See also,* Ptak

FN8. Prior to 1996, the New York State Department of Social Services and its Commissioner supervised administration of all public assistance programs in New York State. In 1996, the Legislature transferred supervision of administration of the Medicaid program to the Commissioner of the Department of Health. *See* L. 1996 C. 474 § 233. In 1997 the Legislature renamed the portion of the Department of Social Services responsible for administering cash public assistance programs the Office of Temporary and Disability Assistance. *See* L. 1997 C. 436 Part B § 122. Because of these legislative changes, the definitions of the words “department” and “Commissioner” in the Social Services Law vary depending on their location. *See* NY SSL § 2(1) and (6).

Local social services districts determine whether individuals who apply for these forms of public assistance are eligible to receive them. *See* NY SSL §§ 365(1), (Federal and State Medicaid) 344 (Family Assistance) and 95(3) (Food Stamps). In addition to making eligibility determinations, local social services districts furnish ongoing public assistance to eligible recipients by providing benefits through electronic cards that can be swiped at machines in provider facilities or grocery stores, through direct vendor payments to landlords, and otherwise as appropriate. *See* NY SSL §§ 62, 21-a.

When a local social services district determines whether a household is eligible to receive benefits, the district (1) identifies who is applying for benefits as part of the household, and (2) determines whether the combined income and resources of household members are below the standards of need set in law. *See* NY SSL § 366

(Medicaid), 131-a (Family Assistance and SNA) and 95 (FS).[FN9]

FN9. But See footnote 1 *Supra.* For purposes of this law suit, the local districts are determining which applicants are eligible to receive cash public assistance, either Family Assistance or SNA, which will lead to eligibility for Medicaid and Food Stamps unless the federal alienage restrictions interfere.

Applicants who are financially eligible to receive SNA are also financially eligible to receive Food Stamps and Medicaid, so separate eligibility determinations regarding Food Stamps and Medicaid are not made when SNA financial eligibility is ascertained. *See* 7 U.S.C. § 2014(a); NY SSL § 366(1)(a)(1).

1. GENERAL SUPERVISION THROUGH STATE REGULATIONS AND OTHER STATEWIDE INSTRUCTIONS TO LOCAL DISTRICTS

State DOH provides general supervision of the administration of the Federal and State Medicaid programs by issuing regulations and otherwise notifying the local districts of statewide policies applicable to local social services districts administering the Federal and State Medicaid programs. *See* NY SSL § 363-a(2); LeClair Aff. „ 14. Similarly, State OTDA provides general supervision of the administration of the Family Assistance, SNA, and Food Stamp programs by issuing regulations and otherwise notifying local social services districts of statewide policies applicable to local social services districts administering those programs. *See* NY SSL §§ 17, 20, 34; Ptak Aff.

2. REVIEW OF SPECIFIC CASES THROUGH FAIR HEARINGS

The Food Stamp Act provides that the State plan shall provide “for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency ...” *See* 7 U.S.C. § 2020(e)(10). The Social Security Act provides that the State Medicaid plan must “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness ...” 42 U.S.C. § 1396a(a)(3).

To implement these Federal mandates, State DOH and State OTDA review cases where applicants for or recipients of public assistance are dissatisfied with local agency actions or failure to act and seek fair hearing review. *See* NY SSL § 22; 18 New York Codes, Rules and Regulations (“N.Y.C.R.R.”) Part 358.

Through the State fair hearing process provided for by federal and state statute, the State OTDA oversees local social services districts' administration of individual Food Stamp, Family Assistance and SNA cases. *See* Social Services Law § 22. The State DOH also utilizes the State OTDA's fair hearing office to oversee the local districts' administration of the Medicaid program. 18 N.Y.C.R.R. § 360-2.9.

Fair hearings are available to applicants for or recipients of Food Stamps, Medicaid and public assistance. NY SSL § 22(3). A person may challenge a local district's denial of an application, failure to act upon any application, inadequacy in the

amount of assistance, or full or partial discontinuance of assistance. NY SSL § 22(5).

The party for whom the fair hearing is requested is the "appellant." 18 N.Y.C.R.R. § 358-2.6. An appellant may examine his or her case record before the fair hearing and, if requested, must receive before the hearing, at no charge, copies of all documents which the local social services district will present at the hearing. 18 N.Y.C.R.R. §§ 358-3.7, 358-4.2(c). In the City of New York, implementation of these regulations is governed by a Stipulation of Settlement in *Rivera v. Bane,* Supreme Court, new York County, Index No. 45305/92 (Soto, J). A copy of the Stipulation is annexed to the Kraft Decl. as Exhibit 2.

The appellant's rights in the fair hearing process are set forth at 18 N.Y.C.R.R. § 358-3.4.[FN10] The parties' respective burdens of proof at the fair hearing are set forth at 18 N.Y.C.R.R. § 358-5.9. The burden of proof to establish eligibility for a benefit, or for a higher benefit amount than that provided by the local agency, is upon the appellant. In contrast, the burden of proof to establish that the discontinuation or reduction of a benefit is correct is upon the local agency. 18 N.Y.C.R.R. § 358-5.9(a). The hearing officer who conducts the fair hearing is not a representative of either the appellant or the local social services district.[FN11] The decision after fair hearing must be supported by substantial evidence. 18 No.Y.C.R.R § 358-5.9(b)

FN10. As an appellant you have the right:
(a) to the continuation or reinstatement of your public assistance, medical assistance authorization, food stamp benefits or services until the issuance of a decision in your fair hearing, ... You have the right to request that your assistance, benefits or services not be continued or reinstated until the fair hearing decision is issued;
(b) to examine your case record and to receive copies of documents in your case record which you need to prepare for the fair hearing, upon your request, ...;
(c) to examine and receive copies of all documents and records which will be submitted into evidence at the fair hearing by a social services agency,...;
(d) to the rescheduling (adjournment) of your hearing, ...;
(e) to be represented by an attorney or other representative at any conference and hearing, or to represent yourself;
(f) to have an interpreter at any fair hearing, at no charge to you, if you do not speak English or if you are deaf. You should advise OAH prior to the date of the fair hearing if you will need an interpreter;
(g) to appear and participate at your conference and fair hearing, to explain your situation, to offer documents, to ask questions of witnesses, to offer evidence in opposition to the evidence presented by the social services agency and to examine any documents offered by the social services agency;
(h) to bring witnesses to present written and oral evidence at any conference or fair hearing;
(i) at your request to the social services agency, to receive necessary transportation or transportation expenses to and from the fair hearing for yourself

and your representatives and witnesses and to receive payment for your necessary child care costs and for any other necessary costs and expenditures related to your fair hearing;
(j) to have the fair hearing held at a time and place convenient to you as far as practicable, taking into account circumstances such as your physical inability to travel to the regular hearing location;
(k) to request removal of a hearing officer in accordance with section 358-5.6 of this Part; and
(l) to seek review by a court if the decision is not in your favor. 18 N.Y.C.R.R. § 358-3.4.

FN11. (b) To ensure a complete record at the hearing, the hearing officer must:
(1) preside over the fair hearing and regulate the conduct and course of the fair hearing, including at the hearing officer's discretion, requiring sworn testimony, and administering the necessary oaths;
(2) make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which the fair hearing will be conducted;
(3) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness; however, the hearing officer will not act as a party's representative;
(4) where the hearing officer considers independent medical assessment necessary, require that an independent medical assessment be made part of the record when the fair hearing involves medical issues such as a diagnosis, an examining physician's report, or a medical review team's decision;
(5) adjourn the fair hearing to another time on the hearing officer's own motion or on the request of either party, ...;
(6) adjourn the fair hearing when in the judgment of the hearing officer it would be prejudicial to the due process rights of the parties to go forward with the hearing on the scheduled hearing date;
(7) review and evaluate the evidence, rule on the admissibility of evidence, determine the credibility of witnesses, make findings of fact relevant to the issues of the hearing which will be binding upon the commissioner unless such person has read a complete transcript of the hearing or has listened to the electronic recording of the fair hearing;
(8) at the hearing officer's discretion, where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records; and
(9) prepare an official report containing the substance of what transpired at the fair hearing and including a recommended decision to the commissioner or the commissioner's designee.
(c) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing. ... 18 N.Y.C.R.R. § 358-5.6.

When the decision after fair hearing is adverse to the local district, the local district must comply with the decision. NY SSL § 22(9)(a).

It is not uncommon for a decision after fair hearing to remand the matter back to the local district, such as to render an eligibility determination where the public assistance application has not been timely processed or where the fair hearing decision annuls the local social services district's denial of an application for benefits on a particular criterion without reaching other eligibility criteria. Such a decision after fair hearing provides that the determination of the local social services district is not correct and is reversed, and is considered favorable to the appellant. If a fair hearing appellant who received a favorable decision after fair hearing-either a decision on the merits or a remand for further local district action- believes that the local district has failed to comply and wishes the State to secure the local district's compliance, State regulations provide for the appellant to submit a complaint to State OTDA's Office of Administrative Hearings Compliance Unit. 18 N.Y.C.R.R. § 358-6.4(c). The Compliance Unit will thereafter “secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case.” 18 N.Y.C.R.R. § 358-6.4(c).

A decision after fair hearing that is adverse to the appellant may be challenged by commencing a proceeding in State Supreme Court pursuant to N.Y. Civil Practice Law and Rules article 78. *See* NY SSL § 22(9)(b). Also, upon request to the Commissioner, a fair hearing decision may be corrected for any error of law or fact. 18 N.Y.C.R.R. § 358-6.6(a)(3).

3. STATE OTDA OPERATES A COMPUTER SYSTEM THAT LOCAL SOCIAL SERVICES DISTRICTS USE TO ADMINISTER PUBLIC ASSISTANCE PROGRAMS

State OTDA has designed and implemented a computerized welfare management system (“WMS”) which is capable of receiving, maintaining and processing information relating to persons who have applied for or been determined eligible for benefits under any program for which State OTDA has supervisory responsibilities. The WMS provides individual and aggregate data to local social services districts to assist them in making eligibility determinations and basic management decisions, and provides data to State OTDA to assist it in supervising the local administration of such programs. *See* NY SSL § 21(1). State DOH uses WMS to supervise the administration of the Medicaid program. *See* NY SSL § 21(5). The Legislature intended the WMS to limit fraud and mismanagement and to achieve compliance with Federal law, and to maximize utilization of Federal funds. *See* NY SSL § 21(1).[FN12]

FN12. Such system shall be designed so as to assist local districts and the state in achieving the following goals:
a. reducing mismanagement in the administration of such program, detecting fraudulent practices, and helping identify policies or conditions that will reduce or deter fraud;
b. promoting efficiency in local district determinations of eligibility for public assistance and care and other programs supervised by the department, to expedite such determinations and to reduce unauthorized or excessive payments;
c. achieving compliance with federal laws and regulations and maximizing utilization of federal funds;
d. improving data collection and retention techniques and developing uniform

> reporting forms and procedures;
> f. being developed and implemented in each social services district, to the extent possible consistent with statewide uniformity, in a manner compatible with maximum utilization of existing data processing systems and capabilities of such district and with minimum local participation by such district in administrative expenditures directly attributable to the design and implementation of such system; and
> g. achieving such other goals consistent with this chapter and other laws as are desirable for improving the administration of such programs. NY SSL § 21(1).

Workers in local social services districts ensure that the data they collect when processing initial applications and ongoing cases is entered into the WMS.

D. THE PLAINTIFFS' FAIR HEARINGS

Plaintiffs M.K.B., A.I. and L.A.M. allege no fair hearing requests. Plaintiffs Denise Thomas and J.Z. obtained stipulated resolutions of their fair hearing requests. Complete copies of the administrative records for the remaining plaintiffs which records include a transcript, copies of the evidence submitted by both parties, and the Decision After Fair Hearing ("DAFH") are annexed as exhibits to the Hopkins Aff.

Plaintiff O.P.

The issue at the fair hearing of O.P. (who alleges she is PRUCOL, Complaint at „ 163) was whether the HRA correctly denied her application for public assistance, Medicaid and Food Stamps due to her alien status. O.P. hearing transcript ("Tr.") at 2 & 13. At the hearing, O.P.'s attorney, *inter alia,* objected that he did not have the HRA's evidence packet. O.P. Tr. at 8. The HRA's representative stated that due to the emergency scheduling of this hearing "we have nothing to present" and asked for a recess. O.P. Tr. at 11-12. The ALJ denied the request for a recess. O.P. Tr. at 12. The HRA representative left the hearing room to consult with her supervisor after the ALJ told her that he would proceed with the hearing without her presence. O.P. Tr. at 12 & 14. The hearing continued with O.P.'s attorney submitting documents regarding O.P.'s immigration status.

O.P.'s DAFH, dated August 11, 2005, held that the HRA's failure to produce its evidence package violated the *Rivera* stipulation and, in compliance with the *Rivera* stipulation, annulled the HRA's denial of O.P.'s application for public assistance, Medicaid and Food Stamps and directed the HRA, *inter alia,* to re-process O.P.'s application and to advise appellant what further documents are necessary, if any. O.P. DAFH at 3.

Plaintiff L.W.

The issue at L.W.'s fair hearing was whether the HRA correctly denied her application for Food Stamps due to her alien status and failed to process her application for public assistance. L.W. Tr. at 12-14. At the hearing, L.W.'s attorney raised *Rivera* and *Rodriguez* objections on the ground that the HRA did not produce certain documents for the fair hearing. L.W. Tr. at 24-25. L.W.'s attorney also asked for a

Medicaid disability review referral in order to obtain federal food stamps and also asserted, in the alternative, that L.W. was eligible for State Food Stamps. L.W. Tr. at 27-28.

L.W.'s DAFH, dated July 29, 2005, held that the HRA's failure to produce documents for the hearing violated the *Rivera* stipulation, annulled the HRA's denial of her application for Food Stamps, held that the HRA's failure to act on her application for public assistance was incorrect, and directed the HRA, *inter alia,* to process O.P.'s application for both and to advise appellant what further documents are necessary, if any. L.W. DAFH at 4-5.

Plaintiff M.A.

The issue at M.A.'s fair hearing was whether the HRA failed to act on M.A.'s request to add her to her daughter's public assistance, Medicaid and food stamps case. M.A. Tr. at 3, 11-12. At the hearing, M.A.'s attorney stated that M.A. is “not eligible for Federal Food Stamp Benefits ... [b]ut she is eligible for FAP [State Food Assistance Program].” M.A. Tr. at 19. At the hearing, M.A. and her attorney submitted documents relating to M.A.'s immigration status and her application, as to which the HRA had not yet submitted a written decision. M.A. Tr. at 13-21.

M.A.'s DAFH, dated October 21, 2005, held that the HRA incorrectly failed to act on M.A.'s request to add her to her daughter's public assistance, Medicaid and food stamps case, and directed the HRA, *inter alia,* to process her application taking into account her approved I130 form and to advise her what further documents are necessary, if any. M.A. DAFH at 6-7.

Plaintiff Marieme Diongue

The issue at the fair hearing of Marieme Diongue (who alleges she is PRUCOL, Complaint at „ 209) was whether the HRA's Notice of Action correctly omitted her from her child's public assistance and Medicaid case. Diongue Tr. at 6 & 14. At the hearing, Diongue's attorney submitted, *inter alia,* a copy of a letter to the HRA “showing that she applied for both” herself and her child. Diongue Tr. at 20).

Diongue's DAFH, dated October 5, 2005, set forth the “adequate notice” requirement of 18 N.Y.C.R.R § 358-2.2, and held that the HRA's “notice improperly did not give a reason for the Agency's determination not to include the needs of the Appellant in the Public Assistance and Medical Assistance” household. Diongue DAFH at 5-10.

Plaintiff M.E.

The issue at M.E.'s fair hearing was whether the HRA correctly discontinued her Public Assistance, Food Stamp and Medicaid benefits for her alleged failure to submit documents for her recertification of these benefits. M.E. Tr. at 11-13, 17-18. At the hearing, M.E. testified about, and produced copies of, the documents she presented at her recertification to support her immigration eligibility status. M.E. Tr. 35-38).

M.E.'s DAFH, dated September 27, 2005, found that M.E. “timely submitted all re-

quired documentation to the HRA," annulled the HRA's determination to discontinue her Public Assistance, Food Stamp and Medicaid benefits and directed the HRA, *inter alia,* to restore any such lost benefits retroactive to the date of the discontinuance. M.E. DAFH at 3.

Plaintiff P.E.

The issue at P.E.'s fair hearing was whether the HRA correctly reduced her Public Assistance and Food Stamps. P.E. Tr. at 2-3. At the hearing, P.E.'s counsel raised a *Rivera* objection n on the ground that the HRA did not produce certain documents for the fair hearing. P.E. Tr. at 4-5. P.E.'s counsel also asserted that the HRA's notice was inadequate for not stating a reason and that P.E. is eligible for State Food Stamps pursuant to the State court decision in *Teytelman v. Wing.* P.E. Tr. 17-18.

P.E.'s DAFH, dated December 14, 2005, held that the HRA's failure to produce documents for the hearing violated the *Rivera* stipulation, annulled the HRA's notice and directed the HRA, *inter alia,* to restore any lost benefits retroactive to the date of the action. P.E. DAFH at 4-5.

Plaintiff Anna Fedosenko

The issue at Anna Fedosenko's fair hearing was whether the HRA correctly discontinued her Food Stamps. Fedosenko Tr. at 2-3. At the hearing, Fedosenko's counsel asserted that the HRA had discontinued Fedosenko's Food Stamps without notice. Fedosenko Tr. 4-5. Fedosenko's counsel also asserted that Fedosenko should nonetheless be eligible for federal food stamps due to her disability. Fedosenko Tr. 8.

Fedosenko's DAFH, dated August 29, 2005, discussed the regulatory notice requirements for discontinuing benefits, and held that the HRA's discontinuation of Fedosenko's Food Stamps without notice was incorrect, and directed the HRA to restore her food stamps retroactive to the date of the discontinuance. Fedosenko DAFH at 2.

E. ALLEGATIONS IN THE COMPLAINT

In the Class Action Complaint dated December 13, 2005, thirteen plaintiffs[FN13] seek to represent a class. Plaintiffs demonstrate three common facts. First, they all applied to receive public assistance at offices known as Job Centers run by the HRA. Second, plaintiffs are not United States citizens, though their immigration statuses, and the documentation they have to demonstrate those statuses, differ. And third, the HRA failed to provide plaintiffs with the full relief requested. *See* Complaint „„ 149-348.

FN13. Plaintiff L.M. has voluntarily dismissed her claim.

Plaintiffs' claims against the State defendants, found in the seventh claim for relief,[FN14] are all supervisory in nature. Plaintiffs would have this Court find the State defendants supervisorily liable for the City defendant's conduct.

FN14. 359. Actions and omissions by State OTDA and State DOH have caused and/or contributed to the policies, customs, and usages of HRA described above.

Because HRA functions as a matter of law as the agent of State OTDA (with regard to federal food stamps) and State DOH (with regard to federal Medicaid), State OTDA and State DOH are jointly and severally liable for HRA's violations of federal law.

360. Through their actions and omissions that have caused and/or contributed to the policies, customs, and usages of HRA described above, State OTDA, and State DOH have violated their responsibilities under federal law as the single state agencies responsible for administering and supervising the federal food stamp and federal Medicaid programs, respectively, in New York State, in violation of 7 U.S.C. § 2012(n) (food stamps); 42 U.S.C. § 1396a(a)(5) (Medicaid), and 42 C.F.R. § 431.10 (Medicaid).

361. State OTDA and State DOH have been deliberately indifferent to the need to provide proper training and supervision to HRA employees who administer federal food stamps and federal Medicaid at job centers. Their deliberate indifference to the federal rights of class members has caused and/or contributed to the policies, customs, and usages of HRA described above; and has resulted in the widespread and systematic denial of the rights under federal law of eligible class members to receive federal food stamps and federal Medicaid.

ARGUMENT

POINT I

PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AGAINST THE STATE DEFENDANTS SHOULD BE DENIED

“When seeking a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the moving party must show: (1) it will suffer irreparable harm absent the injunction and (2) a likelihood of success on the merits. However, where the injunction sought will alter rather than maintain the status quo, the movant must show clear or substantial likelihood of success. As a final consideration, whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiffs threatened irreparable injury and probability of success on the merits warrants injunctive relief.” *Rodriguez* ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 233 (2nd Cir.1999) (citations, internal quotation marks and brackets omitted), *cert den.,* 531 U.S. 864 (2000).

Plaintiffs request an order Granting a Preliminary Injunction directing the State Defendants: “A. within two weeks after entry of said Order, to establish and maintain, for the pendency of this litigation, a record of all fair hearings requested and held involving issues of immigrant eligibility, and of all fair hearing decisions resulting from these hearings; B. to supervise and oversee City defendant's compliance with the notice requirements of paragraph II [of the Notice of Motion] and all other requirements of paragraph II as they relate to federal food stamps and federal Medicaid; and C. within ninety days of entry of said Order, to submit a plan to the Court and Plaintiffs' counsel, identifying in the computer system(s) that the State defendants operate, all problems that cause or contribute to the erroneous

denial of federal food stamps and federal Medicaid, and specifying a method and a time line for fixing them forthwith." Notice of Motion dated January 11, 2006.

A. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT THE INJUNCTION

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. Accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered. The movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied." *Id.* at 233-4 (citations and quotation marks omitted).

Plaintiffs have not stated the harm, let alone irreparable harm, that will befall them if the State defendants do not "establish and maintain, for the pendency of this litigation, a record of all fair hearings requested and held involving issues of immigrant eligibility, and of all fair hearing decisions resulting from these hearings." This piece of injunctive relief seems most like an overbroad discovery request that would cover fair hearings beyond the cases of class members and include fair hearings on State benefits, which, pursuant to the Eleventh Amendment, are beyond the purview of this Court. Furthermore, as discussed in subpoint (B)(3) below, this Court lacks jurisdiction to review State fair hearing decisions on Federal benefits, which, instead, are subject to State judicial review.

A separate flaw with this prayer for injunctive relief is that, if read to the fullest extent, it requires State defendants to review every fair hearing transcript to ascertain what issues were discussed at the hearing so as to keep "a record of hearings requested and held involving issues of immigrant eligibility." However, as alleged by plaintiffs, this issue is not reached in a number of fair hearings involving aliens, since those aliens or their representatives, raise procedural notice-related issues that have nothing to do with immigration status.

Similarly, plaintiffs will not suffer irreparable harm in the absence of an order directing State defendants "to supervise and oversee City defendant's compliance with the notice requirements of paragraph II and all other requirements of paragraph II as they relate to federal food stamps and federal Medicaid."[FN15]

FN15. II. Granting a preliminary injunction directing Defendant Verna Eggleston (hereinafter the "City Defendant"):
A. within two weeks of entry of said Order, to establish a procedure by which Plaintiffs' counsel may contact a designee of City Defendant on behalf of individual class members whose eligibility has been erroneously assessed, and which ensures that such individual class members have their eligibility assessed correctly and their public assistance, Medicaid and/or food stamps (collectively public benefits) issued within the time frames established by law during the pendency of the litigation;
B. within two weeks of entry of said Order, to ensure that all HRA workers

correctly enter the code(s) in the computer system(s) designating the immigration status of all class members who apply for public benefits or apply to be added to a household member's public benefits case; and to maintain electronic or paper copies of all immigration documentation that such class members submit;

C. within ninety days of entry of said Order, to submit a plan to the Court and Plaintiffs' counsel, identifying in the computer system(s) that HRA operates, all problems that cause or contribute to the erroneous denial of public benefits to class members, and specifying a method and a time line for fixing them forthwith.

D. Immediately after entry of said Order,

(i) to refrain from unlawfully denying, discontinuing, and/or reducing class members' federal food stamps on account of immigration status;

(ii) to refrain from unlawfully denying, discontinuing, and/or reducing the public assistance and/or Medicaid benefits of class members who are not lawful permanent residents on account of immigration status;

(iii) to refrain from turning away, deterring, or discouraging class members from applying for federal food stamps or encouraging them to withdraw applications for these benefits, on account of immigration status;

(iv) to refrain from turning away, deterring, or discouraging class members who are not lawful permanent residents from applying for Medicaid and public assistance benefits or encouraging them to withdraw applications for these public benefits, on account of immigration status;

(v) to provide class members with timely and adequate written notice of the denial of food stamps, Medicaid, and/or public assistance benefits (1) when assistance is granted to some household members but denied to others based on immigration status; and (2) when class members apply to be added to an existing benefits case and are denied;

(vi) to refrain from issuing misleading notices to class members that make it difficult or impossible for class members to determine whether public benefits were correctly denied, discontinued, or reduced; or whether they were granted in the proper amount and whether to appeal such denial, discontinuance, or reduction;

(vii) to ensure that all disabled Qualified Alien class members are referred for Medicaid disability determinations if there is an indication that they may qualify for disability-related Medicaid, and that those determined to be disabled receive the food stamps to which they are legally entitled;

(viii) to assist class members who are applying for federal food stamps and federal Medicaid in completing an application for a Social Security number and to provide them with the proper documentation that complies with the Social Security Administration's requirements.

(ix) to refrain from enforcing State regulations, State directives, and City directives and instructions that purport to require applicants for public assistance and State Medicaid to furnish a Social Security number as a condition of eligibility when a Social Security number is impossible to obtain.

State defendants already supervise City defendant's administration of the Medicaid

and Food Stamp programs. State defendants' supervision includes the matters raised in this lawsuit, and plaintiffs have not demonstrated that State defendants' supervision of their particular cases through the fair hearing process is legally flawed so as to entitle plaintiffs to the sought after supervisory injunction. In particular, there is no basis for issuing a preliminary injunction against State defendants to supervise the City defendant's compliance with "adequate notice" requirements, as State defendants already supervise this issue through the fair hearing process, as illustrated by Diongue's fair hearing decision which vacated the City's notice as inadequate.

Plaintiffs, apparently aware that the Eleventh Amendment to the United States Constitution prohibits this Court from directing State defendants to enforce state law, would limit the State defendants' supervision of City defendant to issues of federal law. Yet, most of the named plaintiffs, and presumably the class they would represent if they are representative, are eligible to receive only State law benefits, SNA and State Medicaid. *See* LeClair Aff. „„ 27-40. If the majority of plaintiffs who are only eligible for State law benefits are not harmed without an injunction compelling the State defendant to supervise the City defendant's administration of State law, there is no harm, let alone no irreparable harm, in the absence of an order requiring the State defendants to supervise the City defendant's administration of Federal law more than it already does.

Furthermore, many of the provisions that the plaintiffs would have this Court apply to City defendant are not specifically required by Federal law. For example: the provision in subparagraph A. establishing a liaison for immigration-related complaints from plaintiffs' counsel; the provision in subparagraph C. requiring the City defendant to submit a plan to the Court and Plaintiffs' counsel, within ninety days of entry of said Order, identifying in the computer system(s) that HRA operates, all problems that cause or contribute to the erroneous denial of public benefits to class members, and specifying a method and a time line for fixing them forthwith; and the provision in clause D(vii) to ensure that all disabled Qualified Alien class members are referred for Medicaid disability determinations if there is an indication that they may qualify for disability-related Medicaid, and that those determined to be disabled receive the food stamps to which they are legally entitled.

Finally, plaintiffs will not suffer irreparable harm in the absence of an order requiring the State defendants, "within ninety days of entry of said Order, to submit a plan to the Court and Plaintiffs' counsel, identifying in the computer system(s) that the State defendants operate, all problems that cause or contribute to the erroneous denial of federal food stamps and federal Medicaid, and specifying a method and a time line for fixing them forthwith." In fact, the experience with the named plaintiffs demonstrates that, with proper attention to the cases paid by the City defendant's employees, the plaintiffs eligible for federal benefits could be recorded on the State's computer system as eligible to receive the Federal benefits sought. *See* LeClair Affidavit „„ 27-29.

The plaintiffs incorrectly allege that the WMS system is rife with substantial

flaws. From this inaccurate statement, the plaintiffs imply that its operation in granting benefits contributes to a violation of federal rights which is undefined in their papers. Moreover, the problems which plaintiffs point to are mainly those of the City's computer system, the Paperless Office System ("POS"), not the state computer system, WMS.

The plaintiffs have limited this case to the granting of benefits in the job centers operated by the City of New York. There is a WMS devoted to processing and managing benefits in New York City, separate from the remainder of the state. Eisenstein Aff. „ 3.[FN16] The major alleged flaws of WMS simply do not exist. *Id.* „ 10.

FN16. Affidavit of Rochelle Eisenstein, sworn to January 24, 2006 hereafter "Eisenstein Aff.". Ms Eisenstein is the Director of the New York City Welfare Management Systems Group of OTDA.

The handling of benefits for what plaintiffs label as "mixed households" has been accomplished successfully by WMS for 25 years. *Id.* „ 4. Instructions for doing so are set forth in Exhibit 1 to the Eisenstein affidavit at page 45. The fact that, assuming *arguendo,* plaintiffs are correct, HRA workers have difficulty in following the instruction does not demonstrate a flawed computer system.

The other problems plaintiffs claim also are non-existent. WMS does allow benefits to be granted to individuals who do not have Social Security Numbers. Eisenstein Aff. „ 5. Nor does WMS always require an individual have an alien number. *Id.* „ 6. Electronic benefit cards have worked properly with two suffix[FN17] cases for years. *Id.* „ 8. Nor is WMS unable to issue federal food stamps through disability-based Medicaid as plaintiffs incorrectly allege. *Id.* „ 9.

FN17. In a situation where some members of the household receive federal benefits and others receive state and locally funded benefits, there is a single case number for the family and different "suffix"es are utilized to issue benefits.

B. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SHOWING CLEAR OR SUBSTANTIAL LIKELIHOOD OF SUCCESS

"The moving party must make a clear or substantial showing of a likelihood of success where (1) the injunction sought will alter, rather than maintain, the status quo--i.e., is properly characterized as a mandatory rather than prohibitory injunction; or (2) the injunction sought will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir. 1996) (citations and internal quotation marks omitted). Furthermore, "when the moving party seeks a preliminary injunction to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, a preliminary injunction should only be granted if the movant meets the more rigorous likelihood of success standard." *Reynolds v. Goord,* 103 F.Supp.2d 316, 335 (S.D.N.Y. 2000) (quoting *Latino Officers Ass'n v. City of New York,* 196 F.3d 458, 462 (2d Cir. 1999)) (internal quotation marks and citations omitted).

1. THE ELEVENTH AMENDMENT BARS PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS WHICH SEEK RETROSPECTIVE RELIEF FOR ALLEGED PAST VIOLATIONS OF FEDERAL LAW AND WHICH ALLEGE VIOLATIONS OF STATE LAW

Plaintiffs bring this action under 42 U.S.C. § 1983. Complaint „ 1. However, the Eleventh Amendment to the United States Constitution bars a federal suit by a citizen against a state, or one of its agencies, absent its consent to such a suit or an express statutory waiver of immunity. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 100 (1984); *Alabama* v. Pugh, 438 U.S. 781 (1978). It is well settled that the State of New York has not consented to suit in federal court, *see Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35, 38-40 (2d Cir. 1977), and that the provisions of 42 U.S.C. § 1983 were not intended to override a state's immunity. *Quern v. Jordan,* 440 U.S. 332, 343 (1979). Similarly, neither a State nor a State agency is a "person" subject to suit under section 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 64 (1989). *Will* applies to "State or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* 491 U.S. at 70.

To the extent plaintiffs seek declaratory judgment relief regarding past violations of federal law by the State defendants, those claims must also be dismissed because the Eleventh Amendment "does not permit judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993) (quoting *Green v. Mansour,* 474 U.S. 64, 73 (1985)).

Furthermore, it is well-settled that the Eleventh Amendment bars federal courts from granting relief against state officials for alleged violations of state law. *Pennhurst,* 465 U.S. at 103; *Allen v. Cuomo,* 100 F.3d 253, 260 (2d Cir. 1996); *Oberlander v. Perales,* 740 F.2d 116 (2d Cir. 1984). In this regard, the Supreme Court has stated:
A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst, 465 U.S. at 106. Accordingly, under *Ex parte Young,* 209 U.S. 123 (1908), this Court's jurisdiction over the State defendants is limited to potentially redressing, on a prospective basis, ongoing violations of federal law. *See Kentucky v. Graham,* 473 U.S. 159, 167 n. 14.

In this action, most of the plaintiffs allege grievances tied to the City defendants' administration of various State benefits conferred by New York State law, *i.e.,* the State's Food Assistance Program (now expired), the State's Safety Net Assistance program (the State's primary public assistance program for citizens and aliens who are not eligible for federal benefits), and the State Medicaid program (the State's Medical Assistance program for persons who are not eligible for Federal

Medicaid). The plaintiffs who receive these State benefits allege PRUCOL status (O.P.,Complaint at „ 163; Diongue, *id.* at „ 209; L.A.M., *id.* at „ 282), which is not a "qualified alien" status for federal benefit purposes. *See also,* LeClair Affidavit, „„ 30-40.

Since this Court, applying the Eleventh Amendment, is likely to dismiss all claims against the State defendants which allege that the State defendants, either directly or through their supervisory capacity over the City defendant, violated State law in the operation of the State's Food Assistance Program, Safety Net Assistance program, and the State Medicaid program, the plaintiffs' request for a preliminary injunction must be similarly denied.

2. PLAINTIFFS' CLAIM THAT THEY ARE ENTITLED TO FEDERAL FOOD STAMPS BECAUSE THEY ARE ELIGIBLE FOR DISABILITY-RELATED MEDICAID IS LIKELY TO BE DISMISSED, BECAUSE THE FOOD STAMP STATUTE EXPRESSLY HINGES SUCH ELIGIBILITY UPON RECEIPT OF DISABILITY-RELATED FEDERAL MEDICAID, NOT STATE MEDICAID

A disabled applicant may be found eligible to receive Federal Medicaid as "categorically needy" or "medically needy." *See* 42 U.S.C. §§ 1396a(a)(10(A) and 1396a(a)(10(C) respectively. If a certified disabled individual is receiving federal Supplemental Security Income ("SSI") cash assistance because his or her income and resources do not exceed SSI levels, he or she is "categorically needy" and is automatically eligible for Federal Medicaid. See 42 U.S.C. § 1396a(a)(10)(A)(ii). States that participate in Federal Medicaid must cover these categorically needy individuals and other categorically needy individuals as described in 42 U.S.C. § 1396a(a)(10)(A). A separate group of recipients of federal Medicaid are the "medically needy." *See* 42 U.S.C. § 1396a(a)(10)(C). This is an optional group that states may include in their Medicaid programs but are not required to do so. New York includes the medically needy in its Medicaid program. The medically needy include disabled individuals who would be "categorically needy" (i.e. would be eligible to receive SSI cash assistance) except that they have slightly higher income and resources that disqualify them from receiving SSI cash assistance. To be eligible for Federal Medicaid as an SSI-related medically needy recipient, an applicant must be aged, blind or certified disabled and have income and resources that, although exceeding SSI eligibility levels, are below standards applicable to the medically needy. If found eligible, such a medically needy recipient spends down a portion of his or her income monthly on medical care before Medicaid pays the remainder of his medical bills. *See* NY SSL § 366(1)(a)(5). These same principles are part of the State Medicaid program. *See* LeClair Aff. „ 43.

Both Fedosenko (Complaint „„ 253, 257) and L.W. (Complaint „ 180, 190) allege that they are disabled. They both receive State Medicaid as categorical eligibles based on their low incomes and resource levels. Fedosenko acknowledges that she has been receiving SNA and State Medicaid. Complaint „ 254. L.W. acknowledges that she has received Medicaid through a Medicaid- only center for all times relevant to the Complaint. Complaint „ 185. Although she does not specify whether it was State or Federal Medicaid, because she entered the United States in October, 2003, (Complaint „ 182), she is receiving State Medicaid since she cannot receive Federal Medicaid due

to the five year waiting period. Likewise, since Fedosenko entered the United States on September 27, 2002, she is not eligible to receive Federal Medicaid.

Fedosenko and L.W. claim that they are eligible to receive federal Food Stamps even though they are both in their five year ban period prohibiting their receipt of Food Stamps. Plaintiffs' claim is best summarized in a paragraph regarding Fedosenko that erroneously states that "[b]ecause she is disabled, she would be eligible for federal food stamps if HRA had complied with its legal obligation to refer her for a Medicaid disability determination." Complaint „ 254. The just stated legal conclusion is erroneous because those qualified aliens eligible to receive federal Food Stamps without a five year waiting period must be "receiving benefits or assistance for blindness or disability (within the meaning of section 2012(r) of Title 7)." *See* 8 U.S.C. § 1612(a)(2)(F)(ii). Meanwhile, section 2012(r) of Title 7, defines the phrase "elderly or disabled member," in pertinent part, as "a member of a household who- ... *receives disability-related medical assistance under title XIX of the Social Security Act* (42 U.S.C. 1396 et seq.)." *See* 7 U.S.C. § 2012(r)(2)(B) (emphasis added).

Fedosenko and L.W. are not eligible to receive federal disability-related medical assistance under title XIX of the Social Security Act because they have not been in the United States for five years in a qualified status. They are eligible to receive, and do receive, State Medicaid, but State Medicaid is not provided "under title XIX of the Social Security Act."

Even if, *arguendo,* State Medicaid was found to be "under title XIX of the Social Security Act," State DOH does not pay State Medicaid dollars to have a doctor determine that someone who already receives State Medicaid due to low income is disabled and, therefore, could be receiving State Medicaid due to disability. Low income alien Medicaid recipients like Fedosenko and L.W. receive State Medicaid because of their financial status, not because of their disability. *See* LeClair Aff. „ 41-46. There is no federal requirement that they be referred for a disability determination when they still would not qualify for Federal Medicaid due to their alien status.

3. PLAINTIFFS' SUPERVISORY CLAIMS AGAINST THE STATE DEFENDANTS ARE LIKELY TO BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING TO MAINTAIN THESE CLAIMS since PLAINTIFFS EITHER OBTAINED FAVORABLE FAIR HEARING DECISIONS FROM STATE DEFENDANTS AND, IF DISSATISFIED WITH THOSE DECISIONS, FAILED TO SEEK AVAILABLE STATE COURT REVIEW, OR FAILED TO REQUEST FAIR HEARINGS FROM STATE DEFENDANTS

As set out above, New York has adopted the federally approved option whereby local social services districts such as the HRA determine whether applicants for public assistance are eligible to receive the benefits applied for, and whether recipients are entitled to changed levels of benefits (NY SSL § 61), with the State defendants reviewing those determinations when requested to do so by individuals who feel aggrieved by local social services districts determinations (NY SSL § 22). The State defendants have no direct obligation to make determinations regarding the eligibility of any applicant for the types of benefits at issue in this case. Therefore, plaintiffs' claims against the State defendants are all of a supervisory nature.

Plaintiffs' claims against the State defendants are likely to be dismissed because all of the named plaintiffs either invoked State defendant's supervisory review through their fair hearing requests and obtained favorable decisions after fair hearing, or did not request a fair hearing and, therefore, failed to seek the State defendant's supervisory review. Thus, plaintiffs' allegations fail to state a claim for supervisory relief against the State defendants as well as fail to demonstrate standing to assert that State defendants' fair hearing supervision of their cases has caused them legal injury.

The“case or controversy” clause of Article III of the Constitution makes standing a threshold issue when considering the viability of a case in the Federal Courts. That is, a “plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright,* 468 U.S. 737, 751 (1984), *reh. denied,* 468 U.S. 1250 (1984), citing *Valley Forge Christian College v. Americans* United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Such lack of a causative link against a supervisory defendant was the basis for the Supreme Court's holding in *Rizzo v. Goode,* 423 U.S. 362 (1976), that class action plaintiffs failed to satisfy Article III's case or controversy requirement for a permanent injunction against the Police Commissioner which was aimed at curtailing alleged unconstitutional misconduct by the Commissioner's police officers:
As the facts developed, there was no affirmative link between the occurrences of the various incidents of police misconduct and the adoption of any plan or policy by petitioners -- express or otherwise -- showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them but as to the members of the classes they represented.

423 U.S. at 371. *See also* *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 42 (1976) (indigent plaintiffs alleging that non-profit hospitals failed to provide them with medical treatment did not satisfy Article III's case or controversy requirement against the Internal Revenue Service, observing that “it does not follow ... that the denial of access to hospital services in fact results from the IRS's Revenue Ruling allowing favorable tax treatment to such hospitals that offered only emergency-room services to indigents, rather than full hospital services”).

Of the twelve remaining named plaintiffs, nine of them requested fair hearings. Seven of them obtained favorable decisions, and the other two, Denise Thomas and J.Z., obtained stipulated resolutions to their fair hearing requests. Plaintiffs M.K.B., A.I. and L.A.M. allege no fair hearing requests.

As to the seven plaintiffs who obtained favorable decisions, their alien eligibility status was not reached in these fair hearing decisions, as these seven fair hearings were decided against the City on procedural grounds raised at the hearing. To illustrate, O.P. and L.W. both obtained favorable decisions annulling the City's denial of their respective food stamp applications pursuant to the *Rivera* stipulation. P.E. similarly obtained a favorable decision annulling the City's reduction of her public

assistance and food stamps pursuant to the *Rivera* stipulation. M.E. obtained a favorable decision annulling the City's discontinuation of her public assistance, food stamps and Medicaid for her alleged failure to submit documents upon recertification, upon a finding that she complied with the City's recertification request for documents. Fedosenko obtained a favorable decision annulling the City's discontinuation of her food stamps, due to the absence of notice. M.A., who challenged the City's failure to add her to her daughter's case, obtained a favorable decision after fair hearing directing the City to process her application. Marieme Diongue obtained a favorable decision annulling the City's determination which omitted her from her daughter's case, as providing inadequate notice, and directing the City to make a retroactive determination of her eligibility.

Thus, plaintiffs have not demonstrated that State defendants' fair hearing review of their particular cases is legally flawed, let alone so as to subject State defendants to a supervisory injunction enjoining State OTDA and State DOH to employ an alternative method of supervising alien eligibility issues. While plaintiffs complain in this action that their fair hearing decisions should have reached their substantive immigration eligibility status, as set out above, they prevailed on other grounds at their fair hearings, such as procedural defenses, which obviated reaching those issues. Plaintiffs have not demonstrated a Constitutional or statutory mandate for hearing officers to always reach and decide an appellant's substantive eligibility for benefits, especially when the appellant's challenge to the local social services district's determination can be resolved in the appellant's favor on other grounds. It is also questionable whether plaintiffs' fair hearing records were such as to prove (or disprove) their eligibility - let alone demonstrate that a remand was unlawful.

In any event, if plaintiffs, most of whom were represented by counsel at their fair hearings, wished to judicially challenge their fair hearing decisions, they had available to them, and did not avail themselves of, State judicial review pursuant to N.Y. Civil Practice Law and Rules Article 78, and thus they cannot seek to somehow challenge their respective fair hearing decisions in this Court. *See* *Marino v. Ameruso,* 837 F.2d 45 (2d Cir. 1988)(affirming dismissal of § 1983 suit by discharged city employee who claimed ALJ made evidentiary error at administrative hearing since employee had available State court remedies pursuant to CPLR Article 78). Also, in *New York State National Organization for Women v. Pataki,* 261 F.3d 156 (2d Cir. 2001) ("N.O.W."), the Second Circuit reversed the district court's award of injunctive and declaratory relief to class action plaintiffs who alleged undue delay in a state agency's handling of their claims. The Second Circuit stated that "the district court failed to consider the availability of other procedures that could have prevented the claimants from suffering prejudicial delay. More precisely, the district court erred in not considering Article 78 proceedings and how (if utilized by the claimants) these proceedings could have reduced claimants' risk of experiencing prejudicial delay." 261 F.3d at 168. The Second Circuit in *N.O.W.* went on to state that "[g]iven the availability of Article 78 procedures, which can be invoked before actual prejudice arises (unlike a § 1983 damage claim, which presumably would arise only after actual prejudice had occurred), we find that the second *Matthews* factor weighs dispositively in favor of the government." *Id.* at 168. The Circuit further

went on to state that "[b]ecause we hold that Article 78 proceedings provide a meaningful pre-deprivation remedy, we need not decide whether the 'alleged deprivations'-- i.e., processing delay followed by actual prejudice--are 'random and unauthorized,' or instead are based in established state procedures." Id. at 169 n. 3 (emphasis added), citing *Alexandre v. Cortes,* 140 F.3d 406, 411 (2d Cir. 1998) (noting that the existence of independent state post-deprivation remedies are a defense only when the deprivation at issue was "random and unauthorized").

Some of the plaintiffs allege that although they obtained favorable fair hearing decisions, the City nonetheless did not comply with those decisions. *See, e.g.,* L.W., Complaint at „ 190; M.A., *id.* at „ 205; J.Z., *id.* at „ 344). However, these plaintiffs do not allege that they informed State defendants' Compliance Unit of this non-compliance by making non-compliance complaints pursuant to 18 N.Y.C.R.R. § 358-6.4(c). Insofar as these plaintiffs have not exhausted their available supervisory remedies with State defendants, they lack standing, as well as a legal basis, for contending that State defendant's supervision of their particular cases is legally inadequate.[FN18]

> FN18. O.P. (who is PRUCOL) made a compliance complaint, which resulted in the City submitting a Fair Hearing Compliance Statement (exhibit K to O.P's declaration dated November 22, 2005), stating, *inter alia:*
> We have been unable to determine if you are eligible for the benefits that were the subject of your Fair Hearing. We mailed you a letter on 8/16/05, asking you to bring the following [documents] to the Job Center by 8/24/05 ... Because you failed to respond to our letter, we cannot complete any compliance action until you supply the requested information. If you bring the information to the Job Center within ten days from the date of this notice, we will consider the information in accordance with the Fair Hearing decision.

Furthermore, the allegation of HRA's non-compliance with a fair hearing decision does not support the request for a preliminary injunction against State OTDA. For example, in *Hegarty v. Perales,* 168 A.D.2d 561 (2d Dep't 1990), the petitioner sued the State and local social services commissioner to compel compliance with the State commissioner's decision after fair hearing. The Appellate Division affirmed Supreme Court's dismissal of the petition as against the State commissioner and affirmed Supreme Court's denial of the petition as against the local commissioner "except to the extent of directing his compliance with the 'Decision After Fair Hearing'." 168 A.D.2d at 561. Similarly, in *Patterson v. Blum,* 86 A.D.2d 893 (2d Dep't 1982), the petitioner sued the State and local commissioners of social services to compel the local commissioner to comply with the State commissioner's decision after fair hearing. There, again, the Appellate Division dismissed the petition as against the State commissioner, and only granted the petition "to the extent that the matter is remitted to the Nassau County Department of Social Services with directions to proceed in accordance with the directives set forth in the decision after fair hearing." 86 A.D.2d at 894.

4. PLAINTIFFS SUPERVISORY CLAIMS AGAINST THE STATE DEFENDANTS ARE LIKELY TO BE DISMISSED BECAUSE PLAINTIFFS LACK A PRIVATE RIGHT OF ACTION UNDER THE FOOD STAMP ACT OR

THE SOCIAL SECURITY ACT TO PRESCRIBE THE MANNER BY WHICH STATE DEFENDANTS MUST SUPERVISE THE ISSUES HEREIN, IN PARTICULAR AS PLAINTIFFS HAVE NOT DEMONSTRATED THAT STATE DEFENDANTS' FAIR HEARING REVIEW OF THEIR CASES VIOLATED THE FEDERAL FOOD STAMPS OR MEDICAID STATUTES OR REGULATIONS

Plaintiffs seek an injunction against the State defendants to “supervise” the City defendants in some manner which plaintiffs do not specify other than to contend that “the State fair hearing system ... is wholly inadequate and ineffective in rectifying widespread and persistent errors by HRA in the delivery of public benefits to class members.” Plaintiffs' memorandum of law in support of motion for preliminary injunction and class certification, at 28. However, as discussed above, plaintiffs have not demonstrated that their respective fair hearing decisions, all of which were favorable, somehow legally harmed them - let alone, violated the federal food stamp or Medicaid statutes and regulations, which expressly provide for supervisory review through the fair hearing process. To the extent the State's WMS is considered a form of supervision, plaintiffs have not demonstrated that the State computerized welfare management system contains any error that systemically deprives eligible aliens of federal benefits.

The Food Stamp Act provides that the State agency participating in the food stamp program “shall submit for approval a plan of operation specifying the manner in which such program will be conducted within the State in every political subdivision.” 7 U.S.C. § 2020(d).[FN19] The“Secretary [of the United States Department of Agriculture] may not, as a part of the approval process for a plan of operation, require a State to submit for prior approval by the Secretary the State agency instructions to staff, interpretations of existing policy, State agency methods of administration, forms used by the State agency, or any materials, documents, memoranda, bulletins, or other matter, unless the State determines that the materials, documents, memoranda, bulletins, or other matter alter or amend the State plan of operation or conflict with the rights and levels of benefits to which a household is entitled.” 7 U.S.C. § 2020(d).

> FN19. Under the Food Stamps statute, “State agency” means “the agency of State government, including the local offices thereof, which has the responsibility for the administration of the federally aided public assistance programs within such State, and in those States where such assistance programs are operated on a decentralized basis, the term shall include the counterpart local agencies administering such programs ...” 7 U.S.C. § 2012(n).

The Food Stamp Act further provides that the State plan shall provide “for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency ...” 7 U.S.C. § 2020(e)(10). Implementing regulations provide that the “State agency shall maintain a system *of its choosing* for handling program complaints filed by participants, potential participants, or other concerned individuals or groups.” 7 C.F.R. § 271.6(a)(1) (emphasis added). This regulation further provides that “[c]omplaints regarding such areas as processing standards and service to participants and potential participants would generally be handled under this complaint procedure.” 7 C.F.R. § 271.6(a)(1).

In addition, the Food Stamp Act provides that "[w]hen a State agency learns, through its own reviews under section 2025 of this title or other reviews, or through other sources, that it has improperly denied, terminated or underissued benefits to an eligible household, the State agency shall promptly restore any improperly denied benefits ..., and shall take other steps to prevent a recurrence of such errors where such error was caused by the application of State agency practices, rules or procedures inconsistent with the requirements of this chapter or with regulations or policies of the Secretary issued under the authority of this chapter." 7 U.S.C. § 2020(b).

Finally, the Food Stamp Act provides that "[i]f the Secretary determines, upon information received by the Secretary, or investigation that the Secretary shall initiate upon receiving sufficient information evidencing a pattern of lack of compliance by a State agency of a type specified in this subsection, that in the administration of the food stamp program there is a failure by a State agency without good cause to comply with any of the provisions of this chapter, ... the *Secretary shall immediately inform such State agency of such failure and shall* allow the State agency a specified period of time for the correction of such failure." 7 U.S.C. § 2020(g)(emphasis added). "If the State agency does not correct such failure within that specified period, the Secretary may refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance forthwith by the State agency ..." *Id.*

The Medicaid program is administered by the states in accordance with a plan approved by the United States Department of Health and Human Services. The Social Security Act provides that the State Medicaid plan, *inter alia:*
... provide for the establishment or designation of a single state agency to administer or *to supervise the administration of the plan,* except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter ....

42 U.S.C. § 1396a(a)(5) (emphasis added). The state's Federal Medicaid plan must "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 1396a(a)(1). The state's Federal Medicaid plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness ..." 42 U.S.C. § 1396a(a)(3).

With respect to State agency compliance, the Social Security Act provides:
If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan ... finds ... that in the administration of the plan there is a failure to comply *substantially* with any such provision... the Secretary shall notify such State agency that further payments will not be made to the State ... until the Secretary is satisfied that there will no longer be any such failure to comply.

42 U.S.C. § 1396c (emphasis added).

As the food stamp Act and Social Security Act and implementing regulations expressly provide for supervisory review through the fair hearing process, even though the plaintiffs are aliens, they lack a private right of action to mandate some other manner by which State defendants must supervise the alien eligibility issues involved here. In *Blessing v. Freestone,* 520 U.S. 329 (1997), the United States Supreme Court held that individuals do not have a private right of action under section 1983 to enforce a "substantial compliance" provision of Title IV-D of the Social Security Act. In reaching its conclusion, the Supreme Court followed its traditional three-prong test for determining whether a federal statutory provision confers a federal private right of action: (1) Congress must have intended that the provision benefit the plaintiff, (2) "plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence", and (3) the statute must unambiguously impose a binding obligation on the States. 520 U.S. at 341, *citing,* *Wright* v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430-32 (1987).

In *Blessing,* the Supreme Court determined that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the Social Security Act] was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right." 520 U.S. at 343. The Court found that "[f]ar from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program." *Id.* (emphasis in original). The Court further stated that "the Secretary must look to the aggregate services provided by the State, *not to whether the needs of any particular person have been satisfied."Id.* (emphasis added). The Court also observed that "many provisions, like the 'substantial compliance' standard, are designed only to guide the State in structuring its systemwide efforts at enforcing support obligations." 520 U.S. at 344 and opined as follows:
The Court of Appeals erred not only in finding that individuals have an enforceable right to substantial compliance, but also in taking a blanket approach to determining whether Title IV-D creates rights. It is readily apparent that many other provisions of that multifaceted statutory scheme do not fit our traditional three criteria for identifying statutory rights. To begin with, many provisions, like the "substantial compliance" standard, are designed only to guide the State in structuring its systemwide efforts at enforcing support obligations. These provisions may ultimately benefit individuals who are eligible for Title IV-D services, but only indirectly. For example, Title IV-D lays out detailed requirements for the State's data processing system. Among other things, this system must sort information into standardized data elements specified by the Secretary; transmit information electronically to the State's AFDC system to monitor family eligibility for financial assistance; maintain the data necessary to meet federal reporting requirements; and provide for the electronic transfer of funds for purposes of income withholding and interstate collections. *42 U.S.C.* § 654a (1994 ed., Supp. II); 45 C.F.R. § 307.10 (1995). *Obviously, these* complex standards do not give rise to individualized rights to computer services. They are simply intended to improve the overall efficiency of the States' child support enforcement scheme.

520 U.S. at 344 (emphasis added). The Supreme Court further stated that it is impermissible for plaintiffs simply to cite to an entire federal program statute (in that case child support services under Title IV-D of the Social Security Act), and then claim they have a legally enforceable federal right to sue the State to compel compliance with the program in all respects. The Court stated that such an approach:
paints with too broad a brush. It was incumbent upon [plaintiffs] to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV-D, as an undifferentiated whole, gives rise to undefined “rights.”

520 U.S. at 342.[FN20]

> FN20. The Supreme Court consequently reversed and remanded to the lower court “to determine exactly what rights, considered in their most concrete specific form” were being asserted and “whether any specific claim asserts an individual federal right.” 117 S.Ct. at 1362.

Here too, plaintiffs' supervisory claim against the State defendants “paints with too broad a brush” in alleging that State defendants' supervision of plaintiffs' cases violates the federal food stamps statutory provision, 7 U.S.C. § 2012(n), and the Federal Medicaid statutory provision, 42 U.S.C. § 1396a(a)(5) and regulation, 42 C.F.R. §431.10. (Complaint at para. 360). However, 7 U.S.C. § 2012(n) is merely a definitional section, and states that “State agency” means “the agency of State government, including the local offices thereof, which has the responsibility for the administration of the federally aided public assistance programs within such State, and in those States where such assistance programs are operated on a decentralized basis, the term shall include the counterpart local agencies administering such programs ...” 7 U.S.C. § 2012(n). Meanwhile, plaintiffs' citation to the Medicaid statute, 42 U.S.C. § 1396a(a)(5), is unavailing to confer upon them an enforceable right against the State DOH since this statute merely requires that the State Medicaid plan, *inter alia:*
... provide for the establishment or designation of a single state agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter ...

42 U.S.C. § 1396a(a)(5). While 42 C.F.R. § 431.10 sets forth certain provisions for the Medicaid supervising agency, these provisions, and those cited above, do not confer private rights enforceable pursuant to *Blessing.* These provisions are not intended to provide a benefit to individuals with respect to State supervision. Furthermore, the provisions do not confer a concrete benefit specific enough for the judiciary to enforce. Congress created more restrictive criteria for aliens, adding alienage-related conditions which also embroil the welfare eligibility process with other federal agencies involved in immigration matters, *i.e.,* the United States Citizenship and Immigration Services and the Social Security Administration. Thus, plaintiffs lack the private right of action to enjoin the State defendants to supervise the alien eligibility issues here in some manner beyond the Congressionally mandated fair hearing process, as to which, again, plaintiffs have not demonstrated

that their fair hearings violated the federal food stamps or Medicaid statutes or regulations. *Graus v. Kaladjian,* 2 F.Supp.2d 540, 544 (S.D.N.Y. 1998) (no private right of action is conferred by 42 U.S.C. § 1396a(a)(5) and 42 C.F.R. § 431.10, on which certain of the claims against the State DOH are premised).

POINT II

PLAINTIFFS' MOTION FOR CERTIFICATION OF A PROPOSED CLASS SHOULD BE DENIED

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. Federal Rule of Civil Procedure ("Fed. R. Civ. P.") Rule 23(a). When a person sues as a representative of a class, the court must--at an early practicable time-- determine by order whether to certify the action as a class action. Fed. R. Civ. P. Rule 23(c)(1)(A). An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel. Fed. R. Civ. P. Rule 23(c)(1)(B). Plaintiffs ask this Court to certify a broad class with a complex definition as follows:
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/or (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).

Notice of Motion dated January 11, 2006. The phrase "Affected Immigrants" is overbroad in including people who are not "qualified aliens" under federal law, and in including qualified alien categories which are not represented by the named plaintiffs. The only "qualified alien" category which plaintiffs represent appears to be the "battered alien" category. Because the proposed class is completely subsumed in the definition of a certified class that provides for permanent injunctive relief for those who apply for benefits at Job Centers, and because the proposed definition is overly broad and includes references to state law claims that this court may not enforce against State defendants, the Court should deny the instant motion for class certification.

It is well-settled that a class action is "an exception to the usual rule that lit-

igation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)*. Accordingly, as a prerequisite under Fed. R. Civ. P. 23 for maintaining a class action, it must appear that a plaintiff presents a claim or an issue for adjudication that is typical of a class of claims or issues which could be raised by an ascertainable class of persons who are not before the court. "[T]he class-action device saves the resources of both the courts and the parties by permitting *an issue* potentially affecting *every* [class member] to be litigated in an economical fashion under Rule 23." *Califano, id.,* at 701 (emphasis added). Otherwise class actions could result in the litigation of abstract questions which are not generated by the parties before the court. The very rationale for employing Rule 23 thus involves a threshold determination by the trial court that the individual plaintiff or plaintiffs before the court possesses claims which are representative of the class.

In *Reynolds v. Giuliani, 118 F.Supp.2d 352 (S.D.N.Y. 2000)* the Court certified a class defined as "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." *Id.* at 392. The Court recently signed a final judgment directing permanent injunction against State DOH, STATE OTDA and City defendant. *See* 2005 WL 3428213. Some of the lawyers who are proposed class counsel in the instant action are class counsel in *Reynolds.* Clearly plaintiffs in the instant action are members of the *Reynolds* class. Relief is best sought for them through the *Reynolds* litigation, especially since the provision of relief to them might interfere with plans to provide relief to other *Reynolds* class members.

In the instant action, most of the plaintiffs have demonstrated that, if they are eligible to receive any kind of public benefit, they are eligible to receive SNA and State Medicaid.[FN21] These are claims arising out of State law, and this court is precluded by the Eleventh Amendment from adjudicating how the State defendants enforce state law. For this reason alone, certification of the proposed class that includes references to state law benefits is improper.

> FN21. The plaintiffs rely on „„ 3-16 of the declaration of Camille Carey, Esq., one of the attorney/witnesses representing the plaintiffs, to argue that they satisfy the numerosity criterion of Rule 23(a)(1). Plaintiffs' Memorandum of Law at 52. Examination of the declaration demonstrates that Ms. Carey transmits estimated information she heard from others to arrive at the total of persons she claims might be members of the class. This is hearsay and is not admissible into evidence. Fed. R. Evid. 802. "The evidence supplied by plaintiffs for use by the court in its analysis must be such that it could be received into evidence." *Cokely v. NYCCOC, 2003 WL 1751738 (S.D.N.Y. Apr. 2, 2003)*(Motley, *J.)citing In re Visa Check/Mastermoney Antitrust Litigation, 280 F.3d 124, 135 (2d Cir.2001)*. Accordingly, the plaintiffs' argument must fail. Ms. Carey makes no effort to demonstrate how many of the cases she improperly reports actually suffered harm, that is a benefits application problem due to their immigration status.

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CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction against the State defendants and class certification should be denied.

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 City Human Resources Administration; Robert Doar, as Commissioner of the New York State Office of Temporary and Disability Assistance; and Antonia C. Novello, as Commissioner of the New York State
2006 WL 548605 (S.D.N.Y.)

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