2005 WL 342106
United States District Court,
S.D. New York.

Lakisha REYNOLDS, Georgina Bonilla, April Smiley, Lue Garlick, Adriana Calabrese, Jenny Cuevas, and Elston Richards, on their own behalf and on behalf of all others similarly situated, Plaintiffs,
v.
Rudolph GIULIANI, as Mayor of the City of New York, Jason Turner, as Commissioner of the New York City Human Resources Administration, Brian J. Wing, as Commissioner of the New York State Office of Temporary and Disability Assistance, and Barbara Debuono, as Commissioner of the New York State Department of Health, Defendants.

No. 98 Civ.8877(WHP). | Feb. 14, 2005.

Attorneys and Law Firms

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Opinion

AMENDED MEMORANDUM AND OPINION

PAULEY, J.

***1** This class action was brought on behalf of qualified welfare beneficiaries who claim to have been deprived of federally sponsored cash assistance, food stamp and Medicaid benefits in violation of federal and state law. Plaintiffs brought this action against Rudolph Giuliani as Mayor of the City of New York and Jason Turner as Commissioner of the New York City Human Resources Administration ("HRA") (collectively, the "City defendants"), as well as Brian J. Wing as Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA") and Barbara DeBuono as Commissioner of the New York State Department of Health ("DoH") (collectively, the "State defendants"). The Complaint ("Compl.") alleges violations of the Food Stamp Act, 7 U.S.C. § 2020 *et seq.,* the Medicaid Act, 42 U.S.C. § 1396 *et seq.,* and New York law. The Complaint further alleges that those violations support individual claims pursuant to 42 U.S.C. § 1983. Plaintiffs seek declaratory relief and a permanent injunction ordering defendants to process applications for food stamps, Medicaid and cash assistance in accord with federal and state law. For the following reasons, plaintiffs' requested relief is granted.

As required by Rule 52, this Court sets forth its findings of fact and conclusions of law.

FINDINGS OF FACT

I. ***Background***

The factual background and regulatory framework undergirding plaintiffs' claims are set forth in three prior memoranda and orders of this Court. *See Reynolds v. Giuliani,* 35 F.Supp.2d 331 (S.D.N.Y.1999) (*"Reynolds I"*); *Reynolds v. Giuliani,* 43 F.Supp.2d 492 (S.D.N.Y.1999) (*"Reynolds II"*); *Reynolds v. Giuliani,* 118 F.Supp.2d 352 (S.D.N.Y.2000) (*"Reynolds III"*).

Following enactment of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"),[1] the City defendants began converting their Income Support Centers-the primary vehicle for distributing public assistance-into Job Centers to comply with PRWORA. The City defendants operate twenty-nine Centers that are either Job Centers or Income Support Centers scheduled for conversion to Job Centers. (Declaration of Patricia Smith, dated Feb. 2, 2001 ("Smith Decl.") ¶¶ 2-3.) On average, those Centers process between 12,000 and 15,000 applications for public assistance each month. (Smith Decl. ¶ ¶ 2-3.) Many of those applications are

combined with applications for food stamps and Medicaid. (Smith Decl. ¶¶ 2-3.)

[1] PRWORA replaced the Aid to Families With Dependent Children ("AFDC") program with the Temporary Assistance for Needy Families ("TANF") program.

On December 16, 1998, plaintiffs filed this action alleging that certain policies and practices of HRA and OTDA prevent eligible individuals from applying for and timely receiving food stamps, Medicaid and cash assistance. *Reynolds I,* 35 F.Supp.2d at 337. Plaintiffs claim that defendants are violating federal and state law by: (1) failing to provide or accept initial applications and improperly deterring potential applicants; (2) failing to make correct eligibility determinations and failing to provide immediate needs grants or expedited food stamp service to eligible applicants on a timely basis; (3) failing to make eligibility determinations regarding applicants' food stamp and Medicaid applications separate from the eligibility determinations regarding their cash assistance applications; and (4) failing to provide applicants with timely and adequate written notices of determinations of their eligibility for these benefits. (Compl.¶¶ 3, 255-57, 260, 262-64.)

***2** On January 25, 1999, this Court granted a preliminary injunction requiring the City defendants to accept and process applications for food stamps, Medicaid and cash assistance. *Reynolds I,* 35 F.Supp.2d at 347-48. That injunction also barred the City defendants from opening any new Job Centers or converting existing Income Support Centers to Job Centers pending a hearing on the adequacy of a corrective action plan. *Reynolds I,* 35 F.Supp.2d at 347-48.

On February 5, 1999, the Food and Nutrition Service at the U.S. Department of Agriculture ("USDA") concluded that the converted Job Centers were impeding access to public assistance. (*See* Declaration of Steven Ptak, dated Feb. 2, 2001 ("Ptak Decl.") Ex. 3: Attach. at 6-14.) The USDA report requested a corrective action plan and recommended that OTDA monitor local district operations to ensure compliance with all applicable food stamp regulations. (Ptak Decl. Ex. 3: Attach. at 6-24.)

In response to the USDA report, OTDA staff reviewed operations at twelve Job Centers. OTDA concluded that "New York City had implemented corrected procedures to address the deficiencies identified in the USDA Program Access Review." (Ptak Decl. Ex. 13.) OTDA further found that the City was fulfilling its obligations under federal and state law. (*See* Ptak Decl. Ex. 13: Attach. at 2 (draft report, Ex. 16).)

On May 24, 1999, this Court approved the City defendants' corrective action plan ("CAP") and modified the preliminary injunction to permit the City defendants to open three additional Job Centers. *See Reynolds II,* 43 F.Supp.2d at 497-98. The CAP specified that individuals seeking benefits would be informed of their right to apply for them during their initial contact with any Job or Income Center. *See Reynolds II,* 43 F.Supp.2d at 495-96. The CAP also provided for training, audits and a "spot check" program of unannounced inspections. (Declaration of Jacquelyn Flaum, dated Feb. 1, 2001 ("Flaum Decl.") ¶ 3.)

In July and August 1999, OTDA reviewed nine Centers and again concluded that the Job Centers were fulfilling their responsibilities to public assistance applicants. (Ptak Decl. Ex. 21 at 1, Ex. 24.) Consequently, on December 10, 1999, the City defendants applied for a further modification of the preliminary injunction and offered results from an August 1999 audit of applications submitted from May through July 1999 (the "August 1999 Audit"). After a three-day hearing in December 1999 and January 2000, this Court found that the City defendants had failed to demonstrate sufficient improvement to warrant modification of the preliminary injunction. *See Reynolds III,* 118 F.Supp.2d at 352. Additionally, this Court denied the State defendants' motion to dismiss the complaint and their application to modify the preliminary injunction. This Court also certified a class consisting of "all New York City residents who have sought, are seeking, or will seek to apply for food stamps, Medicaid, and/or cash assistance at a Job Center." *Reynolds III,* 118 F.Supp.2d at 392.

***3** On February 8, 2001, plaintiffs consented to vacatur of that portion of this Court's January 25, 1999 Order staying the opening of new Job Centers and the conversion of existing Income Support Centers to Job Centers. That concession was based on the results of an audit of applications filed in September 2000 at Job Centers and Income Support Centers to measure their performance (the "September 2000 Audit"). The September 2000 Audit focused on the twenty-nine Centers where benefits applications were being processed and reviewed a statistically significant sample of applications filed in New York City.

In April 2001, this Court conducted a bench trial. The September 2000 Audit was the centerpiece of the trial. The City defendants presented testimony from Patricia M. Smith, Executive Deputy Director of the Family Independence Administration, Dr. Jessica Pollner, an

expert in statistical analysis (Trial Transcript ("Trial Tr."), at 69), and William Waldman, an expert in the operation and administration of public assistance programs and in national human services policy as it affects state public assistance programs. (Trial Tr. at 177.) Plaintiffs' only witness was Richard Faust, an expert in sampling and statistics.

II. *City Defendants*

A. *The Application Process*

While the application process for public assistance varies depending on the Center, a client's first interaction is with a receptionist. (City Defendants' Proposed Findings of Fact ("City Defs. Findings") ¶ 3.) If a prospective applicant indicates a desire to apply for public assistance benefits, the receptionist is required to provide an Applicant Job Profile, i.e., an application, to be completed by the applicant. (City Defs. Findings ¶ 3.) Once the application is completed, the receptionist checks to see if the applicant has an active or pending case at another Income Support or Job Center. (City Defs. Findings ¶ 3.) After an application is completed, a Center employee registers it in the State's computerized Welfare Management System ("WMS") database. A registration number is assigned memorializing the application date. (City Defs. Findings ¶ 3; Smith Decl. ¶¶ 7-8.)

Once the application is registered, a Center employee interviews the applicant to determine eligibility. (City Defs. Findings ¶ 4.) At Job Centers, that interview must cover subjects including emergency assistance, employment counseling and general eligibility guidelines for the different public assistance programs. (City Defs. Findings ¶ 4.) In addition, eligibility interviewers are required to address various social issues that may arise. For example, applicants who are victims of domestic violence are referred to an HRA domestic violence liaison. (City Defs. Findings ¶ 4.) Applicants for ongoing assistance who have an immediate need may also be eligible for "pre-investigative" grants during the time their application is pending. (City Defs. Findings ¶ 4; Smith Decl. ¶ 10.)

***4** During the eligibility interview, a Center worker reviews the application to determine whether the applicant needs immediate benefits, and completes a history sheet explaining why the applicant came to the Center and identifying any needs. (City Defs. Findings ¶ 5; Smith Decl. ¶ 11.) When determining whether applicants are eligible for pre-investigative benefits, family size, income, resources, citizenship or immigration status and identification are considered. (City Defs. Findings ¶ 5; Smith Decl. ¶ 11.) Applicable codes are entered into the WMS and forms including, *inter alia,* an expedited service worksheet for food stamps; a Form 145HH, notifying the applicant of HRA's decision to grant or deny an immediate needs grant and/or expedited food stamps; a Form DSS-3575, authorizing the payment of any immediate benefit; a Form DSS-3574, authorizing the issuance of expedited food stamps; and the form DSS-3517, which provides demographic data about the applicant are completed. (City Defs. Findings ¶ 5; Smith Decl. ¶ 11.) In addition, appointment referrals are made and applicants are finger-imaged. (City Defs. Findings ¶ 5; Smith Decl. ¶ 11.) After review by a Center supervisor, the paperwork is entered into the WMS and applicants receive written notice of any decision on their benefits applications.

A "Notice of Decision on Food Stamps and/or Cash Assistance to Meet an Immediate Need" is issued advising applicants whether they will receive an immediate needs grant or expedited food stamps, and the reason for the decision. (City Defs. Findings ¶ 30.) Applicants withdrawing their applications receive a "Notification of Application Withdrawal" informing them that they may qualify for food stamps or Medicaid even though they did not complete their cash assistance applications. (City Defs. Findings ¶ 30.) Finally, an "Action Taken on Your Application" form is provided to advise applicants of their eligibility for assistance. (City Defs. Findings ¶ 30.) If the application is denied, that form explains the reasons for the denial and advises applicants of their right to a fair hearing if they wish to challenge the denial. (City Defs. Findings ¶ 30.)

B. *The September 2000 Audit*

The September 2000 Audit was conducted pursuant to a protocol established by the parties from a statistically significant sample of applications filed in September 2000 at 29 Income Support and Job Centers in New York. (*See* Fourth Report of Plaintiffs' Expert Richard Faust ("Fourth Faust Rep.") ¶¶ 6-13; City defendants' Expert Jessica Pollner's Report ("Pollner Rep.") at 5.) The audit assessed whether: (a) expedited food stamp and immediate needs cash grants were timely provided to those eligible for such grants; (b) applications for food stamps, Medicaid and cash assistance were withdrawn based on inaccurate or misleading information; (c) separate food stamps and Medicaid determinations or referrals were made as required when cash assistance applications were denied or withdrawn; and (d) notice concerning expedited food stamps, immediate needs cash grants, Medicaid and cash assistance was timely and adequate. (Fourth Faust Rep. ¶ 14; Pollner Rep. at 5.)

***5** A sample of 597 applications was selected from a population of 13,972 names within the City defendants' Eligibility Verification Review ("EVR") database. The sample included applications filed in September 2000 and applications filed prior to that time that were withdrawn or rejected on the same day they were filed. (Fourth Faust Rep. ¶¶ 6, 9, 11-12; Declaration of Jessica Pollner ("Pollner Decl.") at 1-3.) The EVR data system captures information from the WMS regarding applicants scheduled for an appointment with an EVR office. (Fourth Faust Rep. ¶ 7.) The parties then selected 559 applications from the EVR list for review. (Fourth Faust Rep. ¶ 11 .)

The EVR database did not include applications withdrawn on the day they were filed. To address that omission, the parties sampled applications filed in September 2000 that were not entered into the EVR system by collecting case files for all September 2000 applications identified as withdrawn or rejected on the first day (the "withdrawn sample"). (Fourth Faust Rep. ¶¶ 8, 12; Pollner Rep. at 2-3.) A total of 37 such cases were selected for audit, 36 of which were used in the audit results. (Fourth Faust Rep. ¶ 12; Pollner Rep. at 2-3.)[2]

[2] The EVR data system captures information from the WMS regarding applicants scheduled for an appointment with an EVR office and contains the greatest number of applications filed in any given month. (Fourth Faust Rep. ¶ 7.)

However, the data supplied by the City defendants did not represent all withdrawn cases recorded on the application logs. (Fourth Faust Rep. ¶ 13.) Thus, plaintiffs created a supplemental list of withdrawn applications from the logs maintained by the Job Centers and drew a supplemental sample from that list. That supplemental list contained an additional 825 names. At the direction of this Court, HRA attempted to locate the files for those applications but succeeded in retrieving only two (the "supplemental withdrawn sample"). (Fourth Faust Rep. ¶ 13.)

The September 2000 Audit minimized disputes over data from applicant files. (Fourth Faust Rep. ¶ 27; Plaintiffs' Proposed Findings of Fact ("Pls.Findings") ¶ 34.) The parties disagreed over only 8 of the 559 EVR sample, and 8 of the withdrawn and supplemental withdrawn sample cases. (Pls. Findings ¶ 34; Fourth Faust Rep. ¶ 27.)

However, after the September 2000 Audit was completed, the City defendants embarked unilaterally on a second review of cases for which the plaintiffs and the City defendants had both concluded that either (1) expedited food stamps or immediate needs cash grants were erroneously denied, or (2) an application was withdrawn based on inaccurate or misleading information. Based on this second review, the City defendants changed their determinations in 34 cases. (Declaration of Michael Bermudez, dated Mar. 9, 2001 ("Bermudez Decl.") ¶¶ 5, 16-20, 22; Deposition of Michael Bermudez, dated Mar. 19, 2001 ("Bermudez Dep."), at 69-70, 82-83.)

The City defendants engaged in opportunistic rummaging within the data set that led to a significant change in their statistics. Specifically, the City defendants determined that the relevant pool was the total number of applications rather than the total number of *eligible* applications. That alteration of the denominator had a profound effect on statistical comparisons of the City defendants' success rates. This Court agrees with plaintiffs that the proper base from which HRA's success or failure rates are calculated is the number of eligible applicants, not the number of overall applicants. Compliance with the food stamp, Medicaid and cash assistance laws should be measured according to how many eligible applicants are incorrectly denied benefits.[3] Moreover, because the City defendants' second review was dehors the agreed-upon protocol for the September 2000 Audit and not subject to challenge by plaintiffs, it does not bear the same indicia of reliability as the earlier results.

[3] *See, e.g., Reynolds v. Giuliani,* 35 F.Supp.2d 331, 334 (S.D.N.Y.1999) ("The State agency must provide *eligible* applicants that complete the initial application process with food stamps as soon as possible.") (citing 7 U.S.C. § 2020(e)(3) and 7 C .F.R. § 273.2(g)) (emphasis added); *see also Catanzano v. Wing,* 103 F.3d 223, 229 (2d Cir.1996) ("A state's Medicaid plan must make 'medical assistance' available to *qualified recipients."*) (citing 42 U.S.C. § 1396d(a)) (emphasis added).

***6** Faust also evaluated the EVR sample of 559 cases for possible bias. Because the size of the population sampled was unknown, the total withdrawn population could not be identified. (Fourth Faust Rep. ¶¶ 40-42.) Nevertheless, Faust concluded that "based on the sampling protocol, the 36 withdrawn applications audited from the initial withdrawn list should be representative of the ... applications initially retrieved.... [T]here is no reason to expect any better performance among the non-retrieved applicants than among the retrieved applications." (Fourth Faust Rep. ¶ 43.) Thus, although the City defendants lack accurate information concerning the number of withdrawn applications, this Court concurs with Faust that there is no reason to expect any better performance among the non-retrieved applications than among the retrieved ones.

In contrast, Pollner combined the EVR sample with the withdrawn sample. (Supplemental Report of Jessica Pollner ("Supp. Pollner Rep .") at 1-2.) While Faust considered that statistical method inappropriate, he nevertheless re-ran his results combining the 36 applications in the withdrawn sample with the EVR sample, thereby testing Pollner's procedure. Faust concluded that combining the samples did not significantly affect the overall audit procedures. (Fourth Faust Rep. ¶¶ 45-46.)

Therefore, this Court finds that the September 2000 Audit was conducted in accord with generally accepted survey principles and generally recognized statistical standards. Specifically, this Court concludes that: (1) the EVR sample is representative of the EVR population from which it was selected; (2) the inclusion of the withdrawn sample in the results of the September 2000 Audit does not materially alter the outcome; (3) the data gathered was accurately reported; and (4) the data was analyzed in accord with accepted statistical principles. *See* Manual for Complex Litigation (4th) § 11.493. The findings of the September 2000 Audit are discussed below.

1. ***Expedited Food Stamps***

The Food Stamp Act requires that states provide food stamps to certain needy households on an expedited basis. *See* 7 U.S.C. § 2020(e)(9). All applicants for food stamps must be screened to determine whether they qualify for expedited issuance of food stamps. *See* 7 U.S.C. § 2020(e)(9); 7 C.F.R. § 273.2(i)(2). New York law requires that eligible applicants be provided with expedited food stamps within five days. *See* 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a); *see also* 7 U.S.C. § 2020(e)(9) (seven-day requirement). It bears noting that the statutory regimes focus on *eligible* applicants. *See* 7 U.S.C. § 2020(e)(3); 7 C.F.R. § 273.2(g); 42 U.S.C. § 1396d(a).

Faust's and Pollner's calculations show nearly identical citywide performance in providing expedited food stamp service within the five-day period set forth by New York State law: 69 percent versus 69.31 percent, respectively. (Pls. Ex. 49: Fourth Faust Rep., Table C-2; Pollner Supp. Rep. at 14, Table 13.) Both parties agree that the Job Centers provide expedited food stamp services within five days to no more than 72 percent of the applicants who receive expedited food stamps and that the citywide average is approximately 69 percent. (Pls. Ex. 49: Fourth Faust Rep., Table C-2; Pollner Supp. Rep. at 14, Table 13.)[4]

[4] Using a compliance rate that compares the number of applicants who received food stamps within the federally required seven days with the total number of applicants who were eligible for expedited food stamps, Faust calculated that 303 applicants were approved for expedited food stamps citywide and that 72 other applicants were eligible for expedited food stamps but were incorrectly denied. (Supp. Pollner Rep. Queries C-8 & C-15 at Attach. 16.) An additional 23 grants were authorized but not issued. (Supp. Pollner Rep. Attach. 16, Query C-5.) Thus, from the pool of 398 applicants eligible for expedited food stamps, 259 eligible applicants, or 65.07 percent, received expedited food stamps within seven days.

***7** Faust and Pollner were in substantial agreement concerning the percentage of applicants properly denied expedited food stamps because of ineligibility. Faust calculated that 33 percent of applicants were actually ineligible to receive expedited food stamps. (Fourth Faust Rep., Table C-3, at Pls. Ex. 49.) Pollner's original report showed that applicants were properly denied expedited food stamps because they were ineligible 42.67 percent of the time. (Pollner Rep. at 15 (Table 10).) Even taking Pollner's revised data, the percentage of ineligibles only increased to 45.09 percent. (Supp. Pollner Rep. at 6; Fourth Faust Rep. Table C-3, at Pls. Ex. 49.) Accordingly, the range of eligible applicants who were denied expedited food stamps is between 57.33 percent (Pollner) and 67 percent (Faust).

2. ***Immediate Needs Grants***

Where applicants for Medicaid, food stamps or cash assistance are in immediate need, temporary assistance must be granted pending completion of an eligibility investigation. N.Y. Soc. Serv. Law § 133; *see Gonzales v. Blum,* 486 N.Y.S.2d 630, 632 (Sup.Ct.1985) ("There is no doubt that this section establishes the right of public assistance applicants to pre-investigative relief should it appear that they are in immediate need."). Applicants in need are entitled to immediate needs grants even when ongoing eligibility has not yet been established. *See* 18 N.Y.C.R.R. § 351.8(c)(4).

Faust and Pollner were in virtual agreement concerning the City defendants' rate of compliance with the same-day requirement once an immediate needs grant was authorized: 69 percent versus 69.31 percent, respectively. (Pls. Findings ¶ 58.) Both experts agree that the Job Centers provided immediate needs grants on the same day as requested to no more than 79.33 percent of the eligible applicants. (Pls. Findings ¶ 58; Supp. Pollner Rep., Table 4 at 9.)

The experts' conclusions regarding eligible applicants who never received immediate needs cash grants are again substantially similar. Pollner concluded that 54.06 percent of citywide applicants were correctly denied immediate needs grants (Supp. Pollner Rep. Table 5 at 9), compared to Faust's 51 percent. (Pls. Ex. 49: Fourth Faust Rep., Table B-3.) This minor discrepancy is attributable to the City defendants' data rummaging.[5]

[5] The City defendants maintain that examining the number of grants issued the day following the application is relevant for determining their level of compliance. But even then, Pollner calculates that only 72.82 percent of eligible applicants received immediate needs grants on the same day or the next day citywide. (Pls. Findings ¶ 63, Table 12.)

3. ***Separate Determinations for Foods Stamps and Medicaid***

The September 2000 Audit also addressed the issue of whether HRA workers made separate determinations for food stamps and Medicaid when cash assistance applications were denied.

Federal law provides that "no household shall have its food stamp benefits denied solely on the basis that its application to participate in another program has been denied or its benefits under another program have been terminated without a separate determination by the State agency that the household failed to satisfy a food stamp eligibility requirement." 7 C.F.R. § 273.2(b)(3). If the cash assistance application is denied or withdrawn, the applicant is not required to submit a new application for food stamps. 7 C.F.R. § 273.2(b)(3).

***8** The Medicaid program contains a similar requirement. Individuals or households wishing to apply for Medicaid benefits must be given the opportunity to do so. *See* 42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.906. Medicaid applications must be processed within 45 days, except in circumstances where the applicant claims to be eligible for Medicaid because of a disability, in which case the application must be processed within 90 days. *See* 42 C.F.R. § 435.911(a)(1)-(2). A state agency cannot deny an application for Medicaid benefits solely because the cash assistance application was denied or withdrawn. *See* 42 C.F.R. § 435.909. Nor may the State require that the individual or family in such circumstances submit a new Medicaid application. *See* 42 C.F.R. § 435.909.

Both experts concluded that the City defendants made separate food stamp determinations when denying cash assistance applications only sporadically. (Fourth Faust Rep. ¶ 64 (6 percent); Supp. Pollner Rep., Table 19, at 20 (14.20 percent).) Separate determinations for Medicaid benefits after cash assistance was denied were made less than 11 percent of the time. (Fourth Faust Rep. ¶ 66 (8 percent); Pollner Rep. Table 19, at 20 (10.34 percent).)

4. ***Application Withdrawals***

Federal law requires that if a Medicaid application is withdrawn, the administering agency must send a notice to the applicant confirming the withdrawal. *See* 42 C.F.R. § 435.913. The state agency, here HRA, or the state-delegated agency, may not deny Medicaid benefits solely because the cash assistance application has been withdrawn, nor may the cash assistance applicant be required to submit a new Medicaid application. *See* 42 C.F.R. § 435.909.

Federal law also requires that case files document withdrawal of a food stamp application and the advice to a household of its right to reapply for food stamp benefits. *See* 7 C.F.R. § 273.2(c)(6). Where a cash assistance application is withdrawn, the applicant cannot be required to submit a new application for food stamps. *See* 7 C.F.R. § 273.2(b)(3).

The experts spar over the number of applications withdrawn based on erroneous information provided by Center employees to applicants. Faust concludes that 49 percent of cash assistance applications, 45 percent of food stamp applications and 56 percent of Medicaid applications were withdrawn based on misleading information from City workers. (Fourth Faust Rep. ¶ 63.) Pollner found a significantly lower incidence of improperly induced withdrawals. However, her conclusion was based on all applications (Supp. Pollner Rep., Tables 16-18, at 17-19), rather than only those that were withdrawn.

Pollner's comparison uses the wrong yardstick. (Fifth Faust Rep. ¶ 45.) The accurate measure is all *withdrawn* applications because they are the relevant population for inquiry. (*See* Fifth Faust Rep. ¶ 45.) This Court accepts Faust's data because Pollner's tables have been adjusted to reflect the already-rejected second review of individual cases conducted by the City defendants.[6]

[6] Plaintiffs present persuasive documentation demonstrating how, for each case in dispute, they reached the conclusion that the application was withdrawn based on inaccurate and misleading information. (*See* Declaration of Randall Jeffrey, dated Feb. 9, 2001 ("Jeffrey Decl.") at 7, 9, 10, 11, 17.) Notably, the City defendants dramatically reduced the

number of applications that they characterized as withdrawn based on inaccurate or misleading information between the time of their expert's initial report and her supplemental report. (*Compare* Pollner Rep. at 19-20, *with* Supp. Pollner Rep. at 18-19, Table 18.)

5. ***Provision of Notices***

***9** Both federal and New York law require that notice be provided for any decision regarding an application. All notices must include the action taken by the agency and the laws and regulations on which that action was based. Additional requirements include the reason for any denial or the amount of the benefit granted, the effective date and the certification period. *See* 7 C.F.R. § 273.10(g)(1) (food stamps); 42 C.F.R. §§ 435.911, 435.912 (Medicaid); 18 N.Y.C.R.R. §§ 351.8(b), 358.2.2(a).

Faust calculated performance measures regarding notices for five types of grants: expedited food stamps service, immediate needs grants, ongoing food stamps, Medicaid and cash assistance. Faust also referred to the date on notices to determine whether they were timely provided. (Fourth Faust Rep. ¶ 69.) The City defendants limited their inquiry to two notices: the W-145HH ("Notice of Decision on Food Stamps and/or Cash Assistance to Meet an Immediate Need") and the M-3 ("Action taken on your Application: Public Assistance, Food Stamps, and Medical Assistance Coverage"). (*See* Supp. Pollner Rep., Table 15B at 16; Supp. Pollner Rep., Query E-2, at Attach. 16.) Pollner did not report on whether either of those notices were completed accurately or timely. This Court finds the statistical data presented by Faust to be more reliable. Faust's data shows, *inter alia,* the following significant failings:

a. For food stamp applicants who did not receive expedited food stamps ("EFS"), the Form W-145HH was in the case file 70 percent of the time but included a reason for non-issuance only 48 percent of the time. (Fourth Faust Rep. ¶ 72.)

b. For applicants who received EFS, the Form W-145HH was in the case file and included the amount of the grant 81 percent of the time; the date of issuance 22 percent of the time; and the time covered by the grant 15 percent of the time. (Fourth Faust Rep. ¶ 73.)

c. For applicants who indicated an immediate need but did not receive a grant, the Form W-145HH was in the case file 78 percent of the time. (Fourth Faust Rep. ¶ 74.)

d. The Form M-3 was in the case file for those denied ongoing cash assistance in 87 percent of the cases, and was in the case file with the correct address in 71 percent of the cases. (Fourth Faust Rep. ¶ 78.)

e. When the Form M-3 was in the case file and the cash assistance application was denied, the form for each assistance denial and reasons for the denial were completed 49 percent of the time. (Fourth Faust Rep. ¶ 79.)

f. When the Form M-3 was in the case file and the food stamp application was denied, the form for food stamp denials and the reasons for the denial were completed 48 percent of the time. (Fourth Faust Rep. ¶ 81.)

C. ***Other Performance Measures***

Apart from the September 2000 Audit, plaintiffs offered other evidence of the City defendants' non-compliance. These measures of performance include Program Evaluation Review Team audits ("PERT audits"), State Program Access Reviews ("PA Reviews") and Management Evaluation Reviews ("ME Reviews") of the Centers, and ongoing performance reviews by the USDA for compliance with food stamp program procedures.

***10** The PERT audits revealed that Job Centers and Income Support Centers inappropriately denied expedited food stamps in 23.2 and 27.6 percent of the reviewed cases, respectively. (Pls. Findings ¶ 84.) In terms of the rate with which the Centers failed to issue expedited food stamps on a timely basis, the results were 24.7 and 35.8 percent, respectively. (Pls. Findings ¶ 85.) For issuance of immediate needs grants, the PERT audits found that the Centers improperly denied cash grants in 33.3 and 52 percent of the cases, respectively. (Pls. Findings ¶ 86.)

The PERT audits indicated that Job Centers failed to make separate food stamps determinations in 97 percent of the cases, while Income Support Centers failed in 78.5 percent of the cases. (Pls. Findings ¶ 87.) Job and Income Support Centers did not make separate Medicaid determinations in 86.9 and 68.4 percent of the cases reviewed, respectively. (Pls. Findings ¶ 87.)

The PERT audits yielded results roughly similar to the September 2000 Audit regarding the City defendants' provision of adequate notices. For example, in approximately 12 percent of the cases reviewed citywide,

W-145HH forms were missing from case files, indicating a failure to notify applicants of the eligibility determination for immediate needs grants or expedited food stamps. (Pls. Findings ¶ 87.)

In November 1999, the USDA conducted performance reviews and noted problems such as inadequate case file determinations, improper denials of expedited food stamps, incorrect completion of expedited screening sheets (Form W-140K), failure to make separate determinations of eligibility for food stamps and untimely or missing notices. (Pls. Ex. 144 at 4-6, 8.) The Health Care Finance Administration ("HCFA"), the federal agency in charge of the Medicaid program, also reviewed applicant files in 1999 and found instances where applications were denied without a referral for an independent Medicaid determination. (Pls. Ex. 88 at 9-10, 22.)

Plaintiffs assert that these studies further establish the City defendants' failure to comply with federal and state law. However, plaintiffs' reliance on prior reviews captures the world's largest welfare system in a still portrait and overlooks the City defendants' efforts toward compliance. Instead, these reviews set a benchmark against which the City defendants' remedial measures should be evaluated. Since they were conducted, the City defendants have undertaken various policy initiatives to improve the Centers' performance in providing eligible applicants with Medicaid, food stamps and cash assistance, which are relevant to determining compliance with state and federal law. For example, the policy directive adopted as part of the Corrective Action Plan makes clear that all individuals have the right to apply for benefits on their first day of contact with a Center. (*See* Policy Directive 99-06R(2); Policy Bulletin 99-13; Center Operations Memorandum CD 99-3.) The City defendants have sought to enforce this policy through various means including training, audits and the agency's "spot check" program, which was implemented in 1999 in order to determine whether Centers were adhering to HRA's mandate to permit applicants to apply and be seen by a worker on the same day.

***11** In terms of initiatives regarding immediate needs grants, HRA issued policy directives and conducted training to underscore that applicants' emergency needs must be met before turning to issues of employment and self-sufficiency. (*See* Policy Directives 00-62, 99-06R(2), 99-06(RR), 99-07R(3), 99-08R(4), 99-11R(4); Policy Bulletin 99-13; Smith Decl. ¶ 20.) Since the preliminary injunction issued, HRA increased the number of immediate needs grants distributed each month from less than 5,000 to over 10,000, while the number of applications has remained fairly constant at around 15,000 per month. (*See* Smith Decl. ¶ 21, Ex. 1(A).)

Additionally, HRA has issued policy directives and conducted training to emphasize that applicants should be screened for expedited food stamp service, and that they may be eligible for expedited food stamps even if it appears that they may not meet the necessary requirements for program participation. (*See* Policy Directives 99-06R(2), 99-08R(4), 99-60RR; Policy Bulletin 99-13; Smith Decl. ¶ 27.) Further, applicants are no longer required to complete a separate form for expedited service. (*See* Smith Decl. ¶ 11.) Instead, the screening questions are now on the application. (*See* Smith Decl. ¶ 11.) Eligible applicants are notified and an electronic benefit transfer ("EBT") card is furnished to them. (*See* Smith Decl. ¶¶ 25-26.) HRA also began a citywide program in 2000 that now permits Center workers to open a separate non-public assistance food stamp case without the transfer of files to an NPA Center. (Trial Tr. at 137.)

Separate determinations for Medicaid cases are made by HRA's Medicaid Assistance program. Thus, if cash assistance is denied for reasons that would not apply automatically to Medicaid, a separate Medicaid determination is required. (*See* Trial Tr. at 138.) Prior to the August 1999 audit, referrals to the Medicaid Assistance Program were not tracked. (Trial Tr. at 138.) In 2000, HRA initiated an automated "reminder" system that combs the WMS, culls cases where public assistance was rejected or closed, identifies those requiring a separate Medicaid determination and then accesses the Medicaid eligibility database to determine whether action was taken. (*See* Smith Decl. ¶ 29; Declaration of Seth Diamond ("Diamond Decl.") ¶ 2.)

HRA also expanded several initiatives intended to oversee Center operations as a whole. A number of these initiatives are conducted through the Office of Quality Assurance ("OQA"), which consists of the Office of Eligibility Monitoring, the Office of Audit and Quality Control and the Office of Corrective Action Innovation. To avoid federal sanctions for payment errors, the Office of Eligibility Monitoring performs monthly audits of all active TANF and food stamp cases. (*See* Declaration of Rochelle Abdullah, dated Feb. 1, 2001 ("Abdullah Decl.") ¶ 7, Exs. 2, 3.) Congruent with these reviews, the Audit and Quality Control Office evaluates all federal and state audits to ensure that error rates reported for New York City are based on complete and accurate information. (*See* Abdullah Decl. ¶ 6.) In 1998, the Office of Corrective Action Innovation established the PERT audit procedure to improve oversight of the Centers. Although the PERT

audit protocol envisions three visits per year by state reviewers to each Center, the City defendants have fallen short of that regimen. (*See* Abdullah Decl. ¶¶ 11-12, Exs. 5, 6.)

***12** In May 2000, HRA started compiling a monthly "Job Stat" report to evaluate each Center's performance in specific areas, including employment, administration and self-sufficiency progress. (Smith Decl. ¶ 37; Declaration of Andrew Bush, dated Mar. 9, 2001 ("Bush Decl.") ¶¶ 4-5, 7.) The Job Stat report enables performance comparisons among Centers as well as performance tracking of each Center over time. (Bush Decl. ¶ 7.) Additionally, HRA launched an initiative called "CenterStat" to evaluate the data compiled in the JobStat reports and develop Center-specific solutions. (Bush Decl. ¶¶ 21-24.)

III. *State Defendants*

A. *Office of Temporary and Disability Assistance (OTDA)*

OTDA supervises all social services work performed by local government units and regulates the financial assistance granted by the State. (Ptak Decl. ¶ 6.) While OTDA oversees rules promulgated by local governments, those regulations become effective automatically within thirty days if OTDA does not invalidate them. (Ptak Decl. ¶ 8.) Although OTDA prescribes minimum qualifications for local social services department staff, it lacks authority to hire or terminate local HRA staff. (Ptak Decl. ¶ 11.) Rather, OTDA supervises the local districts' compliance with food stamp regulations. (Ptak Decl. ¶ 3; Pls. Ex. 33 at 18.) Under a delegation of authority from OTDA, New York's fifty-eight local social services districts, including New York City, administer the food stamp program within their districts. (Ptak Decl. ¶ 3.)

As part of its supervisory function, OTDA monitors food stamp program access in the Job and Income Support Centers in four ways: (1) PA Reviews; (2) ME Reviews; (3) operational review; and (4) corrective action plan ("CAP") follow-up review. (Deposition of Rosella Bryson, dated Feb. 15, 2001 ("Bryson Dep.") at 53-54.) The PA reviews help ensure compliance with food stamp procedures. (State Defendants Post-Trial Memorandum of Law ("State Defs. Mem.") at 10 .) The ME reviews, conducted on a cyclical basis, measure compliance with USDA objectives. (Ptak Decl. ¶¶ 2, 7, 50.) During 2000 and 2001, OTDA conducted PA and ME reviews at all Job Centers and completed food stamp reviews at five Income Support Centers. (Ptak Decl. ¶¶ 11, 52.) However, the PA and ME reviews were not conducted at regular intervals, and OTDA has no policy regarding how much time may elapse between those reviews. (State Defs. Ex. NN at 59.)

A January 1999 USDA Report noted a "lack of effective state agency oversight at local district offices." (Pls. Ex. 33 at 17.) Further, the Report commented that "[s]ubstantial non-compliance with the [Food Stamp Act] and regulations has gone undetected and unaddressed at the local level." (Pls. Ex. 33 at 17.) In 2000 and 2001, OTDA reported the results of its various reviews to the City defendants and required CAPs on a Center-by-Center basis. (Ptak Decl. ¶¶ 52-53.)

***13** In March 2001, OTDA notified HRA about its reviews of food stamp program access in New York City and summarized the findings of the PA reviews, ME reviews and CAP follow-up reviews. (Ptak Supp. ¶ 18; State Defs. Ex. NNN.) That notification required HRA to submit quarterly reports to OTDA until all outstanding issues were resolved. (Ptak Supp. ¶ 18; State Defs. Ex. NNN.)

OTDA also issued directives requiring adherence to specific program requirements, including the separate determination of eligibility for food stamps. (Ptak Decl. ¶¶ 40, 43; Ptak Supp. ¶ 17.) In January 2000, HRA issued a policy directive providing that when a public assistance application is withdrawn or denied, but the applicant wants to proceed with a food stamp eligibility evaluation, HRA staff must register and accept the case in all Centers. (Ptak Decl. ¶ 40.) Nevertheless, in October 2000, OTDA advised HRA that the ME reviews had demonstrated that this policy had not been implemented in compliance with the initial schedule. (Ptak Decl. ¶ 40.) In response, OTDA directed HRA to investigate and address its failure to make separate determinations. (Ptak Decl. ¶ 40.) OTDA also required that HRA submit a plan for citywide implementation of OTDA's policy directive regarding separate food stamp determinations. (Ptak Decl. ¶ 40.) HRA submitted a draft policy directive, which, at the time of trial, was still under review by OTDA. (Ptak Supp. ¶ 16; State Defs. Ex. KKK.) Further, in March 2001, OTDA directed HRA to furnish monthly written confirmations that OTDA's policy concerning separate food stamp determinations are being implemented. (Ptak Supp. ¶ 17.)

OTDA also has monitored and requested improvements to HRA's EVR process. In December 2000, in accord with USDA mandates, OTDA directed HRA to cease its policy of denying food stamp applications when applicants fail to keep a scheduled EVR appointment. (Ptak Decl. ¶ 45; State Defs. Ex. JJ.) In January 2001, HRA agreed in writing that it would comply with OTDA's directive.

(Ptak Decl. ¶ 45; Ptak Supp. ¶ 13.)

In tandem with the layers of supervision detailed above, OTDA provides a system of fair hearings for public assistance applicants to review decisions by local social service officials regarding such assistance. (State defendants' Findings of Fact ("State Defs. Findings") ¶ 148.) OTDA employs approximately 125 administrative law judges and supervising administrative law judges to conduct these hearings. (Declaration of Russell J. Hanks, dated Feb. 2, 2001 ("Hanks Decl.") ¶ 3.) Approximately 90 of those judges are assigned to administer fair hearings in the New York City district. (Hanks Decl. ¶ 4.)

B. ***New York State Department of Health (DoH)***

As part of its supervisory function, DoH evaluates changes in federal law such as welfare reform that impact the Medicaid program and disseminates information regarding those changes to the local districts for implementation. (Declaration of Betty Rice ("Rice Decl.") ¶ 19.) DoH provides legal interpretations of such changes to determine whether state law and regulations should be amended to conform to revised federal requirements. (Rice Decl. ¶ 20.) DoH also consults with New York State agencies that may be affected by new legislation. (Rice Decl. ¶ 21.) DoH notifies local districts, such as New York City, of federal and state mandates, provides training in the implementation of policies, and develops various reference tools that summarize procedures for receipt of Medicaid. (*See* State Defs. Findings ¶ 82.) Once DoH has completed its issuance of written guidance to the local districts on new federal and state mandates, it provides ongoing technical assistance and training for each district. (Rice Decl. ¶ 27.)

***14** DoH trains HRA staff regarding Medicaid issues. (Rice Decl. ¶ 28; Declaration of Cornelia McElligot, dated Feb. 2, 2001 ("McElligot Decl.") ¶ 8.) Further, DoH coordinates Medicaid Technical Advisory Group ("MTAG") meetings with New York City. (McElligot Decl. ¶ 9; Rice Decl. ¶ 31.) DoH also conducts "Targeted Case Reviews" or Medicaid Eligibility Quality Control ("MEQC") reviews, under a federal waiver. The MEQC reviews are conducted in accordance with HCFA requirements. (Deposition of Betty Rice, dated Feb. 16, 2001 ("Rice Dep.") at 21.)

In early 1998, DoH learned that the City defendants intended to convert certain Income Support Centers to Job Centers. (Rice Decl. ¶ 6.) The State defendants acknowledge that this litigation was DoH's first notice of complaints regarding inappropriate denials, withdrawals and deterrence of Medicaid applications at certain Centers. (State Defs. Findings ¶ 101.) DoH reacted by issuing instructions to local districts to bring them into compliance. (Rice Decl. ¶ 5.) DoH further collaborated with the City defendants to review and approve corrective changes in the City's policy directives regarding the application process. (McElligot Decl. ¶ 7 .)

In early 1999, DoH provided HCFA with information concerning DoH's administration of the Medicaid program, including the monitoring of social services districts. (Rice Decl. ¶ 15.) In addition, DoH participated in developing a statewide work plan to review program access, case reviews, and for unannounced visits to local districts. (Rice Dep. at 97; McElligot Decl. ¶ 14.)

In August 2000, in response to federal efforts to improve low-income families' ability to enroll in Medicaid, DoH formulated a work plan for Medicaid program access. That work plan included reviews of the State's Medicaid eligibility policy as well as the Medicaid eligibility status of TANF cases closed since the implementation of PRWORA. (State Defs. Exs. RRR, VVV, ZZZ; Rice Decl. ¶ 17; Rice Dep. at 95-101.)

After learning of plaintiffs' allegations, DoH revised its policy directives and required HRA employees to monitor referrals for separate Medicaid determinations. (Rice Decl. ¶ 48.) HRA distributed a brochure titled "You Can Still Apply for Medicaid," explaining that applicants may still be eligible for Medicaid benefits even if they are denied cash assistance. (Rice Decl. ¶ 49 .) DoH also clarified an applicant's entitlement to a separate Medicaid determination in the event cash assistance is denied. (Rice Decl. ¶ 51.)

CONCLUSIONS OF LAW

I. ***The City Defendants***

A. ***Legal Standard and Private Rights of Action Under the Food Stamp and Medicaid Acts***

A party seeking a permanent injunction must demonstrate irreparable harm and must actually succeed on the merits. *See Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 546 n. 12 (1987); *Reuters Ltd. v. United Press Int'l, Inc.,* 903 F.2d 904, 907 (2d Cir.1990); *Civic Assoc. of the Deaf v. Giuliani,* 915 F.Supp. 622, 631 (S.D.N.Y.1996). It is necessary to show that the irreparable injury is likely, not merely possible. *See JSG Trading Corp. v. Tray-Wrap, Inc.,* 917 F.2d 75, 79 (2d. Cir.1990). As discussed at length in *Reynolds I,* plaintiffs have established the

irreparable harm threatened by an erroneous denial of benefits. *See* 35 F.Supp.2d at 338-40.

***15** Plaintiffs assert private rights of action based on defendants' violations of the Food Stamp and Medicaid Acts, and further contend that these violations support individual claims under § 1983. *See Reynolds I,* 35 F.Supp.2d at 336-37. Section 1983 imposes liability on those who, acting under color of state law, deprive a person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983.[7] To seek redress through § 1983, a plaintiff "must assert the violation of a federal *right,* not merely the violation of a federal *law." Blessing v. Freestone,* 520 U.S. 329, 340 (1997) (emphasis in original). The City defendants contend that neither the Food Stamp Act nor the Medicaid Act creates a right for individuals to enforce system wide compliance.

7 Although municipalities may not be held liable under § 1983 on a theory of respondeat superior, they may be liable under § 1983 if "execution of a government's policy ... whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" causes the deprivation of federal rights. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 475 (1986); *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 691-92 (1978). When a municipality's failure to train its employees in some relevant respect amounts to "deliberate indifference," that failure is tantamount to a policy or custom and is thus actionable under § 1983. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 389 (1989).

In determining whether a statutory provision creates a federal right, courts must consider three factors: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) "the 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." *Blessing,* 520 U.S. at 341. Additionally, as clarified by the Supreme Court in *Gonzaga University v. Doe,* a federal right must be "unambiguously conferred" to support a cause of action under § 1983. 536 U.S. 273, 283 (2002) ("[I]t is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [Section 1983]." (emphasis in original)).

The provision of the Medicaid Act that plaintiffs claim was violated requires that "medical assistance ... shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). As explained below, this provision gives rise to a § 1983 claim under *Blessing.*

First, the section is framed unambiguously in terms of eligible individuals' rights. *See* 42 U.S.C. § 1396a(a)(8) (Medicaid benefits "shall be furnished" to *eligible applicants*); *see also Cannon v. Univ. of Chicago,* 441 U.S. 677, 692 n. 13 (1979) (for statute to create private rights, its text must be "phrased in terms of the persons benefited"); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 576 (1979) (rights-creating statutes typically phrased with unmistakable emphasis on benefited class). Eligible applicants are the intended beneficiaries under § 1396(a)(8) since they are to receive Medicaid benefits with reasonable promptness. *See Sabree v. Richman,* 367 F.3d 180, 189 (3d Cir.2004) (holding that § 1396a(a)(8) creates a privately enforceable right because, *inter alia,* plaintiffs were intended beneficiaries); *see also Bryson v. Shumway,* 308 F.3d 79, 88 (1st Cir.2002) (holding that § 1396a(a)(8) creates privately enforceable rights under § 1983).

***16** Second, the right conferred is neither vague nor amorphous. *See Sabree,* 367 F.3d at 189 ("[T]he rights sought to be enforced by [plaintiffs under § 1396a(a)(8)] are specific and enumerated, not 'vague and amorphous" '); *Bryson,* 308 F.3d at 89 (holding that § 1396a(a)(8) satisfies second *Blessing* factor).

Finally, this provision unequivocally binds the states. The Medicaid Act "mandates that state plans 'must' provide that medical assistance 'shall' be provided with reasonable promptness. These are not mere guidelines but, rather, requirements which states must meet under the Medicaid system." *Bryson,* 308 F.3d at 89; *Mendez v. Brown,* No. Civ.A. 03-30160-KPN, 2004 WL 626550, at *5 (D.Mass. Mar. 26, 2004) (§ 1396a(a)(8) confers a private right of action under § 1983 whether "analyzed strictly under *Blessing* or through the filter of *Gonzaga"*); *see also Sabree,* 367 F .3d at 189 ("[T]he obligation imposed on the states [under § 1396a(a)(8)] is unambiguous and binding.").

Similarly, the provisions of the Food Stamp Act at issue here confer enforceable rights under § 1983. As this Court discussed at some length in *Reynolds I,* Congress intended those provisions to benefit eligible applicants such as plaintiffs, the provisions are unambiguous and they impose unequivocal obligations on the states. *See* 35 F.Supp.2d at 340-41 (discussing 7 U.S.C. §§ 2020(e)(2)(B), 2020(e)(3), 2020(e)(9)).

The legislative history of the Food Stamp Act also evinces Congress' intent to permit private rights of action.

Subsequent to the 1977 amendments, the House Agricultural Committee Report stated that the "administrative remedies against the state contained in section 11(f) and elsewhere should not be construed as abrogating in any way private causes of action against states for failure to comply with federal ... requirements." H.R.Rep. No. 464, 95th Cong., 1st Sess. 398. As explained by the Seventh Circuit, "[t]he explicit statement that administrative remedies do not abrogate a private party's right to sue and the specific acknowledgement of cases based on that right clearly indicate congressional intent to allow a private remedy based on the Food Stamp Act." *Haskins v. Stanton,* 794 F.2d 1273, 1275 (7th Cir.1986); *see also Gonzales v. Pingree,* 821 F.2d 1526, 1528 (11th Cir.1987) (noting that, under *Atkins v. Parker,* 472 U.S. 115 (1985), food stamps are a matter of "statutory entitlement").

B. *Compliance Requirements*

Having determined that plaintiffs may pursue their Food Stamp and Medicaid Act claims under § 1983,[8] it is necessary to decide what level of compliance is required under these statutes. The City defendants contend, based on the funding provisions of the Food Stamp and Medicaid Acts, that only substantial compliance is required under those laws. Those funding provisions, sections 2020(g) and 1396c, respectively, are phrased as directives to the state agencies tasked with administering the Food Stamp and Medicaid programs. *See* 7 U.S.C. § 2020(g) (food stamp funding may be terminated when a state fails to comply with federal standards without "good cause"); 42 U.S.C. § 1396c (authorizing the cessation of payments to a state if, *inter alia,* "there is a failure to comply substantially with any such provision [of the Medicaid Act]"); 42 U.S.C. § 1396b(u)(1)(A)-(B) (the federal agency may waive such reductions if a state is unable to reach the permissible error rate "despite a good faith effort").

[8] Because this Court has determined that plaintiffs have enforceable rights under § 1983, it is unnecessary to decide whether the Food Stamp and Medicaid Acts themselves create individually enforceable rights. However, as *Gonzaga* observed, "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983," since "in either case we must first determine whether Congress intended to create a federal right." 536 U.S. at 283.

***17** The City defendants' argument is unavailing because it is the text of the Food Stamp and Medicaid Act provisions at issue-and not the funding provisions-to which this Court must look in determining the level of compliance required. As noted by the Ninth Circuit, "[t]he funding standard is not intended to be the measure of what the [Food Stamp and Medicaid Acts] require; it is intended to measure how great a failure to meet those requirements should cause funds to be cut off." *Withrow v. Concannon,* 942 F.2d 1385, 1387 (9th Cir.1991) ("[W]e are not convinced ... that the standard for termination of federal funding ... is the appropriate one to define the rights of applicants and recipients of program benefits."); *see also Bleecker Charles Co. v. 350 Bleecker St. Apartment Corp.,* 327 F.3d 197, 203 (2d Cir.2003) (to determine meaning of statute, court should look to the language of the statute itself and need look no further if those words are unambiguous).

The plain language of § 1396a(a)(8) states in mandatory, not precatory, terms that Medicaid benefits "shall be furnished" to persons eligible to receive them. 42 U.S.C. § 1396a(a)(8). The relevant provisions of the Food Stamp Act are phrased in similar mandatory terms. *See, e.g.,* 7 U.S.C. § 2020(e)(2)(B) ("[A] State agency ... shall provide timely, accurate, and fair service to applicants for, and participants in, the food stamp program ... [and] shall develop an application containing the information necessary to comply with this chapter."). The language of these provisions is unambiguous and requires that state agencies "shall" or "must" provide the specified benefits to eligible applicants. The plain language thus requires that state agencies comply strictly with their obligations to provide food stamps and Medicaid benefits to eligible applicants. *See Withrow,* 942 F.2d at 1387-88 (holding that strict, not substantial, compliance is required under Food Stamp and Medicaid Acts); *Haskins,* 794 F.2d at 1277 (same).

This interpretation does not encroach on a municipal government's conduct of its internal affairs because "[t]he Act itself imposes the burden." *Haskins* 794 F.2d at 1277; *see also Withrow,* 942 F.2d at 1388 ("The fact that absolutely perfect compliance is unattainable does not of itself preclude an injunction requiring the state to comply with the regulations."). Nor does this holding disturb the principle that district courts have discretion when deciding whether injunctive relief is warranted. "[A]n injunction is not required whenever an agency that is otherwise in full compliance fails in one or a very few sporadic instances." *Withrow,* 942 F.2d at 1388. "There is however, doubtless a point at which any failure of total compliance is truly *de minimus,* where the state has come to comply 'as strictly as is humanly possible,' and it is within the discretion of the district court to deny injunctive relief." *Withrow,* 942 F.2d at 1388. Accordingly, the City defendants are obliged to comply

strictly with the Food Stamp and Medicaid Acts.

C. *City Defendants' Compliance*

***18** Whether the City defendants are complying with the Food Stamp and Medicaid Acts is a fact-specific question. Remedial measures undertaken to redress deficiencies in performance are relevant to whether a "policy or custom" exists for purposes of § 1983 liability. *See City of Canton,* 489 U.S. at 389. Rather than gauging compliance by reference to a specific numeric standard, it is appropriate to consider whether the City defendants have invested the resources and human capital to ensure provision of welfare benefits. (*See* Trial Tr. at 226.)

1. *Expedited Food Stamps*

Plaintiffs seek to hold the City defendants liable for failing to comply with New York's five-day requirement for expedited food stamps under 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a), which they assert as a pendent state law claim. (Compl.¶ 7.)

To determine whether a statute creates a privately enforceable right of action under New York law, a court must consider: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Henry v. Isaac,* 632 N.Y.S.2d 169, 170 (App. Div.2d Dep't 1995) (quoting *Sheehy v. Big Flats Cmty. Day,* 73 N.Y.2d 629, 633 (1989)).

First, just as plaintiffs are intended beneficiaries of the Food Stamp Act, they are intended beneficiaries of 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a). New York Social Services Law § 62 provides that "each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself." N.Y. Soc. Serv. Law § 62, subd. 1; *see Jones v. Berman,* 37 N.Y.2d 42, 54-55 (1975). The City thus bears responsibility for providing public assistance to qualified welfare beneficiaries such as plaintiffs. 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a) implements that directive with respect to expedited food stamps. Buttressing this conclusion, New York courts have inferred private rights of action for similar statutory provisions. *See, e.g., Doe v. Dinkins,* 600 N.Y.S.2d 939, 943 (App. Div. 1st Dep't 1993) (upholding injunction for City's failure to comply with 18 N.Y.C.R.R. §§ 491.3(g)(1)(i) and 491.10(o)(9)(iv)); *Lamboy v. Gross,* 513 N.Y.S.2d 393, 396-98 (App. Div. 1st Dep't 1987) (upholding preliminary injunction for violation of administrative directive 83 ADM-47).

Second, recognizing a private right of action under 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a) promotes the legislative purpose, enshrined in Article XVII § 1 of the State Constitution, mandating aid to the needy. *See Wilkens v. Perales,* 128 Misc.2d 265, 268, 487 N.Y.S.2d 961 (Sup.Ct.1985) ("Aid to the needy is not dependent upon governmental compassion but is a fundamental right."). Private claims under 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a) will aid in effectuating that mandate.

***19** Third, recognizing a private right to enforce 18 N.Y.C.R.R. § 387 .8(a)(2)(i)(a) is consistent with the legislative scheme because it helps to ensure that public officers charged with implementing a state constitutional mandate will perform that duty. *See Wilkens,* 128 Misc.2d at 268.[9]

[9] The exercise of supplemental jurisdiction over plaintiffs' state law claim comports with the values of judicial economy, fairness and comity set forth in *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966). Whether the City defendants are in compliance with New York's five-day limit for expedited food stamps hinges on the same findings-namely, the September 2000 Audit-on which plaintiffs' federal claims rest. *See Leonard v. Dutchess County Dep't of Health,* 105 F.Supp.2d 258, 261 (S.D.N.Y.2000) (exercising supplemental jurisdiction where plaintiff's state and federal claims rested on identical facts). Further, plaintiffs' state law claim is neither novel nor complex. The straightforward issue is whether the City defendants must provide expedited food stamps within five days or within the seven-day federal limit. Finally, New York courts have inferred private rights of action from similar regulations.

Defendants rely on *Concourse Rehabilitation & Nursing Center v. DeBuono* for the proposition that plaintiffs cannot enforce a state law against a state entity in federal court. *See* 179 F.3d 38, 43-44 (2d Cir.1999) ("[T]he failure of a State authority to comply with State regulations cannot alone give rise to a § 1983 cause of action."). While that proposition is correct, *Concourse* is inapposite because the plaintiff in that case attempted to assert a state law claim through § 1983 against a state defendant. *See Concourse,* 179 F.3d at 43-44. Here, by contrast, plaintiffs assert their 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a) cause of action as a pendent state law claim. It is not engrafted on § 1983. Moreover, while New York City exercises "a slice of state power" as a social services district, *Holley v. Lavine,* 605 F.2d 638, 644 (2d Cir.1979), it nevertheless has the primary responsibility to

provide food stamps for the needy who live within its borders. *See Biggs v. Block,* 629 F.Supp. 1574, 1580 (E.D.N.Y 1986) ("New York administers its Food Stamp program through local agencies. Each county (plus the City of New York) has been designated a social services district which is responsible for public assistance programs within its jurisdiction."). Therefore, the City does not enjoy sovereign immunity as a state defendant.

The parties' experts both concluded that the City defendants were in compliance with the five-day period for expedited food stamps under 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a) only 69 percent of the time. (Pls. Ex. 49: Fourth Faust Rep., Table C-2; Pollner Supp. Rep. at 14, Table 13.) Since approximately one-third of eligible applicants do not receive expedited food stamps within the required five-day limit, this Court cannot conclude that the City defendants are meeting their obligations under 18 N.Y.C.R.R. § 387.8(a)(2)(i)(a).[10]

[10] Additionally, the percentage of eligible applicants receiving expedited food stamps within the federally mandated seven-day limit is not materially different. (*See* Supp. Pollner Rep. Attach. 16, Query C-5; Pls. Findings ¶ 53.) The City defendants' PERT audits do not undermine that finding. While the City defendants launched an initiative to make expedited food stamps available on the day of application, it was not fully implemented at the time of trial. Accordingly, this Court also concludes that the City defendants have not complied with the federal time limits for expedited food stamps.

Moreover, approximately 65 percent of eligible applicants were denied expedited food stamps. (*See* Fourth Faust Rep., Table C-3, at Pls. Ex. 49; Pollner Rep. at 15 (Table 10).) Error rates of these magnitudes are evidence of a breakdown in the delivery of essential services to New York's neediest population. *See Caswell v. Califano,* 583 F.2d 9, 12-13 (1st Cir.1978) (injunction warranted where government failed to meet obligations for nearly half of eligible claimants); *Peppers v. McKenna,* 81 F.R.D. 361, 366-67, 370 (N.D.Ohio 1977) (time limit satisfied for only 47.4 percent of welfare benefits appeals).

2. ***Immediate Needs Grants***

Plaintiffs also invoke this Court's supplemental jurisdiction to assert a claim for violation of New York Social Services Law § 133. This Court finds that its exercise of supplemental jurisdiction is appropriate here. *See supra* note 9. That statute provides public assistance applicants with a right to pre-investigative relief if they are in immediate need. *See Gonzales,* 486 N.Y.S.2d at 632 (stating that § 133 establishes a right of public assistance recipients to pre-investigative relief). Local social services districts do not enjoy sovereign immunity against plaintiffs' Social Services Law claim because they have a duty to administer public assistance under New York law. Thus, the City can be held liable for failing to comply with the strictures of Social Services Law § 133. *See Koster v. Perales,* 903 F.2d 131, 137 (2d Cir.1990) (noting that the "County Commissioner has an independent statutory duty, distinct from his obligation as an agent of the State, to 'administer ... public assistance and care' "); *Holley,* 605 F.2d at 644 (stating that the Supreme Court "has 'consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power" " ' (quoting *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 400 (1979))).

***20** While *Beaudoin v. Toia,* 45 N.Y.2d 343, 347-48 (1978), concluded that local social services districts are agents of the state under Social Services Law § 133, that case focused on a county's role in implementing fair hearing decisions as an agent of the state. That is not the situation presented to this Court. Thus, *Beaudoin* is not determinative.

The City defendants assert that imposing liability on them under § 133 would require a transfer of funds from the state treasury and violate the doctrine of sovereign immunity. That argument lacks merit because "the county's duty to provide assistance is not dependent upon the receipt of equivalent money from the State and the cases have so held." *Jones,* 37 N.Y.2d at 55. Indeed, courts have imposed liability on local government entities for violations of § 133. *See Henrietta D. v. Giuliani,* 119 F.Supp.2d 181, 219-20 (E.D.N.Y.2000), *aff'd, Henrietta D. v. Bloomberg,* 331 F.3d 261 (2d Cir.2004).

The experts agree that the City defendants were in compliance with the same-day requirement for immediate needs grants 69 percent of the time. (Pls. Findings ¶ 58.) Moreover, the City defendants erroneously denied immediate needs grants to approximately 47 percent of eligible applicants. (Supp. Pollner Rep. Table 5 at 9; Pls. Ex. 49: Fourth Faust Rep., Table B-3.) Those statistics compel the conclusion that the City defendants are not in full compliance with their obligations under New York Social Services Law § 133.

3. ***Separate Determinations for Food Stamps and Medicaid***

Although the City defendants implemented remedial

measures to assure separate determinations for food stamps and Medicaid, the September 2000 Audit revealed inadequate performance. The credible statistical proof revealed that separate determinations for food stamps and Medicaid were made only about 14 percent of the time. (Fourth Faust Rep. ¶ 64; Supp. Pollner Rep., Table 19 at 20.) Thus, the City defendants are not in strict compliance with their obligation under 7 C.F.R. § 273.2(b)(3).

4. ***Application Withdrawals***
Forty-five percent of all food stamp application withdrawals were based on misleading or inaccurate information. With such an error rate, the City defendants are not in full compliance with the applicable federal regulations. *See* 42 C.F.R. §§ 435.913, 435.909; *see also, e.g., Caswell,* 583 F.2d at 12-13.

5. ***Provision of Notices***
While the City's performance with respect to the provision of notices is better, non-compliance in the range of 20 percent is not *"de minimus." See Withrow,* 942 F.2d at 1388. Moreover, the City defendants failed to provide needed information on the W-145HH and M-3 forms more than 50 percent of the time. *See supra* Section 1.B.5. ¶¶ a, b, c, d, e, f. Because the law requires that the notices be completed correctly, this Court finds that the City defendants have not met their obligations under 7 C.F.R. § 273.10(g)(1), 42 C.F.R. §§ 435.911, 435.912 and 18 N.Y.C.R.R. §§ 351.8(b) and 358-2.2(a).

6. ***Access***
***21** HRA has a policy in place emphasizing applicants' right to apply for benefits on their initial contact at a Center. That policy is enforced through the "spot check" program. The evidence does not demonstrate that the City defendants have engaged in a pattern or policy of denying access.

D. ***The State Defendants***
States that participate in the food stamp and Medicaid programs can either designate a single state agency to administer the programs or, as New York has done, can implement the programs on a decentralized basis through local agencies. *See* 7 U.S.C. § 2012(n); 42 U.S.C. § 1396a(a)(1). While states may delegate administrative responsibility for the day-to-day oversight of these programs, " 'ultimate responsibility' for compliance with [their] requirements nevertheless remains at the state level." *Robertson v. Jackson,* 972 F.2d 529, 533 (4th Cir.1992) (citation omitted); *Woods v. United States,* 724 F.2d 1444, 1447-48 (9th Cir.1984) (State of California could be held responsible for violations of Food Stamp Act committed by San Francisco City government); *Reynolds III,* 118 F.Supp.2d at 385.

For administration of these public welfare programs, local social services districts, including the City of New York, are considered "agents of the state." *See Reynolds III,* 118 F.Supp.2d at 386. The Food Stamp Act expressly defines the term "State agency" as "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...." 7 U.S.C. § 2012(n). Similarly, states bear the ultimate responsibility for supervising compliance with the Medicaid Act and state cash assistance programs. *See Hillburn v. Maher,* 795 F .2d 252, 260 (2d Cir.1986) ("single State agency" required to administer Medicaid to avoid lack of accountability); *Beaudoin,* 45 N.Y.2d at 347-48 ("In the administration of public assistance funds, whether they come from Federal, State or local sources ... the local commissions act on behalf of and as agents for the State.").

Thus, as this Court held in *Reynolds III,* the Food Stamp and Medicaid Acts require participating states to administer these programs and actively supervise local agencies to ensure compliance. 118 F.Supp.2d at 385-86; *see also Beaudoin,* 45 N.Y.2d at 347-48 (holding that the same rule applies for state cash assistance programs). Therefore, a violation of plaintiffs' rights under the Food Stamp, Medicaid and cash assistance programs by City defendants can "give[ ] rise to corresponding Section 1983 claims against the State defendants." *Reynolds III,* 118 F.Supp.2d at 386.

The State defendants have taken various measures to foster compliance by the City Defendants. OTDA has used the ME, PA and CAP reviews to monitor performance. In 2000, it began reporting the results of those reviews to the City defendants. (Ptak Decl. ¶¶ 52-53.) In addition, OTDA required HRA to submit regular reports for CAP components in each Center until outstanding issues were resolved. (Ptak Supp. ¶ 18.) OTDA also issued directives requiring adherence to mandates such as the need to make separate eligibility determinations. (Ptak Decl. ¶¶ 40, 43.) DoH implemented various training programs for the City defendants and has also provided direct supervision for the City's training programs. (Rice Decl. ¶¶ 23, 29, 31; McElligot Decl. ¶¶ 7-8.) Moreover, the State fair hearing process provides a

means to ensure correct determinations for public assistance applications. (Hanks Decl. ¶¶ 3-4.)

***22** However, the City defendant's failure to satisfy their obligations under the Food Stamp and Medicaid Acts, as revealed by the low compliance levels, is persuasive evidence that the State defendants have failed in their oversight obligations. Despite the State defendants' remedial measures, only 65 percent of eligible applicants received expedited food stamps within seven days. Moreover, nearly half of all applications for immediate needs grants were improperly denied. More than half of all withdrawn cash assistance applications were withdrawn for improper reasons. By any measure, those results are not within the *de minimus* range required by the Food Stamp and Medicaid Acts. *See Withrow,* 942 F.2d at 1388. They underscore the fact that the State defendants' curative initiatives have not had the desired prophylactic effect. Thus, the State defendants are not fulfilling their "ultimate responsibility" of ensuring compliance. *See Robertson,* 972 F.2d at 533. This conclusion is consistent with the January 1999 USDA Report noting a "lack of effective state agency oversight." (Pls. Ex. 33, at 17.) A contrary holding would ignore New York City's role as an agent of the state, *see* 7 U.S.C. § 2012(n); 42 U.S.C. § 1396a(a)(1), and allow the State to avoid its responsibility for overseeing the food stamp and Medicaid programs. *See Hillburn,* 795 F.2d at 260 (holding that the Medicaid Act's single state agency provision is intended to avoid "a lack of accountability for the appropriate operation of the program"); *see also Woods,* 724 F.2d at 1447 ("The Food Stamp Act places responsibility for the administration of the food stamp program on the state."). That would be inconsistent with the State's non-delegable duty to administer the food stamp and Medicaid programs under 7 U.S.C. § 2020 and 42 U.S.C. § 1396a, respectively. Plaintiffs' request for declaratory and injunctive relief as to the State defendants is therefore granted.

CONCLUSION

For the foregoing reasons, the plaintiff class is entitled to a permanent injunction requiring the City defendants and the State defendants to: (i) provide expedited food stamp service to eligible applicants within five days; (ii) provide temporary assistance to applicants for Medicaid, food stamps or cash assistance who are in immediate need in accord with N.Y. Soc. Serv. Law § 133; (iii) separately process applications for food stamps when the applications for cash assistance are denied or withdrawn; (iv) send notices to applicants confirming voluntary withdrawals for Medicaid in accord with 42 C.F.R. § 435.913 and document such withdrawals pursuant to 7 C.F.R. § 273.2(c)(6); and (v) provide adequate and timely notice by correctly completing Forms W-145HH and M-3.

The parties are directed to submit a proposed final judgment consistent with this Amended Memorandum and Opinion by February 17, 2005.