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 Civ. 10446 (JSR).
January 31, 2006.

Plaintiffs' Memorandum in Further Support of Their Motions for Preliminary Injunction and Class Certification

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PRELIMINARY STATEMENT

Plaintiffs submit this memorandum of law in reply to the opposition of the defendants to their pending motions. For the reasons set forth below, the plaintiffs' motions should be granted.

ARGUMENT

I. Plaintiffs Meet the Standards for Issuance of a Preliminary Injunction.

A. Class Members Are Suffering Irreparable Injury.

As courts have held time and again, the erroneous deprivation of subsistence benefits constitutes irreparable harm. *Hurley v. Toia,* 432 F. Supp. 1170, 1176 (S.D.N.Y. 1977), *aff'd,* 573 F.2d 1291 (2d Cir. 1977); *Reynolds v. Giuliani,* 35 F. Supp. 2d 331, 339 (S.D.N.Y. 1999); *Becker v. Toia,* 439 F. Supp. 324, 336 (S.D.N.Y. 1977). The City does not dispute plaintiffs' poverty and hunger set forth in detail in the declarations accompanying plaintiffs' moving papers. The City argues instead that because it promises to do better tomorrow, members of the proposed class do not suffer irreparable injury today. (City Mem. 20-21.) The City cites no authority for this proposition, however. As set forth below, the City has not corrected many deficiencies that are directly responsible for harm to the putative plaintiff class. Indeed, HRA admits one of the central allegations in this case: that immigrants "with an approved or pending immigrant visa petition (Form I-130) with evidence of domestic violence, are not accommodated within the agency's computer program." (City Mem. 21.) HRA claims to be "in the process of remedying the situation now," (*id.*), although in depositions the City acknowledged that the earliest any correction could be in place

would be in March. (Shepard Dep. 110:8-12; 113:13-23, Jan 27, 2006.) Meanwhile, computer problems continue to bedevil the City efforts even to provide benefits to the plaintiffs they agree are eligible in this action. Because of computer difficulties, seven of the plaintiffs who were supposed to receive their benefits by court-ordered deadlines in this case did not do so on time. (Saylor Decl. II, ¶¶ 6-16.) Clearly there is a substantial and continuing risk of irreparable injury unless a preliminary injunction is granted.

B. Plaintiffs Are Likely to Succeed on the Merits.

1. Plaintiffs Claims Are Not Barred By The Doctrine of *Res Judicata.*

The claims of the proposed class are not barred as a matter of claim preclusion by the judgment in *Reynolds v. Giuliani,* No. 98 Civ. 8877 (WHP) (S.D.N.Y. 2005). In its brief, the City maintains alternatively that all of the claims in this case either were adjudicated in *Reynolds* (City Mem. 1) or, to the extent they were not, that they "could have been raised there." (*Id.* 24). Both arguments are clearly wrong.

That the principal claims in this action were not actually litigated in *Reynolds* is obvious and beyond doubt. *Reynolds* concerned the public benefits application process up to, but not including, eligibility determinations for ongoing public benefits. Specifically, the *Reynolds* plaintiffs alleged that as part of the defendants' conversion of Income Maintenance Centers to "Job Centers," defendants deterred and discouraged persons seeking to apply for public benefits; failed to provide qualified applicants with emergency pre-acceptance "immediate needs" public assistance grants and expedited food stamps; and failed to make separate determinations on applications for each category of benefits when people filed joint applications for public assistance, food stamps and Medicaid. (*See* complaint in *Reynolds v. Giuliani,* attached as Exhibit A to the Affidavit of David Lock, dated January 24, 2006.) In its brief the City acknowledges that "the gravamen of plaintiffs' complaint is that defendants have erroneously *determined* their eligibility for benefits" (City Mem. 49, emphasis added) - an issue clearly not litigated in *Reynolds.*

The notice claims in this case were not litigated in *Reynolds* either. In the case at bar, plaintiffs allege that defendants fail to provide appropriate notices of denial when accepting some family members while denying others and when refusing to add family members to an already open case and that defendants provide denial notices that mislead plaintiffs by providing inaccurate information about immigrant eligibility issues. None of these issues was raised or litigated in *Reynolds.*

The only claims in this action that overlap with the claims in *Reynolds* are the claims that defendants have a practice of preventing, discouraging, or deterring persons from applying for public benefits, and of failing to process applications. The claims in *Reynolds,* however, all pertain to conduct in or before April 2001, when the record closed in *Reynolds.* Obviously the *Reynolds* court's holding that the plaintiffs did not prove the claims in 2001 is not and cannot be *res judicata* with regard to whether HRA currently deters, discourages, or prevents immigrants from applying for benefits today. The Second Circuit has repeatedly emphasized that *res judicata* does not apply to subsequent transactions. *Interoceanica Corp. v. Sound Pi-*

lots, Inc., 107 F.3d 86, 91 (2d. Cir. 1997); *see also* *Restatement 2d of Judgments*, § 24, Comment d(9).

The City's alternative argument - that the correctness of HRA's eligibility determinations "could have been raised" in the *Reynolds* case - is equally without merit. Claims that "could have been raised" are barred by claim preclusion only if they involve the same "claim" or "nucleus of operative fact," *Interoceanica Corp.*, 107 F.3d at 90, as a claim previously adjudicated. The claims in this action clearly do not involve the same "claim" or "nucleus of operative fact" as those adjudicated in *Reynolds.*

A prior judgment will "have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463-64 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997). "If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." *Id.* at 1464; *see* *Interoceanica Corp.*, 107 F.3d at 91.

Whether the City's eligibility determinations for ongoing public benefits were correct was not at issue in *Reynolds,* and for good reason. *Reynolds* was not restricted to a class of immigrants or to any particular category of applicants. Rather, *Reynolds* plaintiffs alleged systemic flaws in the treatment of applicants prior to determinations of their eligibility for ongoing benefits. To have included allegations in that case of systemic flaws in eligibility determinations for ongoing benefits, in addition to systemic flaws in the pre-determination process, would have involved a vast, if not impossible, expansion of the litigation. Entirely different evidence would have been necessary, including a systematic review of the correctness of eligibility determinations for ongoing benefits involving every conceivable aspect of public benefits law. Because the evidence would have been vastly different, and because the facts essential to this case were not present in *Reynolds,* the cases do not involve the same "claim" for purposes of claim preclusion. *First Jersey Sec., Inc.*, 101 F.3d at 1463-64.

Moreover, as has already been noted, the *Reynolds* case went to trial in April 2001. Even if the issues at trial "could have been" vastly expanded to include whether eligibility decisions for ongoing public benefits were systemically wrongly made, it would only have governed eligibility decisions made before April 2001. None of the issues in this case concerns whether eligibility determinations were wrongly made before April 2001. Therefore, claim preclusion could not possibly apply here. *Interoceanica Corp.*, 107 F.3d at 91.

Finally, HRA points to several examples of *Reynolds* informal relief complaints to allege that plaintiffs' counsel saw *Reynolds* as pertaining to erroneous denials of eligibility. As explained in the supplemental declaration of Elizabeth Saylor (Saylor Decl. II), dated January 31, 2006, those cases involved *Reynolds* violations as well as erroneous eligibility decisions. The advocates properly sought a correc-

tion of the *Reynolds* violations. In asking that counsel for HRA also correct the erroneous denials of benefits in those specific cases, the advocates did not somehow transform the *Reynolds* action into an entirely different lawsuit. For all these reasons, the judgment in *Reynolds* is not *res judicata* with regard to the claims alleged in this case.

2. Named Plaintiffs Have A Clear Legal Right to the Relief Sought.

The City asserts that the named plaintiffs do not have a clear legal right to the relief sought because "[i]n almost every case, the required documentation to demonstrate eligibility for benefits was not provided." (City Mem. 25.) This assertion is factually and legally incorrect.

After this action was commenced, the City determined that all of the named plaintiffs were eligible for benefits, and it provided them with ongoing assistance. The City also provided all of the named plaintiffs except for M.K.B. with retroactive assistance. Now, however, the City argues that O.P., J.Z., L.W., Marieme Diongue, M.K.B., and M.E. were never eligible for benefits in the first place. These arguments, addressed individually below, are without merit.

O.P.: O.P. is and was at all relevant times PRUCOL. She was granted deferred action on her U-visa application on January 25, 2005. (The City is wrong that O.P. did not file for an extension; she did so timely on January 6, 2006. (Saylor Decl. II, Ex. P.)) In May, August and October 2005, she applied for public benefits and provided caseworkers with all the necessary documentation establishing her PRUCOL status and categorical eligibility for public benefits. (O.P. Decl. ¶¶ 18, 30, 31, 41, Ex. G; O.P. Dep. 83:1-25; 84:1-25; 85:1-9; 88:20-22, Dec. 27, 2005[FN1]) On each occasion, her application was wrongfully denied. (O.P. Decl. ¶¶ 19, 33, 42, Ex. H; O.P. Dep. 88:11-13.)

FN1. Excerpts from deposition transcripts cited in this Memorandum are attached to the supplemental declaration of Elizabeth Saylor, dated January 31, 2006.

Marieme Diongue: The City's claim that Marieme Diongue lives in Yonkers is patently false. The City pays the rent on Ms. Diongue's Bronx apartment at 15 Place, and has done so at all times relevant to this action. (Diongue Dep. 57:7-8, 124:9-20; 125:7-126:6; Dec. 28, 2005.) The City sends notices and other mail to Ms. Diongue at her 15 Place apartment. (*See, e.g.,* Diongue Decl. Ex. F (listing 15. Place as Ms. Diongue's address).) Ms. Diongue lives, as she repeatedly testified, and as official documents and correspondence repeatedly demonstrate, at 15 Place, in the Bronx.

The City points to only one page out of 110 produced in discovery thus far relating to Ms.Diongue, a New York State ID card listing an address at 97 Avenue, in Yonkers, as the sole basis for its claim that Ms. Diongue lives outside of the City. At her deposition, Ms. Diongue repeatedly explained the reason for this ID card, but the City did not inform the Court of her explanation. As Ms. Diongue repeatedly explained, she uses that address solely for receipt of mail. She does not live there. (Diongue Dep. 99:2-100:12.).

L.W.: The City's suggestion that L.W. failed to provide documents needed to establish her eligibility is simply untrue. She has submitted, among other documents, her K-3 visa and documentation that she is a victim of domestic violence.[FN2] (L.W. Dep. 29:13 -16; L.W. Decl. ¶¶ 5-7, Exs. B and C.) Because L.W. has a filed I-130 petition and proof of abuse, she is eligible for benefits. The City identifies no specific additional documents necessary to establish her eligibility that L.W. failed to provide. There are no such documents.

> FN2. The expiration of her original K-3 visa is irrelevant to L.W.'s claims. It is the filed I-130 petition underlying the visa, along with proof of domestic violence, that establishes her eligibility for benefits.

L.W.'s March 17, 2005, application for benefits was wrongly denied.[FN3] She applied again on May 31, 2005, and in an apparent admission of her eligibility for benefits, HRA accepted her case. (*See* Saylor Decl. II ¶ 8.). Repeatedly thereafter, attorneys for L.W. requested a Medicaid disability determination for the purposes of establishing entitlement to federal food stamps. (Rolnick Decl. ¶¶ 4-5, 9-12, 21-23, 26; Exs. 1, 3.) L.W. also repeatedly informed HRA personnel of her disabilities. (LW. Dep. 46:6-14; 53:18-22, Jan. 10, 2006.) However, the disability determination was not done. L.W. did not receive food stamps until this action was commenced and HRA belatedly conducted a disability determination and found her disabled.

> FN3. The City incorrectly claims that L.W. received public assistance after her March 2005 application. She did not. (L.W. Decl. ¶ 11; Saylor Decl. ¶¶ 149-57.)

M.E.: The City approved M.E. for benefits in August, 2004, and M.E.'s non-citizen daughter in September, 2004. The City then terminated those benefits in November 2005. The City is wrong in claiming that M.E. failed to provide proof that she had applied for and had been denied a Social Security number prior to November 2005. M.E.'s attorney provided that proof to the City in July and October 2004. (Ganju. Decl. ¶ 22, Ex. 26; Ganju Decl. II ¶ 20.)

Furthermore, HRA told M.E.'s attorney that benefits were terminated because M.E. and her daughter had been denied Social Security numbers. (Ganju Decl. ¶¶ 101-102.) The City's extensive and irrelevant discussion of M.E.'s deposition testimony raises no justification for the City's unlawful denial of benefits to M.E. and her daughter. The City restored benefits to M.E. after this action was commenced.

J.Z.: The City's claim that J.Z.'s case casts doubt on her identity is ridiculous. It is unclear how J.Z.'s public benefits cards, bearing her maiden name, her married name, or both, cast doubt on her identity. HRA created the errors itself. Moreover, HRA refused to correct the problem despite J.Z.'s request that it do so. (J.Z. Dep. 8:4-9:25; 15:9-16:5; 18:7-12; 23:14-24:13, Jan 5, 2006.)

Other documents belonging to J.Z. contain slight misspellings of her first name. J.Z. has been unable to get these corrected. The City has not explained why these slight misspellings have any bearing on benefits eligibility. (J.Z. Dep. 34:21-35:13; 40:2-41:16.)

The City's suggestion that J.Z. was lying when she denied traveling to Santo Domingo is particularly troubling. (City Mem. 27.) The basis for this claim is an exhibit that the City created by stapling together a page from J.Z.'s passport and a page from what obviously is the passport of another person (different page sizes, non-sequential page numbers, different alien numbers, travel date earlier than passport issuance date). (J.Z. Dep. Ex. 9.; 75:13-14; 76:2-13; 76:24-77:8; 78:5-6; 78:10-24.)

The City's claim that J.Z. did not present documents relating to her I-130 family petition and proof of abuse is simply false. (J.Z. Dep. 99:22-100:1; 101:16-102:14; 109:18-110:8; 110:17-21; 112:1-14; J.Z. Decl. ¶ 9.)

M.K.B.: The City does not dispute that M.K.B. and her non-citizen children are currently eligible for ongoing benefits. The City argues, however, that the initial denial of benefits was correct because M.K.B.'s I-130 petition had been denied when her abusive husband failed to complete the application process on her behalf. (M.K.B. subsequently restarted the process on her own behalf through a self-petition.)

This rationale, however, must fail. When M.K.B. first applied for benefits, the reasons HRA gave for the denial was that her children lacked Social Security numbers and that they were generally ineligible immigrants. (M.K.B. Decl. ¶¶ 10-12, Ex. N.) These unlawful grounds for denial of eligibility were typical of those applied to many of the plaintiffs. Only after this litigation commenced did HRA offer a new ground for denying benefits to M.K.B. HRA's post hoc argument is legally incorrect. Battered spouses with denied I-130 petitions, and certainly those like M.K.B. whose petitions were denied solely because their batterers abandoned their petitions are PRUCOL. M.K.B. has requested a fair hearing before OTDA on this issue.

3. The Statutes Relied On By Plaintiffs Are Enforceable under § 1983.

(a) The City's arguments regarding § 1983 are without merit.

Contrary to the City's arguments, plaintiffs have a high likelihood of success on the merits of their claim that the rights they assert under the Food Stamp Act and Medicaid Act are enforceable under 42 U.S.C. § 1983. Despite their many pages of rhetoric contending that the Food Stamp Act and Medicaid Act are not enforceable through § 1983, defendants have not cited a single case standing for the proposition that the substantive provisions of the Food Stamp Act and the Medicaid Act relied on by plaintiffs are not enforceable under § 1983. In fact, the Second Circuit Court of Appeals and district courts within the Circuit have repeatedly held that the Food Stamp and the Medicaid Acts do give rise to statutory rights enforceable under §1983. And they have continued to find these statutes enforceable since the decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), relied on so heavily by the defendants.

As the Supreme Court made clear, the decision in *Gonzaga* did not change, but only clarified, the test for determining whether a federal statute and implementing regulations are enforceable. *Gonzaga* clearly articulates the difference between those statutes giving rise to a § 1983 claim and those that do not. Citing specifically to

its decisions in *Wright v. Roanoke Redev. Hous. Auth.,* 479 U.S. 418 (1987), and *Blessing v. Freestone,* 520 U.S. 329 (1997), the Court stated that the question is whether the statute confers "a mandatory [benefit] focusing on the individual." *See Sabree v. Richman,* 367 F.3d 180, 183-94 (3d Cir. 2004) (holding that "the [*Gonzaga*] court did not abandon the [*Blessing*] test" and finding that 42 U.S.C. § 1396a(a)(8) met the *Blessing* test and is enforceable under § 1983).

In the Second Circuit's only post-*Gonzaga* decision ruling on the issue of the enforceability of the provisions of a federal benefit program under § 1983, *Rabin v. Wilson-Coker,* 362 F.3d 190, 201 (2d Cir. 2004), the Court of Appeals recognized that "In *Gonzaga,* the [Supreme] Court held that "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* at 201 (quoting *Gonzaga,* 536 U.S. at 284). In analyzing whether an enforceable right existed, the *Rabin* court examined the statutory provision's "language, the context in which the language is used, and the broader context of the statute as a whole" (quoting *Freir v. Westinghouse Elec. Corp.,* 303 F.3d 176, 197 (2d Cir. 2002), *cert denied,* 538 U.S. 998 (2003)). Following this approach adopted by the Second Circuit, it is clear that the provisions of the Food Stamp Act and Medicaid Act at issue in this case create rights that are enforceable under § 1983.

The City concedes, as it must, that "judges in this district have previously held that certain provisions of the Food Stamp Act create a private right of action under 42 U.S.C. § 1983," citing *Reynolds v. Giuliani,* No. 98 Civ. 8877 (WHP), 2005 WL 342106 (S.D.N.Y. February 14, 2005) (City Mem. 46.) The court in *Reynolds,* and other courts in this district, have looked squarely at the ruling in *Gonzaga,* and have recognized that it reaffirms the three-prong test for federal court enforceability set forth in *Blessing.* The court in *Reynolds* found that the provisions of the Food Stamp and Medicaid Acts at issue in the case are enforceable under § 1983 because they are "framed unambiguously in terms of eligible individuals rights...the right conferred is neither vague nor amorphous ... and this provision unequivocally binds the States," thus meeting all the requirements of *Blessing* and *Gonzaga. Reynolds* at *15, 16. *See also, Williston v. Eggleston* 379 F. Supp. 2d 574 (S.D.N.Y. 2005).

In the case at bar, the City has asserted that the two sections of the Food Stamp Act upon which plaintiffs rely, namely 7 U.S.C. §§ 2020(e)(3) and 2020(e)(2)(b)(iii), are not enforceable under § 1983. Section 2020(e)(3) specifically mandates that the agency administering the Food Stamp program "shall ... provide an allotment [of Food Stamps] retroactive to the period of application to any eligible household not later than thirty days following its filing of an application." That language clearly creates an enforceable right on behalf of eligible households to receive food stamps within 30 days of filing an application. Both prior to and subsequent to the Supreme Court's decision in *Gonzaga,* numerous courts, including this Court, have held that these very sections meet the *Blessing* test and create rights that are enforceable under § 1983. *See Williston v. Eggleston,* 379 F.Supp.2d 561, 574-577 (S.D.N.Y. 2005); *Williston v. Eggleston,* ---F.Supp.2d ---, 2006 WL 163491 (S.D.N.Y., Jan. 24, 2006); *Reynolds v. Giuliani,* No.98 Civ. 8877(WHP), 2005 WL 342106 at *6 (S.D.N.Y. February 14, 2005); *Roberson v. Giuliani,* No.99 Civ. 100900, 2000 WL 760300 (S.D.N.Y. June 12, 2000); *see also, Walker v.*

Eggleston, No. 04 Civ. 0369 (WHP), 2005 WL 639584 (S.D.N.Y. March 21, 2005) (finding analogous section of the Food Stamp Act enforceable under § 1983).

Most recently, in *Williston v. Eggleston* 379 F. Supp. 2d 561 (S.D.N.Y. 2005), Judge Sweet adopted the reasoning of the Second Circuit in *Rabin v. Wilson-Coker* and applied it to the Food Stamp Act, ruling that these same provisions of the Food Stamp Act create rights that are enforceable under § 1983. "The provisions of the FSA here appear to relate to the individual household that applies for benefits just as the provisions of the Medicaid Act at issue in *Rabin* with respect to a specific relief to a specific class of beneficiaries and time frames within which eligible households must receive the benefits provided." *Williston,* 379 F. Supp. 2d at 575. Indeed, last week Judge Sweet held that the issue is so clear that no substantial grounds for a difference of opinion exist warranting certification under 28 U.S.C. § 1292(b). *Williston v. Eggleston,* --- F.Supp.2d ---, 2006 WL 163491 (S.D.N.Y. Jan. 24, 2006).

The City's reliance on *Taylor v. Vermont Dep't of Educ.,* 313 F.3d 768 (2d Cir. 2002), and *Ass'n of Comm. Org. for Reform Now v. NYC Dep't of Educ.,* 269 F. Supp. 2d 338 (S.D.N.Y. 2003), is wholly inapt. As Judge Sweet specifically recognized in *Williston,* the statutes at issue in those cases (the Family Educational Rights and Privacy Act of 1974 and the No Child Left Behind Act) do not have the kind of rights-conferring language that the Food Stamp Act contains. 379 F. Supp. 2d at 576-77; *see also* *Williston v. Eggleston,* -- F.Supp.2d ---, 2006 WL 163491 (S.D.N.Y., January 24, 2006) (again rejecting HRA's reliance on *Taylor*).

The City argues equally unsuccessfully that the section of the Medicaid Act upon which plaintiffs rely, 42 U.S.C. § 1396a(a)(8), does not create rights enforceable under § 1983. The overwhelming weight of authority, both in this Circuit and others, is contrary to that position. Section 1396a(a)(8) mandates that medical "assistance *shall* be furnished with reasonable promptness *to all eligible individuals*" (emphasis added). Congress could not possibly have been clearer in creating a right to assistance on behalf of eligible individuals. The City has not cited a single case in which 42 U.S.C. § 1396a(a)(8) was found not to be enforceable under § 1983. Many courts examining the question have held that § 1396a(a)(8) of the Medicaid Act is enforceable under § 1983. *Bryson v. Shumway,* 308 F.3d 79, 88-89 (1st Cir. 2002); *Gean v. Hattaway,* 330 F.3d 758, 772-73 (6th Cir. 2003); *Reynolds v. Giuliani,* No. 98 Civ. 8877(WHP), 2005 WL 342106 (S.D.N.Y. Feb. 14, 2005); *White v. Martin,* No. 02-454 Civ., 2002 WL 32596017 (W.D. Mo. Oct. 3, 2002).

The City argues that the provisions of the Medicaid Act are unenforceable because they are couched in terms of State Plan requirements. (City Mem. 51.) However, the Second Circuit has held that 42 U.S.C. § 1320a-2 specifically forecloses this argument, because this section provides that "in an action brought to enforce provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a state plan or specifying the required contents of a state plan." *See* *Rabin v. Wilson-Coker,* 362 F.3d at 201-02.

The City also argues that the regulations on which plaintiffs rely are not enforce-

able under § 1983, because they are not tethered to a "foundational statutory right." (City Mem. 47-50 (citing *Mundell v. Bd. of County Comm.,* 2005 U.S. Dist. Lexis 1985 (D. Colo. Sept. 2, 2005)). But the regulations relied on by the plaintiffs are tethered to the Food Stamp and Medicaid statutes, and to the requirements of due process of law in relation to notices that must be given to applicants and recipients of public benefits.

The fact that the regulations are addressed to the state agencies does not defeat their enforceability any more than it defeats the enforceability of the foundational statutes. These regulations "further define the substance of statutory (or constitutional) provision[s] that [themselves] create an enforceable right," as this Court found necessary for enforceability in *Graus v. Kaladjian,* 2 F. Supp. 2d 540, 543 (S.D.N.Y. 1998).

In sum, the overwhelming weight of authority supports a finding that the relevant sections of the Food Stamp and Medicaid Acts create individual rights enforceable under § 1983. Plaintiffs therefore have a high likelihood of success on the merits of this issue. And of course, there can be no question but that plaintiffs can enforce, through §1983, their rights to due process of law, as raised in their Fifth Claim for Relief against the City.

(b) State Defendants' § 1983 arguments are without merit.

Relying on this court's decision in *Graus v. Kaladjian,* 2 F. Supp. 2d 540, 544 (S.D.N.Y, 1998), the State defendants contend that plaintiffs have no private right of action under 42 U.S.C. § 1396a(a)(5) to enjoin the State to supervise HRA with regard to alien eligibility issues. (State Mem. 48-49.) But this is not plaintiffs' argument. The plaintiffs need not and do not contend that §1396a(a)(5) creates enforceable rights under the *Blessing* and *Gonzaga* standards. Rather, plaintiffs contend that DOH, as the State agency responsible for New York State's Medicaid program, and OTDA, as the agency responsible for the Food Stamp program, are accountable for violations of the substantive obligations to deliver benefits to eligible class members set forth in 7 U.S.C. §§ 2020(e)(3) and (e)(2)(B)(iii) and 42 U.S.C. § 1396a(a)(8).

Judge Koeltl cogently explained this important distinction in *DaJour B. v. City of New York,* No. 00 Civ. 2044 (JGK), 2001 U.S. Dist. LEXIS 10251 (S.D.N.Y. July 23, 2001), an action seeking to compel HRA and State DOH to provide certain Medicaid services (known as "EPSDT" services). In *DaJour B.,* Judge Koeltl concluded, as did this Court in *Graus v. Kaladjian,* that § 1396a(a)(5) alone created no enforceable rights. But the Court nonetheless denied State DOH's motion to dismiss. Judge Koeltl's reasoning is directly applicable here:

DOH next argues it is not liable for the City's alleged deficiencies in providing EPSDT services. DOH essentially asserts that its delegation of the administration of the state's Medicaid plan to the local social services districts, including the City's HRA, relieves it of its responsibility to ensure that the EPSDT provisions of the Medicaid Act are enforced. This argument is without merit. While a participating state may delegate certain administrative responsibilities to political subdivi-

sions, including the administration of EPSDT services, Congress has placed the ultimate responsibility to administer the Medicaid Act on the State, and that duty is non-delegable. .... Thus, although 42 U.S.C. § 1396a-(a)(5) does not provide the plaintiffs with an enforceable right under Section 1983, the DOH, as the agency responsible for New York State's Medicaid program is accountable for violations of the substantive EPSDT provisions, which do create enforceable rights.

Id. at *42.

Judge Koeltl's holding in *Dajour B.* is fully applicable here and is supported by ample legal authority. In *Reynolds,* for example, the court held that "a violation of plaintiffs' rights under the Food Stamp, Medicaid and cash assistance programs by the City can "give [ ] rise to corresponding Section 1983 claims against the State defendants." *Reynolds v. Giuliani,* No. Civ. 8877(WHP), 2005 WL 342106, *21 (S.D.N.Y. Feb. 14, 2005) (*quoting Reynolds v. Giuliani,* 118 F. Supp. 2d at 386.) The *Reynolds* court recognized that local social services districts are "agents of the state," and that "states bear the ultimate responsibility for supervising compliance" with the Food Stamp and Medicaid Acts. "[T]he City defendant's failure to satisfy their obligations under the Food Stamp and Medicaid Acts ... is persuasive evidence that the State defendants have failed in their oversight obligations." *Id.* at 22.

Likewise, other cases finding provisions of the Food Stamp Act and the Medicaid Act enforceable under § 1983 are enforceable against state agencies. *See, e.g., Rabin v. Wilson-Coker,* 362 F.3d 190 (2d Cir. 2004); *Sabree v. Richman,* 367 F. 3d 180 (3d Cir. 2004); *Williston v. Eggleston,* 379 F.Supp.2d 561 (S.D.N.Y. 2005); *Walker v. Eggleston,* No. 04 Civ. 0369 (WHP) 2005 WL 639584 (S.D.N.Y. Mar. 21, 2005). Those courts have reasoned not that § 1396a(a)(5) alone created enforceable rights, but rather that other federal statutes create enforceable rights and that the State may not escape liability under those statutes by purporting to delegate its responsibilities to HRA.

The State maintains that plaintiffs have no enforceable right "to prescribe the manner by which State defendants must supervise the issues herein." (State Mem. 42-49.) But that is a gross mischaracterization of plaintiffs' claims. The plaintiffs do not seek to prescribe the "manner" in which State DOH and OTDA supervise the City. Instead, the plaintiffs challenge the failure of those agencies, as the entities responsible for the administration of the Food Stamp Act and the Medicaid Act in New York State, to comply, directly or through their agents, the local districts, with the requirements of the Acts.[FN4]

FN4. The State defendants' dereliction of responsibility for ensuring the lawful delivery of public benefits in New York City is nowhere more evident than in their complete lack of responsibility for ensuring the proper design and execution of the POS system. In depositions, the State admitted it had no role in the design of the POS system. It currently has no role with regard to making or approving changes made to the POS system. (Iannucci Dep. 62:16-22.)

4. Plaintiffs Have Established Liability under *Monell.*

The legal standards for establishing liability under *Monell v. Dept. of Soc. Servs.,*

436 U.S. 683 (1978), are not in dispute. The City acknowledges that liability may be established if a practice is “so persistent and widespread that it constitutes a ‘custom or usage’ and implies the constructive knowledge of policy-making officials,” or “a failure by official policy-makers to properly train and supervise subordinates to such an extent that it amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact.” (City Mem. 52-53.) (*quoting* *Community Health Care Ass'n v. DeParle,* 69 F. Supp. 2d 463, 474-75 (S.D.N.Y. 1999)).

The City claims that its policy is “to help putative class members to obtain benefits to which they are entitled.” (City Mem. 53.) But whether or not that was the City's *intention,* its defective systems have created a “custom and usage” of causing benefits to be erroneously denied to class members in this case.

Evidence of that custom and usage is overwhelming. Many of the problems relate to the City's and State's flawed computer programs that are used to administer public benefits. In its brief, HRA candidly admits that “in fact one category of eligible aliens, those with an approved or pending immigrant visa petition (Form I-130) with evidence of domestic violence, are not accommodated within the agency's computer program.” (City Mem. 21.) That admission establishes liability under *Monell* for a substantial portion of the class. But HRA's computer flaws go far deeper than that.

As depositions have demonstrated, the City Paperless Office System (POS) computer program lacks a drop-down menu choice for all battered qualified aliens - not just those with approved or pending I-130 petitions and proof of domestic violence. Workers must first choose either “PRUCOL (PA)” or “Undocumented Aliens” from the drop-down menu for this group of immigrants. But these immigrants are *not* either PRUCOL or undocumented. Workers must therefore make choices that are erroneous in order to coax the computer into opening the cases properly. There are no instructions on the pertinent POS windows explaining how to do this. (Shepard Dep. 66:7-78:2.)

Likewise, the City's Alien Eligibility Desk Aid mislabels I-130 petitioners as *prima facie* holders. Because POS uses information from the Alien Eligibility Desk Aid, this error is also built into the POS screens that are presented to workers. In her deposition, Michelle Shepard, head of the POS design team, candidly admitted that this error is a source of confusion. As she testified, “everybody understood that it was confusing because it talks about prima facie for battered, period.” (Shepard Dep. 134.) Asked whether HRA workers would be confused by this error, Ms. Shepard stated: “It was said that, if-- if we're confused, we imagine workers will be confused, too.” (*Id.* at 134-135.)

The State Welfare Management System (WMS) is also partly at fault. Both the State WMS computer system and the City's POS computer system require workers to enter an Alien Registration number for all battered qualified aliens (Eisenstein Dep. 30:3-14; Shepard Dep. 165:14-18), even though many eligible battered qualified aliens do not have an A number (Eisenstein Dep. 36:22-37:2). If an Alien Registration number is not entered, the case will “error out.” (Shepard Dep. 165:14-18; Eisenstein Dep. 40:5-8.) The State knows of a “work-around” that can be used to circum-

vent this error (involving use of a dummy Alien Registration number consisting of the letter A followed by a series of “9s.” (Eisenstein Dep. 40:12-17.)) But the State has never issued a procedure describing this “work-around” (Eisenstein Dep. 40:21-42:6), and HRA has never received instructions regarding it (Shepard Dep. 165:19-25.) The head of the POS design team, who presumably knows the computer system as well as anyone in HRA, was asked in her deposition: “Are you aware of any way to open a case for somebody in alien category B [battered aliens] if they do not have an alien number?” She answered: “I don't.” (Shepard Dep. 166:3-6) The State acknowledged that at least one of the plaintiffs' or declarants' cases “errored out” for this reason. (Eisenstein Dep. 106:16-08:14.)

Similarly, the notices generated by the Computerized Notice System (“CNS”) are flawed. They omit “battered qualified aliens” as a category of immigrants eligible to receive benefits. (Ptak Aff. Ex. C.)

These serious flaws have led to systemic and erroneous denials of public benefits to eligible immigrants. Regardless of whether the City *intended* its systems to work properly, they clearly do not. Indeed, the defendants' computer systems are so severely flawed, that HRA was unable to open the cases of six of named plaintiffs found eligible for ongoing benefits - M.A., A.I., O.P., M.B., L.W. and Anna Fedosenko - within the time frames agreed upon in Court because of computer problems. (Saylor Decl. II, ¶¶ 3-16.)

5. State Defendants' Remaining Arguments Are Without Merit.

a. The Plaintiffs' Claims Are Not Barred by the Eleventh Amendment.

Contrary to the argument of State defendants, it is well settled that prospective injunctive relief against a state officer sued in his official capacity is permissible. *See Ex parte* *Young, 209 U.S. 123 (1908)*; *Burgio and Campofelice, Inc. v. NYS Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997)*.

b. Disabled Qualified Aliens Are Eligible for Food Stamps.

The State defendants argue that plaintiffs Fedosenko and L.W., and other disabled immigrants like her who have been in a qualified status for fewer than five years, are not eligible for federal food stamps. (State Mem. 35-36.) This argument is squarely wrong.

As the State observes, qualified aliens must be “receiving benefits or assistance for blindness or disability (within the meaning of section 2012(r) of Title 7)” in order to be eligible to receive federal food stamps without a five-year waiting period. 8 U.S.C. § 1612(a)(2)(F)(2). Disingenuously, quoting only part of § 2012(r) in its brief, the State claims that this section defines the phrase “elderly or disabled member” as “a member of a household who - ... receives disability related medical assistance under title XIX of the Social Security Act” (in other words, federal Medicaid). But the State ignores the rest of § 2012(r). The remainder of that section provides that an elderly or disabled person also includes a household member who receives “disability-based State general assistance benefits, if the Secretary

determines that such benefits are conditioned on meeting disability or blindness criteria at least as stringent as those used under title XVI of the Social Security Act."

Apparently, counsel for the State defendants are unaware that the United States Department of Agriculture (USDA) has determined that State Medicaid is included within the meaning of "disability-based State general assistance benefits." In early January of 2003, USDA issued guidance to all of its Regional Directors that stated, among other clarifications, that qualified aliens receiving medical assistance under a State program that uses criteria as stringent as the federal SSI criteria must be considered disabled for the purpose of food stamp eligibility. (Saylor Decl. II Ex. N at 4.) When USDA recently issued proposed regulations implementing amendments to the Food Stamp Act, it again confirmed that receipt of medical assistance under a State disability-based Medicaid program was sufficient to confer food stamp eligibility on an immigrant in a qualified alien status. USDA stated: "Under Section 3(r) of the Act (§ 2012(r)), ... persons receiving ... *state-funded medical assistance benefits* ... may be considered disabled for food stamp purposes if they are determined disabled using criteria as stringent as federal SSI criteria." *See* 69 Fed. Reg. 20724, at 20740 (April 16, 2004) (emphasis added).

No one disputes that New York State's requirements for disability-based State Medicaid are as stringent as the SSI disability criteria. Accordingly, disabled immigrants who have been in a qualified status for fewer than five years are eligible for federal food stamp benefits when a determination is made that they are eligible for disability-based State Medicaid. The State's error on this score is simply confirmation that it has not correctly implemented federal food stamp law.

The State also claims that State DOH does not pay "to have a doctor determine that someone who already receives State Medicaid due to low income is disabled," and therefore eligible for federal food stamps. (State Mem. 36.) That, too, is mistaken. By letter dated March 28, 2003, Linda LeClair, Director of the Bureau of Eligibility Operations and Family Health Plus, assured advocates that "local districts are currently required to have a procedure which identifies disabled Medicaid recipients for FS [Food Stamps] staff, so that FS benefits for eligible individuals can be appropriately authorized." She continued: "Individuals who are also applying for or receiving Medicaid benefits, including applicants/recipients of temporary assistance and Medicaid, may be required to have a medical disability determination if there is indication that they may qualify for disability related Medicaid. Disability-related Medicaid is a benefit that meets the food stamp eligibility criteria for qualified aliens." (Saylor Decl. II Ex. O.) Notably, Ms. LeClair did not limit that statement to disability-related federal Medicaid.

On April 2, 2003, defendant OTDA formally confirmed that position, stating that "individuals who are also applying for or receiving Medicaid benefits, including applicants/recipients of temporary assistance and Medicaid, must have a Medicaid disability determination if there is indication that they may qualify for disability-related Medicaid." (Declaration of Jennie Baum, dated Dec. 12, 2005, Ex. 34 (OTDA, 03 INF-14 (April 2, 2003).)

It is precisely the failure of State defendants to ensure that the local social services districts, including HRA, abide by this policy and refer those qualified aliens who appear to be disabled or who identify themselves as disabled for a disability determination that has effectively barred plaintiffs Fedesenko and L.W. and the class they represent from access to the federal food stamp benefits to which they would otherwise be entitled.

c. The Fair Hearing Process Is Not Adequate Supervision.

State defendants erroneously claim that because some of the plaintiffs received "favorable" fair hearing decisions, it has not failed to supervise HRA.[FN5] But the State's account of the resolution of the plaintiffs' fair hearings proves just the opposite. Despite numerous fair hearings, none resulted in any systemic correction of the problems at issue in this lawsuit. Indeed, the notion that individual fair hearing decisions could somehow result in a correction of the computer problems at issue here is sheer fancy. Moreover, the State's characterization of these fair hearing decisions as "favorable" is very misleading. Many plaintiffs are still unable to obtain benefits, and receive them only as a result of mechanisms other than the fair hearing process. (Pl. Mem. 28-29.)

> FN5. State defendants incorrectly allege that three plaintiffs, M.K.B., A.I. and L.A.M. did not request fair hearings. (State Mem. 38.) L.A.M. and A.I. both requested fair hearings prior to filing and M.K.B. requested one subsequently. (Saylor Decl. ¶ 33, Ex. M.). Further, State defendants ignore the existence of multiple fair hearings for the plaintiffs and the difficulties obtaining compliance with those decisions. (*See, e.g.,* J.Z. Decl. ¶¶ 29-33.)

The State defendants also contend that there is no traceable link between supervision of the City through the fair hearing process and systemic denial of the plaintiffs' cases. (State Mem. 36-42.) But the "link" is imposed by federal law. As set forth above, the State defendants have a non-delegable duty to administer and supervise the federal benefits regime under 7 U.S.C. § 2020 and 42 U.S.C. § 1396a. *See Reynolds v. Giuliani,* No. 98 Civ. 8877(WHP), 2005 WL 342106, at *21 (S.D.N.Y. Feb. 14, 2005). If the fair hearing system is supposed to be the mechanism for ensuring the lawful delivery of benefits to immigrants, then it is failing miserably.

The fair hearing system fails in part because fair hearings generally result in remands that are ineffective in correcting underlying problems. The State remands fair hearings on procedural issues even when advocates request decisions on the substantive issues and present evidence establishing eligibility (State Mem. 19-23; *See, e.g.,* transcripts at Hopkins Decl. Ex. 2 at 24; Ex. 4 at 27; Ex. 5 at 6, 39). Further, fair hearing decisions on immigrant eligibility either omit discussion on the relevant law or misstate it. (*See* McEnnis Decl.) Moreover, State defendants have not responded to advocates' requests for assistance when the City fails to comply with the fair hearing decision. (*See* supplemental declaration of Jami Johnson, dated January 31, 2006; Decl. of Reena Ganju, dated Jan. 31, 2006 ¶¶61-80; Saylor Decl. II ¶¶ 34-35.)

II. The Proposed Class Should Be Certified.

The City's main arguments against certification of the class are first, that there is no common question of fact as required by Rule 23 (a)(2) and second, that defendants have not acted or refused to act on grounds generally applicable to the class as required by Rule 23 (b)(2). (City Mem. 56-57, 58-59.) These arguments, which are closely related, are without merit.

The central question of law and fact in this case, common to all class members, is whether defendants systematically and erroneously deny public benefits to class members. Plaintiffs allege that defendants have acted on grounds generally applicable to the class by systematically denying public benefits to class members. Plaintiffs have submitted convincing evidence demonstrating defendants' systemic violations of the laws regarding alien eligibility for public benefits. Defendants consistently deny public benefits to class members because of actions and omissions that are generally applicable to the proposed class, including, *inter alia:* (i) systemic flaws in the computer system that are generally applicable to the class because every class member's application for public benefits is processed using the POS and WMS systems; and (ii) lack of training of HRA workers and erroneous policy directives that consistently result in the systematic misapplication of the rules regarding alien eligibility for public benefits and erroneous denials of class members applications for public benefits.

Issues of fact and law about these systemic failures predominate over any questions about the individual eligibility of class members. This Court has repeatedly certified classes of public benefits applicants and recipients in which the eligibility of individual class members would also have been a factor to be determined, but did not predominate over the systemic questions affecting the class as a whole. *See* *Williston v. Eggleston* 379 F. Supp. 2d 561 (S.D.N.Y. 2005); *Walker v. Eggleston,* No. 04 Civ.0369 (WHP), 2005 WL 639584 (S.D.N.Y. March 21, 2005); *Reynolds,* 118 F. Supp. 2d at 113; *Morel v. Giuliani,* 927 F. Supp. 2d 622 (S.D.N.Y. 1995). Furthermore, minor factual differences in the circumstances of each class representative and the class members are not determinative, so long as they share the ultimate issues of entitlement to and denial of public benefits. *Morel,* 927 F. Supp. 2d at 633; *White v. Mathews,* 559 F.2d 852, 858 (2d Cir.1977), *cert. denied,* 435 U.S. 908 (1978).

Defendants assert several additional, insubstantial arguments against certification of the class. Contrary to the defendants' assertions, the numerosity requirement of Rule 23(a)(1) is met by any measure in this case. In support of their motion for class certification, plaintiffs submitted the declaration of Camille Carey, reporting statistics indicating that over 1000 class members are identified annually. A showing of forty or more class members is presumptively deemed sufficient in the Second Circuit to satisfy the numerosity requirement of Rule 23(a)(1). *Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995). “Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement.” *Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir. 1992). Plaintiffs may make common sense assumptions to support a finding of numerosity. *Burley v. City of New York,* No. 03 Civ. 735, 2005 U.S. Dist. LEXIS 4439 at *10 (S.D.N.Y. Mar. 25, 2005); *Pecere v. Empire Blue Cross and Blue Shield,* 194 F.R.D. 66, 70 (E.D.N.Y. 2000).

The City also asserts “grave doubt” regarding the adequacy of representation of the named class. (City Mem. 57.) These doubts are premised on the erroneous contention that the named plaintiffs were properly denied benefits. As explained *supra* in Section I.B.2, today and at all times relevant to their applications for public benefits, all of the named plaintiffs were eligible and continue to be eligible for public benefits. In fact, the City has made determinations regarding the current eligibility of the named plaintiffs, issuing ongoing benefits to all of the named plaintiffs and retroactive benefits to all but one plaintiff (M.K.B.).

The State defendants attack plaintiffs' numerosity showing on evidentiary grounds as “hearsay” inadmissible under Fed. R. Evid. 802. (State Mem. 52). However, neither *Cokely v. NYCCOC,* No. 00 Civ. 4637 (CBM) 2003 WL 1751738 (S.D.N.Y. Apr. 2, 2003), cited by the State defendants, nor any other authority, precludes consideration of hearsay evidence per se under Rule 23. Finally, the State defendants suggest that the proposed class should not be certified because the class definition includes “qualified alien categories which are not represented by the named plaintiffs.” (State Mem. 50.) This is simply incorrect. The only categories of qualified aliens included in the class are battered qualified aliens and lawful permanent residents who have been in that status for less than five years. Named plaintiffs M.K.B., L.W., M.E., P.E., A.I., Denise Thomas, J.Z are all qualified aliens, and plaintiff Anna Fedosenko is an lawful permanent resident.

CONCLUSION

For the foregoing reasons, plaintiffs' motions should be granted.

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 739012 (S.D.N.Y.)

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