

**NEW YORK STATE DEPARTMENT OF FAMILY
ASSISTANCE
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE**

REPORT OF SIGNIFICANT LITIGATION

(July 2013)

* indicates update since last report

**indicates new case

I. Litigation Affecting the Policies and Procedures of the Division of Temporary Assistance

Walter E. Carver v. New York State Office of Temporary and Disability Assistance, New York State Department of Taxation and Finance, and New York State Division of Lottery

Supreme Court, Kings County, commenced April 25, 2008.

Supreme Court Appellate Division 2nd Judicial Department, decided June 21, 2011.

Remand to Supreme Court, Kings County, commenced June 21, 2011.

Supreme Court, Kings County, decided August 8, 2012.

New York State Court of Appeals, commenced July 27, 2011.

New York State Court of Appeals, decided September 8, 2011.

*United States District Court, Eastern District commenced September 10, 2008.

United States District Court, Eastern District, decided March 31, 2009.

United States Court of Appeals, 2nd Circuit, decided September 23, 2010.

Remand to United States District Court, Eastern District, commenced September 23, 2010.

*Note that U.S. Federal District Court case does not name OTDA as a defendant.

New York State Court of Claims, commenced October 1, 2008.

New York State Court of Claims, decided May 4, 2009.

Supreme Court Appellate Division 3rd Judicial Department, decided December 16, 2010.

Parties: Petitioner/Plaintiff is an individual who was a former public assistance recipient who won the lottery on August 10, 2007 and had those winnings intercepted by OTDA. Respondents in the State Court Actions are: NYS OTDA, NYS T&F and NYS Lottery. Defendants in the Federal Court Action are: the City of New York, NYC HRA, NYC Health and Hospital Corp. and NYC Dept. of Transportation.

Character of Litigation: The State Court Action is a CPLR Article 78 and the Federal Court Action is a Class Action for Declaratory and Injunctive Relief.

Law or Regulation in Issue: Social Services Law 131-r, 336, New York Tax Law 1613-b, Fair Labor Standards Act (FLSA)

Issue: The petitioner won \$10,000.00 playing the lottery on August 10, 2007. Pursuant to Social Services Law (SSL) §131-r and Tax Law § 1613-b, OTDA intercepted \$5,000.00 of Mr. Carver's lottery winnings in recoupment of public assistance (PA) benefits he received during the period from September 5, 1997, through March 4, 2000. On April 25, 2008, Petitioner brought an Article 78 in the Kings County Supreme Court against OTDA in which he alleged that he owed no debt to defendant since any and all PA received was "payment" for hours "worked" at minimum wage while he was assigned by the local social service district to a WEP activity. Petitioner alleged that as a participant in the WEP program, he was assigned to work for the City of New York at Coney Island Hospital, where he sorted and delivered mail, and at the Staten Island Ferry Terminal, where he swept floors, picked up trash, and threw down salt in the winter. The petitioner also asserted that, as a WEP participant, he was required by the OTDA to work 35 hours per week and in exchange for his work, he was paid \$176 every two weeks, and he also received food stamps.

Status: State Court Action: The Kings County Supreme Court dismissed the Article 78 proceeding in April of 2009 as to all the Respondents and Petitioner appealed. The Appellate Division Third Department ruled against OTDA on June 21, 2011, and remanded the case to the Supreme Court on the issue of FLSA. OTDA filed an Answer on July 27, 2011, oral argument was held on March 2, 2012, and Petitioner filed a Reply on May 18, 2012. The Supreme Court held on August 8, 2012: (1) petition is granted to the extent that New York State is directed to return the sum of \$5,000 to Mr. Carver; (2) OTDA and New York State are considered the employer for the purpose of determining Mr. Carver's public assistance payments and the burden is on the employer to keep records of their employees' work hours and pay; and (3) the petitioner has established a prima facie case showing that any forfeiture of his lottery winnings would, under these particular facts and circumstances, result in a federal wage violation under FLSA (29 USC §201, et seq.), because Mr. Carver would have been paid less than the applicable federal minimum wage for the work he performed. OTDA is currently consulting with the Solicitor General's Office regarding the potential appeal of this decision.

Federal Class Action: The U.S. District Court dismissed the Plaintiff's motion on March 31, 2009 and Plaintiff appealed. The U.S. Court of Appeals 2nd Circuit held that Plaintiff had standing to assert his minimum wage claims and remanded the case to the District Court for further consideration. At this time OTDA is not a named party in this Federal Class Action.

Related Cases: None

Responsible Attorneys:

Robert Kraft, Assistant Attorney General, New York State Department of Law
Alicia Sullivan, Associate Attorney, New York State Office of Temporary & Disability Assistance
Arieh Mezoff, Associate Attorney, New York State Office of Temporary & Disability Assistance

***M.K.B. et al v. EGGLESTON, DOAR & NOVELLO**

United States District Court, Southern District of New York, commenced December 13, 2005.

Parties: Plaintiffs are certain non-citizens who have a relatively obscure immigration status. The Defendants are the Commissioners of HRA, OTDA and DOH.

Character of Litigation: Class Action, Action for declaratory and injunctive relief.

Law or Regulation in Issue: Social Services Law §§122, 131, 366; 18 NYCRR §§349, 350, 351; 42 USC § 1983; 7 USC §2020; 7 CFR §273.2

Issue: Plaintiffs claim that HRA is failing to properly determine their eligibility for public assistance, food stamps and Medicaid. Plaintiffs allege that the HRA computer system (POS) and workers do not correctly identify the status and make them eligible for benefits. The allegation against the State OTDA and Department of Health is that we do not properly supervise and train HRA. Among the facets of that allegation is that, allegedly, our regulations with respect to the need for a social security number are inconsistent and contrary to law; and that our WMS system is difficult to use and doesn't allow the plaintiffs to be correctly determined and recorded as eligible.

A specific issue with respect to Medicaid is related to the Food Stamp program. In general, qualified aliens have to wait five years to be eligible for food stamps. However, qualified aliens who are in receipt of certain disability benefits, including Medicaid, based on a Medicaid disability determination, can receive food stamps without the five year wait. The plaintiffs want Medicaid disability determinations done on all of the class members, even if they are already receiving Medicaid without a disability determination. The only purpose of the determination would be to establish eligibility for food stamps.

Status: Plaintiffs requested discovery and the OTDA has, to date, provided many of the requested materials. The discovery request is ongoing and the OTDA will be providing additional materials to comply with the requests. The plaintiffs moved for a preliminary injunction and the Court heard argument on February 2, 2006. On February 16, 2006, the Court issued a preliminary injunction ordering the OTDA to make certain revisions and issue a new release for aliens who are victims of domestic violence. The Court deferred ruling on all other matters until after a full evidentiary hearing. Numerous depositions were held between February 17, 2006 and the March evidentiary hearing.

A 9-day evidentiary hearing concluded in late March 2006 relative to the plaintiffs' motion seeking class certification and a preliminary injunction against all defendants. OTDA moved the Court to vacate its February 16, 2006 Order wherein the Court directed OTDA to complete four actions it had voluntarily promised to perform by various dates certain in its February 8, 2006 letter to the Court.

By Opinion and Order dated August 29, 2006, the United States District Court for the Southern District of New York (Rakoff, J.) granted the plaintiffs' motion for preliminary injunctive relief by reconfirming the relief set forth in the Order of February 16, 2006.

While commending the defendants for their ameliorative actions undertaken since the commencement of this action, the Court held that additional measures were warranted.

Specifically, as against the State, in addition to directives set forth in the Court's February 16th Order, the Court ordered (1) OTDA to add a second date field to WMS so that the date an immigrant became a qualified alien and the date the immigrant entered the country can both be recorded, and in furtherance of this addition, to issue instructions explaining the use of these fields and clarifying that time accrued in different qualified alien statuses should be added together to determine eligibility for federal food stamps; (2) OTDA to issue clear and comprehensive instructions on how to open cases for aliens directly in WMS, focusing particularly on multi-suffix cases; (3) OTDA to correct a prior issuance which, according to the Court, is not sufficient to cause the Social Security Administration to issue a non-work social security number to an immigrant who lacks work authorization; and (4) the State to revise its training materials so that they accurately and comprehensively explain which immigrants are eligible for federal Medicaid.

On September 13, 2006, the State defendants moved for reconsideration of the class certification order on the grounds that two of the class members were improperly included in the class, namely, (1) LPRs who have been in that status for less than five years have no class representatives that can demonstrate the various claims such persons may have and (2) persons who are PRUCOL would require relief, that when implemented, would unavoidably require enforcement of State law against the State defendants in violation of the Eleventh Amendment to the U.S. Constitution. The Court denied the State defendants' motion for reconsideration of the class certification order.

A Stipulation of Settlement was signed by the parties on January 12, 2006. The stipulation incorporates the terms set forth in the above preliminary injunction and also provides for restored benefits and monitoring of the various programs. The fairness hearing was held on June 5, 2007, and the final Judgment was issued shortly thereafter. On June 23, 2011, plaintiffs moved to extend the stipulation against State defendants. On September 29, 2011, the Court extended the terms of the Stipulation until February 15, 2013. On January 3, 2013, the Court "so ordered" a stipulation extension through August 15, 2013. Plaintiffs have notified defendants that they will be seeking a further extension through August 15, 2014, the maximum time for extension under the original stipulation.

Programmatic Impact: The Settlement provides for the identification of and notice to certain class members who are eligible for a restored benefit under the stipulation. The stipulation also provides for worker training by the City defendant. The stipulation provides for various monitoring by all defendants semi-annually for 46 months from the effective date of the stipulation and as required by subsequent extender stipulations and orders.

Responsible Attorneys:

Robert Kraft, Assistant Attorney General, New York State Department of Law

John DiBari, Associate Attorney, New York State Office of Temporary & Disability Assistance

Malinka Gutierrez, Associate Attorney, New York State Office of Temporary & Disability Assistance

****Megan Rafferty, et al v. Robert Doar, Kristin Proud, Nira V. Shah, New York City Human Resources Administration (HRA), New York State Office of Temporary and Disability Assistance (OTDA) and New York State Department of Health(DOH)**

United States District Court, Southern District, commenced March 8, 2013

Parties: Plaintiffs are a proposed class of New York City residents who are alleged to be “substantially limited in seeing, who are current or future applicants for or recipients of Food Stamps and /or Medicaid, and who need materials in accessible alternative formats for effective communication regarding the Food Stamps and/or Medicaid program.” Defendants are OTDA, Kristin Proud, HRA, Robert Doar, DOH and Nirav Shah.

Character of Litigation: Federal Court Action is a Class Action for declaratory relief, preliminary and permanent injunctive relief.

Law or Regulation in Issue: The Americans with Disabilities Act of 1990 (ADA), 42 USC §12101, et seq., Section 504 of the Rehabilitation Act of 1973, 29 USC §701-797b, Due Process Clause of the Fourteenth Amendment to the United State Constitution, New York State Human Rights Law, NY Executive Law §291, et seq. the New York City Human Rights Law, NYC Administrative Code §8-107, New York State OTDA regulations, 18 NYCRR §303.1.

Issue: Plaintiffs seek relief requiring Defendants to provide written materials in alternative formats to plaintiffs and other similarly situated visually impaired Food Stamps, now entitled, Supplemental Nutrition Assistance Program (SNAP) and Medicaid applicants and recipients. Plaintiffs are also seeking the development and implementation of policies and procedures to determine who needs materials in alternative formats and to inform applicants and recipients of their right to receive materials in such formats. Lastly, plaintiffs seek the appointment of a monitor to ensure Defendants comply with any injunctions and declarations, written reports by Defendants every 6 months on the progress and status in complying with relief requested and reasonable attorney’s fees.

Status: Commenced on March 8, 2013. Defendants’ responses to the class certification and preliminary injunction motions are adjourned pending settlement discussions with Plaintiff’s counsel.

Related Cases: None

Responsible Attorneys:

Linda Fang, Assistant Attorney General, New York State Department of Law

Alicia Sullivan, Associate Attorney, New York State Office of Temporary & Disability Assistance

****Alechea Toney-Dick, et al v. Robert Doar, Kristin Proud, Tom Vilsack, New York City Human Resources Administration (HRA), New York State Office of Temporary and Disability Assistance (OTDA) and United State Department of Agriculture (USDA)**

United States District Court, Southern District, commenced March 29, 2013

Parties: Plaintiffs are a proposed class which consists of all individuals in New York City who (a) have a physical or mental impairment that substantially limits one or more major life activities within the meaning of the ADA or have a record of such an impairment (b) are eligible to apply for D-SNAP benefits, (c) reside in the covered zip codes for the HRA D-SNAP program and (d) need reasonable accommodations to enable them to apply for D-SNAP benefits. Defendants are OTDA, Kristin Proud, HRA, Robert Doar, USDA and Tom Vilsack.

Character of Litigation: Federal Court Action is a Class Action for declaratory and injunctive relief.

Law or Regulation in Issue: The Americans with Disabilities Act of 1990 (ADA), 42 USC §12131, et seq., Section 504 of the Rehabilitation Act of 1973, 29 USC §794, et seq., the Food Stamp Act, 7 USC §2011, et seq. and State and New York City local law.

Issue: Plaintiffs allege discrimination in the design, approval, implementation and administration of HRA's D-SNAP created in response to Hurricane Sandy in New York City.

Status: Originally commenced on December 21, 2012 against defendant HRA only. On March 29, 2013, a second amended class action complaint was filed which added both OTDA and USDA as necessary parties. Defendants OTDA, USDA and HRA filed motions to dismiss on June 12, 2013. The Defendants have been served with discovery demands and responses are due July 19, 2013.

Related Cases: None

Responsible Attorneys:

John P. Gasior, Assistant Attorney General, New York State Department of Law

Alicia Sullivan, Associate Attorney, New York State Office of Temporary & Disability Assistance

John DiBari, Associate Attorney, New York State Office of Temporary & Disability Assistance

WILLISTON et al. v. EGGLESTON et al.

United States District Court, Southern District of New York, commenced June, 2004.

Parties: Plaintiffs are a purported class of New York City residents who have sought, are seeking or will seek to apply for food stamps in New York City.

Character of Litigation: Class action pursuant to 42 USC § 1983 for declaratory and injunctive relief.

Issue: The plaintiffs brought this action against this Office and the City of New York alleging violations of State and federal law in the administration of the Food Stamp program. Specifically, plaintiffs allege that defendant's policies and practices fail to provide food stamp benefits to eligible applicants in a timely manner and that the State defendant does not properly oversee and supervise the City defendant's administration of the Food Stamp program. Further, plaintiffs allege that defendants do not provide food stamp benefits to eligible households within thirty days of application, that households are being deterred, discouraged and prevented from filing applications for food stamp benefits at initial contact with food stamp offices and that food stamp benefits are not being issued within the expedited processing time requirements by City defendant at their food stamp offices.

The plaintiffs are seeking certification of a class consisting of all New York City residents who have sought, are seeking or will seek to apply for food stamps in New York City. The plaintiffs also bring this action on behalf of two subclasses consisting of (1) New York City food stamp applicants who have not had their applications processed within 30 days of the day of application and (2) New York City residents who have been deterred, discouraged and prevented from filing an application for food stamp benefits and/or who have not received expedited food stamp benefits at New York City food stamp only offices.

The plaintiffs are seeking to permanently enjoin defendants from continuing the alleged policies and practices set forth above and a declaration that such actions violate State and federal law.

Status: The defendants moved to dismiss plaintiffs' complaint. The plaintiffs made a motion to intervene. The Court granted plaintiffs' motion to intervene on July 15, 2005 and denied defendants' motions to dismiss on July 25, 2005. The defendant OTDA submitted an answer on August 15, 2005. The City defendant's motion for leave to appeal the Court's denial of their motion to dismiss was denied. Defendants were served with Discovery requests and Interrogatories. The OTDA is in the process of responding to the Discovery request. In addition, plaintiffs moved for class certification. On June 29, 2006, the State defendant submitted our response opposing plaintiffs' motion for class certification. A settlement was reached in April 2008 which provides for State monitoring of New York City implementation of FS timeliness requirements. The State is currently monitoring those requirements.

Related Cases: Reynolds et al. v. Giuliani et al. The Food Stamp program access issues in the Reynolds litigation included the timely processing of food stamp applications, expedited processing of food stamp applications and barriers preventing individuals from applying for food stamps. However, the Reynolds litigation also involved the public assistance and Medicaid programs and concerns only New York City Job Centers. Williston involves only the Food Stamp program and relates to both New York City Job Centers and food stamp only centers. While there are clearly crossover issues with Reynolds, Williston differs to the extent that the food stamp allegations relate to food stamp only centers.

Responsible Attorneys:

William Bristow, Assistant Attorney General, New York State Department of Law

John DiBari, Associate Attorney, New York State Office of Temporary & Disability Assistance

III. Litigation Affecting the Operations of the Division of Legal Affairs (Office of Administrative Hearings)

***FISHMAN et al. v. DAINES and PAOLUCCI**

United States District Court, Eastern District of New York, commenced December 1, 2009.

Parties: The plaintiffs are a proposed class consisting of all New York State applicants for, or recipients of, Medicaid, (“A/R’s”), who have requested a hearing, who defaulted the hearing, but were never sent a letter informing them that they defaulted and asking them if they have abandoned their hearing. Defendants are Richard Daines, New York State Department of Health, and John Paolucci, New York State Office of Temporary and Disability Assistance.

Character of Litigation: Class action for declaratory and injunctive relief and attorney’s fees.

Law or regulations in Issue: New York State Medicaid Manual Section 2902.3 regarding default letters; 13 USC 1396a regarding timeliness; 42 CFR Sec 431.205(d) relating to due process; 42 CFR 431.223 regarding federal requirements for defaults; 18 NYCRR 358-5.5 regarding defaults.

Issue: Plaintiffs challenge the custom and practices of defendants in not sending a defaulting A/R a letter telling them they have defaulted and inquiring whether they have abandoned their Fair Hearing.

Status: Defendants’ motion to dismiss was denied. The parties negotiated preliminary relief regarding the letters and will litigate the underlying merits. Discovery continues.

Programmatic Impact: An adverse decision could result in having to permanently send out letters to A/R’s who defaulted their hearings asking them if they have abandoned same and the opportunity to reschedule same.

Related Cases: None

Responsible Attorneys:

Susan Connolly, Assistant Attorney General, New York State Department of Law
Richard Mathieu, Senior Attorney, New York State Office of Temporary & Disability Assistance

***MENKING et al. v. DAINES and HANSELL**

United States District Court, Southern District of New York, commenced April 27, 2009.

Parties: The plaintiffs are a proposed class consisting of all New York City applicants for, and recipients of, Medicaid who have requested or will request Fair Hearings, for whom defendants have not rendered and implemented or will not implement a Fair Hearing decision within 90 days from the date of request of the Fair Hearing. The defendants are Richard F. Daines, MD, New York State Department of Health, and David Hansell, New York State Office of Temporary and Disability Assistance.

Character of Litigation: Class action for declaratory and injunctive relief and attorney's fees.

Law or Regulations in Issue: 42 USC § 1396a(a)(3), 42 CFR § 431.244(f), 45 CFR § 205.10(a)(16) regarding the timeliness of final administrative action.

Status: The Court is treating this case as a companion to Shakhnes v. Doar, (SDNY 2006). OTDA filed its answer, provided discovery and made a motion to dismiss which was denied. OTDA then responded to Plaintiff's motion for class certification and also filed a motion for summary judgment. The magistrate judge issued a report and recommendation certifying the class, denied OTDA's motion for summary judgment, and granted partial summary judgment for plaintiff. Defendants moved for reconsideration when it was learned that the sole class member died. There has been no decision on the motion for reconsideration.

Programmatic Impact: An adverse final decision could result in court monitoring of defendant's program administration and hearings process and, potentially, the imposition of penalties.

Related Cases: Cutler v. Perales (SDNY 1988), Morel v. Giuliani (SDNY 1994) Shakhnes v. Doar (SDNY 2006)

Responsible Attorneys:

Robert Kraft, Assistant Attorney General, New York State Department of Law

Richard Mathieu, Senior Attorney, New York State Office of Temporary & Disability Assistance

Jane McCloskey, Senior Attorney, New York State Department of Health

***MOREL, et al v. GIULIANI, et al.**

United States District Court, Southern District of New York,

commenced June 16, 1994.

Parties: The plaintiffs are a class consisting of New York City residents who are recipients of one or more types of benefits, including Aid to Families with Dependent Children (AFDC), Home Relief (HR) or Food Stamps, who have requested or will request fair hearings in a timely manner to review a determination by the New York City Human Resources Administration (HRA) to discontinue, suspend reduce or restrict their benefits, and are entitled to aid continuing pending the issuance of a decision after fair hearing. Defendants are the Mayor of the City of New York, the Commissioner of HRA and Michael Dowling as Commissioner of the Department.

Character of Litigation: Action for declaratory and injunctive relief and attorney's fees.

Law or Regulation in Issue: 42 U.S.C. 602(a)(4); 7 U.S.C. 2020(e)(10); SSL Section 22; 18 NYCRR 358-4.2

Issue: Local social services agencies are required to restore assistance pursuant to an aid continuing directive as soon as possible, but no later than five business days from the date of notification by the Department that aid is to be continued. Plaintiffs are challenging the failure of HRA to respond to the Department's aid continuing directives in a timely manner in connection with the pending hearings of the named plaintiffs, as well as for the class, the failure of the Department to adequately supervise HRA's response to the aid continuing directives, and the failure of the Department to process timely hearing requests in a timely manner.

Status: Preliminary injunction granting class certification and provisional injunctive relief was signed on January 4, 1995. In addition to directing specific relief for the named plaintiffs the court enjoined the Department and HRA from redeploying or otherwise reducing staff responsible for insuring that class members receive benefits unchanged pending a fair hearing decision. The court also appointed a Special Master to "assist the parties in the development of a plan for the prompt disposition of requests for change of circumstances grants of aid-continuing benefits." Amended Preliminary Injunction issued in March 1996 removed the stay of redeployment and reduction of staff, and enjoined the Department and HRA to timely process hearing requests, direct aid continuing, and to implement aid continuing pursuant to the plan outlined in Principles of Agreement, which were incorporated in the order. The order also referred the case to a magistrate judge for trial by March 1, 1998. Detailed monitoring provisions are contained in the Principles of Agreement, and aid continuing data is being provided to all parties on an ongoing basis. Monitoring criteria and performance standards have been incorporated into a stipulation of settlement, which, in rough terms, will require processing of 90% of fair hearing requests within three business days. A fairness hearing was held on March 26, 2013. On May 1, 2013 the Court so-ordered the Stipulation and Order of Settlement, making the effective Date of the Stipulation and Order of Settlement May 31, 2013. OTDA's reporting obligation under the Stipulation begins with data for June 2013. Monitoring of State and City performance under the Stipulation will continue for a period of 30 months after the effective date.

Programmatic Impact: Fair hearings are requested on fewer than one of every one hundred notices sent by HRA. An adverse decision after could result in a continuation of benefits in millions of cases in which hearings are not requested, until a positive determination is made that no hearing has been requested. The Department may also be required to establish affirmative monitoring of the provision of aid continuing by HRA, which would require additional staff and resources, and could be subject to the imposition of penalties in those cases in which timely compliance with aid continuing directives is not effectuated.

Related Cases: Moore v. Perales (USDC/EDNY) 1985.

Responsible Attorneys:

George Alvarez, Assistant Attorney General, New York State Department of Law

Henry Pedicone, Assistant Counsel, New York State Office of Temporary & Disability Assistance

PIRON, et al. v. WING, et al.

Supreme Court, New York County, commenced April 1997.

Parties: The plaintiffs are a class consisting of New York City applicants for and recipients of public assistance who have requested or will request a fair hearing from a determination or act or failure to act by the New York City Human Resources Administration (HRA) concerning their receipt of, or application for, benefits.

Character of Litigation: Action for declaratory and injunctive relief and attorney's fees.

Law or Regulation in Issue: 18 NYCRR 358-5, 358-6.4.

Issue: Plaintiffs originally brought this matter as an Article 78 proceeding to address alleged non-compliance with a fair hearing decision. By order to show cause and amended complaint, plaintiffs then sought to intervene various public assistance applicants and recipients who claimed they have not received timely fair hearing decisions or timely compliance with favorable fair hearing decisions. Plaintiffs also sought class certification and a preliminary injunction requiring timely compliance with all fair hearing decisions for the proposed class and requiring OTDA to compel the HRA to timely comply with fair hearing decisions, if necessary, by imposing sanctions.

Status: This action is based solely on state regulations. OTDA opposed intervention and class certification. By decision dated June 27, 1997, the court permitted intervention and conversion of the special proceeding to an action, and granted injunctive relief requiring compliance with the fair hearing decisions of the interveners. On December 22, 2000, the parties agreed to settle the litigation. The stipulation continued the jurisdiction of the court for a 21 month period, beginning April 1, 2001, during which time the defendants were required to comply with the regulatory timeliness standard for an agreed upon percentage of cases. Due to the events of September 11, 2001, and their impact on the hearings process and the December 22, 2000 stipulation, the parties agreed to new settlement terms on May 28, 2003. That stipulation continued the jurisdiction of the court until January 31, 2004, during which time the defendants were required to comply with the regulatory timeliness standard for an agreed upon percentage of cases in seven of the nine months of monitoring. Further settlement negotiations are pending.

Programmatic Impact: An adverse decision could result in court monitoring of defendant's compliance process and also in the imposition of penalties against either or both defendants in those cases in which timely compliance is not effectuated.

Related Cases: Moore v. Perales (USDC/EDNY) 1985.

Responsible Attorneys:

William Bristow, Assistant Attorney General, New York State Department of Law

David Amiraian, Principal Administrative Law Judge, New York State Office of Temporary & Disability Assistance

***RICHARD C. v. BERLIN**

United States District Court, Southern District of New York, commenced August 2, 2012.

Parties: As a result of an amended complaint, Plaintiffs are two proposed unrelated classes of SNAP applicants and recipients statewide. Proposed Class A consists of all New York State residents who are recipients of, or applicants for, SNAP benefits and, since August 3, 2009, have requested, or will request fair hearing regarding SNAP benefits, where no cash assistance issues are raised, and where defendant did not or does not issue a DAFH within 60 days from the date the fair hearing is requested. Proposed Class B consists of all New York State recipients of, and applicants for SNAP benefits who were issued a Notice of Adverse Action based on alleged failure to comply with SNAP employment requirements since August 3, 2009, or who will be issued such Notices in the future, that does not include information describing the action that the individual can take to avoid the imposition of the sanction before the disqualification period begins. The sole named defendant is Elizabeth R. Berlin, in her Official Capacity as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance.

Character of Litigation: Plaintiff's class action seeks declaratory and injunctive relief together with attorney's fees.

Law or Regulation in Issue:

Class A - 7 U.S.C. § 2020(e)(10), 7 C.F.R. § 273.15(c), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. Amend. XIV, § 1.

Class B - 7 U.S.C. §§ 2013(a), (c), 2014(b), 2015(a), (d), 2020(a), (e), 7 C.F.R. § 273.7, 273.13 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. Amend. XIV, § 1.

Issue:

Class A – Plaintiffs challenge the Defendant's alleged customs, policies, patterns, and practices of failing to conduct fair hearings, issue fair hearing decisions, and notify the household of the decision within 60 days of a fair hearing request concerning SNAP benefits where no cash assistance issues are present.

Class B - Plaintiffs allege violation of federal requirements/regulation and deprivation of due process to the extent that, between 8/03/09 and 12/14/12 the State has issued NOAA's for failure to comply with SNAP work requirements to applicant for and recipients of SNAP benefits which failed to inform the individual of the action that might be taken to avoid the imposition of the SNAP sanction before the period of disqualification begins.

Status: On January 16, 2013, USDA approved OTDA's request for a waiver of the notice specified in federal regulations, allowing for the "second chance" to be provided to clients before the issuance of a notice of adverse action. OTDA is working on the implementation of this waiver, which will have an initial effective period of 18 months from implementation. This waiver had been requested prior to the commencement of this litigation. The parties have agreed to settlement of all claims. Fairness hearing held on June 13, 2013, and Order of Settlement signed on June 19, 2013. Attorney's fees will be sought in a separate motion.

Monitoring of fair hearing timeliness to begin with hearing requested on or after July 1, 2013. Restored benefits and adjustment of sanction count to be completed by 5 months after the June 19, 2013 “effective date” of the stipulation.

Programmatic Impact:

Class A – Prior to the institution of the litigation, the State had taken measures and reallocated resources to redress a backlog of fair hearing request which had resulted in a period during which decisions after fair hearing were delayed beyond 60 days from receipt of request. As of the institution of the litigation, the State was approaching compliance (within reasonable deviations) of the federal 60 day requirement for the rendering of decisions.

Class B - Prior to the institution of the litigation, the State had engaged in a course of prolonged communication with the USDA seeking guidance as regards how to implement policies and procedures compliant with the federal regulations at 7 CFR 273.7(f). The Agency’s engagement with USDA led to, prior to the onset of this litigation, the filing of a request for waiver of the federal requirements, and an allowance that the State implement a new conciliation process for SNAP applicants and recipients by which they might demonstrate compliance with SNAP work requirements and thus avoid the imposition of a SNAP sanction before the period of disqualification begins. Pending formal approval of the waiver request by USDA, the State voluntarily suspended the issuance of SNAP work related sanctions, statewide for a period of 90 days, and otherwise continuing until such time as the State is able to implement a process by which to issue SNAP sanctions compliant with federal regulations.

Related Cases:

Responsible Attorneys: Bonita Gutierrez, Assistant Attorney General, New York State Department of Law

Class A: David Amiraian, Principal Administrative Law Judge, New York State Office of Temporary & Disability Assistance

Richard Mathieu, Senior Attorney, New York State Office of Temporary & Disability Assistance

Class B: Henry Pedicone, Assistant Counsel, New York State Office of Temporary & Disability Assistance

Arieh Mezoff, Associate Attorney, New York State Office of Temporary & Disability Assistance

John DiBari, Associate Attorney, New York State Office of Temporary & Disability Assistance

SHAKHNES et al. v. DOAR, et al.

United States District Court, Southern District of New York, commenced June 21, 2006.

Parties: The plaintiffs are a proposed class consisting of all New York City applicants for, and recipients of, Medicaid funded home health services, who have requested or will request fair hearings challenging denials, reductions, or terminations of their home health services and who (1) do not receive final administrative action from defendants within ninety days of their requests for fair hearings; and/or (2) do not receive timely and adequate notice of denials, reductions, or terminations of their home health services; and/or (3) do not receive aid-continuing when they meet all the requirements for it. Defendants are Robert Doar, New York State Office of Temporary and Disability Assistance, Antonia Novello, New York State Department of Health, and Verna Eggleston, New York City Human Resources Administration.

Character of Litigation: Class action for declaratory and injunctive relief and attorney's fees.

Law or Regulations in Issue: 42 USC §1396a(a)(3), 42 CFR §431.244(f)(1)(ii) and 18 NYCRR §358-6.4(a) regarding timeliness of final administrative action; 42 USC §1396a(a)(3), 42 CFR §§ 435.912, 435.919, 431.206(b), (c) and 431.210, New York State Social Services Law §22(12), 18 NYCRR §§505.14(b)(3)(iv)(f)(2) and 358-3.3 regarding timely and adequate notices; 42 USC §1396a(a)(3), 42 CFR §§ 431.230(a), 431.231(c) and 18 NYCRR §358-3.6 regarding aid-continuing; and 42 USC §1396a(a)(5), 42 CFR §§431.10, 431.50 and 435.903, and New York State Social Services Law §§ 22, 363-a(1) and 364(2) regarding supervision of HRA.

Issue: Plaintiffs challenge the custom and practices of defendants in 1) allegedly failing to take and/or ensure final administrative action within 90 days after requests for fair hearings on Medicaid home health cases; 2) allegedly failing to provide timely and adequate notices of denial, reductions or terminations of Medicaid home health services; 3) allegedly failing to provide required aid-continuing benefits pending issuance of fair hearing decisions; and 4) allegedly failing to oversee and supervise City defendant's customs and practices concerning the provision of notice, aid-continuing and implementation of fair hearing decisions in Medicaid home health cases.

Status: Defendants submitted an answer to the complaint and have responded to plaintiffs' discovery demands.

On September 30, 2010, the Court certified a class consisting of:

All New York City applicants for, and recipients of, Medicaid-funded home health services, who have requested or will request Fair Hearings challenging adverse actions regarding their home health services, and who are not challenging any decision regarding Medicaid eligibility, and who do not receive final administrative action from Defendants within ninety days of their requests for fair hearings. "Home health services" include home personal care, long term home health, and certified home health aide services.

The Court also granted partial summary judgment against state defendants and denied it as against the City, with respect to timeliness of final administrative action. The Court issued an order directing relief on April 15, 2011. The defendants have filed a notice of appeal.

Programmatic Impact: An adverse decision could result in court monitoring of defendants' program administration and hearings process and, potentially, the imposition of penalties.

Related Cases: Cutler v. Perales, (USDC/SDNY) 1988

Responsible Attorneys:

Robert Kraft, Assistant Attorney General, New York State Department of Law

David Amiraian, Principal Administrative Law Judge, New York State Office of Temporary & Disability Assistance

VARSHAVSKY, et al v. PERALES, et al

Supreme Court, New York County, commenced February 8, 1991.

Parties: The plaintiffs are a class consisting of applicants for and recipients of one or more types of benefits, including Medical Assistance (MA), Aid to Families with Dependent Children (AFDC), Food Stamps, Home Energy Assistance Payments (HEAP), and Home Relief, who had requested fair hearings to be held in their homes because of their inability to travel. Such hearings have not been scheduled pursuant to the suspension of the scheduling of home hearings by the Office of Administrative Hearings. Defendants are Cesar Perales, the Commissioner of the New York State Department of Social Services (Department) and Mark Lacivita, Acting Director of Fair Hearing Administration.

Character of Litigation: Action for declaratory and injunctive relief and attorney's fees.

Law or Regulation in Issue: 7 CFR 273.15(o); 42 CFR 431.240(a); 45 CFR 205.10(a); SSL 22.1; 18 NYCRR 358- 3.4(g).

Issue: Plaintiffs are challenging the 1990 decision of the Office of Administrative Hearings to suspend the provision of home hearings, claiming that this decision violates the due process clauses of the State and federal constitutions, that it violates State and federal law and regulations governing the various assistance programs involved and laws prohibiting discrimination against the handicapped, and effectively amends official State regulations without following mandatory notice and comment procedures of the State Administrative Procedure Act (SAPA). Plaintiffs also allege that the Department has failed to protect the rights of handicapped persons who have no one to represent them, or to arrange or consider the availability of adequate transportation. Additionally, plaintiffs challenge the adequacy of the existing central hearing sites for the needs of handicapped persons, citing such matters as deficiencies in bathroom facilities, crowded waiting areas, long delays, lack of protection from exposure to infection for AIDS patients, and lack of adequate air purification for cardiac or respiratory patients. Plaintiffs sought certification as a class, and requested that the Department be enjoined from terminating the home hearing process, and sought a preliminary injunction ordering the scheduling of hearings at the homes of plaintiffs.

Status: Temporary restraining order signed November 1, 1991, directed the Department to conduct telephone hearings, or hearings by representative. Upon completion of the hearing, if the Administrative Law Judge were to be unable to recommend an appellant-favorable decision, the hearing was to be reopened and scheduled in the appellant's home. On November 20, 1991, an order was signed granting a preliminary injunction granting relief similar to that of the previous order, and certifying the class. Both orders were appealed by the Department. In March 1994, the Appellate Division affirmed the lower court decisions. Pursuant to the injunction, the OAH has been conducting hearings in the homes of appellants for whom the initially assigned ALJ is unable to recommend a fully favorable decision. Over two thousand of such hearings have been held statewide. It is anticipated that these hearings will continue to be held pending the ultimate resolution of the case.

Programmatic Impact: An adverse final decision could require the scheduling of a significant number of home hearings in the first instance, which would be impracticable without additional administrative law judges.

Related Cases: *Suau v. Perales* (USDC/SDNY) 1986.

Responsible Attorneys:

William Bristow, Assistant Attorney General, New York State Department of Law
David Amiraian, Principal Administrative Law Judge, New York State Office of
Temporary and Disability Assistance

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