UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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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,

- against -

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.

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05 Civ. 10446 (JSR)
(ECF CASE)

**PLAINTIFFS' POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION**

**TABLE OF CONTENTS**

**TABLE OF CONTENTS**
**(Continued)**

Page

**TABLE OF CONTENTS**
**(Continued)**

**TABLE OF CONTENTS**
**(Continued)**

Page

## TABLE OF AUTHORITIES

Page(s)

### CASES

**TABLE OF AUTHORITIES**
**(Continued)**

Page(s)

**STATUTES AND RULES**

**TABLE OF AUTHORITIES**
**(Continued)**

Page(s)



**MISCELLANEOUS**

## PRELIMINARY STATEMENT

Plaintiffs submit this post-hearing memorandum of law in support of their request for additional preliminary injunctive relief beyond that ordered by the Court in its order of February 16, 2006 and in support of their contention that the February 16, 2006 order is valid and its current provisions must remain in effect.

In Point I, we demonstrate that liability under 42 U.S.C. § 1983 has been established against defendant Eggleston (hereafter City defendant or HRA). In this section, we show that plaintiffs established at trial the elements necessary to prove a claim against a municipality under *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978), consisting of (1) an unlawful custom and usage and (2) a failure to train. We also demonstrate that certain pendent state claims that the Court may hear under its supplemental jurisdiction, 28 U.S.C. § 1367, have been established against the City defendant.

In Point II, we demonstrate that liability under 42 U.S.C. § 1983 has been established against the State defendants. As part of that discussion, we establish that all admissions received against the City defendant are admissible against the State defendants because the City defendant functions in law and in fact as the State's agent with regard to all the matters at issue here.

In Point III, we detail the specific additional remedies plaintiffs seek against the City and State defendants in their preliminary injunction motion beyond those set forth in the Court's order of February 16, 2006.

In Point IV, we address a question left open at the end of trial concerning whether the pending motion to intervene by Galina Rybalko should be granted. Ms. Rybalko's motion to intervene should be granted so that she may represent a group of green card holders for whom relief is being sought, and concerning whom future disputes may arise.

In Point V, we supplement arguments set forth in plaintiffs' original memorandum of law in support of class certification, based on facts established at trial.

## POINT I

## LIABILITY UNDER 42 U.S.C. § 1983 HAS BEEN ESTABLISHED AGAINST THE CITY DEFENDANT.

Plaintiffs are not re-briefing arguments that were fully addressed in the parties' moving papers on the preliminary injunction motion, and resolved by the Court in its order of February 16, 2006. For example, in their original moving papers, the parties fully briefed whether the federal statutes under which plaintiffs have sued create rights that are enforceable under §1983. *See, e.g., Blessing v. Freestone***,** 520 U.S. 329, 340-41 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). In its order of February 16, 2006, the Court found "it likely, based on the voluminous submissions of counsel thus far, that plaintiffs will prevail against the various legal defenses raised by defendants." (Order of Feb. 16, 2006 at 1.) The only remaining question is whether the plaintiffs proved at trial the existence of a policy, custom, or usage that violates due process and/or the federal statutes at issue here. That is the issue addressed in this memo of law. Whether those statutes create enforceable rights has already been fully briefed and decided.

In their original moving papers, plaintiffs also set forth the principles according to which custom or usage can be the basis of a claim under § 1983. *See, e.g., Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978). Plaintiffs have established liability against the City defendant under the custom/usage and training/supervision theories.

### A. Customs and Usages In Violation of Due Process and Federal Statutes

At trial, the plaintiffs proved the existence of four customs and usages by the City defendant that violate due process and/or federal statutes that create enforceable rights under § 1983. They are:

(1) a City custom and usage of denying federal public benefits to eligible battered qualified immigrants;

(2) a City custom and usage of denying federal food stamps and federal Medicaid to immigrants without a Social Security number who cannot obtain one because the City provides them with improper documentation;

(3) a City custom and usage of denying federal public benefits to eligible immigrants who are green card holders, who have had their green cards for less than five years, and who have five years of qualified alien status; and

(4) a City custom and usage of (a) failing to provide written notice of the denial of public benefits when an immigrant household applies for public benefits and the case is accepted for the citizen children and denied for the immigrant parents; (b) failing to provide written notice when a request to add immigrant household members to the existing public benefits case of a citizen child is denied; and (c) issuing computerized notices that are misleading because they leave battered qualified aliens off the list of eligible immigrants.

These four practices violate due process and/or federal statutes, for which a cause of action is created by 42 U.S.C. § 1983.

In addition to these practices, three municipal customs and usages have been shown to violate state law and are cognizable under the Court's supplemental jurisdiction, 28 U.S.C. § 1367. The plaintiffs demonstrated:

(5) a City custom and usage of denying State public benefits to eligible battered qualified immigrants;

(6) a City custom and usage of denying State public benefits to immigrants who are not eligible to obtain a Social Security number from the Social Security Administration, through

no fault of their own, on account of their immigration status but who are nonetheless eligible for public benefits; and

(7) a City custom and usage of denying State public benefits to certain eligible immigrants who are PRUCOL.

**1. The City has a custom and usage of denying federal and State public benefits to eligible battered qualified immigrants.**

The City has a custom and usage of denying federal and State public benefits to eligible battered qualified immigrants.[1] The voluminous evidence demonstrating the existence of this custom and usage is set forth in plaintiffs' Proposed Findings of Fact (FOF) ¶¶ 193-318. Without attempting to summarize all that evidence here, we draw the Court's attention to some of the more salient facts from which the Court can and should infer that this practice is systemic in nature.

**a. Computer-related problems**

The City's Paperless Office System (POS) computer system has made it all but impossible to open a public benefits case correctly for a battered qualified immigrant. Workers who wish to open a case for a battered qualified immigrant must access a particular screen in the POS computer system. Before November 2005, that screen could not be accessed unless the worker selected one of three specific immigration categories for the immigrant, none of which is applicable to a battered qualified immigrant ("parolee for at least one year," "legal permanent resident" or "conditional entrant"). (*See* FOF ¶¶ 203-204.) After revisions to POS in November

1. The evidence regarding categories (1) and (5) above is discussed together in this section, since the causes of these practices pertain equally to immigrants eligible for federal and State benefits. These categories are separated analytically only to ensure clarity about which claims give rise to § 1983 violations, and which give rise to pendent state claims.

2005, the worker still must access the screen by selecting one of several immigration categories that are not applicable to battered qualified aliens. The only change is that workers may now choose two additional inapplicable categories: "undocumented" or "PRUCOL". (*See* FOF ¶¶ 218-221.) Ms. Shepard, the head of the POS design team, admitted that POS does not readily accommodate the entry of information for battered qualified aliens. (Tr. 787:13-17.)

Ample testimony corroborated the fact that the lack of a clear and simple way to access the battered qualified alien screen in POS makes it difficult or impossible to open cases correctly for such individuals. Mr. Gladly, a caseworker at HRA's Immigrant and Refugee Center No. 47, told Reena Ganju, an attorney working for Sanctuary for Families, that although he recognized a client was eligible based on an approved VAWA self-petition, he "did not know and could not input her proper immigration status into the computer." (Tr. 393:11-14.) Mr. Gladly described the various attempts he made to open the case, including discussions with other caseworkers and with supervisors, in order to find where under the PRUCOL heading there was a VAWA self-petition category that he could select. (Tr. 393:22-25.) None of the choices would work, however, because the space for alien number was "grayed out" such that it would not accept numbers. (Tr. 393:22-394:20.) Another worker at the Immigrant and Refugee Center, Ms. Morales, described the same predicament. (Tr. 395:13-23.)

Indeed, this computer problem has been so intractable that some workers have purposefully "miscoded" a battered qualified immigrant's case as that of a citizen or green card holder in order to facilitate opening the case. As Ms. Ganju testified, Mr. Gladly said "that basically caseworkers would fake it, meaning they would miscode immigration statuses in order to facilitate their entry into the computer system." (Tr. 396:4-7.) Ms. Ganju identified at least three clients whose cases had been miscoded in this fashion. (*See* FOF ¶¶ 210-217). This

miscoding practice had a serious negative consequence, however, because it would subject the client to discontinuance at a later date because she would not be able to verify that she had the immigration status that was actually entered into the computer. (Tr. 396:9-13.)

Other problems related to the State's WMS computer system also cause the denial of public benefits to eligible battered qualified aliens. (*See* FOF ¶¶ 225-252.) Because these problems are primarily attributable to the State, they are discussed in Point II B1 *infra*.

**b. Misplaced focus on those with "prima facie" notices**

Problems related to policies and training also lead to the wrongful denial of benefits to eligible battered qualified immigrants. (*See* FOF ¶¶ 253-258.) One of the most serious problems is a systemic misunderstanding by HRA workers about the eligibility of battered immigrants who are the beneficiary of a pending or approved I-130 petition by a citizen or lawful permanent resident spouse (the so-called "I-130 group"). For years, no City and State policy documents made any mention of the eligibility of immigrants in the I-130 group, and important policy documents still in use do not mention I-130 holders. (*See* FOF ¶¶ 265-266.) HRA employees therefore simply do not understand that immigrants in the I-130 group with proof of domestic violence could be eligible for benefits. (*See* FOF ¶¶ 266-267.)

Some of the most telling evidence that this error is pervasive and systemic is HRA's own defective training material. (*See* FOF ¶¶ 270-272.) HRA's Deputy Commissioner in charge of training, James Whelan, testified that HRA relies on a system of "training the trainers." (Tr. 1194:9-19.) Senior trainers develop curricula and use it to train "center based trainers." Those center-based trainers, in turn, are stationed at job centers and train the staff at those centers. (Tr. 1195:4-18.)

The materials those trainers have used to train job center staff are clearly and seriously defective. For example, HRA's "April 2005 Monthly Staff Meeting Instructor's Guide" defines

a battered qualified alien solely as a person with a "prima facie" notice. No other battered qualified aliens are mentioned. (Pl. Ex. 469 at MKB01171-2.) Likewise, HRA's "April 2005 Training Release" defines a battered alien solely as a person with a "prima facie" notice. (Pl. Ex. 464 at C12928-29.) No other battered qualified aliens are mentioned. (Pl. Ex. 464 at C12928-41.) Similarly, HRA's April and June 2005 "Trainer's Manual" for its new hires training refers only to battered aliens with approved I-360s and those with a "prima facie case." (Ex. 468 at MKB01166-7.) Battered aliens with I-130 family-based petitions, K or V visas, are not mentioned.[2] (*Id*.)

That the trainers themselves are seriously misinformed about I-130 petitions surfaced during a telling moment in Ms. Ganju's testimony. Ms. Ganju spoke to the Assistant to the Director of the Waverly Job Center in Manhattan about her client C.W.S., who was in the I-130 category. The Assistant to the Director, she said, "had spoken with the trainer at the welfare center, a woman by the name of Ms. Adeno and Ms. Adeno had stated that the client needs to have a prime [sic] facie notice in order to be eligible for benefits." (Tr. 454:20-455:5.)

The significance of this admission is not just that it is wrong – although it certainly is wrong. Immigrants in the I-130 group do not have "prima facie" notices, but may nonetheless be eligible for benefits if they have proof of domestic abuse. Rather, the significance is that it was said by the person responsible for training the entire staff of the Waverly Job Center. And she, according to Mr. Whelan, was trained by HRA's senior training staff at HRA. Other senior HRA staff have expressed similar confusion on this issue. As late as the summer or fall of 2004, Ive

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2. State training materials prepared for use by HRA are even more deeply flawed. (*E.g.*, Pl. Ex. 536 at MKB01355.) Those materials fail to mention *any* categories of battered qualified immigrants who are eligible for federal benefits. (*See* FOF ¶ 259.)

Sisco, who is in charge of writing immigrant eligibility polices for HRA, (*see* FOF ¶ 285), told Paul Dichian that even she did not know whether the I-130 group of immigrants could be eligible for public benefits (Tr. 700:16-702:4).

From HRA's own defective training materials, and from statements by the trainers like Ms. Adeno, and by senior staff such as Ms. Sisco, the Court can fairly infer that the senior staff of HRA itself does not understand the eligibility of immigrants in the I-130 group. And since the senior trainers and the principal policy writer do not understand it, it is impossible for the rest of HRA's staff to understand it. This is powerful evidence indeed that misinformation about the I-130 group is systemic.

**2. The City has a custom and usage of denying federal food stamps and federal Medicaid to eligible immigrants because the City provides them with improper documentation.**

The plaintiffs demonstrated at trial that the standard form letters prescribed by the State, and used by the City, for obtaining a Social Security number for an immigrant applying for a federal benefit program (federal food stamps and federal Medicaid) are defective. These letters virtually ensure that an immigrant who lacks work authorization will be erroneously denied a Social Security number. Since furnishing a Social Security number is a condition of eligibility for those federal benefit programs, this causes immigrants who lack work authorization to be systematically and erroneously denied federal food stamps and federal Medicaid.

Federal law requires applicants for federal Medicaid[3] and federal food stamps[4] to furnish a Social Security number as a condition of eligibility. If an applicant for one of those federal benefits does not have a Social Security number, the agency administering the program must assist the applicant in applying for one. 7 C.F.R. § 273.6(b) (food stamps); 42 C.F.R. § 435.910(e) (Medicaid).

In the case of applicants for a federal benefit (like federal food stamps and federal Medicaid), the Social Security Administration (SSA) will issue a Social Security number to immigrants who are not authorized to work when they need one "to satisfy a *Federal* statute or regulation that requires you to have a social security number in order to receive a Federally-

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3. 42 C.F.R. § 435.910(a) ("The agency must require, as a condition of eligibility, that each individual (including children) requesting Medicaid services furnish each of his or her social security numbers (SSNs)").

4. 7 C.F.R. § 273.6. This regulation arguably contains an ambiguity regarding whether food stamps must be denied if SSA declines to issue a Social Security number after an application for one is made. Section 273.6(a) provides: "The State agency shall explain to applicants and participants that refusal or failure without good cause to provide an SSN will result in disqualification of the individual for whom an SSN is not obtained." The question is whether SSA's denial of a Social Security number could constitute "good cause." "Good cause" is defined in § 273.6(d), which states: "Once an application has been filed, the State agency shall permit the member to continue to participate *pending notification* of the State agency of the household member's SSN" (emphasis added). The consensus by witnesses who testified for the City and State was that a Social Security number is required for food stamp participation. Asked by counsel for the State about this requirement, Ivelia Sisco, HRA's Director of Procedures for eligibility, testified: "You're required to have a Social Security number at some point." (Tr. 997:15-16.) Steve Ptak, the Food Assistance Director with the OTDA Division of Employment and Transitional Supports, testified that it was his "general understanding" that an immigrant without a Social Security number "would not be eligible for food stamps," and indicated that "We have asked USDA for clarification regarding that." (Tr. 1180:1-3.) He also testified that a USDA official "gave a tentative answer that he believed that those individuals would not – would not be eligible and would have to be closed or denied, but that he needed to check with USDA counsel." (Tr. 1180:4-1181:2.)

funded benefit to which you have otherwise established entitlement . . . ." 20 C.F.R. § 422.104(a)(3)(i)(emphasis added).

It must be emphasized that SSA will issue a Social Security number to immigrants for a federal benefit who lack work authorization only if a federal statute or regulation requires a Social Security number in order to receive the benefit. The procedure for doing so is set forth in the SSA Program Operations Management System (POMS) RM 00203.510 (available online at https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0100203510). The only acceptable documentation for this purpose is a letter from a government entity, dated and on letterhead stationery, specifically identifying the alien, the non-work reason for which a Social Security number is required, the relevant statute or regulations requiring the Social Security number as a condition to receive the benefit or service, and the name and telephone number of an official to contact so that the information provided may be verified. *Id.*

SSA's policy is different in the case of applicants for a state benefit. Even when a state law requires furnishing a Social Security number as a condition of eligibility, SSA will issue a Social Security number to an immigrant applying for a state benefit only if the immigrant has work authorization. (Tr. 647:16-25.) This is because federal regulations specify that SSA will issue a non-work Social Security number to an immigrant who is eligible for state public benefits only if the immigrant is "legally in the United States." 20 C.F.R. § 422.104(a)(3)(ii); *see also* POMS RM 00203.510, a phrase SSA construes as meaning that the immigrant must have work authorization.

This means that for immigrants who lack work authorization, the letter from a government entity must specify the federal program for which a Social Security number is required (*i.e.*, federal Medicaid or federal food stamps) and the federal regulation that requires

the Social Security number. If only a state program or state regulation is specified, SSA will not issue a Social Security number to an immigrant who lacks work authorization.

The letter prescribed by the State for this purpose, and used by the City, does not satisfy this requirement. The State letter, Pl. Ex. 631 (02 INF 40, Attachment), states: "____(Alien's Name)_____ is an applicant for public assistance . . . . In New York State public assistance is known as temporary assistance. . . ." (The identical City letter is in evidence at Pl. Ex. 504 at MKB01505.) Temporary Assistance is a State public assistance program. The letter also cites only to a state regulation, not a federal statute, as required by SSA's rules. (Pl. Exs. 631, 504 at MKB01505.) On its face, this letter does not suffice to cause SSA to issue a non-work Social Security number to an immigrant who lacks work authorization because it refers only to a state program.

This defect causes denial of federal food stamps and federal Medicaid to battered qualified immigrants who lack work authorization. Plaintiff M.E.'s daughter, E.R., represents a typical example of this problem. As the minor child of a battered qualified immigrant, E.R. is eligible for federal food stamps. 8 U.S.C. § 1612(a)(2)(J). As HRA instructed, M.E. applied for a Social Security number on behalf of herself and E.R. (Tr. 153:19-23); on November 10, 2005, SSA denied both requests, stating "You have not given us document(s) we need to show U.S. citizenship or lawful alien status." (Pl. Exs. 204, 204-A; Tr. 153:24-155:8.)

This problem is systemic by nature, since the defective letter is in use by HRA in all cases in New York City, and indeed is in use throughout New York State.

### 3. The City has a custom and usage of denying federal food stamps to eligible lawful permanent residents who have five years of qualified alien status, but who have had their green cards for less than five years.

The evidence demonstrates a custom and usage of denying food stamps to lawful permanent residents who have five years of qualified alien status, but who have had their green cards for less than five years. This problem is related to a deficiency in the design of the State WMS computer system, which contains a single date field related to immigration status. Although State OTDA has announced a purported fix to this problem, the fix does not correct it. (*See* FOF ¶¶ 362-64.)

Two dates are relevant to determining an immigrant's eligibility for federal food stamps, Medicaid, and federal public assistance. Pursuant to 8 U.S.C. § 1612(a)(2)(L), a Qualified Alien is eligible for food stamps if she has resided in the United States in a Qualified Alien status for five or more years, regardless of the date of entry into the United States. Pursuant to 8 U.S.C. §§ 1612(b)(1) and 1613(a)(b) & (c), an immigrant is eligible for federal Medicaid and federal public assistance if she entered the United States before August 22, 1996 or, if she entered after that date, if she has been in a Qualified Alien status for five or more years.

WMS contains only one data element for recording a date related to a client's immigration status. (Tr. 871:24-872:17.) For an immigrant who does not yet have a green card, the date recorded here is either the date she arrived in the United States or the date on which she became a Qualified Alien. If and when she later obtains a green card, that date would be entered in WMS, overwriting the earlier date (Tr. 1335:20-22) and causing WMS to conclude that she had fewer than five years of Qualified Alien status.

Elaine Witty admitted that the single date field causes problems for persons who attain Qualified Alien status prior to attaining lawful permanent resident. She explained at trial:

Q. Isn't it true that some time in 2004, you learned that WMS cannot maintain a record of both the date someone became a qualified alien and the date that person became a lawful permanent resident?

A. Yes.

Q. And did this feature of WMS cause you concern?

A. Yes.

Q. And why did it cause you concern?

A. I was concerned that the LPR date would override the date of becoming a battered qualified alien.

Q. And why did that cause you concern?

A. I was concerned that by losing the date a person becomes a battered qualified alien, it would affect their eligibility for public benefits.

(Tr. 945:19-946:7.)

In his testimony, David Spielman, one of State OTDA's computer witnesses, confirmed that Ms. Witty was correct to be concerned: "[W]orkers were changing the date on the system which was making these people ineligible." (Tr. 1334:20-22.)

At the close of trial, Mr. Spielman testified that State OTDA agreed "in principle" to a modification of WMS to address this problem by adding an "edit" (or rule) that prevents a date previously entered in the date field from being changed to a more recent date. (Tr. 1333:9-22, 1339:21-1340:4.) This modification, however, does not fully address the problem.

First, the override fix is not an adequate workaround because WMS must have two date fields in order to record both the date of entry and the date an immigrant obtained qualified status. It is possible for an immigrant to have entered the United States before August 22, 1996, but not to have more than five years of qualified status. This would be typical of an immigrant in the I-130 group who does not have proof that she began suffering domestic violence until some years after her entry. (Plaintiff M.E. is illustrative.) Such an immigrant can be eligible for

federal Medicaid and federal public assistance benefits by virtue of her pre-1996 entry into the United States, but would not be eligible for federal food stamps until she has been in a qualified status for five years. It is necessary to track both dates in order to determine when she becomes eligible for federal food stamps.

Second, without clear instructions on the relevant dates that workers should enter, immigrants will continue to be unlawfully denied food stamps.

#### 4. HRA has a custom and usage of failing to provide adequate written notice of the denial of public benefits in three circumstances.

The plaintiffs demonstrated a City custom and usage of failing to provide adequate written notices. Specifically, the plaintiffs demonstrated that the City systemically (a) fails to provide written notice of the denial of public benefits when an immigrant household applies for public benefits and the case is accepted for the citizen children and denied for the immigrant parents; (b) fails to provide written notice when a request to add immigrant household members to the existing public benefits case of a citizen child is denied; and (c) issues computerized notices that leave battered qualified aliens off the list of eligible alien and therefore mislead battered qualified aliens to think that benefits were correctly denied or discontinued.

##### a. Cases accepted for citizen children and denied for immigrant household members

Some form notices used in accepting public benefits cases have no space for identifying members of the household whose application has been denied. (*See* FOF ¶ 372.) These notices are facially defective and do not give adequate notice when a case is accepted for citizen children but assistance for one or more immigrant household members is denied.

Other notices include a space on which the names of household members who were denied assistance could be indicated. (*See* FOF ¶ 373.) However, in completing those notices, the City's practice is to check the boxes indicating the case has been accepted, and to leave blank

the areas for household members who are denied assistance. (*See* FOF ¶¶ 373-379.) Representative notices of this kind are in evidence for plaintiffs Miriam Diongue (Pl. Ex. 45) and M.K.B. (Pl. Ex. 765), and are before the Court in the declaration of W.S. (W.S. Decl., Ex. F.)[5]

During colloquy at trial, counsel for the City alleged it would show that in these kinds of situations, the City's practice was to fill out the notice forms, including any denials. (Tr. 427:23-428:3.) But the City never introduced into evidence an example of any notice indicating that any case was accepted for some household members and denied for others. If, as the City alleged, its practice was to complete these notices correctly and include denial information, then it should have been a trivial matter to identify at least one example of such a notice, if not dozens. Not a single example of such a notice is in evidence.

**b. Cases in which a request to add an immigrant parent to a child's case is denied**

Numerous clients testified or attested to the failure to give a written notice of denial when an immigrant parent's request to be added to the open case of a citizen child is denied. (*See* FOF ¶¶ 373-379.) In July 2004, and on seven or eight additional occasions after that, A.I. asked Ms. Walker at the Jamaica Job Center if she and W.A. could be added to S.A.'s public assistance case. (Tr. 105:17-106:13.) Each time, she was told orally, not in writing, that she could not receive benefits because she did not have a green card. (Tr. 106:16-19.) On July 14, 2005, M.A. went to HRA Job Center #46 and asked to be added to her child's public assistance case. (Pl. Ex. 91; Tr. 204:8-19.) M.A. received no written notice in response to her request to be added. (Tr.

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5. The inaccuracy of the W.S. notice, as described in her declaration, is corroborated by the testimony of Reena Ganju. (Tr. 405:2-24; Tr. 424:23-425:10.) The City did not object to Ms. Ganju's testimony regarding the inaccuracy of W.S.'s notice because the notice and her declaration were before the Court. (Tr. 425:15-19.)

250:19-20.) Nicole Prince asked to be added to her child's case on February 22, 2005 (Pl. Ex. 803) and in March 2005 (Pl. Ex. 805). She did not receive a notice in response to either of these requests to be added. (Prince Decl. ¶ 22.) Likewise, L.A.M., M.H., K.T., and Angelica Higinio all did not receive a notice in response to their requests to be added to their children's public assistance case. (L.A.M. Decl. ¶ 25; Higinio Decl. ¶¶ 18-19, 21, 22; M.H. Decl. ¶¶ 8-9; K.T. Decl. ¶¶ 7, 9.)

Again, the City never introduced in evidence a single example of a notice denying an immigrant parent's request to be added to a child's open public assistance case.

**c. Inadequate and misleading computerized notices**

The City issues computerized notices that erroneously fail to list battered qualified aliens as one of the categories of immigrants eligible for public benefits. (*See* FOF ¶ 380.) Because the language in these notices is prescribed by the State, these issues are discussed in Point II(B)(1)(g) *infra*.

**5. The City has a custom and usage of denying State public benefits to eligible immigrants who cannot obtain a Social Security number from SSA through no fault of their own.**

The City has a custom and usage of denying State public benefits to eligible immigrants who cannot obtain a Social Security number from SSA, through no fault of their own, on account of their immigration status. (*See* FOF ¶¶ 277-318.) The City's (erroneous) belief that furnishing a Social Security number is a condition of receiving State public benefits was manifest throughout the trial. Perhaps the most striking proof of this fact was the testimony of Ivelia Sisco, HRA's Director of Procedures for eligibility, in response to questioning by counsel for the State. Mr. Kraft asked Ms. Sisco:

> Q. Is the receipt – is the possession of a Social Security number a requirement to receive state funded safety net assistance?

A. Yes.

Q. You're sure about that?

A. It is a requirement at least at some point.

(Tr. 997:24-998:4.) Likewise, Josephine Pierre, a supervisor at the Linden Job Center who reports to the Center Director, testified:

> Q. What instructions have you received concerning whether a client can have an active public assistance case if she does not have a Social Security number?
>
> A. As far as I know a Social Security number is required.

(Tr. 1130:15-18.) Similarly, Ms. Ganju testified that Mr. Flaum, who is an HRA official above the level of Center Director, and who works in the HRA Regional Manager's Office overseeing the Homeless Region, stated that "he did not believe that those who did not have Social Security numbers were eligible for benefits." (Tr. 462:9-463:6.) Likewise, Ms. Wright at the Euclid Job Center said that Social Security numbers are required in order to receive benefits. (Tr. 503:21-504:2.)

There was ample evidence that this misunderstanding was widespread among HRA workers. Ms. Ganju, for example, testified that in four of her cases, HRA workers personally informed her that her clients were being denied benefits because they lacked a Social Security number. (Tr. 444:21-445:3.) In one case (H.G.), she contacted Paul Dichian at State OTDA, who persuaded the HRA worker (Mr. Flaum) to reverse his position. (Tr. 445:12-15.) In the other three cases, the HRA workers adhered to their positions even after Ms. Ganju remonstrated that a Social Security number was not necessary. (Tr. 445:4-21.)

The City's practice of requiring a Social Security number as a condition of receiving State public assistance benefits is scarcely surprising in light of the State's regulations and instructions to the City. A State regulation, 18 N.Y.C.R.R. § 351.2(c), flatly says that each

member of the household "must furnish a social security number as a condition of the household's eligibility for public assistance." (Pl. Ex. 634.) State Informational Letter 02 INF 40 instructs that "Districts should advise aliens as early as possible of the requirement to furnish" a Social Security number. (Pl. Ex. 631, at 2.) The letter prescribed by the State for use by clients in applying for a Social Security number refers to § 351.2 of the State regulations and states unconditionally: "[A]ll applicants and legally responsible relatives must provide a Social Security number as a condition of eligibility for receipt of temporary assistance." (Pl. Ex. 631, Attachment.)

These instructions, and HRA's adherence to them, put battered immigrants who lack work authorization in what the Court several times called a "Catch 22." (Tr. 662:15-17, 666:7-14.) Through "no fault of their own" (Tr. 662:7), VAWA self-petitioners are unable to obtain a Social Security number until their self-petition is approved and they can obtain work authorization. (Tr. 661:23-662:8.) HRA's insistence that immigrants furnish a Social Security number when they are simply unable, through no fault of their own, to do so, makes it impossible for VAWA self-petitioners to obtain public benefits for 14 to 18 months after they became eligible. (Tr. 646:14-16.)

Despite all these State instructions, however, the State's rule regarding Social Security numbers is actually something quite different. Mr. Dichian testified that "we have conflicting regulations" (Tr. 656:20-21), and that he "rel[ies] on a different regulation, which is in 369.2," requiring that people need only furnish or apply for a Social Security number as a condition of eligibility. (Tr. 657:7-10.) In open court, counsel for the State represented unequivocally that "it [is] the state's position right now that VAWA self petitioners who have been denied Social

Security numbers because they can't qualify for Social Security numbers until the VAWA self petition is approved should receive public assistance." (Tr. 668:13-18.)

Mr. Dichian met with his superiors at State OTDA to discuss this problem. At that meeting, "[t]hey agreed to say that the domestic violence victims should receive benefits and that HRA should stop denying benefits because of their inability to obtain Social Security numbers and they should write a directive to their centers instructing them." (Tr. 664-17:21.) He testified that "they agreed with me that it was an inappropriate denial of benefits and that the controlling regulation was not 351.2 but really should be 369.2." (Tr. 666:19-22.)

Rather than issuing their own instructions to correct this systemic problem, State officials orally instructed HRA to issue its own directive, reasoning that this is "a City problem." (Tr. 665:15-16.). HRA, in turn, did issue such a policy bulletin, PB #04-171-ELI, which is in evidence as Pl. Ex. 639. But that bulletin did not fully address the systemic problem. Indeed, Mr. Dichian testified that the City directive was seriously flawed and that he would not have approved it if he had seen it. (Tr. 690:11-14.) He testified that "It is just not correct. It is not detailed enough." The directive "needs to address, as you say, explain more fully the pending or approved I-130 petitions." Nor would Mr. Dichian have approved the title or the first paragraph, both of which refer only to "approved prima facie determinations." (Tr. 690:20-691:7.)

Moreover, although an early draft of the Policy Bulletin would have covered PRUCOL immigrants, the final version of the Policy Bulletin did not. (Tr. 687:19-24.) Despite that omission, Mr. Dichian acknowledged that it would be incorrect to exclude PRUCOLs (Tr. 685:21-686:22); that he knew of no policy reason for distinguishing between PRUCOLs and battered qualified immigrants in this regard (Tr. 688:6-10), and that he knew of at least one PRUCOL immigrant (H.G.) who had been affected by this problem. (Tr. 687:25-688:2.) He

further testified that no instructions had been given to HRA to clarify that PRUCOLs were covered by the directive:

> Q. To your knowledge, did OTDA ever instruct HRA to make clear that PRUCOLs were covered by this policy directive?
>
> A. No.
>
> Q. Is there any state policy directive or any other state instruction that makes that clear?
>
> A. No.
>
> Q. To your knowledge did OTDA ever issue any training instructions or training manuals that made that clear?
>
> A. No.

(Tr. 688:17-25.)

In sum, a systemic practice existed regarding HRA's denial of State public benefits to eligible immigrants because of the Social Security number problem. (*See* FOF ¶¶ 327-330.) HRA's issuance of PB #04-171-ELI did not fully cure that problem. Further relief necessary to correct the problem is discussed in Point III *infra*.

**6. The City has a custom and usage of denying State public benefits to certain eligible immigrants who are PRUCOL.**

The City has a custom and usage of denying State public benefits to certain eligible immigrants who are PRUCOL, and therefore eligible for State public assistance (called Safety Net Assistance) and State Medicaid.[6] This practice exists because of poor training on PRUCOL

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6. "PRUCOL" is an acronym for "Permanently Residing Under Color Of Law." State OTDA provides State-funded Safety Net Assistance to immigrants who are PRUCOL because N.Y. Soc. Serv. Law § 158(1)(g) provides that "a person is eligible for safety net assistance who is . . . (g) . . . an alien who is permanently residing under color of law but is not a qualified alien." State DOH provides State-funded Medicaid to immigrants who are PRUCOL

(Footnote continued on next page)

issues, coupled with confusing and incomplete policy instructions by State OTDA and HRA. Other causes of this practice include the Social Security number problem discussed in Point I(A)(5) *supra*, and the difficulty of opening a case directly in WMS for aliens (particularly affecting multi-suffix cases) discussed in Point II(B)(1)(b) *infra*.

The City and State are both responsible for faulty training regarding PRUCOL issues. (*See* FOF ¶¶ 322-326.) For example, in April 2005, HRA conducted a "Back to Basics" training on immigrant eligibility for public benefits. (Pl. Ex. 469.) After reviewing various definitions, the trainers discussed "categories of assistance that may be available to our alien population." (Pl. Ex. 469 at MKB01175.) In the discussion of Safety Net Assistance – the only form of public assistance for which PRUCOL aliens are eligible – PRUCOL is not mentioned at all. The trainers taught only that Qualified Aliens who enter the United States after August 22, 1996, and who have been in that status for less than five years, are eligible for Safety Net Assistance. (Pl. Ex. 469 at MKB01176.)

HRA made the same error in a separate April 2005 training release. This training also taught that the only aliens who are eligible for Safety Net Assistance are Qualified Aliens who entered the United States after August 22, 1996, and who have been in that status for less than five years. (*See* Pl. Ex. 464 at C12932.)

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(Footnote continued from previous page)

because, on June 5, 2001, the New York State Court of Appeals held, in *Aliessa v. Novello*, 96 N.Y.2d 418, 730 N.Y.S.2d 1 (2001), that § 122 of the Social Services Law is unconstitutional to the extent that it denies State-funded Medicaid to persons who are PRUCOL.

State OTDA is also responsible for faulty training materials on PRUCOL eligibility. The Professional Development Program at Rockefeller College, University of Albany, prepares training materials under contract with State OTDA. (Tr. 1163:25-1164:1.) An August 3, 2004 training by the Rockefeller College program contained a component on "Citizenship Requirements for Participation." (Pl. Ex. 536.) That training module made no mention at all of PRUCOL eligibility for Safety Net Assistance. It taught only that lawful permanent residents could receive Safety Net Assistance if they have not been in that status for five years. (Pl. Ex. 536 at MKB-01357.)

Flaws in the State OTDA and City alien eligibility desk aids compound these egregious training errors. The State OTDA desk aid has never explained, in any fashion comprehensible to an ordinary caseworker, who is and who is not PRUCOL. (*See* FOF ¶ 337.) In the State desk aid that was in effect when the hearing in this case began (Pl. Ex. 640; Tr. 695:1-4), OTDA did not list the categories of immigrants who are PRUCOL or the documents they would need to prove it. Instead, the desk aid included opaque cross-references to other documents (*see* Tr. 71221-25), which the Court compared unfavorably with the Marx Brothers movie, "A Day at the Races" (Tr. 713:1-14). The two documents cross-referenced (Pl. Exs. 641, 642) are publications from 1988 and 1999 that are outdated, incomplete, extremely difficult to obtain,[7] and described by Mr. Dichian himself as "partially obsolete." (Tr. 720:19-21; *see* Pl. Ex. 643.) "[E]ven if a

7. Neither document is distributed to welfare workers, nor is either document available on the OTDA web site. (Tr. 716:24-717:24.) Pl. Ex. 642 is so obscure that State OTDA received an e-mail (Pl. Ex. 643) from HRA's Office of Legal Affairs asking State OTDA to supply HRA with a copy of Pl. Ex. 642 because HRA did not have a copy in its own library. (Tr. 717:25-718:3.)

person were to get hold of Exhibit 641 or 642 and looked up the categories, there would be still be three categories of PRUCOL persons who were not listed." (Tr. 719:1-5.)

State OTDA's most current public definition of PRUCOL is instead contained in the Temporary Assistance Source Book. (Pl. Ex. 630.) But Mr. Dichian admitted that even this document contains an incomplete list of PRUCOL individuals because it omits four categories of individuals who are PRUCOL.[8] (Tr. 723:11-13.) When asked the question, "How would a diligent and enterprising person who is endeavoring to learn what immigrants the state considered PRUCOL be able to ascertain what all the categories are?," Mr. Dichian answered: "I don't know." (Tr. 723:14-24.)

Until 2003, the situation was no better on HRA's side of the fence. HRA issued two versions of its own alien eligibility desk aid in 2002. (Pl. Exs. 500, 502.) Both versions merely parroted the State desk aid's obscure references to obsolete publications that do not contain correct definitions of PRUCOL. (Pl. Exs. 500 at MKB01221, 502 at MKB01489.) No HRA caseworker could reasonably have understood who was, and was not, PRUCOL from these obscure references.

The situation was so dire that, in February 2003, an employee in HRA's Office of Refugee and Immigrant Affairs sent an e-mail to various City and State officials, including Paul Dichian, urging "that the centers/workers need more specific guidance on PRUCOL eligibility . . . . This office has received a lot of inquiries from the centers and other program areas on the

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8. The four categories are V, K, S , and U visa applicants. (Tr. 721:6-16.) State OTDA's counsel's office stated, and Mr. Dichian agreed, that "[s]ince they are known to [BCIS], are in the country permissibly for an indefinite, lengthy period, likely to be permanent, I can think of no reason why they would not be PRUCOL." (Tr. 722:22-723:5; Pl. Ex. 646.)

documentation necessary to establish PRUCOL status and eligibility for Safety Net Assistance. We have been unable to find any policy guidance on the required documentation to establish PRUCOL in the context of eligibility for Safety Net Assistance . . . ." (City Ex. MM. at MKB-OTDA 10236.)

Mr. Dichian responded in an e-mail by providing a list of immigrants that OTDA considers PRUCOL. (*Id*. at MKB-OTDA 10234-35.) In August 2003, HRA issued for the first time a desk aid that contained a comprehensible description of who is and is not PRUCOL. (Pl. Ex. 506.) However, HRA did so in a way that was not designed to inform any caseworker that changes in the description of the PRUCOL category had been made. The policy bulletin transmitting the desk aid recites that the desk aid has been revised to reflect changes concerning "sponsor deeming requirements when determining Food Stamp eligibility and benefits for children who are under the age of 18." (Pl. Ex. 506 at MKB01526.) Since PRUCOL immigrants are not eligible for food stamps, no caseworker could reasonably have been alerted to changes affecting the PRUCOL categories. A revision to the City guide issued in May 2004 also made no mention of changes to the PRUCOL categories. (Pl. Ex. 509.)

In October 2004, State DOH published a *different* description of immigrants who are PRUCOL for purposes of the Medicaid program.[9] (Pl. Ex. 539.) Although City job centers are required to use this definition for Medicaid purposes, no City desk aid or policy directive or bulletin to job centers has alerted HRA employees of those aspects of State DOH's definition of

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9. Despite what would seem to be the self-evident proposition that the term PRUCOL, as used by the New York Court of Appeals and the Social Services Law, ought to have a single, well-defined meaning, the two agencies that administer benefits to immigrants who are PRUCOL have adopted disparate and, in part, conflicting interpretations of what that term means. (*See* Tr. 712:12-13) ("different state agencies have different interpretations of PRUCOL")

PRUCOL that differ from State OTDA's definition. (*See* FOF ¶ 335.) The City's POS computer system also fails to include many common immigration documents that demonstrate that an immigrant is eligible for State Medicaid. (*See* FOF ¶ 336.)

**B. Failure to Train**

A municipality may be held liable for failing to train and adequately supervise its employees. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court addressed the scope of municipal liability for failure to train or supervise. There the Court held:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

489 U.S. at 390. Elaborating on this language in *Walker v. City of New* York, 974 F.2d 293 (2d Cir. 1992), the Second Circuit set forth three elements that must be established to sustain an allegation of failure to adequately train and supervise municipal employees:

> From these examples, we discern three requirements that must be met before a municipality's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens. First, the plaintiff must show that a policymaker knows "to a moral certainty" that her employees will confront a given situation. *Id*. Thus, a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.
>
> Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. . . .
>
> Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights. . . .

*Walker*, 974 F.2d at 297-98.

A claim of inadequate training and supervision under § 1983 does not require a showing of "ill will" or bad motive by the defendant. As described by the Second Circuit in *Walker*, the test is an objective one. Plaintiffs established at trial that they meet the criteria set forth in *Walker*.

**1. The City knows to a moral certainty that immigrants who are class members in this case will apply for public benefits.**

The City knows to a moral certainty that significant numbers of immigrants who are members of the proposed class in this case will apply for public benefits at Job Centers. Ms. Ganju testified that she alone represented 50 to 60 battered immigrant clients applying to HRA for public benefits during her 28 months at Sanctuary for Families (Tr. 474:16-475:2), and many additional cases were discussed by other witnesses at trial. While the exact number of cases is known only to the defendants, the numbers are obviously significant.

Furthermore, the Court invited the defendants to introduce evidence at trial of the total number of such cases, and indeed said that it was assuming the defendants would do so. (Tr. 467:10-14.) Yet, although the information is solely within their control, the defendants have never suggested, much less proffered, any evidence indicating that the number of cases is small or insignificant.

**2. Eligibility decisions regarding class members in this case present City employees with difficult choices of the sort that training and supervision will make less difficult.**

Eligibility decisions regarding immigrant class members in this case present City employees with difficult decisions of the sort that training and supervision will make less difficult. Ms. Shepard acknowledged this in response to questions by the Court regarding the

POS computer system, which is supposed to guide workers through what is otherwise a very complex situation and lead them to correct decisions regarding eligibility:

> THE COURT: . . . This system, as I understand it, this POS system, is supposed to operate so that if someone comes into a job center seeking either benefits they don't previously have or enhanced benefits or anything to do with benefits, the person there who is on the recipient end starts entering – starts making use of this computer programming *to take them through what is otherwise a very complicated situation to make sure that the person is eligible or to determine if a person is not eligible*. Do I have that part right?
>
> THE WITNESS: Yes.

(Tr. 761:19-762:4) (emphasis added). The POS computer system is designed with the idea that decisions regarding eligibility for public benefits – even those not involving alien eligibility – are inherently complex. The complex statutory scheme governing immigrant eligibility for benefits makes that all the more true with regard to alien eligibility decisions.

HRA itself recognizes that a regular regime of training is essential to ensure that workers make correct eligibility decisions. Mr. Whelan testified that HRA attempts to implement such training on a monthly basis using a "train-the-trainer" methodology. (Tr. 1194:6-1195:18.) The issue here is not whether such trainings are important and should be conducted; that is conceded. Indeed, HRA has established an Office of Training under Mr. Whelan's jurisdiction. (Tr. 1186:21-22.) Instead, the question is whether the trainings HRA conducted were accurate, comprehensive, and sufficiently frequent to ensure that workers are properly trained and supervised. As we demonstrate below, the evidence shows they are not.

### 3. City employees have a history of mishandling decisions regarding the eligibility of immigrant class members in this case.

As the preceding discussion has demonstrated, overwhelming evidence demonstrated that City employees have a history of mishandling decisions regarding the eligibility of immigrant class members in this case. (*See* FOF ¶¶ 291, 318, 342-355.) Repeated, common errors by City

workers, causing erroneous eligibility determinations, are directly attributable to flawed training materials prepared by the defendants. As was demonstrated earlier, the lack of awareness by HRA caseworkers of the eligibility of immigrants in the I-130 group and of PRUCOL immigrants is attributable in part to defective training materials used by the City to train those workers as well as to corresponding defects in the POS computer system that they utilize on a daily basis. (*See* pp. 4-8 *supra*.)

Other evidence demonstrated that workers who needed additional training in the area of immigrant eligibility for public benefits were not receiving it. For example, Josephine Pierre, a supervisor in the Linden Job Center who worked for the Center Director, testified that she could not remember the last time she attended a training regarding the eligibility of asylum applicants (Tr. 1130:19-25). Until she attended a training shortly before she testified, Ms. Pierre could not recall attending any trainings regarding immigrant eligibility for benefits for at least three years. (Tr. 1131:1-16.)

Likewise, when the Office of Immigrant and Refugee Affairs reached out in an e-mail to senior State and City officials and indicated that "centers/workers need more specific guidance on PRUCOL eligibility," and that "[w]e have been unable to find any policy guidance on the required documentation to establish PRUCOL" (City Ex. MM), it was evident that workers at job centers were not receiving sufficient training on that important topic.

In short, the evidence demonstrates not only a history of errors, but a history of errors that flowed from either inadequate training or the use of faulty training materials, and that was reinforced by similar flaws in the City's computer system.

### 4. Erroneous decisions by City employees frequently cause the loss of public benefits to which immigrant class members are eligible.

Plaintiffs also demonstrated that erroneous decisions by City workers frequently cause immigrant class members to lose public benefits to which they are legally entitled. The record is replete with examples of benefits being denied erroneously or discontinued. (*See* FOF ¶¶ 291-318, 342-355, 356-361.) Even when decisions were later rectified – for example, after fair hearings, or as the result of persistent and extended advocacy by advocates like Ms. Ganju – benefits were still lost for significant periods of time, causing severe and irreparable injury. In response to questioning by the Court, Ms. Ganju testified that the duration of delays in the receipt of benefits varied greatly, but she indicated that in some cases the delays could amount to months in duration. (Tr. 477:22-478:13.)

### 5. The City was on notice of the need for additional training.

The City had ample notice of the need for additional training regarding immigrant eligibility issues. (*See* FOF ¶¶ 390-405.) In July 2004, Ms. Ganju and other advocates attended a meeting with HRA's Deputy Commissioner for Domestic Violence Emergency Services, Cecile Noel. During that meeting, Ms. Ganju discussed her belief that additional training of "ADVENT program" workers was necessary on issues of immigrant eligibility for benefits. (Tr. 479:10-20.) The ADVENT program consists of units within job centers that deal exclusively with domestic violence victims. (Tr. 479:1-4.) Although ADVENT workers are not involved in "initial applications," they are involved at subsequent stages after the initial application has been completed. (Tr. 512:1-5.) At that meeting, Ms. Ganju expressed her belief that ADVENT workers "did not know the alien eligibility rules," and that it was important that they do so because they were dealing with battered qualified immigrants frequently. (Tr. 479:16-20, 482:21-483:1.) She also presented Ms. Noel with a letter requesting additional and

comprehensive training for ADVENT staff on battered immigrant eligibility for public benefits (Pl. Ex. 778), and sent a copy of that letter to Elaine Witty, Director of HRA's Office of Immigrant and Refugee Affairs. (Tr. 512:13-16.) In October 2004, Ms. Ganju followed up on her initial conversation and provided training materials to Ms. Noel and Ms. Witty on immigrant eligibility issues. (Tr. 483:5-18.)

In conclusion, all the elements of a claim for inadequate training and supervision against the City defendant have been established here.

## POINT II

## LIABILITY UNDER 42 U.S.C. § 1983 HAS BEEN ESTABLISHED AGAINST THE STATE DEFENDANTS

### A. Evidence Received Against the City Defendant Is Admissible Against the State Defendant.

All evidence received against the City defendant as an admission by a party opponent is admissible against the State defendants under Fed. R. Evid. 801(d)(2)(D). Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." "A sufficient foundation to support the introduction of vicarious admissions therefore requires only that a party establish (1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 537 (2d Cir. 1992). "The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate." *Id.* at 538.

As a matter of law and fact, HRA serves as the agent of State OTDA with regard to the food stamp and public assistance programs, and the agent of State DOH with regard to the

Medicaid program. Section 65(3) of the Social Services Law provides: "The county commissioner shall act *as the agent* of the department in all matters relating to assistance and care administered or authorized by the town public welfare officers." N.Y. Soc. Serv. Law § 65(3) (emphasis added).[10] Construing this language in *Beaudoin v. Toia*, 45 N.Y.2d 343, 408 N.Y.S.2d 417 (1978), the New York Court of Appeals made this agency relationship crystal clear:

> In New York State, the social services program is a State program, administered through the 58 local social services districts under the general supervision of the State Department of Social Services and the State Commissioner of Social Services. (NY Const, art XVII, § 1; Social Services Law, §§ 17, 20, 34.) The county commissioners are denominated by statute "agents" of the State department (Social Services Law, § 65, subd 3) . . . . [T]he local commissioners act on behalf of and as agents for the State. Each is a part of and the local arm of the single State administrative agency. . . .
>
> Inasmuch as the local commissioners are agents of the State department they may not substitute their interpretations of the regulations of the State department for those of the State department or the State commissioner (*Matter of Samuels v Berger*, 55 AD2d 913; *Matter of Bonfanti v Kirby*, 54 AD2d 714; *Matter of Barbaro v Wyman*, 32 AD2d 647). To recognize any such right would be to undermine the supervisory authority of the State commissioner and to invite administrative chaos.

*Beaudoin*, 45 N.Y.2d at 347-48, 408 N.Y.S.2d at 419.

In addition to their statutory role as "agents" under state law, the local districts serve as agents under federal law with regard to the federal food stamp and federal Medicaid programs. The Food Stamp and Medicaid Acts both require participating states to designate a single state

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10. The term "department" is defined in N.Y. Soc. Serv. Law § 2(1): "Department means the state department of social services, provided however that for purposes of titles eleven . . . of article five of this chapter [Medicaid], department means the state department of health. . . ." The "department of social services" has since been renamed the Office of Temporary and Disability Assistance, 1997 Laws of N.Y. ch. 436, § 122(f).

agency to be responsible for administering and supervising the programs. 7 U.S.C. § 2012(n) (food stamps); 42 U.S.C. § 1396a(a)(5), 42 C.F.R. § 431.10 (Medicaid). As Judge Pauley found last year in *Reynolds v. Giuliani*, 2005 U.S. Dist. LEXIS 2743, at *61-62 (S.D.N.Y. Feb. 14, 2005), these federal mandates require HRA to serve as the State's agent for purposes of the Medicaid and food stamp programs:

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

Accordingly, HRA is the agent of State OTDA (and, for the Medicaid program, State DOH) for purposes of Rule 801(d)(2)(D). Since there is no doubt that any statements by HRA pertaining to this case were made during the course of the agency relationship, and relate to matters within the scope of that agency, these statements are admissible against the State agencies.

Finally, at trial, the State and City defendants conceded the existence of this agency relationship. For example, when counsel for the State asserted that only the City, and not the State, makes determinations of eligibility for public assistance unless the matter is brought to a fair hearing (Tr. 1371:12-21), the following colloquy ensued:

> THE COURT: I see. So in other words, the state has delegated to the city as its agents this important function.

MR. KRAFT: That's right. It's exactly how the social services law is laid out.

THE COURT: You are making a very good case for Mr. Rosenberg's last argument. But in any event, for the moment the question will be limited to the city.

(Tr. 1371:22-1372:3.)

Likewise, counsel for the City asked Mr. Dichian:

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

A. No.

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

A. No.

(Tr. 728:7-13.) HRA's authority is limited in this fashion because, by statute, HRA serves as the agent of the State.

For all these reasons, admissions by HRA personnel received in evidence against the City are admissible against State OTDA (with regard to public assistance and food stamps) and against State DOH (with regard to Medicaid) as well.

### B. The State Defendants' Liability for Violations of Federal Law Has Been Established.

The State's liability in this action has been demonstrated for two independent reasons. First, as a factual matter, the State either caused or contributed to the cause of many of the violations committed by the City defendants' employees. Second, as a legal matter, the State is jointly responsible with the City defendant for the City's violation of federal law.

#### 1. The State caused or contributed to the cause of violations.

The plaintiffs demonstrated that the State caused or contributed to the cause of federal violations by the City defendant in the following seven respects. The first four categories

involve issues on which further relief from this Court is necessary. The last three categories involve issues that were rectified by the State in response to this Court's order of February 16, 2006. Although no further relief is needed regarding those last three items, mention is made of them here to make clear that the Court's order of February 16 on these aspects of relief was fully warranted.

**a. Single date field for Alien/Citizenship Indicator**

As noted previously, *see* Point I *supra*, the WMS computer system has a single date field for recording the date on which an immigrant entered the country or became a qualified alien. Until changes ordered by this Court are implemented, information entered into that field can be erased when a subsequent relevant event occurs (such as when the immigrant obtains a green card), and a new date is entered in that field. This problem, which Mr. Spielman conceded caused the wrongful denial of benefits (Tr. 1334:20-22.), will be partially rectified by an edit that will prevent a later date from overwriting an earlier date. While an improvement, this change does not fully solve the problem. *See* Point III *infra*.

**b. Opening cases for immigrants directly in WMS**

A case must have two suffixes if one person in the family is eligible for State public benefits and another is eligible for federal public benefits. (Tr. 791:20-792:10, 856:25-857:3.) Two suffix cases cannot be opened in POS and must be opened in WMS. (Tr. 792:14-16.)

Evidence presented at trial established that the design of the WMS computer system makes it difficult to open a case directly for an alien in WMS generally, but particularly difficult if a case is multi-suffix. (*See* FOF ¶¶ 225-245.) The problem lies in certain rules built into

WMS, known as "edits" and "cross-edits"[11] that are designed to ensure the compatibility and integrity of data in various fields. In order to open a case successfully for an immigrant, the alien status or ACI indicator (element 382), alien number (element 381), and date of entry (element 389) must be compatible with several data elements related to whether someone was eligible for state or federal benefits (elements 307, 325, 376, 377, and 343). (Tr. 1364:19-1365:24.) Most of the plaintiffs' and declarants' cases errored out in WMS because of errors related to these cross-edits. (Tr. 1370:7-14, 1376:19-1377:1.)

These problems are acute when a family member seeking addition to an existing case is eligible for state benefits has a case in a rejected ("RJ") status and the household member with an active case is receiving federal benefits. In that situation – which applied to, and caused errors in, a number of the plaintiffs' cases (Tr. 1377:7-13) – the steps that must be taken to open such a multi-suffix case in WMS are very complex and must be taken over a series of days. (Tr. 796:16-22, 1343:18-20; FOF ¶¶ 234-237.)[12]

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11. An "edit" is a rule requiring that data entered into a data element in WMS must conform to a value that WMS recognizes. If a case fails an edit in WMS, then it errors out. (Tr. 846:6-847:11.) A "cross-edit" is a rule requiring that data entered into a data element in WMS must be compatible with information entered in other data elements in WMS. If data in one data element is not compatible with data in another, the case will error out and will not process successfully. (Tr. 1364:1-15, 809:11-20, 849:3-9.)

12. On the first day, the worker must change the entire family to Safety Net Assistance. On the second day, the worker must put the immigrants into applying (or AP) status. Then the worker must activate the lines. Finally, the worker must split the suffix into two so that those family members eligible for federal public benefits are on a separate line from those eligible for state public benefits. (Tr. 1354:18-1356:6.) If a worker attempts to add such persons to a case through POS, the case will error out. POS does not, however, prompt workers to inform them that the case must be processed through WMS. (Tr. 1359:16-1360:18; see also Tr. 1094:3-19.)

The root of the problem – and the basis for the relief plaintiffs are seeking on this score, *see* Point III *infra* – is that instructional materials and training on these matters are inadequate. (*See* FOF ¶¶ 238-243.) This full process for opening such cases is not explained in State OTDA's Authorization of Grants Manual (State Exhibit QQ). (Tr. 1356:9-12, 880:25-881:4; *see also* Tr. 1346:24-1347:1.) Indeed, there is no example in the Authorization of Grants Manual regarding how to open a multi-suffix case involving a family with immigrants. (Tr. 877:8-12.) HRA workers do not receive training on when a case needs to have two suffixes (Tr. 1097:1-6.), and State OTDA does not provide trainings to HRA employees on how to open multi-suffix cases. (Tr. 883:21-884:13.) Even some "error correction specialists" do not know how to open cases of this type. (Tr. 1095:10-18.)

Although multi-suffix errors may eventually be corrected, they cause significant delays in clients receiving benefits for which they are eligible. Even after the defendants represented to the Court that benefits would be provided to the named plaintiffs, some of their cases continued to error out multiple times. (Pl. Exs. 30A at 2, 30B, 30C.) In the case of Ms. Ganju's client, S.M., the case errored out no fewer than six or seven times before it was finally opened. (Tr. 403:22-404:5.)

**c. Social Security numbers for immigrants applying for federal benefits**

As noted previously, the City provides a flawed letter to immigrants to use in applying for a Social Security number. That letter is on a form prescribed by the State. In Point III *infra*, the plaintiffs seek relief against State OTDA regarding this problem to the extent that it results in the denial of federal benefits.

**d. Flawed State training materials**

State training materials are seriously flawed. (*See* FOF ¶¶ 253-243.) A number of flawed State training materials have already been noted. For example, the training materials

prepared for State OTDA by Rockefeller College in 2004 are rife with errors concerning the eligibility of immigrants for public assistance. (Pl. Ex. 536.) In the list of immigrants who may be eligible for federal public assistance, federal food stamps, and federal Medicaid, battered qualified aliens are not even on the list. (Pl. Ex. 536 at MKB01355-57.) In the description of who may be eligible for Safety Net Assistance, PRUCOL immigrants are not even mentioned. (*Id.* at MKB01357.)

The Rockefeller College training materials prepared in November 2005 on food stamp eligibility (Pl. Ex. 677), discussed at some length during Mr. Ptak's examination at trial (Tr. 1152:10-1162:12), are also grievously flawed. Those materials are the State's most recent final set of training materials on food stamp eligibility (Tr. 1154:1-4), and were used as recently as November and December 2005 to train HRA workers. (Tr. 1154:5-13.) They completely omit any mention of battered qualified aliens from the list of immigrants who are eligible for federal food stamps. (Pl. Ex. 677 at MKB-OTDA 10437; *see* Tr. 1156:15-1158:18.) Moreover, they are seriously flawed in many other ways as well (Tr. 1160:7-1162:12), demonstrating a stunning lack of attention to detail and accuracy. Indeed, Mr. Ptak admitted that the training materials he had attached to his own affidavit did not include mention of any of the categories of immigrants whose eligibility for food stamp benefits was restored by the Food Stamp Reauthorization Act of 2002, Title IV of Public Law 107-171, which he discussed in paragraph six of his affidavit. (Tr. 1174:20-1178:4.)

**e. Alien numbers**

Some battered qualified immigrants do not have an Alien number. (Tr. 1389:13-14, 863:15-864:15, 866:15-867:2.) Nonetheless, until this Court ordered that corrective action be taken concerning this problem, WMS and POS required the entry of an Alien number in order to

open a case for a battered qualified immigrant. (Tr. 1389:9-12.) If an Alien number was not entered, the case would error out. (Tr. 865:4-11; *see also* FOF ¶¶ 246-252.)

A number of battered qualified immigrant cases either could not be opened or "errored out" because of this problem. For example, in January 2006, one of the plaintiffs' or declarants' cases errored out because that individual did not have an Alien number. (Tr. 868:11-25, 871:2-10.) Additionally, two of Ms. Ganju's clients were denied public benefits, or had their receipt of public benefits delayed, because they did not have an Alien number or because the number could not be located. (Tr. 472:9-474:15.) In the case of R.K., this caused a delay in the receipt of benefits of one month. (Tr. 473:20-474:10.)

Corrections to WMS regarding Alien numbers were not made until March 2006, in response to this Court's order of February 16, 2006. (Tr. 865:12-16, 1389:9-12.)

**f. State Alien Eligibility Desk Aid and State Policy Memoranda**

Until the fall of 2004, the State alien eligibility desk aid (Pl. Ex. 640), and State informational materials (Pl. Exs. 647, 648) made no mention of the eligibility of the I-130 group of immigrants. (Tr. 695:8-697:13.) The State has admitted that the desk aid was not clear enough regarding I-130 petitions. (Tr. 700:1-15.) Moreover, apart from the desk aid, as of the summer of 2004, no other State OTDA policy statements or training materials addressed the I-130 group of immigrants. (Tr. 702:8-11.) Even after mention of this group was added, *see* Pl. Ex. 640 at MKB-OTDA 10535, it was done in a very misleading and incomplete manner. (*See* FOF ¶¶ 337-341.) The applicable row of the chart that addresses battered immigrants refers only to immigrants who obtain a prima facie notice (which does not apply to the I-130 group). Not until the end of trial did the State issue a new desk aid making corrections in this respect. (*See* FOF ¶ 341.)

### g. Inadequate and misleading State CNS Notices

A substantial amount of evidence was received regarding Client Notice System (CNS) notices that are inaccurate, incomplete, or misleading because they fail to include any reference to battered qualified immigrants. (*E.g.*, *see* Pl. Ex. 882; 1164, ninth unnumbered page (notice to Natasha Dmitro); Tr. 703:3-704:10, 1167:3-11687; FOF ¶¶ 380-386.) In response to this Court's order, this problem appears to have been rectified. (State Ex. UU.)

## 2. The State is jointly responsible for the City's systemic violations of federal law.

Because the State caused, or contributed to the cause of, numerous systemic violations of federal law by the City defendant, injunctive relief against the State under 42 U.S.C. § 1983 is fully warranted. Accordingly, this Court need not reach the question whether the State would also be liable for such systemic violations by the City under § 1983 even if the State were not, in fact, responsible for causing the problem in whole or in part.

That said, the law is clear that the State is jointly liable with the City, as a matter of law, for the City's systemic violations of the federal food stamp and federal Medicaid Acts, regardless of whether the State factually caused or contributed to those violations. As noted earlier, the federal Food Stamp and Medicaid Acts impose on the State the responsibility for administering and supervising the programs. 7 U.S.C. § 2012(n); 42 U.S.C. § 1396a(a)(5). Although the State may delegate those responsibilities to its agents, the local social services districts, ultimate responsibility for administration of the program rests on the shoulders of the State. *See Reynolds v. Giuliani,* 118 F. Supp. 2d 352, 385-86 (S.D.N.Y. 2000).

Judge Koeltl's discussion of the State's liability under these provisions in *Dajour B. v. City of New York,* 2001 U.S. Dist. LEXIS 10251 (S.D.N.Y. July 23, 2001), is fully applicable here. As Judge Koeltl held:

> 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 subdivisions, 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. *See* 42 U.S.C. § 1396(a); *Reynolds II*, 118 F. Supp. 2d at 385-86 (concluding that a state that chooses to delegate administration of the Medicaid program retains duty to ensure compliance with the Medicaid Act's requirements); *cf. Robertson v. Jackson*, 972 F.2d 529, 533 (9th Cir. 1992) (holding state responsible for ensuring local agencies compliance with the Food Stamp Act where the state chose to delegate administrative responsibilities of its food stamp program to local agencies); *Woods v. United States*, 724 F.2d 1444, 1447 (9th Cir. 1984) ("While the state may choose to delegate some administrative responsibilities, the ultimate responsibility for operation of the food stamp plan remain[s] with the state.") (quotation omitted). 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

2001 U.S. Dist. LEXIS 10251, at *42-43.

During the oral argument on February 2, 2006, the Court was well-aware of Judge Koeltl's holding in *Dajour B.*, and asked counsel for the State to address how, if at all, *Dajour B.* could be distinguished. (Tr. of Oral Arg., February 2, 2006, at 27.) At that time, Mr. Kraft sought to limit the reasoning of *Dajour* to cases in which individual problems could not be addressed in fair hearings. (*Id*. at 27-28.) This distinction lacks merit. Apart from the fact that other courts have reached the same conclusion even when issues could be raised in fair hearings, *e.g., Reynolds v. Giuliani*, *supra*, the distinction misses a critical point.

The issues in this case are actionable under § 1983 precisely because they involve *systemic* violations. Systemic violations cannot, by definition, be cured in individual fair hearings. Consider, for example, the design flaws in the POS computer system that made it

difficult or impossible for HRA workers to open cases for battered qualified immigrants. No State Administrative Law Judge (ALJ) could do more than order that benefits be provided or restored to a particular appellant affected by that problem. Certainly an ALJ could not, in the context of a single fair hearing, order the City to redesign its computer system. And even if such an extraordinary order were ever issued by an ALJ, the City would certainly refuse to comply with it because it ordered relief beyond the circumstances of the individual client whose case was heard in the fair hearing.

In short, the essence of the State's position here is that it has no legal responsibility to take steps to rectify any systemic violations of the federal Food Stamp and Medicaid Acts. Its ALJs may not order such corrections; and – the State claims – no court may hold the State responsible for such violations either. This is an extraordinary legal position with no support in the food stamp or Medicaid Acts or in the case law. Those statutes make the State the single agency responsible for administration of the systemic aspects of the benefit programs. The State's position, in contrast, would absolve the State of any such responsibility. This position is wholly without merit and must be rejected.

## POINT III

## THE COURT SHOULD ORDER ADDITIONAL INJUNCTIVE RELIEF AGAINST THE CITY AND STATE DEFENDANTS.

### A. Additional Relief Warranted Against the State Defendants

For the reasons set forth in Points I and II of this brief, the evidence demonstrates that the following additional relief should be ordered against the State defendants:

#### 1. Adequately correct the single-date problem in WMS

As discussed in Point I(A)(3) *supra*, the fact that WMS has only one date field related to alien status results in the unlawful denial of food stamps to lawful permanent residents who have

been green card holders for less than five years but who have been in a qualified status for five or more years. To prevent these erroneous denials, State OTDA should be ordered to add a second date field to WMS and provide proper instructions on which dates should be entered into those fields.

**2. Training and improved instructions regarding multi-suffix cases**

For reasons explained earlier, instructional materials and training on how to open multi-suffix cases for immigrants are grossly inadequate. The State should be ordered to prepare clear and comprehensive instructions on how to enter such cases into WMS for all the categories of immigrants affected by this litigation. (*See* ¶¶ 33-35 *supra*.)

**3. Social Security numbers for applicants for federal benefits**

The State should be ordered to revise 02 INF 40 (Pl. Ex. 631) so that it correctly states the current practice of the SSA with regard to the issuance of non-work Social Security numbers for immigrants applying for public benefits. The letter provided to those who do not have Social Security numbers but are otherwise eligible for federal benefits should be revised to make clear that the local social services district must designate the federal benefits program, if any, for which the immigrant is applying for benefits, and the provision of federal law that requires a Social Security number in order to receive those benefits. (*See* ¶¶ 8-11 *supra*.)

**4. Training materials regarding federal Medicaid and food stamps**

The State should be ordered to revise all State training materials, including those prepared and used by contractors, so that they accurately and comprehensively recite the immigrant eligibility rules for federal Medicaid and federal food stamps.

**B. <u>Additional relief warranted against the City defendant</u>**

For the reasons set forth in Point I of this brief, the evidence demonstrates that the following additional relief should be ordered against the City defendant:

### 1. Social Security number requirements

The Court should direct the City to issue a correct and comprehensive policy directive or bulletin regarding when Social Security numbers are, and are not, required for federal and State public benefits programs for all categories of immigrants affected by this case. This issuance must include a sample letter that complies with SSA's requirements. Upon issuance, the City should conduct trainings for all staff who are involved in determining or reviewing the eligibility of immigrants for food stamps, Medicaid, and public assistance at Job Centers, including the new immigrant liaisons; all supervisory personnel in the Center Director and Regional Manager offices; ADVENT staff; fair hearing compliance workers; and all other personnel who are involved in accepting, denying, or discontinuing public benefits.

### 2. Eligibility for benefits of battered qualified immigrants and persons who are PRUCOL immigrants

The Court should direct the City to correct all policy directives that relate to immigrant eligibility for benefits and that omit reference to the eligibility of the I-130 group of immigrants (such as 03-65-ELI, which is Pl. Ex. 507)). (*See* FOF ¶¶ 264-290.) The Court should also direct the City to issue a policy directive or bulletin on PRUCOL eligibility for benefits, which should include a clear description of PRUCOL eligibility for both public assistance and Medicaid and the differences, if any, between them. Upon issuance, the City should conduct trainings for all staff who are involved in determining or reviewing the eligibility of battered qualified immigrants and PRUCOL immigrants for Medicaid, public assistance, and/or food stamps at job centers, as described above. (*See* FOF ¶¶ 327-341.) A separate training should be conducted for frontline workers designed to ensure that they correctly recognize a client who may be a battered qualified immigrant or a PRUCOL immigrant, and make a proper referral to the immigrant liaison. (*See* FOF ¶¶ 342-355.)

### 3. Green card holders who have had their green cards for less than five years

As was evident with the case of Galina Rybalko, *see* Point IV *infra*, there can be substantial confusion over the eligibility of green card holders who have had their green cards for less than five years. In particular, as occurred in the case of Ms. Rybalko, questions arise concerning how to determine the number of years of Qualified Alien status. To ensure that eligibility decisions in these cases are made by properly trained workers, the Court should direct the City to include such cases among those that are referred to the immigrant liaisons. The liaisons should receive training regarding the so-called Rybalko issue (how to determine the number of years of Qualified Alien status). In the alternative, the Court should direct the City to conduct trainings for all front-line eligibility workers and supervisor staff regarding the eligibility of immigrants in this category and the number of years of qualified status they have accrued.

The Court should also direct the City to train its workers to know which dates must be entered into the computer systems in order to determine eligibility for food stamps (the date qualified status is achieved) and in order to determine eligibility for federal Medicaid and federally-funded public assistance (date of entry into the country).

### 4. Training on opening cases on aliens in WMS

The Court should direct the City, in coordination with the State, to conduct trainings on how to open cases for aliens directly in WMS, focusing particularly on multi-suffix cases. This training should be for all staff who are involved in opening such cases for battered qualified immigrants for Medicaid, public assistance, and/or food stamps at job centers.

**5. Issuance of notices**

The Court should direct the City to issue a policy directive or bulletin regarding the issuance of a notice of acceptance or denial to households (a) when an immigrant household applies for public benefits and the case is accepted for the citizen children and denied for immigrant household members; and (b) when a request to add immigrant household members to the existing public benefits case of a citizen child is denied. Upon issuance, the City should conduct training for all staff who are involved in issuing such notices.

**6. Cases not handled by immigrant liaisons**

The testimony of Mr. Whelan was rather unclear regarding how many and what types of cases the immigrant liaisons would handle. (*E.g.*, Tr. 1232:15-1233:2.) This was particularly so with regard to cases involving battered qualified immigrants and PRUCOL immigrants outside of the context of initial eligibility, including cases (a) coming up for recertification, (b) involving a proposed adverse action to be taken related to immigration status or a Social Security or Alien number issue, and (c) involving fair hearing compliance related to immigration status or a Social Security number or Alien number issue.

The plaintiffs believe it would be preferable if the immigrant liaison staff were to handle all cases in categories (a), (b), and (c). However, caseload limitations may make that proposal impractical at this time. Therefore, the Court should order that if, and to the extent that, the City defendants do not refer cases in categories (a), (b), and (c) to the immigrant liaisons, then staff who handle such cases will be provided the same training that immigrant liaison workers receive with regard to immigrant eligibility for benefits.

**7. POS revisions**

The record is somewhat unclear concerning precisely what changes to POS will be made in the upcoming POS release. In the upcoming release, POS should add a category for battered

qualified immigrants in the initial menu. POS should eliminate any question that requires a worker to answer "yes" to whether such an immigrant has a "prima facie" notice in order to open such a case. Revisions to POS should include references to documents that render an immigrant eligible for PRUCOL for Medicaid purposes (to the extent different than for public assistance). POS should also make clear that in determining five years of qualified status, periods of qualified status accrued under different immigration status may be added together, so that the eligibility of clients like Ms. Rybalko will be handled correctly. (*See* Tr. 1372:22-1373:15.)

## POINT IV

## PLAINTIFFS' MOTION TO INTERVENE MS. RYBALKO SHOULD BE GRANTED

### A. Facts Concerning Ms. Rybalko

Galina Rybalko was paroled into the United States for an indefinite period in April 2000. (Pl. Ex. 173). She therefore entered the United States as a Qualified Alien. 8 U.S.C. § 1641(b)(4). A Qualified Alien is eligible for food stamps if she has resided in the United States in a qualified status for five or more years. 8 U.S.C. §§ 1612(a)(2)(L). Thus, Ms. Rybalko became eligible for federal food stamps in April 2005.

Ms. Rybalko received her green card in June 2003. (Pl. Ex. 173.) She applied for food stamps at the Coney Island Job Center in April 2005, shortly after the five-year anniversary of the date she became a Qualified Alien. (Tr. 323:5-9.) HRA initially denied Ms. Rybalko's application. Later HRA granted her benefits, but then discontinued them after finding they were erroneously granted. When benefits were denied and later discontinued, HRA workers at the Coney Island center repeatedly stated that Ms. Rybalko is ineligible because she has not had her green card for five years. (Tr. 325:20-326:17, 329:13-330:8; *see also* FOF ¶¶ 64-77.)

Ms. Rybalko requested two fair hearings challenging the denial and discontinuance of her food stamps. In two fair hearing compliance statements, HRA stated that Ms. Rybalko is not eligible to receive food stamps on account of her immigration status. (Pl. Ex. 170, 172.) In one of those statements, HRA explicitly indicates that Ms. Rybalko must have a green card for five years in order to be eligible for food stamps. (Pl. Ex. 70.)

Even after Ms. Rybalko testified in this case, there was considerable confusion at the City and State levels regarding whether she had five years of qualified alien status. (*See* Tr. 1217:16-20 (indicating that the City was waiting for a "clearance from the State" before it could report back to the plaintiffs), 1372:22-1373:15 (discussing the number of years of qualified status).) As of the close of trial, Ms. Rybalko had not received the benefits she was seeking. (Tr. 1405:2-6.)

For purposes of the proposed findings of fact, the Court directed the parties to assume Ms. Rybalko had been intervened, and indicated that if intervention is granted, she will be added *nunc pro tunc* as of March 24, 2006. The Court deemed plaintiffs' oral application to add Ms. Rybalko as a named plaintiff to be a motion for that relief. (Tr. 1409:6-12.)

**B. <u>Ms. Rybalko's Motion to Intervene Should Be Granted.</u>**

Fed. R. Civ. P. 23(d)(2) permits class members to intervene in a pending class action. *Eckert v. Equitable Life Assurance Soc'y*, 227 F.R.D. 60, 64 (E.D.N.Y. 2005); *Diduck v. Kaszycki & Sons Contractors*, 147 F.R.D. 60, 62 (S.D.N.Y. 1993). In addition, Fed. R. Civ. P. 24(b) authorizes permissive intervention upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." Courts are "particularly amenable to permissive intervention" when no additional issues are presented and when intervention would strengthen the adequacy of the representation. A. Conte & H. Newberg, NEWBERG ON CLASS ACTIONS § 16:8, at 166-68 (2002).

In this case, Ms. Rybalko shares a question of law and fact with the class. The class is comprised of "Affected Immigrants" who are eligible for, *inter alia*, federal food stamps and who have either been denied those benefits or had them discontinued or reduced, because of a misapplication of immigrant eligibility rules. The term "Affected Immigrants" includes four groups of immigrants. The third of those groups consists of "lawful permanent residents who have been in that status for less than five years." (Complaint ¶ 30.) Ms. Rybalko is eligible for federal food stamps; she has had those benefits both denied and discontinued because of a misapplication of immigrant eligibility rules; and she is in the third category of Affected Immigrants. She therefore shares a question of law and fact with the class. Currently, she is the only representative of the third category of Affected Immigrants.

Ms. Rybalko's motion to intervene should be granted for several reasons. First, and most importantly, the City has proposed a plan in which immigrant liaisons will review and act on applications for benefits by certain immigrants. Those immigrants include battered qualified immigrants and persons who are PRUCOL (the first, second, and fourth groups of Affected Immigrants in the class). However, they do not include green card holders (the third group represented by Ms. Rybalko). (*See* FOF ¶¶ 409-410.) As indicated in Point III *supra*, the plaintiffs are requesting certain relief regarding immigrants in Ms. Rybalko's category, including referrals to the immigrant liaisons and training concerning immigrant eligibility. Ms. Rybalko's motion to intervene should be granted so she may represent that group of immigrants for whom this relief is sought.

Second, even if the Court were to deny this branch of the relief plaintiffs seek, Ms. Rybalko should be permitted to intervene because disputes may arise in the future regarding other immigrants like her who are seeking public benefits. Indeed, if the "Rybalko cases" are not

referred to the liaisons, then such disputes may be more likely to arise because of potential confusion regarding their eligibility and because their cases will not be handled by specialists. A class representative of those immigrants should be made a party to the action in case further relief regarding this group is sought.

Ms. Rybalko's motion to intervene is timely. Additionally, there would be no conceivable prejudice to the defendants if she were made a party to the action. Accordingly, her motion to intervene should be granted.

## POINT V

## THE PROPOSED CLASS SHOULD BE CERTIFIED

Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and (b)(3) on behalf of themselves and a class defined as:

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

The standards for class certification are set forth in plaintiffs' opening memorandum of law. At the hearing, plaintiffs have proved all of the requisite elements.

### A. Plaintiffs have demonstrated numerosity.

Plaintiffs have provided direct evidence in this proceeding of the erroneous denial and discontinuance of the applications of a large number of Affected Immigrants. (*See* FOF ¶¶ 1-189 (discussing 24 class members); Tr. 474:16-475:2 (testimony of Ms. Ganju that she represented 50 to 60 battered immigrant clients applying to HRA for public benefits during her 28 months at Sanctuary).) This evidence demonstrates that a large number of Affected Immigrants have faced the problems alleged in the Complaint and that there are system-wide problems that would affect any member of the class, when viewed in light of the common sense assumption that the advocates involved in this case could not possibly have brought before the Court every instance of erroneous denial that exists throughout the proposed class. It is further evident, from the fact that defendants have portions of their computer systems and published policies specifically dealing with the issues of the proposed class members, that the defendants themselves consider the matters at issue to involve classes of applicants within the City and not mere isolated cases. Moreover, although invited by the Court to do so (Tr. 467:10-14), defendants never proffered any evidence to dispute the numerosity of the proposed class.

This evidence readily satisfies the numerosity requirement for a class action.

### B. Class members share common issues of law and fact.

Plaintiffs allege, and have submitted extensive proof, that the alleged deprivations on the part of defendants are widespread and systematic. These problems, involving flawed computer systems, policies and training, broadly affect qualified immigrants. (*See* FOF ¶¶ 197-252 (computer problems); ¶¶ 264-290, 331-341 (flawed policy directives); ¶¶ 253-263, 390-405 (faulty training)).

The evidence shows that all class members share common issues of law and fact: defendants erroneously and systemically fail to provide public benefits to members of the class

as a result of, for example, maintaining computer systems that wrongly omit significant categories of eligible immigrants, failing to provide instructions and training on the proper use of those computer systems to handle issues typical of the members of the proposed class, providing policy directives and guidelines that do not conform to applicable law, and not properly training workers charged with assessing eligibility.

The common questions resulting from the systemic failures on the part of the defendants which have been demonstrated in this case are sufficient to satisfy the commonality requirement. *See Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("[t]he commonality requirement is met if plaintiffs' grievances share *a* common question of law or fact.") (emphasis added); *McCoy v. Ithaca Hous. Auth.*, 559 F. Supp. 1351, 1355 (N.D.N.Y. 1983) (even a single common question establishes commonality).

**C. Named plaintiffs' claims are typical of the claims of the class.**

Plaintiffs have shown that the named plaintiffs' claims are typical of those of the rest of the class because each plaintiff, like all members of the class, is an immigrant eligible for public benefits who was denied or delayed in receiving those benefits as a result of defendants' pattern and practice of misapplying the laws governing eligibility of immigrants.

In *Reynolds*, this Court certified a class of public benefits applicants similar to that in this case. The court found that the proposed class satisfied the commonality and typicality requirements because "the named plaintiffs' claims arise from the same course of conduct that gives rise to the claims of all the class members and are based on the same legal theories." *Reynolds*, 118 F. Supp. 2d at 389.

Where computer systems are programmed to omit large portions of a class, policies are promulgated that erroneously direct that benefits be withheld from substantial groups within the

class, and workers are not trained so as to deal effectively with issues that typify membership in the class, the typicality requirements for a class action are satisfied.

**D. Named class members and counsel provide adequate representation.**

Counsel has demonstrated its ability to prosecute this case vigorously, and this Court has denied defendants' motion seeking disqualification. The named plaintiffs have and will continue to fairly represent the class. The interests of the named plaintiffs are identical to those of the proposed class because the named plaintiffs seek declaratory and injunctive relief to assure that defendants conform their computer systems, policy directives, and worker training to the statutes and regulations governing immigrant eligibility so that class members will receive the benefits for which they are eligible. Such relief will have no detrimental effect on any of the other class members, but will serve to assist them in obtaining benefits to which they are entitled. Further, the named plaintiffs have participated fully in this litigation, having depositions taken, submitting requested documents, and testifying at the evidentiary hearing. Thus, the proposed class satisfies the requirements of Rule 23(a)(4).

**E. The Class Satisfies The Requirements of Rules 23(b)(2) and (3).**

**1. The class meets the standard of Rule 23(b)(2).**

The proposed class meets the criterion for certification set forth in Rule 23(b)(2), which provides that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The defendants routinely violate the statutes and regulations governing immigrant eligibility for public benefits, thus denying public benefits to eligible immigrant class members. Class-wide declaratory and injunctive relief is therefore appropriate under Rule 23(b)(2). *See Reynolds*, 118 F. Supp. 2d at 390-91 (certifying class under 23(b)(2) where City defendants'

improper deterrence of individuals from applying for food stamps, Medicaid, and public assistance, and failure to timely process applications, as well as State defendants' failure to oversee the City defendants' compliance with welfare laws, constituted actions generally applicable to the class making injunctive and declaratory relief appropriate to the class as a whole).

**2. The class meets the standard of Rule 23(b)(3).**

The proposed class also meets the criteria for certification set forth in Rule 23(b)(3) because "questions of law or fact common to the members of the class predominate over any question affecting only individual members." Fed. R. Civ. P. 23(b)(3). Plaintiffs do not merely seek to receive the benefits to which they personally are entitled, but rather they are addressing class-wide problems that commonly bear on Affected Immigrants.

Plaintiffs also fulfill the second requirement of Rule 23(b)(3), "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (2003). The Rule lists the following four factors to consider under the second requirement:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As for the first factor, class members share the same interest: ensuring that Affected Immigrants receive the benefits to which they are entitled. Regarding the second factor, named plaintiffs are unaware of "any litigation concerning the controversy already commenced by or against the members of the class." Fed. R. Civ. P. 23(b)(3)(B). Additionally, it is clearly desirable to concentrate this litigation in New York City because all of the class members are New York City

residents and have been negatively affected by the actions of the New York City government and the New York State government in New York City. Finally, class counsel has already demonstrated that it is capable of managing the case by filing the complaint and bringing this case through a two-week hearing over the short span of less than four months.

## CONCLUSION

For the foregoing reasons, this Court should (1) issue a preliminary injunction granting the relief set forth in Point III *supra*; (2) certify a class as defined in paragraph 30 of the Complaint; and (3) grant the motion to intervene by Galina Rybalko.

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Respectfully submitted,

Steven Banks, Attorney-in-Chief (SB0987)
THE LEGAL AID SOCIETY
Adriene L. Holder (ALH1872)
Attorney-in-Charge, Civil Practice Area
Scott A. Rosenberg (SAR5579)
Director of Litigation, Civil Practice Area
Christopher D. Lamb (CDL8145)
Attorney-in-Charge, Staten Island Neighborhood Office
Elizabeth S. Saylor, of Counsel (ESS8091)
Jennifer Baum, of Counsel (JB4030)
Camille Carey, of Counsel (CC1435)
199 Water Street, 3rd Floor
New York, New York 10038
Phone: (718) 422-2871

Yisroel Schulman, Executive Director (YS3107)
NEW YORK LEGAL ASSISTANCE GROUP
Jane G. Stevens, of Counsel (JS4790)
Caroline Hickey, of Counsel (CH1410)
Kevin Kenneally, of Counsel (KK0710)
450 West 33rd Street, 11th Floor
New York, NY 10001
Phone: (212) 613-5000

HUGHES HUBBARD & REED LLP
Ronald Abramson (RA0979)
Russell Jacobs, of Counsel (RJ3657)
One Battery Park Plaza
New York, N.Y. 10004-1482
Phone: (212) 837-6000

By: /s
Elizabeth S. Saylor

*Attorneys for Plaintiffs and the Plaintiff Class*

Of Counsel:

THE EMPIRE JUSTICE CENTER
Barbara Weiner
119 Washington Ave.
Albany, N.Y. 12210
Phone: 518-462-6831