UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M.K.B., O.P., L.W., M.A., Marieme Diongue, M.E., P.E., Anna Fedosenko, A.I., L.A.M., L.M., Denise Thomas, and J.Z., on their own behalf, and on behalf of their minor children and all others similarly situated,

Plaintiffs,

- 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 CV 10446 (JSR)
(ECF Case)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

PRELIMINARY STATEMENT

Immigrants who reside in New York State legally and permanently, and who are impoverished because they are disabled or unemployed, are legally entitled to receive certain forms of subsistence-level public benefits they need to survive. In New York City, the local agency responsible for determining eligibility for and delivering those benefits is the New York City Human Resources Administration (HRA). The State agencies responsible for ensuring that HRA administers benefits lawfully, and on whose behalf HRA acts as an agent, are the New

York State Office of Temporary and Disability Assistance (State OTDA) and the New York State Department of Health (State DOH).

Because of deep-seated flaws in their policy statements, computer programming, training, supervision, and other deficiencies described in this memorandum of law, HRA, State OTDA, and State DOH systemically and routinely fail to deliver State and federally funded public assistance, Medicaid, and food stamps (collectively public benefits[1]) at New York City job centers[2] to many categories of immigrants who are legally eligible for assistance. The immigrants who are most frequently victimized by these failings, and on whose behalf this action is brought,[3] are:

(i) Battered spouses and battered children of U.S. citizens or lawful permanent residents who are, for that reason, Qualified Aliens;[4]

(ii) Their immigrant children or, in the case of battered children, their immigrant parents, provided that they too are Qualified Aliens;

(iii) Lawful permanent residents who have been in that status for less than five years; and

(iv) Persons who are Permanently Residing in the United States under Color of Law (PRUCOL).[5]

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[1] "Public benefits," as defined here, includes federal food stamps, federal and State Medicaid, federally and State-funded public assistance and, for periods before October 1, 2005, State food stamps through the Food Assistance Program.

[2] Since 1998, New York City has used the term "job center" to refer to the HRA offices responsible for administering joint public assistance, food stamps, and Medicaid cases. *See Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 334 (S.D.N.Y. 1999).

[3] For a detailed statement of the class definition, *see* Compl. ¶ 39.

[4] For the statutory definition of the term "Qualified Alien," *see infra* note 6, and Compl. ¶ 42.

[5] The term "PRUCOL," an acronym for "Permanently Residing Under Color of Law," refers to immigrants living in the United States with the knowledge and permission or acquiescence of the federal immigration authority and whose departure the federal immigration authority does not contemplate enforcing. For a complete definition of the term PRUCOL, *see* N.Y. State Department of Health, Admin. Dir. 04 OMM/ADM-07, at 19-22; Compl. ¶ 70.

For simplicity, immigrants in (i) and (ii) above will be described in this memorandum as "battered qualified immigrants" – a term that includes Qualified Aliens who are themselves battered as well as their children and parents.

All class members are either Qualified Aliens or PRUCOL. All of them are eligible for both Medicaid and public assistance. In addition, class members who are Qualified Aliens and who are either children, disabled, or in certain other categories, are also eligible for federal food stamps. The impact of the defendants' systemic failure to deliver Medicaid, public assistance, and food stamps to eligible class members at New York City job centers is irreparable and utterly devastating. Many class members are battered qualified immigrants who require public benefits not only to survive, but to escape the victimization they have suffered at the hands of their batterers.

This action seeks to compel HRA, State OTDA, and State DOH to develop the plans and improvements necessary to rectify systemic flaws in the delivery of Medicaid, public assistance, and food stamps to class members at New York City job centers. Ultimately, plaintiffs seek an order ensuring that all class members receive the public benefits to which they are legally entitled.

STATEMENT OF THE CASE

A. Immigrant Eligibility for Public Benefits

The rules governing the eligibility of immigrants for public benefits are admittedly complex. But complexity is no excuse for failing to apply the law uniformly and correctly at all HRA job centers. For convenience, the most important rules are summarized below. For a full statement of the relevant rules concerning immigrant eligibility for public benefits, see the Compl. ¶¶ 40-83.

Qualified and PRUCOL Aliens. The first step in determining whether an immigrant is eligible for public benefits in New York State is to determine whether the immigrant is either a Qualified Alien or PRUCOL. The term "Qualified Alien" is defined in 8 U.S.C. § 1641(b) and, for convenience, is summarized in the footnote below.[6] The term "PRUCOL" includes all persons who are permanently residing in the United States with either the knowledge and permission of the United States Citizenship and Immigration Services (USCIS), or the knowledge and acquiescence of the USCIS.[7]

Of particular importance here are two groups of battered immigrants and their children and/or parents who are Qualified Aliens because of the abuse they have suffered. One group of battered qualified immigrants, known as "VAWA self-petitioners," includes immigrants who have filed a petition for classification as a battered spouse or child of a U.S. citizen, 8 U.S.C. § 1641(c)(1)(B)(i), or of a lawful permanent resident, 8 U.S.C. § 1641(c)(1)(B)(ii), under the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, Title IV, Subtitle G, 108 Stat. 1902, 1953 (1994). Two subgroups of VAWA self-petitioners are important here: those who have received a notice stating they have set forth a "prima facie case" under VAWA; and those whose self-petitions under VAWA have been approved. The statute defines both subgroups as Qualified Aliens. 8 U.S.C. § 1641(c)(1)(B) (referring to an alien who "has been approved or has a petition pending which sets forth a prima facie case . . .").

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[6] A Qualified Alien is an alien who (a) is lawfully admitted for permanent residence under the Immigration and Nationality Act (INA), or (b) has been granted asylum under § 208 of the INA, or (c) was admitted as a refugee under § 207 of the INA, or (d) has been paroled into the United States for at least one year under § 212(d)(5) of the INA, or (e) has been granted withholding of deportation under § 243(h) of the INA (as in effect before April 1, 1997), or § 241(b)(3) of the INA, or (f) has been granted conditional entry under § 203(a)(7) of the INA (as in effect before April 1, 1980), or (g) is a Cuban or Haitian entrant, as defined in § 501(e) of the Refugee Education Assistance Act of 1980, or (h) has been battered or subjected to extreme cruelty in the United States (referred to herein as battered qualified immigrants). 8 U.S.C. §§ 1641(b), (c).

[7] *See supra* note 5.

A second group of battered qualified immigrants includes immigrants who are not "self-petitioners," but who present proof of abuse and proof that a petition has been filed on their behalf by a U.S. citizen or lawful permanent resident parent or spouse for classification of the alien as a spouse or child of the U.S. citizen or lawful permanent resident petitioner. *See* 8 U.S.C. § 1641(c)(1)(B)(iv). Because the form for filing such a petition is known as an I-130, this second group will be referred to as the I-130 group of battered qualified immigrants throughout this memorandum. Some kinds of visas, such as certain K or V visas, suffice as proof that an I-130 petition has been filed because the filing of the I-130 petition is a condition of obtaining the visa.

Prominent among immigrants in the PRUCOL group are those who have been granted deferred action status by USCIS, and asylum applicants who have been authorized to work in the United States. *See* State DOH, 04 OMM/ADM-07, §§ IV(F)(i), (l), at 19-20 (attached as Ex. 45 to the accompanying Declaration of Jennifer Baum dated Dec. 12, 2005 (Baum Decl.)). An important group of immigrants granted deferred action are those who have submitted U visa applications to USCIS. U visas are available to victims of certain crimes, including domestic violence, who have suffered substantial harm because of these crimes and who have been helpful with the criminal investigation or prosecution of these crimes.

Medicaid and public assistance. All Qualified and PRUCOL Aliens have immigration statuses that render them eligible for Medicaid and public assistance. Those who entered the United States before August 22, 1996 or have been a Qualified Alien for five years (the "five-year bar"), or are exempt from the five-year bar,[8] are eligible for federally funded Medicaid and

[8] Immigrants who are exempt from the five-year bar for federal Medicaid include (1) persons admitted as refugees under § 207 of the INA; (2) persons granted asylum under § 208 of the INA; (3) persons granted withholding of deportation under § 243(h) of the INA (as in effect before April 1, 1997) or § 241(b)(3) of the INA; (4) Cuban or Haitian entrants, as defined in § 501(e) of the Refugee Education Assistance Act of

federally funded public assistance, known as Family Assistance in New York State. Otherwise, they are eligible for fully State-funded Medicaid (State Medicaid), *Aliessa v. Novello*, 96 N.Y.2d 418, 426-27 (2001); 8 U.S.C. § 1621(d); N.Y. Soc. Serv. Law § 122(1)(c), and State-funded public assistance, known as Safety Net Assistance in New York State, N.Y. Soc. Serv. Law § 122(1)(c); 18 N.Y.C.R.R. § 349.3(b)(1)(iv).

Food Stamps. A Qualified Alien has an immigration status that renders her eligible for federal food stamps if she is (1) a lawful permanent resident who has worked 40 qualifying quarters as defined under the Social Security Act; or (2) is receiving benefits or assistance for blindness or disability within the meaning of the Food Stamps Act; or (3) was lawfully residing in the United States and was 65 years of age or older on August 22, 1996; or (4) is under 18 years of age; or (5) has resided in the United States in a Qualified Alien status for five or more years; or (6) is in one of several other immigration categories.[9] 8 U.S.C. § 1612(a)(2)(B), (F)(ii), (I), (J), (L).

B. Facts Concerning Four Representative Named Plaintiffs

This case is brought by 13 named plaintiffs on behalf of themselves and a class of similarly situated lawfully residing immigrants. The facts regarding four representative named plaintiffs are summarized below. For a brief summary of all the plaintiffs' experiences, see ¶¶ 24 - 37 of the Declaration of Elizabeth S. Saylor submitted in support of the Order to Show

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1980; (5) Amerasians; (6) lawfully residing veterans or individuals on active duty and their lawfully residing dependents; or (7) American Indians born in Canada or members of a federally recognized Indian tribe. 8 U.S.C. §§ 1613(b), (d). Immigrants who are exempt from the five-year bar for federally reimbursed Family Assistance are the same as those who are exempt from the five-year bar for federal Medicaid, except that American Indians born in Canada or members of a federally recognized Indian tribe are not included. 8 U.S.C. § 1613(b).

[9] These categories are identical to the categories of immigrants who are exempt from the five-year bar for federal Medicaid, *see supra* note 8, with one addition: Members of a Hmong or Highland Laotian tribe who rendered assistance to the United States military during the Vietnam era are included. 8 U.S.C. §§ 1612(a)(2)(C), (G), (K). As discussed in *supra* note 1, the State-funded food stamp program expired on September 30, 2005.

Cause.[10]

1. M.K.B.

M.K.B. is a 33-year-old woman from Jamaica who lives in a homeless shelter in Manhattan with her three children, M.A.B., age 9; S.B., age 7; and, N.B., age 2 months. In May 2004, M.K.B. and her two older children arrived in New York to be reunited with her husband and the children's father. M.K.B. entered the United States on a V-1 visa and her children entered on V-3 visas. They received these visas because M.K.B.'s husband, a lawful permanent resident, filed an I-130 family-based petition on their behalf. (Declaration of M.K.B., dated Dec. 1, 2005 (M.K.B. Decl.) ¶¶ 1, 3-4, 8.)

Unfortunately, soon after their arrival, M.K.B.'s husband became abusive. He tormented the children, for example, by leaving a large kitchen knife under M.A.B.'s pillow. The worst incident occurred in September 2005, when M.K.B. was eight months pregnant. M.K.B.'s husband came at her with an ice pick, threatened to kill her, and threw a bucket at her, just missing her stomach that held their unborn child. He also showed her rat poison and threatened to feed it to the children. Fearing for her safety and the well-being of her two children and unborn son, M.K.B. called the police and fled with her children that night. Since then, she has lived in a homeless shelter with her children. M.K.B. subsequently received a temporary order of protection from New York County Family Court. (*Id.* ¶¶ 5-7.)

As immigrants with approved I-130s plus proof of domestic violence, M.K.B. and her two immigrant children are Qualified Aliens and therefore eligible for State Medicaid and State public assistance. As Qualified Aliens under the age of 18, M.A.B. and S.B. are also eligible for

[10] The plaintiffs' experiences are all set out in more detail in the Compl. at ¶¶ 149-348. Many of the plaintiffs and declarants in this matter are proceeding anonymously because they fear that using their names would endanger them and their children by creating a risk that their abusers could find them.

federal food stamps. N.B., who was born in late September 2005, is eligible for all federal public benefits because he is a citizen. (*Id.* ¶¶ 1, 3, 8.)

On September 30, 2005, M.K.B. applied for public benefits for herself and her three children at the Riverview Job Center. M.K.B. told Mr. Sonde, her HRA caseworker that she was a domestic violence victim. She showed him police reports, her and her children's passports (which contain the V visas), her work permit, and her Social Security card. Mr. Sonde told her that her immigrant children were not eligible because they did not have Social Security numbers. (*Id.* ¶¶ 9-10.)

M.K.B. later received notices stating that public assistance, Medicaid, and food stamps cases had been accepted and that she would receive $68.50 semi-monthly in public assistance and $119 per month in food stamps. The notices did not state who in the family had been accepted. M.K.B. assumed these benefits were for her because she had not yet brought in her newborn's Social Security card. M.K.B. never received a notice stating that her or her children's application for public assistance, food stamps, and Medicaid had been denied. (*Id.* ¶ 11.)

Because M.K.B. did not know who in her family was accepted, her attorney called the Riverview Job Center. Ms. Medina, a HRA caseworker, stated that the case was open only for the citizen baby and that the rest of the family had been rejected due to their immigration status. (Declaration of Reena Ganju dated Dec. 12, 2005 (Ganju Decl.) ¶ 104.)

Since M.K.B. fled her husband, she has struggled to provide for her family. M.K.B. uses almost all of the public assistance grant to purchase baby wipes and diapers for her newborn son. Even so, she often runs out of diapers. Once when she ran out of diapers, several children of other shelter residents each gave her dollar bills they had just received at a church dinner so that she could buy diapers. The other shelter residents have also given her soap, toothpaste, sanitary

pads, and shampoo. M.K.B. fears their kindness will end soon, leaving her and her children with almost nothing. (M.K.B. Decl. ¶ 18.)

M.K.B. also does not have enough money to feed herself and her three children. She cannot afford to purchase nutritious foods, such as dairy products, fruits, and vegetables. Her family survives on cereal and milk, hot dogs, frozen dinners, and fast food because these are the only foods they can afford with the benefits she receives for her newborn son. As a result of not eating enough, she and her children have lost weight and often lack energy. M.K.B. frequently feels weak and suffers from headaches because she is not eating enough and is breastfeeding. (*Id.* ¶¶ 14-15.)

When she fled her home in September, M.K.B. could only bring a few items of clothing with her. Now she is unable to afford more clothing for herself and her children. They rely on clothing donations from the shelter, but there have not been enough winter clothing donations to clothe her and her family. Her son S.B. does not have a warm winter coat and M.K.B. and the children all need winter sweaters, shoes, and pants. (*Id.* ¶ 19.)

Because she does not have Medicaid, M.K.B. has been unable to obtain the medical care she needs to treat painful eye cysts and two sexually transmitted diseases she contracted from her abusive husband. Also, S.B. has been unable to see a dentist for chipped front teeth even though he is in pain. (*Id.* ¶ 17.)

M.K.B. and her children will not be able to afford to move out of the shelter until they are receiving benefits for the entire family. (*Id.* ¶ 23.)

2. O.P.

O.P. is a 39-year-old immigrant victim of domestic violence from Peru. She has two children, ages 5 and 13, both of whom live with her in a homeless shelter in New York City.

O.P. was granted deferred action by the USCIS in January 2005 based on a U visa application. She is eligible for a U visa because she assisted the District Attorney's Office in the prosecution of the father of her younger child, who abused her for several years. O.P.'s immigration status makes her PRUCOL, and therefore eligible for State Medicaid and Safety Net Assistance. (Declaration of O.P. dated Nov. 22, 2005 (O.P. Decl.) ¶¶ 1, 4, 7-12.)

In March 2005, O.P. moved into a domestic violence shelter. She first applied for public assistance and Medicaid at the Hamilton Job Center shortly thereafter. She submitted copies of all of her immigration documents, including her deferred action notice; her passport and Social Security card; and a letter from an attorney explaining the basis for her PRUCOL status and the public benefits for which she is therefore eligible. The caseworker processing her application told O.P. that her application for public benefits would be denied because she "did not have a green card." (*Id.* ¶¶ 18-19.) O.P. later received a notice dated June 14, 2005, denying her application for public assistance because she did not present "verification that [she is] a citizen or that [she is] a lawful permanent resident."[11] (*Id.* ¶ 20, Ex. H.) O.P. never received a notice regarding her Medicaid application. (*Id.* ¶ 20.)

On July 7, 2005, O.P. attended an administrative fair hearing conducted by State OTDA regarding the denial of her public benefits application. The decision issued after the hearing, dated August 11, 2005, did not state O.P.'s immigration status, nor did it state the public benefits for which she is eligible or explain the immigrant eligibility rules. It merely instructed the center to withdraw the denial notice and to continue to process her public benefits application. (*Id.* ¶¶ 21-22, Ex. I.)

On August 5, 2005, O.P. and her children were forced to move out of the domestic violence shelter and into a regular homeless shelter because they had reached the State-mandated

[11] This quotation has been translated from Spanish to English.

time limit for stays in emergency domestic violence shelters. After moving into the homeless shelter, she reapplied for public benefits twice more – in August and October at the Riverview Job Center. Both times she was erroneously denied due to her immigration status. (*Id*. ¶¶ 23, 31, 41.)

She still has not received any benefits, even though the Administrative Assistant (AA) to the Director[12] of the Riverview Job Center, Mr. Oni, told her and her attorney on September 23, 2005 that he would look into the case. (Declaration of Kevin Kenneally, dated Dec. 8, 2005 (Kenneally Decl.) ¶¶ 11-14.)

O.P. and her children are suffering great hardship every day because of the erroneous denials of her three public benefits applications. O.P. has no money and is receiving no other form of assistance. She feeds herself and her two children by going to food pantries, where she is able to get some canned food and sometimes a box of cereal or a little bag of rice. She is unable to afford nutritious fresh food for herself and her two children. Sometimes she goes without food in order to feed her children. (O.P. Decl. ¶¶ 45-46.)

O.P.'s application for Housing Stability Plus, a housing subsidy for those living in shelters, was denied solely because she was not receiving public assistance. This subsidy would have enabled O.P. and her two children to move out of the shelter system and into permanent housing of their own. (*Id.* ¶ 24.)

O.P. is unable to visit a doctor because she does not have Medicaid. O.P. frequently suffers debilitating pain in her ovaries. In September 2005, she underwent a colonoscopy. The doctor who performed that procedure referred her to a gynecologist for further treatment regarding the pain in her ovaries. She has not, however, been able to see a gynecologist or

[12] The AA to the Director is the person in the Director's office who generally handles advocates' requests for assistance with problem cases. (Ganju Decl. ¶ 20.)

receive any treatment for this problem because she is unable to afford the fee.

Recently, she fainted in the kitchen at her homeless shelter. Her son discovered her collapsed and unconscious on the floor. She does not know why she lost consciousness or for how long, and she is unable to afford medical treatment to learn why or how to prevent a reoccurrence. (*Id.* ¶¶ 36-40.)

Because she has been denied public assistance, she is also denied child care assistance and cannot search for or obtain a job. (*Id.* ¶¶ 15, 48.)

3. L.W.

L.W. is a 62-year-old battered qualified immigrant from Jamaica who is staying temporarily with a friend in Brooklyn. She suffers from multiple severe medical problems, including heart disease, kidney stones, a hernia, and high blood pressure. L.W. entered the United States in 2003 on a K-3 visa as the spouse of a U.S. citizen. (Declaration of L.W., dated Oct. 21, 2005 (L.W. Decl.) ¶¶ 1, 3, 5; Declaration of Jennifer Rolnick, dated Dec. 12, 2005 (Rolnick Decl.) ¶ 29.)

As a domestic violence victim with an approved I-130 family-based petition, L.W. is a Qualified Alien and is eligible for State Medicaid and Safety Net Assistance. As a disabled Qualified Alien, she is also eligible for federal food stamps. L.W. did not, however, receive public assistance until four months after she originally applied, and she is still not receiving federal food stamps seven months after applying. (L.W. Decl. ¶¶ 2, 11, 27.) She is receiving Medicaid, but not disability-related Medicaid, despite her serious medical problems, because HRA has failed to make a determination of disability, which State procedures require HRA to do. HRA's failure to make a Medicaid disability determination for L.W. is critical because she

can receive food stamps only after being found disabled pursuant to such a determination. (Rolnick Decl. ¶¶ 9, 22.)

L.W. first applied for public assistance and food stamps on or about March 17, 2005. A caseworker told her that HRA would deny her application, but she never received a notice stating this. L.W. applied for public assistance and food stamps a second time on or about May 31, 2005. That same day, HRA denied her food stamps application due to her immigration status, this time by issuing a written notice of determination. On June 7, 2005, a worker told L.W. that HRA had denied her public assistance application. HRA provided no written notice of that decision. (L.W. Decl. ¶¶ 11-15.)

After continuous advocacy by L.W.'s attorneys, HRA finally approved her application for public assistance on July 14, 2005. On June 29, a State OTDA hearing decision directed HRA to re-evaluate L.W.'s May 31 application for food stamps. Despite that directive and numerous calls to the center by her attorneys, HRA has taken no further action on her food stamps application. (*Id.* ¶¶ 19-23; Rolnick Decl. ¶¶ 7-11, 21, 26; Declaration of Elizabeth Saylor dated Dec. 12, 2005 (Saylor Decl.) ¶¶ 153-157; Declaration of Angela Migally, dated Oct. 14, 2005 (Migally Decl.) at ¶¶ 5, 8-14.)

L.W. does not have the resources to provide herself with a sufficient diet. She lived in a domestic violence shelter until about two weeks ago, but she had to move out because she had exceeded the State-mandated time limit and the shelter could no longer afford to house her without payment. When she lived in the shelter, she had to rely on other residents for hand-outs in order to eat. Now she has to rely on charity. Sometimes no one has food to give her and she has to go without food. She worries that not eating will cause her health to deteriorate further.

She already suffers from stomach and chest pain almost every day. (L.W. Decl. ¶ 27; Rolnick Decl. ¶ 29.)

4. M.A.

M.A. is a 36-year-old battered qualified immigrant from the Dominican Republic who lives in a homeless shelter in the Bronx, New York with her 3-year-old daughter. M.A. arrived in the United States in September 1999 to be reunited with her husband, who is a lawful permanent resident. In October 2003, her husband filed an I-130 family-based petition on her behalf, which USCIS approved in February 2004. Although she is eligible for State Medicaid and Safety Net Assistance, she has not received the benefits for which she is eligible. (Declaration of M.A., dated December 3, 2005 (M.A. Decl.) ¶¶ 1-5, 20.)

M.A.'s husband frequently beat her, threatened her with weapons, and said he would kill her. During the summer of 2004, the abuse became unbearable and M.A. fled to a domestic violence shelter in Brooklyn with her daughter. Because her husband continued to threaten her, she obtained an order of protection from Family Court. On or around February 2005, their allowed time at the shelter expired and they moved to a homeless shelter in the Bronx, where M.A. and her daughter currently live. (*Id.* ¶¶ 6-9.)

M.A. first applied for public assistance and Medicaid for her daughter, a U.S. citizen, on or around September 9, 2003. On behalf of her daughter alone, she currently receives $68.50 in public assistance semi-monthly and $116 per month in food stamps. This is her family's only source of income. (*Id.* ¶ 10.)

M.A. has gone to the Crotona Job Center and asked to be added to her daughter's public benefits case four times – on July 14 and 21, 2005 and on November 15 and 18, 2005. Each time, she gave the HRA workers a copy of her I-130 notice and proof of abuse. Each time, she

was told that she was ineligible due to her immigration status. She was told, for example, that she was not eligible because she was not a lawful permanent resident and did not have a "prima facie." She never received a written notice in response to any of these applications. (*Id.* ¶¶ 10-20.)

On September 30, 2005, she attended a fair hearing to challenge the failure of the center to add her to her daughter's case. The decision, dated October 21, 2005, directed the center to continue processing her application, taking into account her approved I-130 status. The decision, however, contains no discussion of the law on immigrant eligibility for benefits and does not state whether M.A. is eligible for benefits. To date, no one has contacted M.A. regarding the fair hearing decision. (*Id.* ¶¶ 16-18, Ex. D; Declaration of Russell Jacobs, dated Dec. 12, 2005 (Jacobs Decl.) ¶¶ 10-12.)

M.A. cannot afford to buy enough food for her daughter and herself. She also cannot afford to buy her daughter winter clothes. And it is extremely difficult for her to find housing outside of the shelter system until her application for benefits is accepted because only then will she qualify for an adequate housing subsidy. (M.A. Decl. ¶¶ 21-22.)

Because she does not have Medicaid, M.A. is unable to receive all of the medical treatment she needs. A clinic doctor recommended that she see a psychologist for depression resulting from the domestic violence, but she does not have money to pay for counseling. She has been unable to go to the dentist, although she has pain in her teeth. She worries that if she becomes seriously ill that no one will be able to care for her daughter. (*Id.* ¶ 23.)

C. Class-Wide Facts

HRA systemically and routinely erroneously denies applications by class members for Medicaid, food stamps, and public assistance at HRA job centers because of misapplications of

immigrant eligibility rules, and systemically and routinely deters and discourages class members from applying for these benefits. HRA also systemically and routinely fails to give adequate and timely notice to immigrants who have been denied benefits at job centers. These systemic violations of law are directly attributable to material misstatements and omissions in defendants' policies and instructions; errors in design of the defendants' computer systems; and defects in the notices defendants use (or fail to use) to notify immigrants of the denial of an application for benefits. The State fair hearing system, which is supposed to rectify erroneous denials of Medicaid, public assistance, and food stamps, is wholly inadequate and ineffective in rectifying widespread and persistent denials of public benefits by HRA to eligible immigrants.

1. Systemic errors by HRA caseworkers and supervisors

HRA workers have repeatedly told eligible immigrants that they are ineligible for benefits because they or their spouses are not U.S. citizens or lawful permanent residents,[13] or because they have not resided in the United States for five years,[14] or because they do not have work authorization,[15] or because an Immigration Judge has not yet ruled on an asylum application,[16] or because they lack a Social Security number.[17]

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[13] *See* Declaration of L.A.M. dated Nov. 29, 2005 (L.A.M. Decl.) ¶¶ 17, 23; Declaration of P.S. dated Nov. 17, 2005 (P.S. Decl.) ¶ 13; Declaration of Marieme Diongue (Diongue Decl.) ¶ 14; M.A. Decl. ¶ 20; Declaration of K.T. dated Oct. 12, 2005 (K.T. Decl.) ¶ 7; Declaration of Nicole Prince dated Dec. 8, 2005 (Prince Decl.) ¶ 17; O.P. Decl. ¶¶ 19, 42; Declaration of R.R. dated Sept. 29, 2005 (R.R. Decl.) ¶ 12; Declaration of P.E. dated Nov. 10, 2005 (P.E. Decl.) ¶¶ 10, 37, 49; Declaration of Violeta Petrova dated Sept. 1, 2005 (Petrova Decl.) ¶¶ 16, 18; Declaration of N.E. dated Aug. 25, 2005 (N.E. Decl.) ¶ 17; Declaration of W.J. dated Sept. 30, 2005 (W.J. Decl.) ¶¶ 13, 21, 24; Declaration of M.T. dated Sept. 22, 2005 (M.T. Decl.) ¶ 24; Declaration of Angelica Higinio dated Dec. 3, 2005 (Higinio Decl.) ¶ 18; Decl. of Denise Thomas dated Dec. 11, 2005 (Thomas Decl.) ¶¶ 18-19, Jacobs Decl. ¶ 79; Saylor Decl. ¶ 111.

[14] *See* Declaration of Anna Fedosenko dated Nov. 21, 2005 (Fedosenko Decl.) ¶¶ 8, 14; K.T. Decl. ¶ 5; Prince Decl. ¶ 25; R.R. Decl. ¶ 12; Declaration of W.S. dated Nov. 22, 2005 (W.S. Decl.) ¶ 5; Thomas Decl. ¶ 19; Jacobs Decl. ¶ 79.

[15] *See* P.E. Decl. ¶ 30; Petrova Decl. ¶ 10.

[16] *See* Fofana Decl. ¶ 11; Declaration of Carrie Wollmershauser dated Sept. 14, 2005 (Wollmershauser Decl.) ¶ 3.

[17] *See* M.K.B. Decl. ¶ 10; P.S. Decl. ¶ 13; P.E. Decl. ¶¶ 26-27, 34, 37, 44, 49; Declaration of M.E. dated Nov. 8, 2005 (M.E. Decl.) ¶ 9; Ganju Decl. ¶¶ 32-34, 103, Ex. 32; Prince Decl. ¶ 22; W.J. Decl. ¶ 16; Thomas Decl. ¶ 18; Saylor Decl. ¶ 178.

The systems employed by defendants to deliver public benefits to class members are rife with error. Workers' errors are especially prevalent with respect to battered immigrants. Some HRA workers understand that a VAWA "prima facie" notice is sufficient to prove that an immigrant is a Qualified Alien – although many workers get even that wrong. (For example, a worker at the Linden Job Center told Nicole Prince that she had never heard of a "prima facie" notice) (Prince Decl. ¶ 12; *see also* M.H. Decl. ¶¶ 7, 9; L.A.M. Decl. ¶ 17; P.S. Decl. ¶¶ 13-14; Thomas Decl. ¶¶ 18-19, 22; Ganju Decl. ¶¶ 14, 47, 23-24, 65, 67.) Most HRA workers are unaware that immigrants with I-130 petitions and proof of abuse are eligible for benefits. (M.A. Decl. ¶¶ 12, 14, 19, 20; P.E. Decl. ¶¶ 10, 13; Declaration of J.Z. dated Dec. 9, 2005 (J.Z. Decl.) ¶¶ 16, 19; M.E. Decl. ¶¶ 22, 25; Declaration of Anya Emerson (Emerson Decl.) ¶ 10; Ganju Decl. ¶¶ 15, 20, 96, 97; W.J. Decl. ¶¶ 7-8, 13; Saylor Decl. ¶ 216.) Workers who may have heard of an I-130 petition are generally unaware that proof of an I-130 filing may be shown by other documentation, including documents indicating that an immigrant has or is eligible for a V-1, V-2, or V-3 visa[18] or has a K-3 or K-4 visa.[19] (M.K.B. Decl. ¶ 10; Declaration of A.I. dated Dec. 1, 2005 (A.I. Decl.) ¶¶ 17, 24-27; L.W. Decl. ¶¶ 5, 13.)

Likewise, workers who may have heard of a VAWA prima facie notice are often unaware that a VAWA approval notice also suffices to prove eligibility. When N.E. showed a job center worker the approval notice on her VAWA self-petition, her worker told her that the approval notice was insufficient and that only a prima facie notice would suffice. (N.E. Decl. ¶ 24; *see also* M.A. Decl. ¶ 19; Petrova Decl. ¶¶ 8, 12, 19.) When M.T. presented a VAWA approval

[18] V visas, issued pursuant to INA § 101(a)(15)(v), are issued to the spouse (V-1) or unmarried child (V-2 or V-3) of a lawful permanent resident who is the beneficiary of Form I-130, Petition for Alien Relative, filed on or before December 21, 2000 so that they may enter the United States. 8 C.F.R. §§ 214.15(a) and (c).

[19] K visas, issued pursuant to INA § 101(a)(15)(k), are issued to those with filed I-130 petitions for the purpose of allowing reunification of families of U.S. citizens by allowing the spouse (K-3) and her children (K-4) to enter the United States. 8 C.F.R. § 214.2(K)(7).

notice, the job center worker threatened to remove her from the case because she did not have a green card. (M.T. Decl. ¶ 24; *see also* Petrova Decl. ¶¶ 20-21; W.J. Decl. ¶ 24.)

Similarly, most HRA workers are unaware that certain battered immigrants may be PRUCOL and therefore eligible for public assistance and Medicaid. For example, most workers do not know that U visa applicants who have been granted deferred action status are PRUCOL and therefore eligible for benefits. (L.A.M. Decl. ¶¶ 17, 23; Diongue Decl. ¶¶ 14-15; O.P. Decl. ¶¶ 18-19, 31, 33; Higinio Decl. ¶¶ 18-19, 22; R.R. Decl. ¶¶ 10, 12, 14; Ganju Decl. ¶¶ 12, 19, 45; Declaration of Diane Gonzalez dated Sept. 7, 2005 (Gonzalez Decl.) ¶¶ 15, 23.) Indeed, many workers are unaware of what the term PRUCOL even means. (*See* Declaration of Nicole Sara Price (Price Decl.) ¶¶ 4-9; Jacobs Decl. ¶ 55; Saylor Decl. ¶ 215.)

Several systemic errors affect immigrants who are eligible for federal food stamps. All Qualified Aliens are eligible for federal food stamps if they are in receipt of benefits or assistance for blindness or disability. 8 U.S.C. § 1612(a)(2)(F)(ii). State OTDA has instructed local social services districts that if a person applying for federal food stamps is also applying for or receiving Medicaid, and there is any indication that the person may be disabled, then the person must be referred for a Medicaid disability determination. If the determination establishes that the person is disabled, then he or she is eligible for federal food stamps. (Baum Decl. ¶ 39.)

Despite that State directive, HRA job centers routinely do not make, and indeed do not know how to make, the required referrals. For example, the Administrative Assistants (AA) to the Directors at the Linden and Brooklyn Immigrant and Refugee Job Centers stated they could not make the required referrals, as did a supervisor at Dekalb and a Deputy Director at the Senior Works Center. (Declaration of Gella Pyetranker (Pyetranker Decl.) ¶ 7; Declaration of Polina Benyminov dated Aug. 25, 2005 (Benyminov Decl.) ¶¶ 12, 13; Rolnick Decl. ¶¶ 8-12, 21-23;

Lourdes-Merilien Decl. ¶ 15; Declaration of Caroline Hickey (Hickey Decl.) ¶ 11.) As a result, many disabled Qualified Aliens, including Plaintiffs Anna Fedosenko and L.W., do not receive the food stamps they desperately need. (Fedosenko Decl. ¶¶ 7-9 (without food stamps for fourteen months); Hickey Decl. ¶¶ 11, 15; L.W. Decl. ¶¶ 14, 27 (without food stamps for eight months); Rolnick Decl. ¶¶ 7-10, 17, 22-23. *See also* Benyminov Decl. ¶¶ 12-13, 17 (denied food stamps for nine months); Lourdes-Merilien Decl. ¶¶ 15, 17 (denied food stamps for sixteen months); Saylor Decl. ¶¶ 120-157.)

Additionally, lawful permanent residents with 40 quarters of work history as defined by the Social Security Act are eligible for federal food stamps regardless of their age, how long they have had their status, or whether they are disabled. 8 U.S.C. § 1612(a)(2)(B). HRA workers routinely deny food stamps to immigrants who have been lawful permanent residents for fewer than five years, even if they have more than 40 quarters of work history. Indeed, HRA routinely fails to determine or inquire about how long a lawful permanent resident who is applying for food stamps has worked. (Declaration of L.M. dated Nov. 15, 2005 (L.M. Decl.) ¶ 11.)

2. Flaws in the defendants' computer systems

Various flaws in the computer systems used by the defendants to process applications for public benefits are partly responsible for the systemic and erroneous denial of benefits to eligible class members. Two computer systems are relevant here. The Welfare Management System (WMS), which is designed and maintained by State OTDA, is the computer system primarily responsible for issuing benefits to public assistance recipients in New York State. HRA has developed a "front end" to WMS called the Paperless Office System (POS), which is used in all but one job center in New York City to take actions in WMS. POS and WMS contain numerous

programming errors that make it difficult, and sometimes impossible, to provide public benefits to class members.

a. Flaws regarding eligible immigrants and documents

POS has been programmed to prompt HRA caseworkers to enter an applicant's immigration status from a drop-down menu. VAWA self-petitioners, however, and the I-130 group of battered qualified immigrants, are not included as an option in this drop-down menu. Nor do these immigration statuses fit into any of the other choices on the menu. (Ganju Decl. ¶¶ 56-57; Petrova Decl. ¶ 23, Ex. D.) Caseworkers routinely misinterpret these omissions as evidence that an applicant is ineligible. For example, P.S. and A.M. were erroneously denied public benefits because their workers could not select VAWA from the POS pull down menus, or otherwise enter a VAWA immigration status in the computer system. As a result, their caseworkers believed that both immigrants were ineligible for benefits. (P.S. Decl. ¶ 14; *see also* Petrova Decl. ¶ 29; Declaration of Megan Dorton (Dorton Decl.) ¶¶ 6-9, 11.)

Nor does POS have fields for certain PRUCOL categories, such as asylum applicants. When Khady Fofana, an asylum applicant with employment authorization, applied for benefits at HRA's specialized Manhattan Immigrant and Refugee Job Center, a worker acknowledged "that the computer system did not list the code on [Ms. Fofana's] employment authorization card as a valid code for PRUCOL or to receive benefits." (Declaration of Khady Fofana dated Dec. 6, 2005 (Khady Decl.) ¶ 23.) After explaining a computer "work-around" needed to open the case, he "stated that most workers . . . probably do not know that [Ms. Fofana is] eligible for public benefits or how to input [her] application into the computer so that it would be properly accepted." (*Id*.; *see also* Declaration of Jami Johnson dated Dec. 12, 2005 (Johnson Decl.) ¶ 31; Wollmershauser Decl. ¶ 4.) While it appears to be possible to bypass these flaws by working

around POS and opening a case directly in WMS, most workers do not know how or fail to take this step. (Saylor Decl. ¶ 80; Ganju Decl. ¶¶ 51-60.)

The POS drop-down menus for entering class members' documents are also incomplete. POS contains a drop-down list of documents that may be used to establish a client's eligibility for public benefits. However, POS does not permit the worker to enter certain documents that are crucial to establishing the eligibility of some immigrants for public benefits. For example, the drop-down list does not contain a notice of approval of an I-130 petition, although this document can be crucial to establishing a battered immigrant's eligibility for public benefits. When A.B.'s advocate asked her worker to enter her approved I-130 notice in the computer system, the worker could neither select this document from the drop-down list nor type it in. (Emerson Decl. ¶ 14.)

To work around these limitations, some HRA caseworkers intentionally miscode an applicant's immigration status in the computer as citizen or lawful permanent resident. For example, R.J. and M.E. were intentionally miscoded in the computer as citizens, and N.P. was deliberately miscoded as a lawful permanent resident, in order to open their cases. (Ganju Decl. ¶¶ 52-53, 55-56, 92.) In N.P.'s case, Mr. Gladley, an HRA caseworker at the Manhattan Immigrant and Refugee Center, said that while he recognized that the client was eligible for benefits, "he could not figure out how to enter her into the computer . . . Mr. Gladley said that he called a supervisor and others, but no one could tell him how to enter in a VAWA self-petitioner into the system." (*Id.* ¶¶ 54, 58.) When asked why the original entry had been made incorrectly, "[h]e stated that people may be eligible but the computer system makes it impossible to enter their immigration information accurately. He stated that . . . this is why the caseworker had 'faked it' by entering her in as a permanent resident." (*Id.* ¶ 60.)

While these actions may be well-intentioned, they can result in subsequent erroneous case closings. In N.P.'s case, for example, the central HRA office ordered a case review because the facts on record were inconsistent with the client's classification as a lawful permanent resident. (*Id.* ¶ 55; *see also Id.* ¶ 53; M.E. Decl. ¶ 20.)

Shortcomings in State OTDA's computer systems contribute to the erroneous denial of public benefits without adequate notice to eligible immigrants. For example, State OTDA's Computer Notice System (CNS) is programmed with inaccurate and misleading information regarding immigrant eligibility for benefits. (Saylor Decl. 199-208; W.J. Decl. Ex. 13; J.Z. Decl. ¶ 24, Ex. K, Ganju Decl. Decl. ¶ 29, Ex. 7.) Specifically, State OTDA's WMS computer system lacks the capabilities to issue federal food stamps to Qualified Aliens based on the receipt of disability-based Medicaid. (Saylor Decl. ¶¶ 131-33.)

b. Mixed federal and State public benefits cases

The defendants' computer systems are not adequately programmed to handle situations in which one or more family members are eligible for state public benefits, and one or more other family members are eligible for federal public benefits. In these "mixed family" situations, the computer system must create two separate but joined cases so that the federal government subsidizes the payment of public benefits only to those family members who are eligible for federal benefits. HRA handles this "mixed family" situation by utilizing one case number for the entire family but creating two "suffixes," one for the family members eligible for federal benefits and another for the family members eligible for state benefits. (Saylor Decl. ¶ 84.)

When an HRA worker tries to open a case for a "mixed family" in the POS system, the case "errors out." (City workers use the term "error out" to describe situations when the computer is rejecting the case not because the applicant is ineligible for public benefits, but

because the computer is unable to open the case due to errors in processing the case.) (Saylor Decl. ¶ 85; Ganju Decl. ¶¶ 46-47.) Recognizing that the POS computer system cannot handle these multi-suffix cases, a City policy directive instructs workers to process them through the WMS system. (Saylor Decl. ¶ 85.) In order to do so, the information must be written out on a form and given to the technology department to be entered directly into WMS. (*Id*. at ¶ 86.) Most HRA caseworkers do not know how to refer these cases properly to the technology department. And even the technology department has great difficulty getting these "mixed family" cases open. (*Id*. at ¶¶86-87.) As a result, most "mixed families" do not receive all the public benefits to which they are entitled or receive them only after a long delay and extensive advocacy. (Ganju Decl. ¶¶ 48-50; Emerson Decl. ¶ 13; Saylor Decl. ¶¶ 89, 162-165.) L.A.M. and A.I., for example, are not receiving benefits – even though their job centers agree with their legal advocates that they are eligible – because their cases continue to error out in the computer system. (L.A.M. Decl. ¶¶ 26, 28-34; A.I. Decl. ¶¶ 28, 30-32; Saylor Decl. ¶ 90.)

c. Adding parents to their children's open cases

The computer systems make it very difficult to add immigrant parents to public benefits cases that are already open for one or more of their minor children. When HRA opens a case for a minor child only, the child's custodian's name appears on the case as the payee, since benefits cannot be issued directly to a minor. If a caseworker later attempts to add that custodian to the case – either because the custodian recently became an eligible immigrant or because the custodian was initially wrongly denied – the case will be rejected by the computer system as a duplicate case. (Saylor Decl. ¶ 91.) The custodian can be added to the child's case only if the child's case is closed and then a new case is opened for the child and custodian. (*Id*.) Many caseworkers do not know how to or do not attempt to do this. If they do try, sometimes the

child's case remains closed because the caseworker is unable to open a new case including the immigrant parent due to other problems with the computer system. (Saylor Decl. ¶ 90; Ganju Decl. ¶¶ 48-49.)

d. Other computer programming flaws

Class members who do not have Social Security numbers are often incorrectly denied public benefits because the City's computer system makes it difficult to open a case without entering a Social Security number for each applicant. If a Social Security number is not entered for an applicant, a message appears on the screen prompting the caseworker to enter a Social Security number. (Saylor Decl. ¶ 97.) The case cannot be opened until the caseworker makes an entry. (*Id*.) While there is a way to open a case for a person without entering a Social Security number, most caseworkers do not know the code that must be entered and the message on the screen leads them mistakenly to believe that a Social Security number is required in order to be eligible for public benefits. (*Id*.) As a result, class members without Social Security numbers are frequently wrongly denied public benefits. Nicole Prince, for example, attests that her caseworker "said that she could not add me to the case because I did not have a Social Security number. She said that when she tried to enter me into the computer, the computer would not accept my case without it." (Prince Decl. ¶¶ 12, 22; Saylor Decl. ¶ 98.)

Similarly, the computer system requires the entry of an Alien number (A number), which is a number given to some immigrants by USCIS, for each immigrant with an active public benefits case. (Ganju Decl. ¶ 37; Saylor Decl. ¶¶ 100-101, 194.) Some immigrants who are eligible for public benefits, including immigrant children who are derivatives on their parents' VAWA self-petitions, do not have their own A numbers. As a result, they are incorrectly denied public benefits they are eligible to receive. (Saylor Decl. ¶ 102; Ganju Decl. ¶¶ 38-39.)

POS also lacks a field in which to enter the often-critical date when the immigrant became a Qualified Alien if the immigrant is now a lawful permanent resident, even though eligibility for federal public assistance, federal Medicaid, and federal food stamps all may depend upon whether the immigrant has been a Qualified Alien for five years. (Petrova Decl. Ex. D; Saylor Decl. ¶ 103.) As a consequence, immigrants who have been Qualified Aliens for more than five years, but who only recently became lawful permanent residents, are denied the public benefits to which they are entitled. This particularly affects battered qualified immigrants because they are often Qualified Aliens for many years before they become lawful permanent residents. (*Id.* at 104.)

3. Systemic denials of adequate notice

In three circumstances, class members are denied public benefits without any written notice of the denial or the reasons for it. First, HRA invariably fails to provide a notice of denial when assistance is granted to some family members but denied to others because of immigration status. M.K.B.'s experience in this regard is typical. Although she and her immigrant children had been denied public assistance and Medicaid, she received a notice stating that a public assistance and Medicaid case were accepted and that she would receive $68.50. She had no idea which members of her family had been found eligible for public assistance and Medicaid because the letter did not have any names on it. Likewise, although her immigrant children had been denied food stamps, she received a notice stating that she would receive $119 in food stamps every month. Once again, she did not know which family members had been found eligible for food stamps because the notice did not specify. (M.K.B. Decl. ¶ 11; *see also* P.E. Decl. ¶¶ 13-15; K.T. Decl. ¶ 5; W.J. Decl. ¶ 15; W.S. Decl. ¶ 23; M.T. Decl. ¶ 12; Ganju Decl. ¶¶ 14, 13, 20; Saylor Decl. ¶ 168.)

Second, HRA fails to provide a written notice of denial when an immigrant whom a worker deems to be ineligible asks to be added to an existing public benefits case. (*See, e.g.,* A.I. Decl. ¶¶ 25, 27; J.Z. Decl. ¶ 16, 19; M.H. Decl. ¶ 9, 12; K.T.Decl. ¶¶ 7, 9; M.A. Decl. ¶¶ 12, 14-15, 19, 20; Ganju Decl. ¶¶ 12, 20, 28, 40-45; Thomas Decl. ¶¶ 18-19, 22.) Angelica Higinio's experience is typical. In the course of making repeated attempts to be added to her son's active public benefits case, Ms. Higinio tried to give an HRA supervisor her immigration documents and to request benefits for herself, but "she refused to look at the papers and just told me I was ineligible." (Higinio Decl. ¶ 19.) Ms. Higinio attests that "[e]ven though I had gone to Melrose many times, I never received anything in writing stating that I was ineligible for benefits. I was never even allowed to apply, since the workers there just verbally told me I was ineligible for benefits." (*Id*. ¶ 21.)

Finally, many immigrants fail to receive notice of the denial of their application because HRA refuses to permit them to apply. P.S.'s worker "would not allow [her] to submit an application" because she is "not a U.S. resident and do[es] not have a social security number." (P.S. Decl. ¶ 13.) R.R.'s worker told her she "was ineligible for benefits based on [her] immigration status and she refused to let [her] apply." (R.R. Decl. ¶ 10.) When R.R. returned a month later and insisted on reapplying, "[t]he worker advised me she did not know why I was there because I was not eligible for benefits. I saw her pick up my application from the desk and drop it in the garbage can." (R.R. Decl. ¶ 12.) The same thing happened to her the next month. (R.R. Decl. ¶ 14; s*ee also* Diongue Decl. ¶ 14; P.E. Decl. ¶¶ 10, 11; Ganju Decl. ¶¶ 15, 19.)

When HRA does issue notices, the notices often contain misleading statements of the immigrant eligibility rules. As a result, it is difficult or impossible for class members who receive these notices to determine whether the denial of assistance or the amount of benefits

granted was proper, or to make informed decisions about whether to appeal the denials of their applications or discontinuances of their benefits.

The computer-generated notices issued by HRA to some class members omit many qualifying immigration statuses. For example, W.J. received a discontinuance notice that purported to list the immigration statuses that qualify needy immigrants for public benefits, but the notice failed to include battered Qualified Aliens on that list. (Saylor Decl. ¶¶ 199-208; W.J. Decl. ¶ 20, Ex. 13.) Since W.J.'s eligibility for benefits was based on her status as a battered Qualified Alien, the omission of that status from the list of qualifying statuses made it appear that the determination that she was ineligible was correct and that requesting a fair hearing to challenge the determination would be futile. Other computerized notices contain the same errors because they utilize the same stock incorrect eligibility language from defendants' computer systems. (J.Z. Decl. ¶ 24, Ex. K; Ganju ¶ 29, Ex. 7; Jacobs Decl. ¶ 48, 59; Saylor Decl. ¶ 200.)

Handwritten or individually typed notices also routinely contain misleading information. For example, the notice discontinuing M.E. and her daughter E.R.'s public benefits stated that the reason they were being discontinued was that they did not "apply for a prima facie," even though applying for a "prima facie" is not an eligibility requirement. Like the computer-generated notices, notices such as the one sent to M.E. create the misleading impression that a fair hearing would be futile. (M.E. Decl. ¶ 22, Ex. K; *see also* O.P. Decl. ¶ 20, Ex. H; Ganju Decl. ¶ 28, Ex. 12, 6; Fedosenko Decl. ¶ 14, Ex. G; Jacobs Decl. ¶ 49, Ex. 10.)

Without adequate notice of a denial and the reason for it, many class members are unable to effectively challenge erroneous denials in a State fair hearing. Those who are not permitted to apply lack any denial from which to appeal. Those who receive notices are routinely given misleading information about immigration eligibility rules that makes it difficult or impossible

for them to know whether they could successfully challenge the denial. Many plaintiffs and declarants went for many months without public benefits for these reasons. (L.M. Decl. ¶¶ 13, 19-20; Saylor Decl. ¶¶ 166-183; J.Z. Decl. ¶¶ 16, 19, 25; K.T. Decl. ¶¶ 5, 7, 9; Lourdes-Merilien Decl. ¶¶ 8, 12; M.H. Decl. ¶¶ 9, 12, 17; Prince Decl. ¶¶ 12, 29; P.E. Decl. ¶¶ 10, 14, 24; W.J. Decl. ¶¶ 15, 22; M.T. Decl. ¶¶ 12, 16; Thomas Decl. ¶¶ 6, 18-19, 22.)

4. The State fair hearing process does not cure the problems.

State OTDA and State DOH are required by law to ensure that HRA accurately and timely delivers public benefits to eligible class members. The only mechanism by which the State defendants attempt to do so is the State fair hearing system. That system is wholly inadequate and ineffective in rectifying widespread and persistent errors by HRA in the delivery of public benefits to class members.

Fair hearing decisions on the issue of immigrant eligibility usually do not direct a job center to take any action other than to "process" the application or to "review" the case. An instruction of this kind leaves the application in the same status as it was prior to the fair hearing. Immigrants commonly receive decisions that merely direct the job center to continue to process the application. (*See, e.g.*, M.A. Decl. ¶ 17, Ex. D; Diongue Decl. ¶ 19, Ex. G; Declaration of Maryanne Sexton (Sexton Decl.) ¶ 10; Saylor Decl. ¶ 174, 182, 217; O.P Decl. Ex. D; L.W. Decl. ¶ 21, Ex. G; L.M. Decl. ¶ 18, Ex. F; Ganju Decl. ¶¶ 63, 65, 69, 73, Ex. 15-18; Higinio Decl. ¶ 24, Ex. H; M.H. Decl. Ex. F; Fofana Decl. ¶ 14, Exs. G, J; Prince Decl. ¶ 26, Ex. F; R.R. Decl. ¶ 16, Ex. D; W.S. Decl. ¶ 24, Ex. G; Jacobs Decl. ¶¶ 11, 17, 37, 43, 51, 57, 66, 84.) A general command of this kind provides no guidance to the worker and, thus, no remedy to the appellant. (*See, e.g.*, Sexton Decl. ¶¶ 10, 11 (decision directed HRA to process application but

failed to determine eligibility, and HRA responded to the decision by denying the application again); W.S. Decl. ¶¶ 24-25, Ex. H, I ; Fofana Decl. ¶¶ 14-15, 27.)

When immigrants return to their job centers after receiving fair hearing decisions, the centers rarely correct their errors or grant the appropriate level of benefits. (*See, e.g.*, Diongue Decl. ¶ 19, Ex. G; Sexton Decl. ¶¶ 10-12; Fedosenko Decl. ¶¶ 13-14; L.M. Decl. ¶¶ 18, 20); L.W. Decl. ¶¶ 21, 27; Eiley Decl. ¶ 29; Fofana Decl. ¶¶ 15, 27; M.F. Decl. ¶ 20; Prince Decl. ¶ 27; O.P Decl. ¶¶ 3, 22, 28-30; R.R. Decl. ¶¶ 16, 20; Ganju Decl. ¶¶ 45, 66, 70, 73, 74; W.S. Decl. ¶¶ 26-28.) Indeed, it is common for HRA workers to refuse to comply with or even read fair hearing decisions. (*See, e.g.*, Saylor Decl. ¶ 192; R.R. Decl. ¶ 18; Wollmershauser Decl. ¶ 4; Fofana Decl. ¶ 15; Johnson Decl. ¶ 12; J.Z. Decl. ¶ 32; W.S. Decl. ¶¶ 25, 27; W.J. Decl. ¶ 21; Hickey Decl. ¶ 13; Jacobs Decl. ¶ 20.)

Adding to the problem, most immigrants receive fair hearing decisions that fail to cite or that misstate the applicable law. (*See, e.g*., Ganju Decl. ¶¶ 79-80, Ex. 19, 20; Saylor Decl. ¶¶ 182, 190, 217; Diongue Decl. Ex. G; M.E. Decl. Ex. O; Jacobs Decl. ¶¶ 11, 18, 37, 43, 51, 57, 66, 80, 82, Ex. 27; W.J. Decl. Ex. 13; O.P. Decl. Ex. I; L.W. Decl. Ex. G ; L.M. Decl. Ex. F; M.T. Decl. Ex. I.; K.T. Decl. Ex. C.; Prince Decl. Ex. F). In a response to a Freedom of Information Law request by plaintiffs' counsel, the State OTDA identified 42 fair hearing decisions from 2004 and 2005 that included an issue of immigrant eligibility, and out of those 42 decisions, 35 failed to discuss laws or guidelines relating to that very issue. (McEnnis Decl. ¶ 5.) The seven remaining decisions incorrectly or incompletely state the law. (*Id*., *passim*.) Most of those decisions do not even identify the applicant's immigration status. (*Id*. ¶ 4.)

ARGUMENT

POINT I

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SHOULD BE GRANTED.

"To obtain a preliminary injunction the moving party must show, first, irreparable injury, and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships decidedly tipped in the movant's favor." *Green Party v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004). Preliminary relief under Rule 65 of the Federal Rules of Civil Procedure is an appropriate remedy in cases involving the deprivation of a right secured by the laws of the United States, including claims that individuals have been deprived of public benefits to which they are entitled. *See, e.g.*, *Reynolds*, 35 F. Supp. 2d 331 (issuing a preliminary injunction to prevent the improper denial of food stamp, Medicaid, and public assistance applications).

A. Class Members Have Suffered And Will Continue To Suffer Irreparable Harm Unless Defendants Are Enjoined to Provide Class Members With the Benefits For Which They Are Eligible.

The Second Circuit considers "a showing of irreparable harm to be the most important prerequisite for the issuance of a preliminary injunction." *Nat'l Ass'n for the Advancement of Colored People v. Town of E. Haven*, 70 F.3d 219, 224 (2d Cir. 1995). *Accord Reynolds*, 35 F. Supp. 2d at 339. This Court has repeatedly held that the erroneous denial of public benefits results in "extreme and very serious damage" that constitutes irreparable harm. *Hurley v. Toia*, 432 F. Supp. 1170, 1176 (S.D.N.Y. 1977) (internal quotations omitted), *aff'd*, 573 F.2d 1291 (2d Cir. 1977); *Reynolds*, 35 F. Supp.2d at 339 ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury" (quoting *Morel v. Giuliani*, 927 F. Supp. 622, 635 (S.D.N.Y. 1995)); *Becker v. Toia*, 439 F. Supp. 324, 336 (S.D.N.Y. 1977) (issuing a

preliminary injunction to prevent reductions in Medicaid benefits).

Food stamps, Medicaid, and public assistance are essential subsistence benefits that enable class members to survive day to day. Every day that class members live without their full public benefits is a day of "brutal need," causing physical and emotional injury that cannot be compensated with later payments or other monetary awards. *See Goldberg v. Kelly*, 397 U.S. 254, 260-65 (1970). In *Goldberg*, the Supreme Court observed that denying public benefits "may deprive an *eligible* recipient of the very means by which to live." *Id*. at 264 (emphasis in original). This wrongful deprivation constitutes irreparable injury.

Class members suffer irreparable injury in many different ways. Many class members and their children suffer from hunger and poor nutrition because they do not have enough money for food. For example, although she is breastfeeding, M.K.B regularly does not eat enough because she does not have enough money. (M.K.B. Decl. ¶¶ 14-15.) L.M., who was hospitalized for dehydration and low potassium, is forced to skip meals, and often has headaches or is dizzy. (L.M. Decl. ¶¶ 14, 21.) L.W., who is recovering from kidney surgery and suffers from stomach pain, cannot get enough to eat unless others share food with her. (L.W. ¶¶ 22, 27.) Anna Fedosenko is suffering from anemia and is unable to eat food rich in iron as recommended by her doctor. (Fedosenko Decl. ¶¶ 9-10.) Denied public assistance for six months, Khady Fofana went for days at a time without food, and depended on friends and free social services for the food she got. (Fofana Decl. ¶¶ 1, 27; s*ee also* L.A.M. Decl. ¶¶ 36, 40, 45; M.A. Decl. ¶ 21; O.P. Decl. ¶¶ 45-46; Diongue Decl. ¶ 24; A.I. Decl. ¶ 38; R.R. Decl. ¶ 20; P.E. Decl. ¶¶ 19-20; W.S. Decl. ¶¶ 3, 31-32; J.Z. Decl. ¶¶ 48-50; P.S. Decl. ¶ 18; M.T. Decl. ¶ 13; N.P. Decl. ¶ 23; Higinio Decl. ¶ 27; M.E. Decl. ¶ 28; Benyminov Decl. ¶ 11.)

Class members also lack the income they need to buy the barest necessities for their families. Denied public assistance since June 2005, L.A.M. frequently runs out of diapers, as well as toilet paper, laundry detergent, soap, and shampoo. (L.A.M. Decl. ¶ 37.) Sometimes charities give her these items, but she often has to go without them. (*Id.*) Last month, her son's daycare had to take diapers from the other children in order to put diapers on her son. At night, she sometimes puts a plastic bag on the bed instead of putting a diaper on her son so that only the bag – not the bed – gets wet. (*Id.* ¶¶ 37, 41.) She is also worried because her son does not have a winter coat, winter boots, or enough other warm clothes. (*Id.* ¶ 43.) M.A., M.K.B., A.I., and many other class members also cannot afford to buy their young children winter clothes or other basic necessities. (M.A. Decl. ¶ 21; M.K.B. Decl. ¶¶ 18-22; A.I. Decl. ¶¶ 33-41; M.H. Decl. ¶ 17; Diongue Decl. ¶¶ 22-24; P.E. Decl. ¶¶ 42, 44, 51-52; N.E. Decl. ¶ 20; Lourdes-Merilien Decl. ¶ 7; Prince Decl. ¶ 23; Higinio Decl. ¶¶ 29-30; M.E. Decl. ¶ 25; W.S. Decl. ¶ 33; L.W. Decl. ¶ 25; Thomas Decl. ¶¶ 30-31.)

Class members who have been denied Medicaid are unable to obtain routine health care, treat serious medical conditions, and obtain essential prescription medicines. Denied Medicaid for eight months, O.P. has been unable to see a gynecologist to get treatment for the debilitating pain in her ovaries she frequently suffers. (O.P. Decl. ¶¶ 36-40.) P.E. did not go to a doctor when she was in excruciating pain, and is still harassed by collection agencies because Medicaid refuses to pay the over $5000 in bills for her gallbladder removal surgery. (P.E. Decl. ¶¶ 20, 53.) M.K.B. is unable to obtain treatment for serious medical conditions. (M.K.B. Decl. ¶ 17; *see also* M.A. Decl. ¶ 23; P.S. Decl. ¶¶ 3,19; J.Z. Decl. ¶ 52; N.E. Decl. ¶ 20; M.E. Decl. ¶¶ 25, 37, Ex. L; Fofana Decl. ¶ 27).

Many class members have become homeless, or have been faced with the imminent threat of homelessness, because they lack the income they need to pay for housing. P.E. was forced to move into a homeless shelter with her children. (P.E. Decl. ¶¶ 18, 50.) Wrongfully denied the correct amount of assistance, N.E. was threatened with eviction and forced to move because she was behind in rent. (N.E. Decl. ¶¶ 20, 31; *see also* Lourdes-Merilien Decl. ¶¶ 11-12; Diongue Decl. ¶ 21; Fofana Decl. at ¶¶ 6, 27.)

Finally, class members who live in shelters are unable to qualify for housing or housing assistance because they have been wrongly found ineligible for public assistance. M.A. is not eligible for a housing subsidy that will allow her and her two-year-old daughter to move out of a homeless shelter only because the Crotona Job Center refuses to add her to her daughter's public assistance case. (M.A. Decl. ¶ 22; *see also* O.P. Decl. ¶ 24 (O.P. and her children are forced to live in a shelter.); M.K.B. Decl. ¶ 23 (same); L.A.M. Decl. ¶ 46; Prince Decl. ¶ 14; J.Z. Decl. ¶ 48; L.W. Decl. ¶¶ 25, 26; P.E. Decl. ¶ 29 (denied public housing).

B. Plaintiffs Are Likely To Succeed On The Merits.

Section 1983 imposes liability on any person who, acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory," deprives another person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Municipalities and state officials sued in their individual capacities are "persons" for purposes of § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) (municipalities); *Hafer v. Melo*, 502 U.S. 21, 23 (1991) (state officials). A plaintiff asserting claims under § 1983 "must assert the violation of a federal *right*, not merely the violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). In actions against municipal and state officials, the plaintiff must demonstrate that the actions challenged were taken pursuant to a

governmental policy or, if not authorized by "written law," by government practices that are "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell*, 436 U.S. at 691 (internal citations omitted).

These elements are fully satisfied here. Plaintiffs are suing for violations of federal rights unambiguously established by the Food Stamp and Medicaid Acts and the due process clause of the United States Constitution. The actions they challenge are taken pursuant to formal government policies or, when they are contrary to policy, are so pervasive and well-established as to constitute a "custom or usage" with the force of law.

1. Plaintiffs are asserting violations of clearly established federal rights

Plaintiffs seek to enforce clearly established rights under the federal Food Stamp and Medicaid Acts. In determining whether a statute creates a federal right for purposes of § 1983, three factors are relevant: Congress must have "intended that the provision in question benefit the plaintiff"; the asserted right must not be "so 'vague and amorphous' that its enforcement would strain judicial competence"; and it "must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-41 (citations omitted). Clarifying the third element in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002), the Supreme Court held that a federal right must be 'unambiguously conferred' to support a cause of action under § 1983. *Id.*

The claims asserted herein satisfy these standards. The Medicaid Act unambiguously provides that "all individuals wishing to make application for medical assistance under the [Medicaid] plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). Although the

Second Circuit has not yet addressed this language directly,[20] three other Circuits and several district courts in this Circuit have held that this language creates rights that are enforceable under § 1983. *Sabree v. Richman*, 367 F.3d 180, 189-93 (3d Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79, 88 (1st Cir. 2002); *Doe v. Chiles*, 136 F.3d 709, 714-19 (11th Cir. 1998); *Reynolds v. Giuliani*, No. 98 Civ. 8877 (WHP), 2005 WL 342106, at *15-16 (S.D.N.Y. Feb. 14, 2005); *Reynolds*, 35 F. Supp. 2d at 341; *Alexander A. v. Novello*, 210 F.R.D. 27, 35 (E.D.N.Y. 2002). Likewise, the Food Stamp Act unequivocally mandates that applicants must be permitted "to apply to participate in the program on the same day that the household first contacts a food stamp office in person during office hours." 7 U.S.C. § 2020(e)(2)(B)(3)(iii). Eligible applicants must be provided food stamps no later than 30 days after application. 7 U.S.C. § 2020(e)(3); 7 C.F.R. §§ 273.2(a), (g)(1). As numerous district courts in this Circuit have held, this language creates rights enforceable under § 1983. *Williston v. Eggleston*, 379 F. Supp. 2d 561, 574-78 (S.D.N.Y. 2005); *Roberson v. Giuliani*, No. 99 Civ. 10900 (DLC), 2000 WL 760300, *11 (S.D.N.Y. Jun 12, 2000); *Reynolds v. Giuliani*, 2005 WL 342106; *see Reynolds*, 118 F. Supp. 2d at 383.

2. Defendants have a policy, custom, and usage of denying public benefits to eligible immigrants

Liability may be imposed under § 1983 for actions taken pursuant to formal governmental policies, as well as for actions taken under color of any "custom or usage" of a state. "The policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation," *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870-71 (2d Cir. 1992), and need not have "received formal approval through the body's official decisionmaking channels."

[20] The Second Circuit has, however, held that similar language in another section of the Medicaid Act creates rights that are enforceable under § 1983. *Rabin v. Wilson-Coker*, 362 F.3d 190, 202 (2d Cir. 2004) (Section 1396r-6 of the Medicaid Act creates rights enforceable under § 1983). Section 1396r-6(a)(1) provides that families who were receiving public assistance "in at least 3 of the 6 months immediately preceding the month in which such family becomes ineligible for such aid, because of . . . income from, employment . . . shall. . . remain eligible for assistance . . . during the immediately succeeding 6-month period."

Id. A custom or usage "that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Board of the Co. Comm'rs of Bryan Co. v. Brown*, 520 U.S. 397, 404 (1997).

A policy, custom, or usage under § 1983 may be established in several different ways. *See Wahhab v. City of New York*, 386 F. Supp. 2d 277, 284 (S.D.N.Y. 2005). First, policies include "formal rules or understandings – often but not always committed to writing – that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). For example, the Court explained in *Pembaur* that the written rule in *Monell* requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary was a policy for purposes of § 1983. *Id*. at 481. Thus, formal policy directives, bulletins, and instructions issued by State OTDA, State DOH, and HRA constitute policies under § 1983.

Second, a custom and usage may be established by showing that subordinates who, although not themselves "authorized decisionmakers," nonetheless engaged in a practice "that was so permanent and well settled as to imply the constructive acquiescence of senior policy-making officials." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999) (internal quotations and citations omitted). Liability is established on this basis by showing a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jeffes v. Barnes*, 208 F.3d 49, 61 (2d Cir. 2000), *cert. denied*, 531 U.S. 813 (2000) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)); *see Sorlucco*, 971 F.2d at 870-71 ("So long as the discriminatory practices of city officials are persistent and widespread, they 'could be so permanent and well settled as to constitute a 'custom or usage' with the force of law.'").

Finally, a government entity's failure to train and/or supervise subordinate employees may give rise to liability under § 1983. As the Supreme Court explained in *City of Canton v. Harris*, 489 U.S. 378 (1989):

> [I]t 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.

Id. at 390; s*ee also Amnesty America v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004); *Jeffes*, 208 F.3d at 61-62; *Pangburn*, 200 F.3d at 71-72; *Wahhab*, 386 F. Supp. 2d at 284.

In this case, § 1983 liability is established on all three of these theories: City and State officials have issued formal written directives and instructions that are contrary to law, and/or have material misstatements and omissions concerning immigrant eligibility for public benefits. Authorized decision-makers have acquiesced in a longstanding custom and practice by their subordinates of denying public benefits to eligible immigrants. Finally, City and State policy-makers have been deliberately indifferent to the need to provide proper training and supervision to subordinate employees.

a. City and State policy directives contain material misstatements and omissions regarding immigrant eligibility for public benefits.

City and State directives and instructions contain material misstatements and omissions that are contrary to law in a number of different areas including: (1) eligibility of battered qualified immigrants for public assistance and Medicaid; (2) eligibility of disabled immigrants for food stamps; and (3) the use of federal Social Security numbers. (*See* Baum Decl., *passim*.)

(i) Battered qualified immigrants

Over the years, State OTDA and city policy directives have made many serious errors with regard to the eligibility of battered qualified immigrants for public benefits. Those errors have led to a generation of HRA caseworkers and supervisors who misunderstand and misapply the law. Although some corrections have been made recently, State OTDA and City directives still retain significant errors.

For example, the City's most comprehensive and widely available set of instructions on handling domestic violence cases contains a serious omission. It states that a domestic violence victim is eligible for benefits if she receives a "Notice of Prima Facie Case." No other battered qualified immigrants are mentioned. HRA, PD 03-65-ELI, at 17 (Nov. 25, 2003) (attached as an Ex. 10 to Baum Decl.). (*See also* Baum Decl. ¶ 28.)

HRA and State OTDA have also published "Alien Eligibility Desk Aids" that summarize the eligibility of immigrants for public benefits. From 1998 until 2003, all of the City and State desk aids omitted any reference to the entire I-130 group of battered qualified immigrants who have been sponsored for immigration status by their citizen or lawful permanent resident spouse through I-130 family-based petitions. Although the current desk aids refer to the I-130 group, they discuss it under a large-print heading concerning immigrants with a "prima facie" case, erroneously making it appear that the corrections pertain to VAWA self-petitioners only. (*Id.* ¶ 18.) The current City and State desk aids are still not fully correct with regard to battered qualified immigrants. For example, they omit reference to V-3 visa holders like M.K.B. and A.I.'s children.[21] (*Id.* ¶ 23.)

[21] The desk aids also fail to indicate that the following are Qualified Aliens: conditional permanent residents (green card holders who apply for a green card within two years of marriage) with proof of abuse; and immigrants with a notice of establishing that a "battered spouse waiver" (I-751) has been filed. (Baum Decl. ¶ 23.)

These omissions, and others in State and City policy directives (*see* Baum Decl. ¶¶ 9–24), have erroneously led caseworkers to conclude that a Prima Facie Notice under VAWA is the exclusive means for establishing a battered immigrant's eligibility for public assistance and Medicaid. (*See supra* at 18-19.) So great is the confusion generated by this failing that many HRA workers believe that battered immigrants who receive an *approval* of their VAWA self-petition are no longer eligible because they no longer have a current Prima Facie Notice.[22] (*See supra* at 18.)

(ii) Disabled Qualified Aliens

Qualified Aliens are entitled to federal food stamps if, *inter alia*, they are in receipt of disability-related benefits, including disability-based Medicaid. HRA has failed to follow State directives that implement this federal statutory entitlement. State OTDA has issued a directive that correctly provides that persons applying for food stamps who are also applying for or receiving Medicaid "must have a Medicaid disability determination if there is an indication that they may qualify for disability-related Medicaid." State OTDA, 03 Information Letter (INF) 14, at 5 (April 2, 2003) (attached as Ex. 34 to the Baum Decl.). If the determination establishes that the person is disabled, then he or she is "in receipt of disability-related benefits" for federal food stamp purposes. (*Id*. at 4-5.) State DOH's Medicaid Reference Guide (MRG) requires this disability evaluation for the Medicaid program. (Baum Decl. ¶ 40, Ex. 34.)

Several City policy directives mention that Qualified Aliens in receipt of disability-based Medicaid are eligible for food stamps. (Baum Decl. ¶ 42.) But they fail to implement the State's instruction that persons applying for food stamps who are also applying for or receiving

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[22] The initial VAWA prima facie notices expire after 180 days. Federal immigration authorities will issue extensions of these notices until the petition is approved. Once the petition is approved, however, they will not issue a new prima facie notice.

Medicaid "*must have* a Medicaid disability determination" if there is an indication they may be disabled. (*See, e.g.*, State OTDA, 03 INF 14, at 5 (April 2, 2003) (emphasis added) (attached as Ex. to Baum Decl.) Nor has the City created any mechanism for performing such determinations. (Baum Decl. ¶ 43.)

Recognizing that HRA lacked a policy directive requiring such referrals, Elizabeth Saylor, a Legal Aid Society attorney, made repeated requests to personnel at the highest levels of HRA, State OTDA, and State DOH asking those agencies to establish the required referral procedures. Despite those requests, HRA and State OTDA have failed to do so. (Saylor Decl. ¶¶ 123- 148.)[23] As a result, many disabled Qualified Aliens, including plaintiffs Anna Fedosenko and L.W., still do not receive the food stamps they desperately need. (*See infra* at 19.)

(iii) Social Security numbers

Errors regarding the use of Social Security numbers (SSN) arise in two different contexts: cases in which federal law requires furnishing a SSN as a condition of eligibility; and cases in which federal law is inapplicable and a state statute specifically defines as eligible certain immigrants to whom the Social Security Administration (SSA) will not issue SSNs.

SSNs required by federal law. Federal law requires that all applicants for federal food stamps and federal Medicaid provide a SSN or apply for one before certification. 7 C.F.R. § 273.6(a) (food stamps); 42 C.F.R. § 435.910(a) (Medicaid). If otherwise eligible applicants for these programs do not have a SSN, the agency administering the food stamp or Medicaid program must assist the applicants in completing an application for a SSN and send them to

[23] In response to Ms. Saylor's requests, HRA issued a policy directive which explains that instructions in a prior policy directive for entering applicants in this category in the WMS computer system have been revised to correct a computer glitch affecting these cases. This new directive did not, however, resolve the underlying problem that there is still no procedure for referring welfare recipients for Medicaid disability determinations. (Saylor Decl. ¶ 40, 46.)

apply at the local SSA office. 7 C.F.R. § 273.6(b)(2) (food stamps); 42 C.F.R. § 435.910(e) (Medicaid).

SSA will issue a SSN to immigrants not authorized to work by USCIS (non-work SSN) when they need one to obtain federal food stamps or federal Medicaid if they are otherwise eligible for those programs. 20 C.F.R. § 422.104(a)(3)(i). To obtain such a non-work SSN, the local benefits agency must follow the procedure set forth in SSA's Program Operations Manual System (POMS), which requires that a local benefits agency must provide an applicant with a letter meeting certain specific requirements. The letter must not be a form letter; must be dated; must specifically identify "the nonwork reason for which an SSN is required, the relevant statute or regulations requiring the SSN 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." SSA, POMS, Alien without Work Authorization – Nonwork Need for an SSN, Records Maintenance (RM) 00203.510, at 2 (2002) (attached to Ex. 48 to Baum Decl. and available at http://policy.ssa.gov/poms.nsf/).

State and City policy directives virtually guarantee that immigrants who require a non-work SSN as a condition of obtaining federal food stamps and federal Medicaid will not obtain one. This is because State and City policy directives instruct HRA workers to refer applicants to SSA with letters that do not meet SSA's requirements. (Baum Decl. ¶ 59.) The letter prescribed by State OTDA is a form letter, has no space for a date, does not cite the specific federal benefit program for which the applicant is eligible, and does not indicate the statute or regulation requiring an SSN as a condition of receiving the benefit. (*Id.*) Likewise, HRA's instructions attach a draft letter to SSA that fails to specify whether the applicant is eligible for federal or state

benefits. (*Id*. Ex. 7.) SSA will not issue SSNs in response to such letters. (Ganju Decl. ¶ 35-36, Ex. 10; M.E. Decl. ¶¶ 29, 31 Exs. N, P, Q; M.T. Decl. ¶¶ 20, 21.)

Immigrants who are eligible for benefits under State law and who cannot obtain SSNs. SSA will only provide a SSN to an immigrant for the purpose of obtaining a state or local public benefit only if the immigrant has work authorization. (Ganju Decl. ¶ 36, Ex. 10.) New York State Social Services Law §122, however, makes eligible for public assistance and State Medicaid certain immigrants who cannot obtain work authorization and who therefore cannot obtain SSNs, such as battered qualified immigrants and certain PRUCOL immigrants. Nevertheless, one state regulation purports to require applicants for public assistance to furnish a SSN, 18 N.Y.C.R.R. § 351.2(c), while other regulations merely require applicants who do not have a SSN to apply for one. 18 N.Y.C.R.R. § 370.2(c)(3)(1); 18 N.Y.C.R.R. § 369.2(b)(1)(i). State Medicaid regulations make all three of these inconsistent provisions applicable to the Medicaid program. 18 N.Y.C.R.R. § 360-1.2 (with exceptions not relevant here, "All departmental regulations relating to public assistance and care apply to medical assistance . . . ."). To the extent that State regulations purport to require applicants, as a condition of obtaining benefits for which they are eligible under State statutes, to furnish a SSN that is impossible to obtain those regulations are unlawful. *See, e.g.*, *King v. Smith*, 392 U.S. 309 (1968).

Not surprisingly, State policy directives and instructions that address the obligation to furnish a SSN as a condition of eligibility for State Medicaid and public assistance are internally inconsistent and ambiguous. State OTDA's instructions concerning public assistance say several times that "*Furnishing* an SSN is a condition of temporary assistance eligibility." (State OTDA, 02 INF 40, at 2 (Nov. 27, 2002) (emphasis added) (attached as Ex. 33 to Baum Decl.). Yet in numerous other places they refer to an obligation to "furnish *or apply for* an SSN." (*Id*.)

Likewise, a 2004 State DOH directive applicable to Medicaid recites that "New York State's laws and regulations require a Social Security Number for public benefits, including Medicaid." (State DOH, 04 OMM/ADM-7, at 28 (Oct. 26, 2004) (citing, *inter alia*, 18 N.Y.C.R.R. §§ 351.2(c), 360-1.2.) (attached as an Ex. to Baum Decl.) Despite that statement, the directive continues: "All applicants for Medicaid thus must provide a Social Security Number *or proof that they have applied for one or tried to apply for one*." *Id.* (emphasis added). The directive makes an exception even to this requirement for, *inter alia*, "certain battered women immigrants who prove their status under the Violence Against Women ACT (VAWA), as set forth in the section titled 'Battered Immigrant' of this directive." *Id.* (*See also* Baum Decl. ¶ 71.)

State OTDA's instructions fail to make an exception for cases in which an immigrant lacks work authorization, and therefore cannot obtain a SSN. Although State OTDA acknowledges that "SSA no longer assigns SSNs to lawfully admitted aliens (legal aliens) who do not have work authorization," the agency's directive asserts incorrectly: "However, SSA will issue SSNs to aliens who are otherwise eligible for temporary assistance if State Law requires an SSN as a condition of eligibility for temporary assistance." State OTDA, 02-INF-40, at 2 (attached as Ex. 33 to the Baum Decl.)

These faulty and confusing instructions led high-level decision-makers at HRA to conclude that furnishing a SSN is required as a condition of eligibility for public assistance and State Medicaid, even when it is impossible to obtain one. For example, Elaine Witty is Executive Director of HRA's central Office of Immigrant and Refugee Affairs, an office that is supposed to have specialized expertise regarding immigrant eligibility for benefits. In a conversation with Reena Ganju, an attorney with Sanctuary for Families, on or around June 20,

2004, Ms. Witty told Ms. Ganju that "where a public benefits recipient has been denied a Social Security number, her case should be closed because a number is required to receive benefits. She stated that she was doing me a favor by keeping cases of battered immigrants open where they had been denied Social Security numbers." (Ganju Decl. ¶ 35.)

Consistent with Ms. Witty's understanding, HRA's February 2003 policy directive on SSN rules required applicants for public assistance and State Medicaid to furnish a SSN, even when SSA will not supply one. In a correction belatedly issued in September 2004, HRA acknowledged that public benefits may be issued to battered immigrants with I-130 family based petitions or VAWA self-petitions even if they are denied a Social Security number by SSA, as long as they provide proof of the denial. (Baum Decl. ¶ 44.) Unfortunately, this directive says nothing about other categories of immigrants who are eligible for public benefits but who may not have a SSN because they lack work authorization. They include persons who are not eligible for work authorization (because, for example, they are PRUCOL), and persons who are eligible for work authorization but have not obtained it (because, for example, they lack the ability to pay for it, or because they are disabled or are minor children). Since the directive says nothing about those other categories, and since the 2003 directive was never withdrawn, workers continue to infer that Social Security numbers are required in those circumstances. (*Id*. ¶ 65.)

Adding further confusion, HRA issued yet another Policy Directive stating that if the reason for SSA's denial of an SSN cannot be resolved, the applicant's eligibility for benefits must be "re-evaluate[d]." (Baum Decl. ¶ 80.) As applied to immigrants with approved prima facie determinations, this directive contradicts the prior one that states that benefits should be issued when the applicant demonstrates that SSA denied her request for an SSN. It also leaves

the faulty impression that SSA will issue SSNs for these applicants when, in fact, it will not. (*Id.* at 81.)

b. HRA has a custom and usage of denying public benefits to eligible immigrants

City and State policy-makers have acquiesced in a longstanding custom and practice by their subordinates of denying public benefits to eligible immigrants. For at least four reasons, it is clear that errors by City personnel are part of a persistent and widespread custom and practice, and not merely random, sporadic, and isolated mistakes by individuals.

First, the computer systems used by the City and State defendants are plagued with flaws that cause systemic errors in public benefits cases involving immigrants. Many of these flaws are traceable to POS, the graphical "front end" that HRA developed to the State's aging WMS computer system. POS is used in all but one of HRA's job centers. POS reflects a flawed implementation of many rules and regulations that relate to immigrant eligibility for benefits. These flaws are built into the fields and menu choices within POS itself. Since POS is used in almost all job centers, these short-comings cause systemic errors. (*See supra* at 20.)

Second, as discussed at length in the accompanying Baum Declaration, State and City policy directives and instructions have been seriously flawed for years, and are still flawed in many important respects. Most caseworkers and supervisors employed by HRA were trained using these flawed directives and are unaware they are inconsistent with federal and state statutes and regulations.

Third, many HRA personnel have candidly admitted that HRA workers are ignorant of the correct immigrant eligibility rules and procedures. For example, in March 2005, the Deputy Director of the Euclid Job Center acknowledged to Elizabeth Saylor that workers at the Euclid center do not know rules regarding immigrant eligibility for public benefits, and that workers at

that center "do not know what a prima facie notice is." (Saylor Decl. ¶ 225, *see also id*. at 114.) In September 2005, the Administrative Assistant (AA) to the Director at the Bay Ridge Job Center admitted that because of flaws in the computer system, multi-suffix cases must be manually processed. "She stated that only one person at her center knows how to properly open these cases and that when he is out then they have to ask someone from another center to open the case." (*Id*. ¶ 17.) On December 5, 2005, a worker at the specialized Manhattan Immigrant and Refugee Job Center admitted that most workers "probably do not know" that asylum applicants with work authorization are eligible for public benefits, or how to enter their applications into the computer system. (Fofana Decl. ¶ 23.)

Indeed, the declarations submitted in support of this motion are filled with instances of supervisory personnel demonstrating their ignorance of immigrant eligibility rules. For example, on December 5, 2005, the AA to the Director of the Euclid Job Center discontinued M.E. and E.R.'s benefits, stating that they were ineligible because they had been denied a SSN by SSA (Ganju Decl. ¶ 102.) In July 2005, a supervisor at the Hamilton Center told M.E. that immigrants with an approved I-130 and proof of domestic abuse are not eligible for benefits. (M.E. Decl. ¶ 28, 29.) The same thing happened to J.Z. at the Colgate Job Center in September 2004. (J.Z. Decl. ¶ 19.) At the Fordham Job Center in June 2005, a supervisor refused to accept Ms. Higinio's application, telling her she was ineligible. When Ms. Higinio protested that "my immigration attorneys said I was eligible for benefits, [the caseworkers] told me that immigration lawyers know the immigration laws, but that they, the caseworkers, knew the welfare laws, and I was just not eligible." (Higinio Decl. ¶¶ 19, 25.) In July 2005, an AA to the Director at the Linden Center said P.E. was ineligible for public benefits because she did not have work authorization. (Petrova Decl. ¶ 8.) In March 2005, a supervisor at the Queens Job Center denied

public benefits to two domestic violence victims after stating that individuals with deferred action notices are not eligible. (Gonzalez Decl. ¶¶ 15, 23; *see also* Price Decl. ¶¶ 5-9.) As set forth above, the job center directors' offices do not know how to refer immigrants for Medicaid disability determinations. (*See* infra. at 41.)

When supervisory personnel misunderstand and misapply the rules, there is a strong likelihood that errors by the line workers they supervise are systemic and not isolated.

Finally, the sheer breadth, scope, and frequency of the errors described in the accompanying declarations are indicative of the systemic nature of the problem. Ms. Ganju describes approximately 55 cases she has handled between September 2003 and March 2005 involving erroneous immigrant eligibility determinations. (Ganju Decl. ¶¶ 1-117.) In the last year alone, Ms. Saylor has represented, supervised the representation of, or provided advice to approximately 50 cases of the same kind. (Saylor Decl. ¶¶ 107-226.) These two attorneys can see only a small percentage of immigrants who are denied assistance.

c. Defendants have failed to train and supervise

These systemic errors are evidence of a gross and alarming failure by policy-making personnel to train and supervise their subordinates. The Second Circuit has outlined three elements necessary to establish a claim for failure to train. *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992). The plaintiff must demonstrate "that a policymaker knows 'to a moral certainty' that her employees will confront a given situation." Additionally, 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 establish "that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." *Id.*

These elements are plainly satisfied here. None of the categories of immigrants discussed in this memorandum is rare or unusual. The State and City defendants know "to a moral certainty" that immigrants in these various eligibility categories will apply for public benefits at City welfare offices. Nor can there be any doubt that training and supervision will make eligibility decisions concerning these immigrants "less difficult or that there is a history of employees mishandling the situation." *Id.*

Finally, for the reasons outlined above, the evidence is overwhelming that wrong choices by City employees will "frequently cause the deprivation" of the plaintiffs' rights to public benefits. Indeed, not only have defendants' failure to train frequently caused the deprivation of the plaintiffs' rights, but in those limited instances when defendants have attempted to provide training, they have done so with deeply flawed training materials.

For example, training materials prepared for State OTDA by the University of Albany fail to indicate that battered qualified immigrants are eligible for public benefits at all in one lesson. Moreover, another lesson in these training materials that includes a discussion of immigrant eligibility for federal food stamps also fails to include any domestic violence survivors in the explanation of Qualified Alien status. (Baum Decl. ¶ 32.) Likewise, State training materials erroneously state that lawful permanent residents are the only immigrants who are eligible for State funded public assistance or State funded Medicaid. Not once do these training materials mention PRUCOL immigrants, much less explain who falls within this class of immigrants, even though the title of the Lesson section is "Citizenship Requirements for Participation." (*Id.* ¶ 48; *see also id.* ¶¶ 31-36, 52, 83, 84, 93.)

HRA training materials reinforce various mistakes in HRA's and State OTDA's policy directives. For example, in a December 5, 2001 training manual subtitled "Food Stamps for

Aliens," HRA defines a battered Qualified Alien as someone who "has been granted or has a petition pending with INS that sets forth a prima facie case." HRA, Training Workbook, Food Stamps for Aliens, at 20 (2001) (attached as Ex. 19 to the Baum Decl.). No mention is made of battered qualified immigrants who have approved I-130's or other documents showing that they are battered qualified immigrants. (Baum Decl. ¶ 34.) Likewise, the City's "April 2005 Monthly Staff Meeting Instructor's Guide" defines a battered alien solely as someone with a prima facie notice. FIA, Office of Training Operations, April 2005 Monthly Staff Meeting Insturctor's Guide, at 13-14. No other battered immigrants are mentioned. *Id.* ¶ 35.

3. The City defendant's failure to provide timely and adequate written notice of public benefits denials or discontinuances violates federal and State statutes and regulations, and the Due Process Clause of the U.S. Constitution

Adequate notice is one of the most basic and fundamental requirements of due process. *See Goldberg*, 397 U.S. 254; *accord Mullane v. C. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "In order to be constitutionally adequate, notice of benefits determinations must provide claimants with enough information to understand the reasons for the agency's actions." *Kapps v. Wing*, 404 F.3d 105, 123 (2d Cir. 2005). As the Second Circuit held in *Kapps*, "Claimants cannot know whether a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action." *Id*. at 124; *see Henry v. Gross*, 803 F.2d 757, 766 (2d Cir. 1986) ("the recipient must be given information sufficient to put him in a position to defend the impending termination of benefits"); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 100 (1975). "[I]n the absence of effective notice, the other due process rights afforded a benefits claimant – such as the right to a timely hearing – are rendered fundamentally hollow." *Kapps*, 404 F.3d at 124.

Federal and State regulations that implement these due process rights also require timely and adequate notice of any denial or termination of benefits. Notices must indicate the action taken by the agency, the reason for any denial or the amount of the benefit granted, the laws and regulations on which that action was based, and the effective date of the action. *See* 42 C.F.R. §§ 435.911, 435.912 (federal Medicaid); 7 C.F.R. § 273.10(g)(2) (federal food stamps); 18 N.Y.C.R.R. §§ 358-3.3, 358-2.2 (public assistance).

In flagrant violation of these mandates, HRA fails to provide any written notice of denial in three circumstances: (1) when assistance is granted to some family members in a "mixed family" but denied to others because of immigration status; (2) when an immigrant whom a worker deems to be ineligible asks to be added to an existing public assistance case; and (3) when HRA informs an immigrant orally that she is ineligible and refuses to permit her to apply. (*See supra* at 26.) HRA's failure to provide a written notice of denial in these circumstances plainly violates due process, *Goldberg,* 397 U.S. at 267-68, and federal and state regulations.

HRA's practice with regard to "mixed families" is particularly egregious because it is affirmatively misleading. When an immigrant in a "mixed family" applies for benefits, HRA issues a notice stating that benefits have been *granted* – even though benefits have actually been *denied* for some immigrant family members. Immigrants in "mixed families" have no way of knowing that benefits have been denied for some household members, since the notices do not indicate for whom benefits have been granted. (*See supra* at 22.) False and misleading notices like these clearly violate due process. *See, e.g., Reynolds,* 35 F.Supp. at 341 ("Plaintiffs' allegations concerning various practices at job centers such as providing false or misleading information to applicants about their eligibility, . . . state[s] a viable due process claim."); *Mayhew v. Cohen,* 604 F. Supp. 850, 857 (E.D. Pa. 1984) ("Constitutionally adequate notice

must not only contain the necessary minimum amount of relevant data, it must also not mislead its recipient about that data's significance."); *Doston v. Duffy,* 732 F. Supp. 857, 872 (N.D. Ill. 1988) ("The due process clause prohibits unintelligible, confusing, or misleading notices.").

Additionally, when HRA issues written notices, those notices give misleading or erroneous information regarding the basis for a denial of benefits. (*See supra* at 27-29.) HRA's computer-generated and handwritten notices routinely misstate the law regarding immigrant eligibility for benefits and leave out references to eligible categories of immigrants. *See supra* at 28-29. These notices mislead immigrants into believing they are not eligible – and therefore have no basis to appeal – when in fact they are eligible. Accordingly, they violate due process. As the Supreme Court held in *Goldberg*, notice to a public assistance recipient must "detail[] the reasons for the proposed termination" so a recipient is able to determine whether the intended action "rest[s] on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of the particular case." *Goldberg*, 397 U.S. at 267-68. A notice that states false or misleading information about eligibility rules does not comply with this mandate. *Reynolds*, 35 F. Supp. 2d at 341.

POINT II

THE PROPOSED PLAINTIFF 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).

Because class members satisfy the requirements of Rule 23(a) and of 23(b)(2) and (b) (3), and because class certification is essential to the fair and efficient adjudication of this case, plaintiffs' motion for class certification should be granted. Courts have frequently certified classes of applicants and recipients of public benefits seeking to challenge a policy or custom of denials of public benefits. *See e.g., Reynolds*, 118 F. Supp. 2d at 392; *Morel*, 927 F. Supp. at 633 (S.D.N.Y. 1995); *Brown v. Giuliani*, 158 F.R.D. 251, 268-69 (E.D.N.Y. 1994).

A. The Class Satisfies Rule 23(a)

1. The proposed class is so numerous as to warrant class certification.

Rule 23(a)(1) of the Federal Rules of Civil Procedure requires that the class be "so numerous that joinder of all members is impracticable." Impracticable does not mean impossible, but simply difficult or inconvenient. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). The Second Circuit has presumed numerosity "at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

The facts in this case support a finding of numerosity. A portion of the proposed class consists of indigent battered immigrants who have filed either VAWA self-petitions, petitions for a battered spouse waiver (I-751), or applications for U visa-related interim relief. A survey of organizations in New York City that assist indigent battered immigrants with filing these applications indicates that at least 488 VAWA self-petition cases with 338 and 363 derivatives, 58 battered spouse waiver cases, and 157 applications for U visa interim relief are filed annually on behalf of indigent battered immigrants in New York City. (Declaration of Camille Carey

dated Dec. 6, 2005 (Carey Decl). ¶¶ 3-16.) Over 90 percent of these applications were submitted with fee waiver requests, demonstrating that the immigrants were impoverished and likely to be class members in this case. (*Id.* ¶ 16.) It is apparent from these figures alone that the number of proposed class members far exceeds the number of persons who could practically be joined in this action. (*Id.* ¶ 2.)

Moreover, the class size is substantially larger than these figures indicate. First, the number of class members with pending VAWA self-petitions, I-751 battered spouse waiver cases, and applications for U visa-related interim relief are much larger than the number of annual cases filed because of the length of time it takes for USCIS to adjudicate these matters. (*Id*. ¶¶ 17-19.) Second, the proposed class includes individuals in other immigration categories, such as class members who have approved or filed I-130 family-based petitions and proof of abuse, class members who have been lawful permanent residents for less than five years, and others. (*Id.* ¶ 6.) Third, the survey did not include all providers of domestic violence-related immigration services in New York City, and indeed it would have been impractical to contact all such providers. (*Id*.)

The fact that the size of the proposed class has not been precisely determined "is not a fatal defect in the motion; a class action may proceed upon estimates as to the size of the proposed class." *Jane B. v. New York City Dep't of Social Servs.*, 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (quoting *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)); *see also Robidoux*, 987 F.2d at 935. In *Reynolds*, the court found the numerosity requirement satisfied where plaintiffs contended "thousands of families and individuals apply for food stamps, Medicaid, and cash assistance from City defendants each month. Because City defendants deter, discourage, and prevent many of those who seek to file applications . . . from filing applications,

the identity of many plaintiff class members is unknown to plaintiffs and, therefore, joinder is impracticable." 118 F. Supp. 2d at 388.

The requirement that joinder be impracticable is not solely dependent upon numbers, but on the totality of the circumstances of a case. *Robidoux*, 987 F.2d at 936. Joinder is also impracticable here because of the fluid nature of the class. *See Reynolds*, 118 F. Supp. 2d at 388. The composition of the class will change constantly as some members of the class go to work and become ineligible for benefits and other class members' applications are denied. *Cf. Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980) ("[c]lass. . . will change constantly as existing AFDC, Social Security and SSI benefits are discontinued, and new applications are granted . . . [t]herefore, joinder of all class members is impracticable"); *see also Jane B.*, 117 F.R.D. at 70 ("In view of the fluid composition of the [class], joinder. . . is impracticable.").

2. Class members share common issues of law and fact and named plaintiffs' claims are typical of claims of the class.

The commonality requirement of Fed. R. Civ. P. 23(a)(2) is satisfied when class members share a question of law or fact and the requirement of typicality of Rule 23(a)(3) is satisfied when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2) & (3).[24] Here, all class members share common issues of law and fact, *e.g.*, whether defendants erroneously and systemically fail to provide public benefits to members of the class as a result of various practices including, but not limited to, maintaining a computer system that wrongly omits significant categories of eligible immigrants; providing inaccurate training and policy guidelines for employees charged with assessing eligibility; and

[24] Courts will often consider commonality and typicality together because "[t]he crux of both requirements is to ensure that 'maintenance of a class action is economical and that the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Reynolds*, 118 F. Supp. 2d at 389 (quoting *Marisol A. ex rel. Forbes v. Giuliani*,126 F.3d 372, 376 (2d Cir. 1997).

providing fair hearings that more often than not result only in remands that re-start the flawed process.

This common question is 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).

To establish typicality, the class members must show that "each class member's claim arises from the same course of events." *Reynolds*, 118 F. Supp. 2d at 389 (internal citations omitted). 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.

3. The named class members and class counsel will provide adequate representation for members of the class.

Fed. R. Civ. P. 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class, measured by two factors: (1) class counsel must be qualified, experienced, and generally able to conduct the litigation, and (2) the interests of the named plaintiffs cannot be antagonistic to those of the remainder of the class. *See Reynolds*, 118 F. Supp. 2d at 390. Both factors are met in this case.

Counsel are experienced in class action litigation in federal and state courts, including matters relating to public benefits, and will prosecute this action vigorously and competently. The named plaintiffs are able 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 only benefit them as it will increase their chances of obtaining benefits to which they are entitled. Thus, the proposed class satisfies the requirements of Rule 23(a)(4).

B. <u>The Class Satisfies The Requirements of Rules 23(b)(2) and (3).</u>

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 seek to prevent the defendants from engaging in a persistent course of conduct that deprives eligible immigrants of public benefits.

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.

Members of the class have no interest in individually controlling the prosecution of separate actions because all plaintiffs are seeking the same relief, *i.e.* reform of the defendants' practices to bring them into compliance with the law. 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). This is clearly the appropriate forum as 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. Case management of the

proposed class action would not be difficult. There are no individualized questions of fact or law that would cause delays or present the need for numerous individual determinations.

CONCLUSION

For all these reasons, the class should be certified.

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Respectfully submitted,

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