SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of

SHEILA GRAVES, JOAN HILLER and FRANK RIZZUTO, on behalf of themselves and all others similarly situated,

Petitioners-Plaintiffs,

FRED KAMINTZKY, on behalf of himself and all others similarly situated,

Proposed Petitioner-Plaintiff Intervenor,

For a Judgement pursuant to §3001 and Articles 9, 78 and 86 of the C.P.L.R. and 42 U.S.C. §1983,

-against-

ROBERT DOAR, as Commissioner of the Office of the Temporary and Disability Assistance of the New York State Department of Family Assistance, and JOHN E. IMHOF, as Commissioner of the Nassau County Department of Social Services,

Respondents-Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.:10218/06
Motion Seq. Nos.:02,03&04

DECISION AND ORDER

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In Motion Sequence #02 the Petitioners and the Proposed Intervenor Fred Kamintzky move for an Order pursuant to CPLR §1013 and §7802 (d) to intervene in this proceeding as a Petitioner and for Class Certification pursuant to Articles 9 of the CPLR.

In Motion #03 the Petitioners move for Partial Summary Judgement on their fourth Cause of Action.

In Motion Sequence #04 the Attorney General of the State of New York moves for Summary Judgement dismissing the Petition against Respondent-Defendant Robert Doar.

For the purpose of this Decision the Petitioners-Plaintiffs will be referred to as "Petitioners" and the Respondent-Defendants will be referred to as "Respondents".

The background of this case is set forth in this Court's order dated December 19, 2006, which is incorporated herein.

Proposed intervenor Fred Kamintzky alleges that he resides in the same congregate care Level II group home as the three petitioners, and that he has been unfairly deprived of food stamp benefits under the Group Home Standardized Benefit Program ("GHSBP") in the same manner as petitioners. He contests the reduction of his monthly food stamp allotment from $86 to $39, and he seeks to join with petitioners in seeking injunctive and declaratory relief.

Respondents argue that Kamintzky's situation is very different from that of petitioners herein because he never challenged the determination that reduced his Food Stamps at a Fair Hearing. Respondents also claim that had Kamintzky filed his own Article 78 proceeding, it would be dismissed on limitations grounds.

Permissive intervention is governed by CPLR §1013 and 7802(d). The former permits intervention when the proposed intervenor's claim and the main action have a common question of law or fact, provided that the intervention will not unduly delay the determination or prejudice the rights of any party [*Matter of Village of Spring Valley v Village of Spring Valley Housing Authority*, 33 AD2d 1037 (2d Dept 1970)]. The latter liberally permits intervention for "interested persons" and is addressed to the sound discretion of the court [*White v Inc. Village of Plandome Manor*, 190 AD2d 854 (2d Dept 1993), lv app den 83 NY2d 752 (1994)]. Here Kamintzky's claim meets the requirements of both rules.

Respondent Doar protests too much in his argument that Kamintzky's request for intervention is both premature (prior to a determination regarding class certification) and untimely (because the parties have fully briefed the substance of the petition). Neither argument suffices. While respondent Doar objects that the rights of petitioners are already well-represented, this is not a basis for denial of intervention. Moreover, the fact that Kamintzky did not request a Fair Hearing is not dispositive.

Exhaustion of remedies is not required where, as here, an administrative remedy would be futile [*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 (1978); *LeHigh Portland Cement Co. v New York State Dept. of Environmental Conservation*, 87 NY2d 136, 140 (1995)]. Petitioners further point out that any limitations defense is unfounded because Kamintzky

never received any notice or explanation of the reduction of his food stamp allotment [see *Bryant v Perales*, 161 AD2d 1186,lv app den 76 NY2d 710 (1990) (limitations period begins to run upon proper written notice of the agency's determination)]. The Court finds that on this record respondents have failed to demonstrate that Kamintzky's claims would be time-barred . Under liberal rules of construction, the Court concludes that as Kamintzky has a real and substantial interest in the outcome of these proceedings [*County of Westchester v Dept. of Health of the State of New York*, 229 AD2d 460 (2d Dept 1996)], leave to intervene should be **Granted**.

Petitioners seek certification of this proceeding as a class action pursuant to CPLR §901and 902. One of the prerequisites to such certification is a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" [CPLR §901(a)(5)]. However, a class action is not superior to an ordinary lawsuit where it is brought against a government entity since *stare decisis* will afford adequate protection to members of the class [*Neama v Town of Babylon*, 18 AD3d 836 (2d Dept 2005), lv app dsmd in part, den in part 6 NY3d 791 (2006); *Board of Education of City School District of City of New Rochelle v County of Westchester*, 282 AD2d 561 (2d Dept 2001), lv app dsmd 97 NY2d 677; *Jackson v Blum*, 80 AD2d 1076, 1077 (3d Dept 1981)]. In such circumstances where governmental operations are involved, "class action relief is not necessary" [*Matter of Martin v Lavine*, 39 NY2d 72, 75 (1976); *Matter of Jones v Berman*, 37 NY2d 42, 57 (1975); *Jones v Board of Education of Watertown City School District*, 30 AD3d 967, 970 (4d Dept 2006)]. There has been no showing on this record that governmental policy and *stare decisis* will not assure safe harbor due to the socio-economic plight of the putative class, as argued by petitioners. Accordingly, class certification is **Denied**.

Petitioners move for partial summary judgment on their fourth cause of action for violation of Article IV §8 of the New York State Constitution and Article 2 of the State Administrative Procedure Act "SAPA". Article IV §8 states that the effectiveness of any rule or regulation made by any state department commences upon filing in the office of the Department of State, and Article 2 of SAPA sets forth its rule-making procedures. Petitioners argue that the determination of food stamp benefits to group home residents under GHSBP falls within the purview of a "rule", and therefore must be subject to statutory and constitutional rule-making requirements.

A rule is defined in SAPA as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies the law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of an agency" (SAPA §102(2)). For constitutional purposes, the courts have defined a rule as "a fixed general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme" [*Matter of Roman Catholic Diocese of Albany v New* York *State Dept. of Health*, 66 NY2d 948, 951 (1985)], and this finding has been applied to determinations under SAPA [*Matter of Cordero v Corbisiero*, 80 NY2d 771, 772-773 (1992)]. In particular, administrators cannot avoid the required rule-making procedures by characterizing a change as a "policy," where the change is a "rigid numerical policy invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors" [*Matter of Schwartfigure v Hartnett*, 83 NY2d 296 (1994)].

On this motion petitioners insist that because implementation of GHSBP is precisely the application of a rigid numerical policy invariable applied across-the-board to all group home

residents in New York receiving Public Assistance ("PA") or Supplemental Social Security Income ("SSI"). Consequently implementation of GHSBP is subject to statutory and constitutional rule-making requirements. As no GHSBP-related documents have been filed with the New York Department of State, no state regulations whatsoever have been promulgated by respondents to govern the operation of GHSBP, and no GHSBP documents have been published in the New York State Register (Exhibit C to petitioners' moving papers for partial summary judgment), petitioners assert that they are entitled to partial summary judgment on their fourth cause of action.

In opposition respondents argue that GHSBP is not a "rule" because it is a non-permanent five-year pilot program, and furthermore it is a federal program. Respondents argue that GHSBP does not affect eligibility to receive food stamps, only the calculation of the amount of food stamps to be received. The amount of food stamps received is based on averaging the payments given to households based upon their source of income, geographic location and shelter code. The purpose of the program is the standardization of food stamp benefits, which would reduce the time and resources necessary to calculate the benefit, while at the same time providing consistency and less confusion among group home client representatives. In the record, the Food Stamps Bureau Chief, Thomas Hedderman states,

> The process utilized by the Pilot Project is TRANSPARENT to most participating residents. Because the process utilizes averages to determine the standard benefit, some residents' food stamp benefit (sic) will be less than they may have been receiving before the pilot and some resident's (sic) food stamp benefits will be more then (sic) they may have been receiving before the Pilot. However, the difference is TRANSPARENT to most participants. As the meals at the group home are purchased and prepared by the facility, each resident receives the same meal regardless of the amount of their food stamp benefit.

(Hedderman Affidavit, at par. 19, emphasis added).

Based on the foregoing, SAPA does not apply to the implementation of GHSBP, according to respondents.

After much consideration, this Court is compelled to find that petitioners have the better argument: time-limited federally-approved programs are not exempt from state rule-making requirements. Review of the implementation of GHSBP to blind and disabled group home residents who receive PA or SSI, reveals that in the interests of easier and more accurate bookkeepping, food stamp benefits were slashed according to a simple formula. This was done in the name of a temporary federal program, which respondents admit, they hope will become permanent in New York, and "serve as a model for standardization of benefits for this population nationally" (Rickard letters to Fink dated 6/23/06 and 7/24/06, Exhibit E to Logue Affirmation in Opposition). The claim that the effect of the GHSBP program would be "transparent, " demonstrates a serious lack of familiarity with the distribution of food stamps in this area (see affidavits of Diane Mendolia and Deborah Sanderson). Under all of the circumstances of this case, the conclusion is inescapable that implementation of GHSBP falls within the definition of a "rule" and is subject to constitutional and statutory rule-making requirements of this State. This program cannot be characterized as concerning only the internal management of the agency (SAPA 102 (2)(b)(i)). Petitioners are entitled to partial summary judgment on their fourth cause of action, and accordingly, the Court declares that respondents' implementation of GHSBP violates the rule-making requirements of Article IV §8 of the New York State Constitution and Article 2 of SAPA.

State Respondent Doar seeks summary judgment dismissing the petition in its entirety, which the Court interprets as seeking to dismiss the remainder of the petition. Petitioners oppose

the motion on the grounds that such relief is premature where discovery has not yet taken place, especially as to the basis for the federal income exclusion regulation which allows the disparate treatment of SSI and PA recipients who reside in identical group home settings and who receive the same monthly amounts of income, and inconsistent treatment of PA special allowances in other cases (see Castellano affirmation in opposition to State Defendant's motion for summary judgment). The Court finds that petitioners have not had a reasonable opportunity to develop the record through discovery, and accordingly, summary judgment dismissing the first, second, third, and fifth causes of action is **Denied** as premature, with leave to renew upon the completion of discovery [see generally *Banks v New York City Dept. of Education*, 39 AD3d 787 (2d Dept 2007); *Amico v Melville Volunteer Fire Co., Inc.*, 39 AD3d 784 (2d Dept 2007); *Betz v NYC Premier Properties, Inc.*, 38 AD3d 815 (2d Dept 2007)].

The Parties are directed to appear for a Certification Conference on October 3, 2007.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: October 1, 2007
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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