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 14
Index No.:10218/06
Motion Seq. Nos.:05,07, 08 & 09

DECISION AND ORDER

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Pursuant to this Court's order dated November 21, 2008, both motions by petitioners, the motion by the County respondent, and the motion by the State respondent, were adjourned for the purpose of providing to this Court (1) a copy of the newly adopted regulations that replaced GHSBP, and (2) a Report from each party as to the effect of implementation of the new regulations. All Reports and supplemental information, together with the outstanding motions, were submitted to this Court on January 15, 2009.

This Court previously granted petitioners partial summary judgment, finding that the implementation of the New York Group Home Standardized Benefit Program ("GHSBP") by the Office of Temporary and Disability Assistance ("OTDA") violated the State Administrative Procedure Act ("SAPA") and Article IV of the New York State Constitution. The old regulations allowed disparate treatment of group home residents in New York receiving SSI ("Supplemental Security Income") and PA ("Public Assistance," used synonymously by respondents with the term "Temporary Assistance" or "TA"). Pursuant to the new regulations, effective October 1, 2008, these two groups will be treated the same. With this background, the Court now turns to the outstanding motions, mindful of the fact that: "Food stamps make a tangible difference in the lives of the poor . . ." (Cavallo-Smith Affidavit in support of verified reply, par. 13).

Motion by petitioners pursuant to CPLR 2221(e) for leave to renew their prior motion for class certification is granted, and upon renewal the Court grants the following

alternative relief: although class certification must be denied, the following persons, and those similarly situated, may seek leave to seek to intervene in this proceeding: Danielle Thompkins, Louise Bianavilla, Maria Hochstrassser, Regina Stanton, Karen Langdon, Kevin Salvin, Jeanine Kelty, and Andrew Wasowicz, and thereby receive the benefits of this Court's partial summary judgment determination dated December 13, 2007.

Motion by petitioners for partial summary judgment, finding GHSBP violative of the Equal Protection clause of the federal constitution and Article I, Section 11, and Article XVII, Section 1, of the New York state constitution, is **granted** as to the federal and state equal protection clauses, and **denied** as to Article XVII, Section 1, of the state constitution. The latter claim is dismissed.

Cross-motion by the State respondent pursuant to CPLR 3211 for judgment dismissing this proceeding/action against respondent Robert Doar, is also **denied**.

Motion by the County respondent pursuant to CPLR 3212 for summary judgment dismissing the complaint against respondent John E. Imhof is **denied**.

The Motion for Leave to Renew

A motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior determination," together with a reasonable justification for the failure to present such facts on the prior motion" [CPLR 2221(e); *Chunqi Liu v Wong*, 46 AD3d 735 (2nd Dept. 2007); see also *Sanz v Discount Auto*, 41 AD3d 685 (2nd Dept. 2007) and *Kreusi v City of New York*, 40 AD3d 820 (2nd Dept. 2007)]. The new fact presented by petitioners is a Decision After Fair Hearing dated April 23, 2008 (Exhibit 3 to petitioners' motion for leave to renew), for Kevin Slavin, a disabled group home resident similarly situated to petitioners/intervenor.

Mr. Slavin's monthly food stamp benefits were being reduced from $89 to $39 according to GHSBP, after GHSBP had already been found by this Court to violate SAPA and Article IV of the New York State Constitution by decision and order dated October 1, 2007 (Exhibit 1 to petitioners' motion for leave to renew), and partial final judgment dated December 13, 2007 (Exhibit 2 to petitioners' motion for leave to renew). In the Decision After Fair Hearing the reduction of benefits to Mr. Slavin was upheld, and

this Court's rejection of GHSBP was dismissed as "unpersuasive" because class action certification had been denied.

This Court denied certification of this proceeding as a class action, on the grounds that *stare decisis* ordinarily affords adequate protection to members of the putative class where "government operations" are involved [*Bryant Ave. Tenants' Ass'n v Koch,* 71 NY2d 856 (1988); *Matter of Martin v Lavine*, 39 NY2d 72, 75(1976)]. Furthermore, this Court relied upon the assurance by the State that class certification herein was not warranted because:

> State Respondent, unlike a private party, would have to apply the Court's determination to all Food Stamp recipients, regardless of the certification of a class and without any additional recipient having to resort to additional legal action.

(Verified Answer of the State, par. 65). Now the State characterizes this position as referring to prospective injunctive relief only.

This Court has no choice but to find that on the basis of the recent Slavin Decision After Fair Hearing, the State respondent does not intend to apply this Court's decision to other food stamp recipients who are similarly situated to petitioners/intervenor in the absence of additional legal action. Despite the "government operations" rule, additional litigation is apparently required in this case.

Petitioners submit several studies to demonstrate a "regional, statewide and national crisis in the provision of civil legal representation to poor persons" (Vollmer Affirmation in support of motion for leave to renew, at par. 19). In addition, the supervising attorney of the Mental Health Project at MFY Legal Services, Inc. for the five boroughs of New York City affirms that those disabled persons who have suffered from the food stamp disparity created by GHSBP are unable to afford private counsel and unlikely to be represented by legal service organizations where immediate crisis cases receive priority (Fulton Affirmation in support of motion for leave to renew, at pars.8-10).

The foregoing new evidence suffices to meet the test for renewal.

<u>The Renewed Motion for Class Action Certification</u>

Upon renewal, the Court again considers the request for class action certification herein. The Court understands that the issue of class certification has been briefed by the parties, and *amicus curiae*, for the Appellate Division, Second Department. The Court notes further that in their supplemental implementation report petitioners have identified eight individuals who are similarly situated to petitioners/intervenor and seek retroactive remediation. Under these circumstances, the Court adheres to its original determination denying class certification, but in the alternative, authorizes the eight identified individuals, and others similarly situated, to seek leave to intervene herein.

Petitioners' Motion for Partial Summary Judgment

Under GHSBP, petitioners allege that PA and SSI recipients who live in group homes in the metropolitan New York area received the following disparate monthly food stamp allotments:

Date	PA recipient	SSI recipient
January 1, 2005	$82	$32
October 1, 2005	$84	$33
January 1, 2006	$86	$39
January 1, 2007	$89	$37
January 1, 2008	$96	$39

(Vollmer affirmation in support of motion for partial summary judgment, par.30.) Petitioners also allege disparate payments to PA and SSI recipients living in group homes outside of the metropolitan New York area.

Petitioners now seek partial summary judgment on these claims under the equal protection clause of the Fourteenth Amendment to the federal constitution and Section 11 of Article I (the equal protection clause) of the state constitution. There is no dispute that the equal protection clause of the Fourteenth Amendment directs state actors to treat similarly situated persons alike, and the state equal protection clause is no broader in coverage that the federal provision [*Hernandez v Robles*, 7 NY3d 338, 362 (2006)].

Where, as here, no fundamental right or suspect classification (such as race or national origin) is involved, the state need show only a rational basis in order to justify disparate treatment [*Romer v Evans,* 517 US 620, 631 (1996); *Heller v Doe*, 509 US 312, 319-320 (1993)].

Petitioners rely upon statements by Thomas Hedderman, the Food Stamp Bureau Chief for OTDA, to make their case. In a previous affidavit to this Court, Mr. Hedderman stated that under GHSBP, the disparate treatment of SSI and PA group home residents is permitted by 7 CFR 273.9(c)(1)(i)(F). However, this regulation expressly requires the state to make a specific application to the United States Department of Agriculture ("USDA") for authorization to exclude PA payments to PA recipients residing in certain institutions (thereby increasing their food stamp allotment), and the concomitant decision to count all SSI income received by SSI recipients (thereby diminishing their food stamp allotment). FOIL demands to the state have failed to produce any documents constituting a governmental request to the USDA for permission to utilize disparate treatment under the cited federal regulation. Mr. Hedderman admits that "neither OTDA nor USDA has surviving correspondence regarding the original approval" (Hedderman letter dated June 10, 2008 to Ms. Ferris, Food Stamp Program Director, Exhibit I to Vollmer Reply Affirmation).

Petitioners further submit an undated and unsigned document entitled "A Description and Comparison of Old and Proposed Food Stamp Benefits Budgeting Methodologies for Residents of Group Homes in New York State" (Exhibit A to Vollmer Reply Affirmation). This document was an attachment to e-mails sent by Mr. Hedderman

on March 13, 2008, immediately prior to the publication by OTDA of the new regulations in the State Register that do not follow GHSBP. This document contains the following message:

> What follows is a very basic description [of] how group home budgeting was done in New York prior to the implementation of the Group Home Standard Benefit (GHSB) in January, 2005, and an explanation about how the old method – over time – led to a difference between the monthly FS benefits received by Temporary Assistance (TA) recipients and Supplemental Security Income (SSI) recipients. .
>
> It is important to remember that the only difference in the circumstances of the TA household and the SSI household was and is the source of income.
>
> FS countable income for group home residents receiving TA benefits also will be equal to the SSI Living With Others Rate of $660. As with the SSI recipient the difference between the Residential Care Rate and the LWO Rate is a personal care exclusion amount that the provider could reasonably be expected to incur in providing care for and individual living in their facility. ***This is different from the old method***. The logic for this new method is that **although these individuals, if they were living out in the community, would receive the TA "normal grant," since the actual TA grant is equal to the** SSI Residential Care Rate, it makes sense to treat them the same as identically situated SSI recipients. (Emphasis included).
>
> **Given that grants of equal amounts are being paid to the provider for the clients in their care regardless of whether the resident receives TA or SSI, we have no reasonable basis, for using different amounts when calculating and establishing FS countable income.**(Emphasis added).

It has been petitioners' argument from the beginning that there is no reasonable basis for giving SSI group home residents a lower food stamp benefit than their PA counterparts in view of their identical living arrangements and monthly income.

In opposition, the State respondent argues that the rational basis for treating PA and SSI recipients differently "is that the normal maximum grant for a PA recipient living in the community is substantially lower than the Living With Others Rate ("LWO") for a

SSI recipient. This SSI LWO Rate is given to SSI recipients living generally out in the community, not in an institutionalized setting"(Logue affirmation, par.16). While this statement may explain a difference in PA and SSI rates, it does not provide a rationale for a food stamp allocation based upon source rather than amount.

On this record, where the state respondent can provide no documentation regarding the original approval of GHSBP, and the Food Stamps Bureau Chief impliedly adopts the admission that there is no reasonable basis for making the distinction between similarly situated SSI recipients and PA recipients, the Court is compelled to conclude that GHSBP violated the equal protection guarantees of our federal and state constitutions. The state may not reduce its administrative costs by arbitrarily denying publicly funded food stamps to SSI recipients living in group homes, when such funds are available to others similarly situated [see generally *Matter of Lee v Smith*, 43 NY2d 453,462 (1977)].

In view of the foregoing determination, petitioners/intervenor are entitled to all retroactive benefits denied under GHSBP [*Khrapunskiy v Doar*, 49 AD3d 201 (1st Dept.), app dsmd 10 NY3d 926 (2008)], as sought in the petition (petition at pp16-17). This includes the restoration of monthly food stamp benefits which petitioners/intervenor would have received, had GHSBP not been implemented. For the record, the court notes petitioners' assurance that all corrective payments will be paid with 100% federal funds (Vollmer reply affirmation at par. 16, fn.12).

This Court rejects respondent's argument that it is not required to award retroactive food stamp benefits. Respondent's reliance upon *Baum v Yeutter* [758 FSupp

423 (N.D. Ohio 1991), judgment entered by *Baum v Madigan*, 769 FSupp 249 (N.D. Ohio 1991)] and *Colbeth v O'Rourke* [707 F2d 57 (2nd Cir. 1983)], is misplaced as the Eleventh Amendment presents no barrier to this proceeding in State court alleging constitutional claims under both the federal and state constitutions [see *Papasan v Allain*, 478 US 265, 281(1986)].

Section 1 of Article XVII of the state constitution imposes upon the state an affirmative duty to aid the needy [*Tucker v Toia*, 43 NY2d 1, 8 (1977)]. This duty relates to questions of impermissible exclusion of the needy from eligibility for benefits, not to the absolute sufficiency of the benefits distributed to each eligible recipient [*Matter of Bernstein v Toia*, 43 NY2d 437, 439 (1977)]. Because there has been no absolute denial of all aid to SSI recipients who are admittedly needy [cf. *Tucker v Toia*, at p.9], the state has narrowly avoided running afoul of this additional constitutional mandate. Partial summary judgment finding that GHSBP violated Section 1 of Article XVII of the state constitution is **denied**, and this claim is dismissed.

Cross-Motion by the State Respondent for Dismissal of the Petition as Moot

The State respondent cross-moves pursuant to CPLR 3211 for dismissal of the petition as moot, because petitioners "have received all of the relief to which they are entitled" (Logue affirmation, par. 6). The State respondent points out that the new regulations do not use GHSBP, and that OTDA has published new regulations. In its reply papers, the State respondent alleges that it is even directing the issuance of retroactive benefits to the plaintiffs and to the intervenor (Logue reply affirmation, par. 4). This argument is not convincing.

Retroactive benefits have been directed herein, and this Court has authorized eight identified individuals and others similarly situated to seek leave to intervene. Consequently, this proceeding is not moot by any means, and therefore, the motion by the State respondent to dismiss the petition herein as moot must be **denied**.

Motion by the County Respondent

Respondent Imhof, Commissioner of the Nassau County Department of Social Services, seeks summary judgment dismissing all claims against him on the grounds that the "County only carried out the State's directives and thus played no role in the formulating of protocol which resulted in the alleged reduction of benefits"(Faraci affirmation, par. 4). However, according to the State respondent, it is the County respondent that actually authorizes the payment of retroactive benefits (Logue reply affirmation, par. 4). As the restoration of retroactive benefits has not yet taken place, Respondent Imhof's motion for summary judgment is summarily **denied**, with leave to renew when all required retroactive benefits have been restored.

This constitutes the Decision and Order of the Court.

DATED: March 31, 2009
Mineola, N.Y. 11501

ENTER:

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

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