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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 44

Justice

Index Number : 400903/2010

SMITH, QUANISHA

vs.

BERLIN, ELIZABETH

SEQUENCE NUMBER : 004

LEAVE TO INTERVENE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for intervene

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants plaintiff's motion for intervention, amendment of her pleading, and class certification to the extent set forth and denies respondent Berlin's cross-motion to dismiss the intervening claims, pursuant to the accompanying decision. C.P.L.R. §§ 901-903, 1013, 3001, 3025(b), 3211(a)(2), 7802(b), 7804(f).

FILED

AUG 14 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/22/13

Lucy Billings

LUCY BILLINGS J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SHALL BE REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
----------x

In the Matter of the Application of

QUANISHA SMITH,

Petitioner,

Index No. 400903/2010

For a Judgment Pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules

- against -

DECISION AND ORDER

ELIZABETH BERLIN, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and ROBERT DOAR, as Administrator of the New York City Human Resources Administration, and BQNY PROPERTIES, LLC,

Respondents

----------x

APPEARANCES:

For Petitioner and Intervenor
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Legal Aid Society
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Susan Jacquemot Esq. and Matthew B. Moses Esq.
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For Respondent Doar
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For Respondent Berlin
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The numbers of New York City residents dependent on public assistance and food stamps for sustenance has risen steadily during the recent economic crisis. The New York City Human Resources Administration (HRA) reduces or discontinues this needed assistance, however, as a penalty when assistance recipients capable of work are charged with failing to comply with requirements that they train for, seek, and maintain employment. N.Y. Soc. Serv. Law (SSL) §§ 335(3), 335-a(4), 335-b(5)(a), 336, 342; 18 N.Y.C.R.R. §§ 385.2(f), 385.6(a), 385.7(a), 385.9(a), 385.12. Recipients are entitled to appeal these penalties to the New York State Office of Temporary and Disability Assistance (OTDA), which affirms or reverses the penalty.

I. PETITIONER SMITH

Respondent Commissioners of these two agencies reduced petitioner Quanisha Smith's public assistance as a punitive sanction for her alleged failure to attend a mandatory employment appointment. SSL § 331(1); 18 N.Y.C.C.R. § 385.2. Petitioner received respondent Commissioner of HRA's Conciliation Notification informing her of her noncompliance and of a conciliation conference to explain why she did not report to or cooperate with the mandatory appointment. After the conciliation process was unsuccessful, she received City respondent's Notice of Decision that her public assistance would be reduced because she "willfully and without a good reason failed or refused to comply with the requirement to show up for the employment or work

activity assignment." V. Pet./Compl. Ex. F, at 2.

Petitioner claims the Conciliation Notification and the Notice of Decision issued by City respondent violate SSL §§ 22(12)(f) and (g) and 341(1)(a) and (b), 18 N.Y.C.R.R. § 358-3.3, 7 C.F.R. § 273.13(a)(2), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. She claims the Conciliation Notification violates SSL § 341(1)(a), because the notice fails to specify the instance of her noncompliance or the necessary actions to avoid a reduction of public assistance and lacks examples of evidence to establish an exemption from work requirements or that her noncompliance was unwillful or with good cause, which would avoid a sanction. She claims the Notice of Decision violates SSL § 341(1)(b) because the notice similarly fails to specify how or why her noncompliance with work requirements was willful, how or why it was without good cause, and the necessary actions to avoid a reduction of assistance, as well as how she did not comply.

Petitioner further claims this omitted information regarding the substance of evidence a public assistance recipient must present to avoid a punitive sanction compromises her rights to adequate notice provided by SSL § 341(1)(a) and (b), 18 N.Y.C.R.R. § 358-3.3, 7 C.F.R. § 273.13(a)(2), and due process, to enable her to challenge the Notice of Decision at an administrative hearing. Finally, she claims respondent Executive Deputy Commissioner of the State OTDA conducted the administrative hearing she attended in violation of lawful

procedure. C.P.L.R. § 7803(3). The Administrative Law Judge (ALJ) presiding at the hearing failed to develop the record, by eliciting testimony and documents or adjourning the hearing for that purpose, and assess whether the notices issued complied with all applicable laws.

After petitioner commenced this proceeding, City respondent restored all the reductions of petitioner's public assistance. City respondent also revised the Conciliation Notification and claims it now complies with SSL § 341(1)(a).

II. INTERVENING PETITIONER COLAVECCHIO

City respondent discontinued proposed intervening petitioner Anthony Colavecchio's public assistance as a punitive sanction for his alleged failure to attend a mandatory employment appointment. Colavecchio received the same Conciliation Notification, except its dates and times, as petitioner Smith, informing him of his noncompliance with mandatory work requirements. After an unsuccessful conciliation conference, Colavecchio received a Notice of Decision informing him of City respondent's determination to discontinue Colavecchio's public assistance because Colavecchio "willfully and without a good reason failed or refused to comply with the requirement to participate in the Job Search program." 2d Am. V. Class Action Pet./Compl. Ex. M, at 1.

Colavecchio seeks to challenge the adequacy of the Conciliation Notification and Notice of Decision on the same grounds as petitioner Smith. Colavecchio similarly claims that

the deficient notices impeded his preparation and presentation of defenses at an upcoming administrative hearing.

Upon petitioner's and Colavecchio's motion seeking his intervention as a petitioner and class certification, and before his scheduled hearing, City respondent withdrew the determination to discontinue Colavecchio's public assistance and fully restored his discontinued assistance.

III. RELIEF SOUGHT

Petitioner Smith and intervenor Colavecchio move for:

(1) Colavecchio's intervention as a co-petitioner, C.P.L.R. §§ 1013, 7802(d);

(2) certification of a petitioner class, C.P.L.R. §§ 902, 903, of "all present and future recipients of public assistance and/or Food Stamps in New York City who were or may in the future be alleged to have violated employment-related requirements on or after July 8, 2007, and who suffered, or may still suffer a reduction or discontinuance of public assistance and/or food stamps as a result of a punitive sanction for such employment-rule violation, without having first received a Conciliation Notice and a NOI [Notice of Intent] that complies with the requirements of SSL § 341," Aff. of Lester Helfman Ex. 1 (Oct. 22, 2010), 2d Am. V. Class Action Pet./Compl. ¶ 80; and

(3) further amendment of the amended petition to encompass intervenor Colavecchio's and the class' claims. C.P.L.R. § 3025(b).

Intervenor Colavecchio has obtained the relief he sought annulling the determination to discontinue his public assistance, restoring the discontinued assistance, and expunging the infraction from his record.

Ultimately, petitioner Smith, intervenor Colavecchio, and the class seek a declaratory judgment that the Conciliation Notification violates SSL § 341(1)(a), and the Notice of Decision violates SSL §§ 22(12)(f) and (g), 341(1)(b), 18 N.Y.C.R.R. § 358-3.3, 7 C.F.R. § 273.13(a)(2), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. C.P.L.R. § 3001. These petitioners claim City respondent's revised Conciliation Notification does not resolve the notice's noncompliance with SSL § 341(1)(a). Petitioners seek a companion permanent injunction against State and City respondents imposing punitive sanctions on any class members for violation of work requirements, until the notices comply with the governing laws and respondents provide for a meaningful conciliation process. The injunctive relief sought includes removing punitive sanctions imposed on class members and restoring assistance lost due to unlawful sanctions.

City respondent has moved to dismiss the original petition as moot, C.P.L.R. §§ 3211(a)(7), 7804(f), and maintains that, once dismissed, no proceeding will remain in which to intervene or to seek class certification, and no petition will remain to amend. C.P.L.R. §§ 902, 1013, 3025(b). Although State respondent answered the original petition, State respondent also

maintains that petitioner Smith's claims are moot and now cross-moves to dismiss Colavecchio's intervening claims.

IV. THE DECLARATORY AND INJUNCTIVE RELIEF SOUGHT BY PETITIONER SMITH AND INTERVENOR COLAVECCHIO IS NOT MOOT.

Both respondents oppose Colavecchio's intervention on the ground that Colavecchio no longer maintains an interest in the proceeding. C.P.L.R. § 3211(a)(7). Respondents claim that the revision of the Conciliation Notification and restoration of both Colavecchio's and Smith's public assistance rendered his claim as well as hers moot.

A. CITY RESPONDENT'S MOTION TO DISMISS SMITH'S PETITION AND OPPOSITION TO COLAVECCHIO'S INTERVENTION

City respondent's withdrawal of punitive sanctions and restoration of petitioner Smith's and intervenor Colavecchio's assistance do not negate their challenge to the adequacy of the Conciliation Notification and the Notice of Decision, nor do these voluntary actions divest Smith and Colavecchio of an interest in the proceeding. Moreover, even if any issue that they continue to present is moot, an exception to the mootness doctrine, which prohibits advisory opinions, permits a decision on an issue that (1) likely will recur, either between the parties or between a party and other members of the public; (2) is substantial and novel; and (3) typically will evade judicial review. Coleman v. Daines, 19 N.Y.3d 1087, 1090 (2012); City of New York v. Maul, 14 N.Y.3d 499, 507 (2010).

As current recipients of public assistance, both petitioner Smith and intervenor Colavecchio remain subjected to the

mandatory work requirements and to the risk of future reduction or discontinuance of assistance through the claimed unlawful notices and related procedures. Whether these notices comply with SSL § 341(1) presents issues of substantial public interest that likely will recur, due to the use of these notices for all public assistance recipients subjected to the mandatory work appointments and related requirements. Yet these issues typically evade judicial review, due to respondents' withdrawal of punitive sanctions and restoration of assistance once a proceeding for judicial review brings their errors to light. Coleman v. Daines, 19 N.Y.3d at 1090; Branic Intl. Realty Corp. v. Pitt, 106 A.D.3d 178, 213 (1st Dep't 2013); Lopez v. Evans, 104 A.D.3d 105, 108 n.2 (1st Dep't 2012).

Withdrawal of the decisions to impose punitive sanctions on petitioner Smith and intervenor Colavecchio and restoration of their public assistance do not remedy respondents' deficient notices. As ongoing public assistance recipients required to comply with work requirements, Smith and Colavecchio continually will be subjected to these notices if City respondent determines that as recipients they have fallen into noncompliance. These notices are just as likely to lead to another erroneous reduction or discontinuance of assistance if they fail to provide the information mandated by the applicable statutes and regulations and guaranteed by constitutional due process.

The withdrawn sanctions and restored assistance do not remedy the lack of information in the Conciliation Notification,

even as revised, specifying the instances of noncompliance and providing meaningful examples of evidence to establish an exemption, compliance, unwillful noncompliance, or good cause: a form claimed to be in continued violation of SSL § 341(1)(a). The withdrawn sanctions and restored assistance do not remedy the omissions in the Notice of Decision explaining the specific reasons that noncompliance was willful and was without good cause and the necessary actions to avoid a sanction: a form claimed to be in violation of SSL § 341(1)(b). Respondents have provided no remedy for the total omission of information in the Notice of Decision regarding the substance of a defense or evidence a recipient must present to avoid a loss of assistance and thus no assurance that Smith and Colavecchio will fare any better if they challenge the Conciliation Notification or Notice of Decision at an administrative hearing in the future. See Coleman v. Daines, 19 N.Y.3d at 1090; City of New York v. Maul, 14 N.Y.3d at 507; Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 812 (2003); Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713-14 (1980).

The court's determination of whether the notices comply with applicable statutes and regulations and with due process will affect Smith's and Colavecchio's interests in and rights to adequate information regarding the instances of and reasons for charged noncompliance and the defenses or evidence that may avoid punitive sanctions, so as to protect their entitlement to public assistance. Coleman v. Daines, 19 N.Y.3d at 1090; City of New York v. Maul, 14 N.Y.3d at 507; Saratoga County Chamber of

Commerce v. Pataki, 100 N.Y.2d at 812; Allen v. Blum, 58 N.Y.2d at 956. See Hearst Corp. v. Clyne, 50 N.Y.2d at 713-14; New York Pub. Interest Research Group v. Carey, 42 N.Y.2d 527, 530-31 (1977); Crumpley v. Wack, 212 A.D.2d 299, 303 (1st Dep't 1995). If these issues are not resolved, and respondents are not enjoined to conform their notices and procedures to legal requirements, Smith and Colavecchio are just as likely to suffer the same irreparable deprivation of monthly assistance on which they rely to meet basic needs as those notices previously caused. Coleman v. Daines, 19 N.Y.3d at 1090; McCain v. Koch, 70 N.Y.2d 109, 117 (1987); Tucker v. Toia, 43 N.Y.2d 1, 8-9 (1977).

If respondents' corrective actions in individual instances, brought to their attention by the rare lawyers for public assistance recipients, are considered to render the issues moot, they undeniably will evade judicial review. In fact, respondents' reliance on corrective actions to moot judicial challenges to their procedures and determinations to impose sanctions, as demonstrated repeatedly in this proceeding, confirms that the issues will evade judicial review. These circumstances therefore warrant judicial review even if respondents have rendered moot the issues petitioner Smith and intervenor Colavecchio raise. Coleman v. Daines, 19 N.Y.3d at 1090; City of New York v. Maul, 14 N.Y.3d at 507; Hearst Corp. v. Clyne, 50 N.Y.2d at 714-15. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 814.

Insofar as respondents rely on the revision of the

Conciliation Notification to moot Smith's and Colavecchio's challenge, whether the notice complies with SSL § 341(1)(a), even as revised, remains an unresolved legal issue. Moreover, respondents ignore the claimed deficiencies in the Notice of Decision and indicate no intention of effecting any revisions. Absent judicial review and resolution of the adequacy of these two notices, and given respondents' proclivity to take corrective actions once any judicial challenge is launched, the original harms to Smith and Colavecchio, as current public assistance recipients, and similar harms to other recipients are likely to recur. Coleman v. Daines, 19 N.Y.3d at 1090; City of New York v. Maul, 14 N.Y.3d at 507; Hearst Corp. v. Clyne, 50 N.Y.2d at 714-15. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 814.

B. STATE RESPONDENT'S OPPOSITION TO SMITH'S PETITION AND MOTION TO DISMISS COLAVECCHIO'S INTERVENING CLAIMS

State respondent's approval of the notices claimed to violate SSL § 341(1) is grounds for the declaratory and injunctive relief petitioner Smith and intervenor Colavecchio seek against both respondents. C.P.L.R. § 3001; Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51, 57-58 (1st Dep't 2006); United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d 191, 192 (1st Dep't 2005); 319 McKibben St. Corp. v. General Star Natl. Ins. Co., 245 A.D.2d 26, 29-30 (1st Dep't 1997). See Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99-100 (1st Dep't 2009); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 253 (1st Dep't 2006). For

the reasons set forth above, State respondent's opposition to Smith's petition and to the motion for Colavecchio's intervention on mootness grounds and, even if not premature before intervention is granted, State respondent's motion to dismiss the intervening claims on the same grounds fail. Respondents' corrective actions do not negate the controversy before the court over the legal adequacy of the notices and the violation of Smith's and Colavecchio's rights, so as to reduce their claims to policy determinations or discretionary functions or deprive the court of jurisdiction. C.P.L.R. § 3211(a)(2); City of New York v. Maul, 59 A.D.3d 187, 190-91 (1st Dep't 2009), aff'd, 14 N.Y.3d at 507. See Callwood v. Cabrera, 49 A.D.3d 394, 394 (1st Dep't 2008).

If anything, respondents' corrective actions signify a recognition of the continuing errors in their procedures. Despite these corrective actions, and despite this recognition, respondents' actions do not correct ongoing procedures.

C. INTERVENTION IS PERMISSIBLE.

State respondent also opposes Colavecchio's intervention and seeks dismissal of his intervening claims because he has failed to exhaust all administrative remedies by first pursuing his claims through an administrative hearing. Where a claim challenges an agency's action as contrary to its statutory authority and involves no factual disputes, however, exhaustion of administrative remedies is not required. Coleman v. Daines, 79 A.D.3d 554, 560-61 (1st Dep't 2010), aff'd, 19 N.Y.3d at 1091;

People Care Inc. v. City of N.Y. Human Resources Admin., 89 A.D.3d 515, 516 (1st Dep't 2011); Amazon.com, LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 203 (1st Dep't 2010). See Matthews v. Barrios-Paoli, 270 A.D.2d 152, 152 (1st Dep't 2000). Colavecchio's challenge, like petitioner Smith's, implicates only the legal question of whether the notices comply with applicable statutes and regulations and with due process guarantees and requires no resolution of factual issues. As respondents' administrative review process simply would abide by the notices and related procedures Colavecchio and Smith challenge, that process would not afford the declaratory and injunctive relief they seek. Coleman v. Daines, 79 A.D.3d at 560-61, aff'd, 19 N.Y.3d at 1091. See People Care Inc. v. City of N.Y. Human Resources. Admin., 89 A.D.3d at 516; Matthews v. Barrios-Paoli, 270 A.D.2d at 152. Therefore Colavecchio's failure to pursue his claims for declaratory and injunctive relief through an administrative hearing does not bar his intervention or require dismissal of his claims.

Nor has either respondent substantiated any potential prejudice that the proposed intervention may cause. Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC, 77 A.D.3d 197, 201 (1st Dep't 2010); Ferguson v. Barrios-Paoli, 279 A.D.2d 396, 398-99 (1st Dep't 2001). See Giambrone v. Kings Harbor Multicare Ctr., 104 A.D.3d 546, 548 (1st Dep't 2013). To the contrary, intervention will streamline otherwise separate proceedings. Ferguson v. Barrios-Paoli, 279 A.D.2d at 398-99. See Roosevelt

Islanders for Responsible Southtown Dev. v. Roosevelt Is. Operating Corp., 291 A.D.2d 40, 48 (1st Dep't 2001).

As illustrated above, intervenor Colavecchio's and petitioner Smith's claims share common facts: Colavecchio and Smith both are public assistance recipients, failed to attend their mandatory work activity appointments, received identical notices in all material respects, and were subjected to punitive sanctions for noncompliance. Colavecchio and Smith both claim they were unlawfully denied public assistance through the work requirements and sanctions process and deprived of an opportunity to defend adequately against the sanctions, due to respondents' omission of information in the Conciliation Notification and Notice of Decision mandated by applicable statutes and regulations and by due process. Because Colavecchio shares the same interest with Smith in challenging the adequacy of the Conciliation Notification and Notice of Decision and in seeking declaratory and injunctive relief to assure the notices' compliance with constitutional, statutory, and regulatory requirements, in the absence of prejudice to any party, the court permits his intervention. C.P.L.R. §§ 1013, 7802(d); Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC, 77 A.D.3d at 201; Ferguson v. Barrios-Paoli, 279 A.D.2d at 398-99. See Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Is. Operating Corp., 291 A.D.2d at 48.

V. CLASS CERTIFICATION

The court's determination that Colavecchio's and Smith's claims are not moot and that Colavecchio may intervene eliminates respondents' opposition to class certification on the grounds that the class representatives' claims are moot or that class certification is premature before granting Colavecchio intervention. Petitioners' motion for class certification is timely at any point after commencement of the proceeding until 60 days after all respondents have answered. C.P.L.R. § 902. This rule "is designed to promote an early determination" of class certification; "prompt resolution of the certification issue is the desired goal," Argento v. Wal-Mart Stores, Inc., 66 A.D.3d 930, 932 (2d Dep't 2009), "at the outset of the litigation." O'Hara v. Del Bello, 47 N.Y.2d 363, 368 (1979). See Rodriguez v. Metropolitan Cable Communications, 79 A.D.3d 841, 842 (2d Dep't 2010). As City respondent has not answered the original or amended petition, the 60 days has not begun to run. City respondent opposes class certification on the further grounds that it is barred by the governmental operations doctrine and that City respondent's identification of the individuals adversely affected by the challenged notices would be pointless and burdensome.

A. THE GOVERNMENTAL OPERATIONS DOCTRINE IS INAPPLICABLE.

Class certification in an action for relief concerning governmental operations may be unnecessary if stare decisis will afford adequate protection for the class members. Watts v. Wing,

308 A.D.2d 391, 392 (1st Dep't 2003); Holcomb v. O'Rourke, 255 A.D.2d 383, 383 (1st Dep't 1998). Where the relief accorded to individual petitioners will provide no relief for the alleged harm affecting the whole class or will not effectively operate as precedent for the class, this "governmental operations rule" does not bar class certification. Chalfin v. Sabol, 247 A.D.2d 309, 311 (1st Dep't 1998); New York City Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49, 51 (1st Dep't 1997). See Watts v. Wing, 308 A.D.2d at 392.

For these and further reasons the governmental operations doctrine is inapplicable here. City respondent's revision of the Conciliation Notification, even if it now complies with SSL § 341(1)(a), provides no retroactive relief for class members who suffered punitive sanctions through any previously unlawful conciliation notice. Revision of the Conciliation Notification provides no relief at all for class members who suffered sanctions through any unlawful Notice of Decision. Similarly, City respondent's revocation of Smith's and Colavecchio's sanctions and restoration of their public assistance carry no precedential effect for the rest of the class members seeking relief from sanctions as a consequence of past or prospective violations of notice requirements integral to enforcement of the mandatory work requirements.

B. STANDARDS FOR CLASS CERTIFICATION

Even if petitioners overcome the governmental operations rule, as members of a class petitioners may sue as representative

parties on behalf of all class members only if petitioners meet the following prerequisites. C.P.L.R. § 901(a). (1) The class is so numerous that joinder of all members is impracticable. (2) Questions of law or fact common to the class predominate over any questions affecting only individual members. (3) The representative parties' claims are typical of the class' claims. (4) The representative parties will protect the class' interests fairly and adequately. (5) A class action is superior to other methods for the controversy's fair and efficient adjudication.

Petitioners, as the parties seeking class certification, bear the burden to present evidence establishing these criteria. Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d 481, 481 (1st Dep't 2009). The criteria are to be construed liberally in favor of class certification. Id.; Pruitt v. Rockefeller Ctr. Props., 167 A.D.2d 14, 21 (1st Dep't 1991). The court may consider the merits of petitioners' claims only to the extent of ensuring those claims are not a sham, Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d 420, 422 (1st Dep't 2010); Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482; Jim & Phil's Family Pharm. v. Aetna U.S. Healthcare, 271 A.D.2d 281, 282 (1st Dep't 2000), as C.P.L.R. § 902 contemplates a determination of class certification "early in the litigation . . . well before any determination on the merits." O'Hara v. Del Bello, 47 N.Y.2d at 369.

Because petitioners make the requisite showing to meet these criteria, the court grants class certification. The court

provisionally defines the class, however, as:

> all past, current, and future recipients of public assistance or food stamps in New York City since July 8, 2007, who have received City respondent's Conciliation Notification or Notice of Decision and whose public assistance or food stamps have been reduced or discontinued for violating a work requirement.

C.P.L.R. §§ 902, 903. Petitioners' proposed class definition would necessitate an affirmative showing by public assistance and food stamps recipients and a determination by the court that the Conciliation Notification or Notice of Decision they received violated SSL § 341 just to determine their class membership. E.g., In re Nassau County Strip Search Cases, 461 F.3d 219, 223 (2d Cir. 2006). By referring simply to their receipt of one of the notices charging violation of a work requirement, the definition of the certified class obviates the need for such individualized "mini-trials." Id. See Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 422; Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482; In re Nassau County Strip Search Cases, 461 F.3d at 224, 229. Identification of class members will entail identifying who has been subject to a reduction or discontinuance of public assistance or food stamps for a violation of work requirements: persons whom HRA already identifies, as illustrated below.

1. Numerosity

Although at this early stage of the litigation petitioners need not show the exact number of class members, Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 481, according to HRA, in September 2010 alone 18,864 individuals were determined to have violated work requirements or were subject to a reduction or discontinuance of assistance for such a violation. Helfman Aff. Ex. N (Oct. 22, 2010). As it unquestionably would be impracticable to join even that number of potential claimants individually, the class surely satisfies the numerosity requirement for class certification. Dabrowski v. Abax Inc., 84 A.D.3d 633, 634 (1st Dep't 2011); Pesantez v. Boyle Envtl. Servs., 251 A.D.2d 11, 12 (1st Dep't 1998).

2. Commonality

Common questions of law and fact predominate over individual questions. The class is limited to claimants challenging respondents' standard Conciliation Notification and Notice of Decision because the notices omit information mandated by applicable laws, compromising claimants' rights to a meaningful conciliation and administrative hearing process to avoid punitive sanctions for noncompliance with work requirements. The class' predominant legal claim is whether these notices, issued to public assistance recipients charged with such noncompliance, violate SSL §§ 22(12)(f) and (g) and 341(1)(a) and (b), 18 N.Y.C.R.R. § 358-3.3, 7 C.F.R. § 273.13(a)(2), and due process.

Factual questions particular to the named petitioners who

are the proposed class representatives do not defeat commonality. City of New York v. Maul, 14 N.Y.3d at 514; Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 423; Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482. Smith's individual claim that the ALJ fails to review the adequacy of the notices at the administrative hearing and Colavecchio's individual claim that the conciliation procedure fails to provide a meaningful opportunity to resolve the charged noncompliance before a sanction is imposed are subsidiary questions that do not predominate over the classwide issues. The predominant legal claims regarding the adequacy of the predicate notices do not require individualized proof for the class to establish the claims or for the court to determine their merit. These claims thus satisfy the commonality requirement. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 422-23; Yeger v. E*Trade Sec. LLC, 65 A.D.3d 410, 413 (1st Dep't 2009); CLC/CFI Liquidating Trust v. Bloomingdale's, Inc., 50 A.D.3d 446, 447 (1st Dep't 2008).

3. Typicality and Adequacy of Representation

Petitioners satisfy the typicality requirement when the named petitioners' and the class' claims derive from the same course of conduct and are based on the same legal theory. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 423; Ackerman v. Price Waterhouse, 252 A.D.2d 179, 201 (1st Dep't 1998). The named petitioners' claims are typical of the classwide claims, as Smith and Colavecchio seek the same declaratory and injunctive relief based on the same deficiencies

in the Conciliation Notice and Notice of Decision as the relief sought on the class' behalf. The fact that Smith and Colavecchio do not currently require the removal of punitive sanctions and restoration of their public assistance poses no conflict with the class or impediment to class certification. Cheng v. Oxford Health Plans, Inc., 84 A.D.3d 673, 675 (1st Dep't 2011); Nawrocki v. Proto Constr. & Dev. Corp., 82 A.D.3d 534, 535 (1st Dep't 2011). Nothing in the record suggests the named petitioners or the attorneys for the class will not act in the class' best interests, nor is the competence or experience of the class' attorneys questioned. Ackerman v. Price Waterhouse, 252 A.D.2d at 202.

4. Superiority

Class members' numerosity, lack of sophistication, and limited resources and the expenses entailed in bringing separate, individual proceedings outweigh any anticipated difficulties in managing a class action. Judicial resources also would be taxed much more heavily in managing multiple individual proceedings. C.P.L.R. § 902. Particularly for the fair and efficient adjudication of challenges to an administrative agency's procedures by recipients of public assistance benefits, a class action is a superior means. E.g., City of New York v. Maul, 14 N.Y.3d 499; Coleman v. Daines, 79 A.D.3d 554, aff'd, 19 N.Y.3d 1087; New York City Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49.

In sum, class certification may not be necessary, but

whether it is necessary is not the applicable standard. The applicable standard is whether a class action is a superior means to address the issues presented. Here a class action is a superior means for all the reasons set forth above and especially because, otherwise, those issues will continue to slip away from the grasp of judicial review.

Finally, certification of the class defined above is subject to modification until disposition of the action. C.P.L.R. § 902. E.g., DeFilippo v. Mutual Life Ins. Co. of N.Y., 13 A.D.3d 178, 180 (1st Dep't 2004). See Matter of Colt Indus. Shareholder Litig., 77 N.Y.2d 185, 198 (1991); Louisiana Mun. Employees' Retirement Sys. v. Cablevision Sys. Corp., 74 A.D.3d 1291, 1293 (2d Dep't 2010). Although City respondent does not articulate why he is prevented from showing now that petitioners fail to meet the criteria for class certification, City respondent remains free to show that the class must be decertified or redefined. All parties remain free to show that identification of the defined class is too burdensome or that the definition does not capture the persons aggrieved by a Conciliation Notification or Notice of Decision through which respondents reduced or discontinued class members' public assistance or food stamps for violation of a work requirement.

VI. PERMISSION TO AMEND THE PETITION

Respondents point to no specific or substantial prejudice, nor does the court discern any, that would dictate denial of permission to amend the petition to allege Smith's and

Colavecchio's claims individually and on the class' behalf. Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Solomon Holding Corp. v. Golia, 55 A.D.3d 507, 507 (1st Dep't 2008). The conclusion that Smith's and Colavecchio's challenges to the adequacy of the notices are viable and within an exception to the mootness doctrine eliminates the lack of subject matter jurisdiction, urged by State respondent, as a basis for disallowing amendment of the petition. C.P.L.R. §§ 3025(b), 3211(a)(2).

In the currently proposed amended pleading, however, petitioner Smith still claims on her own behalf that the ALJ failed to review the adequacy of the notices at Smith's administrative hearing. Yet Smith no longer seeks relief for that claim, on the class' behalf or her own behalf, since City respondent withdrew its determination, restored her assistance, and expunged the infraction from her records. Thus, even were the court to conclude that the ALJ acted unlawfully, no relief would be warranted. The classwide claims, moreover, will determine the ongoing adequacy of the notices, so that it will no longer be an issue for the ALJ to determine at future hearings. Therefore the court denies permission to amend the petition to include Smith's claim regarding the ALJ's conduct, as that claim is no longer viable. Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d 324, 326 (1st Dep't 2008); Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006). For similar reasons, the court also denies permission to include

claims requiring respondents to withdraw the determination to impose a punitive sanction on Colavecchio, restore his public assistance, and expunge the infraction from his case record, because City respondent's corrective actions also have rendered these claims moot.

VII. CLAIMS FOR ATTORNEYS' FEES

City respondent seeks dismissal of petitioner's claim for attorneys' fees in her original petition because petitioner fails to demonstrate that respondents have violated federal law under 42 U.S.C. § 1983, entitling her to fees under 42 U.S.C. § 1988, or that petitioner is a prevailing party entitling her to recover under either 42 U.S.C. § 1988 or C.P.L.R. § 8601. By their very terms, these grounds for thwarting an attorneys' fees award to petitioners at the outset are premature. As set forth repeatedly above, the representative petitioners and the class now claim respondents' violations of 7 C.F.R. § 273.13(a)(2) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The court has yet to determine that petitioners have not prevailed on these claims or on their claims under state law against State respondent that may entitle petitioners to attorneys' fees under C.P.L.R. § 8601. Moreover, if petitioners prevail on their claims for the class, they may be entitled to attorneys' fees under C.P.L.R. § 909. The court will address petitioners' entitlement to attorneys' fees at the final disposition of this action on its merits.

VIII. CONCLUSION

As delineated above, the court denies State respondent's motion to dismiss Colavecchio's intervening claims and grants petitioner Smith's and Colavecchio's motions for intervention, class certification, and amendment of the petition as proposed, including the claims on behalf of a class, but denies amendment of the petition to include the following individual claims. C.P.L.R. §§ 901, 1013, 3001, 3025(b), 3211(a)(2), 7802(d), 7804(f). The court denies amendment of the petition to include petitioner Smith's claim that the ALJ failed to conduct Smith's administrative hearing according to lawful procedure and Colavecchio's claim requiring respondents' corrective actions regarding his past entitlement to public assistance. The court also modifies the class defined in petitioners' proposed pleading. The court certifies a class of all past, current, and future recipients of public assistance or food stamps in New York City since July 8, 2007, who have received City respondent's Conciliation Notification or Notice of Decision and whose public assistance or food stamps have been reduced or discontinued for violating a work requirement. C.P.L.R. §§ 902, 903. Finally, the court denies City respondent's motion to dismiss petitioner's original petition. C.P.L.R. §§ 3211(a)(7), 7804(f).

Within 20 days after service of this order with notice of entry, petitioners shall serve and file an amended pleading as set forth above. Respondents may serve any answer or motion responsive to this amended pleading within 30 days after its

service, as requested. See C.P.L.R. §§ 3012(a), 3025(d), 7804(c). Petitioners shall serve any reply to an answer within 20 days after its service, see C.P.L.R. §§ 3012(a), 7804(c) and (d), and any opposition to a motion consistent with C.P.L.R. § 2214. The parties may agree to modify these time limits.

This proceeding is now a class action seeking classwide declaratory and injunctive relief, rather than the reversal pursuant to C.P.L.R. § 7803(3) or (4) of respondents' past decisions to reduce or discontinue the named petitioners' public assistance. Therefore the court will determine the claims upon a motion for summary judgment or after an opportunity for disclosure and a trial. New York State Psychiatric Assn., Inc. v. New York State Dept. of Health, 19 N.Y.3d 17, 22-23 (2012); New York State Superfund Coalition, Inc. v. New York State Dept. of Envtl. Conservation, 18 N.Y.3d 289, 292-93 (2011); Yatauro v. Mangano, 17 N.Y.3d 420, 425 (2011). See Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d 100, 102-103 (1984); Phillips v. City of New York, 66 A.D.3d 170, 173 & n.2 (1st Dep't 2009); Camacho v. Kelly, 57 A.D.3d 297, 298-99 (1st Dep't 2008); 10 W. 66th St. Corp. v. New York State Div. of Hous. & Community Renewal, 184 A.D.2d 143, 148 (1st Dep't 1992).

The parties shall seek any further relief by serving and filing a motion or a note of issue and certificate of readiness. Any party also may request a preliminary conference from the Part

46 Clerk. A party filing a note of issue shall schedule a pretrial conference with the Part 46 Clerk.

DATED: July 22, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.