

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD C. and TYRONE A., on behalf of
themselves and all others similarly situated,

Plaintiffs,

- against -

KRISTIN M. PROUD, in her Official Capacity
as Acting Commissioner of the New York State
Office of Temporary and Disability Assistance,

Defendant.

**STIPULATION AND ORDER OF
SETTLEMENT**

12 CIV. 5942 (JMF) (RLE)

WHEREAS, prior to the commencement of this litigation, defendant Kristin M. Proud,¹ as Acting Commissioner of the New York State Office of Temporary and Disability Assistance ("Defendant") asserts that she had requested guidance and assistance from the United States Department of Agriculture ("USDA") as would allow Defendant to establish and implement policies and procedures with respect to the issuance of Supplemental Nutrition Assistance Program ("SNAP") work related sanctions compliant with federal requirements; and

WHEREAS, prior to the commencement of this litigation, Defendant requested of USDA a waiver of the federal regulation at 7 C.F.R. § 273.7(f) as would allow Defendant to offer individuals who fail to comply with mandatory SNAP employment and training activities the opportunity to avoid the imposition of a SNAP work related sanction prior to the commencement of the disqualification period by demonstrating compliance with SNAP work requirements prior to the issuance of a notice of adverse action as part of a new "re-engagement" process; and

WHEREAS, prior to the commencement of this litigation, Defendant asserts that she has made significant efforts to address any backlog as well as any timeliness issue regarding the scheduling of current administrative fair hearings regarding only SNAP issues; and

WHEREAS, Plaintiff Richard C. commenced this litigation by filing an original class action complaint, dated August 2, 2012; and

WHEREAS, Plaintiffs Richard C. and Tyrone A. subsequently filed a first amended class action complaint, dated August 21, 2012 (the "Amended Complaint"), in which they assert claims pursuant to 42 U.S.C. § 1983 on behalf of themselves and two proposed classes of SNAP applicants and recipients residing in New York State; and

¹ Since the filing of the first amended class action complaint on August 21, 2012, named defendant Elizabeth R. Berlin, formerly the Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, was replaced by Kristin M. Proud as Acting Commissioner of OTDA, and is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).

WHEREAS, following the commencement of this litigation, Defendant advised Plaintiffs' counsel about her then pending request to USDA for a waiver that would allow Defendant to use an alternate method to implement the federal requirement pursuant to 7 C.F.R. § 273.7(f) to offer individuals who fail to comply with mandatory SNAP employment and training activities the opportunity to avoid a sanction by demonstrating compliance; and

WHEREAS, on September 26, 2012, Defendant agreed to Plaintiffs' counsel request that Defendant ask USDA to withhold its final approval of Defendant's waiver request until November 13, 2012, in order to allow the parties time to engage in preliminary discussions concerning the waiver and a comprehensive settlement of all issues; and

WHEREAS, on November 21, 2012, Defendant's counsel informed the Court and Plaintiffs' counsel that by December 14, 2012, Defendant would voluntarily stop issuing notices of adverse action relating to alleged violations of SNAP work requirements for a period of up to 90 days. Defendant further stated that she would not issue such notices again until she had implemented a sanction process compliant with the relevant federal requirements; and

WHEREAS, by December 14, 2012, Defendant stopped issuing SNAP work related sanctions; and

WHEREAS, on December 21, 2012, the parties signed a stipulation of class certification and the Court so-ordered it on January 2, 2013. Accordingly, the following two classes were certified for purposes of this litigation:

Class A was certified as consisting of:

All New York State residents who are recipients of, or applicants for, SNAP benefits and, since August 3, 2009, have requested or will request a fair hearing regarding SNAP benefits, where no cash assistance issues are raised, and where defendant did not or does not issue a Decision After Fair Hearing within 60 days from the date the fair hearing is requested;

Class B was certified as consisting of:

All New York State residents who are or were applicants for, or recipients of SNAP benefits who were issued or will be issued, since August 3, 2009, a Notice of Adverse Action (NOAA), based on an alleged failure to comply with SNAP work requirements, that (i) resulted in the individual being disqualified from receipt of SNAP benefits for a period of 2, 4, or 6 months; and (ii) did not inform the individual of action they could have taken to avoid the imposition of the sanction before it began; and

WHEREAS, on January 16, 2013, the USDA approved Defendant's waiver, which allows Defendant to use an alternate method to implement the federal requirement pursuant to 7 C.F.R. § 273.7(f) by which individuals who have failed to comply with mandatory SNAP employment and training activities are provided an opportunity to avoid a sanction by

demonstrating compliance with SNAP work requirements (the "Waiver") (a copy of the Waiver is annexed hereto as Appendix 1); and

WHEREAS, Plaintiffs and Defendant are entering into this Stipulation and Order of Settlement ("Order") solely for the purpose of settling the disputes between them and to avoid further litigation, and without Defendant admitting any fault or liability; and to settle this action upon terms and conditions just and fair to all parties;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned, that this action is settled, subject to the approval of and so ordering by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, on the following terms and conditions:

SECTION I: DEFINITIONS

- a. "Fair Hearing" means the administrative hearing at which a member of Class A appeals to Defendant from a determination, action, or failure to act by a local social services district.
- b. "Decision After Fair Hearing" ("DAFH") means a disposition of a Fair Hearing request, rendered by Defendant, addressing an issue relating to a member of Class A, as referenced in 7 C.F.R. § 273.15(c) and 18 N.Y.C.R.R. § 358-6.4(b)(1).
- c. "Effective Date" means the date upon which the Court issues an order approving this Order pursuant to Rule 23(e), Federal Rule of Civil Procedure.
- d. "SNAP work related sanction" means a reduction or termination of an individual's or household's SNAP benefits based on an allegation of non-compliance with SNAP work rules pursuant to the provisions of 18 N.Y.C.R.R. § 385.12.

SECTION II: INJUNCTIVE RELIEF FOR CLASS A

- 1. Defendant, beginning no later than the Effective Date of this Order, shall comply with the first sentence of the provisions set forth in 7 C.F.R. § 273.15(c)(1) for hearings requested by Class A members.
- 2. In calculating time periods to determine whether defendant is compliant with paragraph 1 of this Order the calculation of days from date of request for a Fair Hearing to the date of the DAFH shall be exclusive of any adjournment of the Fair Hearing requested by the appellant or of any adjournment not requested by the appellant that was granted by Defendant's Office of Administrative Hearings for the benefit of the appellant, such as for severe weather conditions, other conditions potentially affecting the health or safety of hearing participants, or other circumstances rendering the fair hearings system inoperable (which are referred to as "rolled calendars"). Fair Hearings concerning only SNAP issues requested by plaintiffs in *Varshavsky v. Perales* (Index No. 40767/1991 Sup. Ct. N.Y. County) shall also be excluded from paragraph 1 of this Order.

SECTION III: INJUNCTIVE RELIEF FOR CLASS B

3. Defendant shall continue her moratorium on issuing notices of adverse action ("NOAAs") with regard to SNAP work requirement violations until she implements notices and policies that comply with the terms of the Waiver, this Order to be entered upon it, and USDA requirements.
4. At least twenty-five (25) days prior to resuming the issuance of NOAAs with regard to SNAP work related sanctions pursuant to the Waiver, Defendant shall notify Plaintiffs' counsel of Defendant's intent to resume issuance of NOAAs with regard to SNAP work related sanctions pursuant to the Waiver on a certain date at least twenty-five (25) days in the future. Defendant will provide Plaintiffs' counsel with copies of any notices that are newly approved by USDA in connection with Defendant's implementation of the Waiver shortly after Defendant begins issuing the newly approved notices; and in the same manner, Defendant shall provide copies of any subsequent notices pertaining to the Waiver that USDA approves in the twenty-four (24) months after the Effective Date.
5. During the twenty-four (24) months following the Effective Date, Defendant shall not issue NOAAs with regard to SNAP work related sanctions that do not comply with the terms of the Waiver, this Order, and USDA requirements.
6. Subject to USDA approval, within ninety (90) days of Defendant's receipt of USDA's written approval, Defendant shall take steps to treat Class B members' Client Infraction History and Sanction History contained in the Welfare Management System ("WMS") in such a manner so as to count only work related sanctions initiated after December 14, 2012, effectively reducing to zero the number of work related sanctions considered in determining the length of future sanctions.

If USDA declines to allow Defendant to treat Class B members' Client Infraction History and Sanction History contained in WMS in such a manner so as to count only work related sanctions initiated after December 14, 2012, then within 90 days of Defendant's receipt of USDA's written decision, Defendant shall take steps to treat Class B members' Client Infraction History and Sanction History contained in WMS in such a manner so as to discount any work related sanctions implemented or initiated between August 3, 2009, and December 14, 2012.

Within one-hundred-and-fifty (150) days of Defendant's completion of the steps required by paragraph 6 of this Order, Defendant shall provide Plaintiffs' counsel written confirmation that she has completed the actions.

7. Within one-hundred-and-fifty (150) days of the Effective Date, Defendant agrees to authorize restored SNAP benefits (referred to hereinafter as the "Retroactive Relief") to the head of household of which any Class B member was a part during the time when he/she was issued a SNAP work related sanction, in accordance with 7 C.F.R. § 273.17 pursuant to the formula or methodology set forth in paragraph 11 of this Order.

8. Within seven (7) days of issuing the Retroactive Relief pursuant to paragraph 11 of this Order, Defendant shall confirm to Plaintiffs' counsel, in writing, that said Retroactive Relief has been restored.
9. Within one-hundred-and-fifty (150) days of the Effective Date, Defendant will issue notices to the most recent address for SNAP households to which a Class B member belonged at the time of the sanction in the public assistance, SNAP and/or medical assistance benefit records contained in WMS providing them information including: (a) explaining the reason for the one time issuance of Retroactive Relief; (b) providing a general description of how the amount of the Retroactive Relief was calculated; (c) that the household will have their Retroactive Relief restored in a certain amount; (d) their Retroactive Relief will be available by a certain date; and (e) explaining that, as a result of the imposition of the SNAP sanction, that Defendant has modified its Client Infraction History and Sanction History contained in WMS, as provided in paragraph 6 of this Order.
10. Within one-hundred-and-fifty (150) days of the Effective Date, Defendant shall provide to Plaintiffs' counsel a report setting forth:
 - a. The name, Client Identification Number of each Class B member who was issued a SNAP work related sanction between August 3, 2009 and December 14, 2012, and the date the SNAP sanction was imposed, and whether the sanction was for a two, four or six month minimum duration; and
 - b. The Retroactive Relief that Defendant determines each Class B member household is due under paragraph 11 of this Order and the data or other information used to calculate said amount for each Class B member household.

SECTION IV: CALCULATION OF AMOUNT OF RESTORED SNAP BENEFITS DUE CLASS B MEMBERS

11. Retroactive Relief for Class B members will be paid as follows:

For each time Defendant issued a SNAP work related sanction to a Class B member between August 3, 2009, and December 14, 2012, Defendant will issue Retroactive Relief to the households to which Class B members belonged at the time of the sanction calculated by multiplying by either two (2), four (4), or six (6) (depending upon the level of SNAP infraction imposed during such time period, *i.e.* first, second, third and subsequent) the difference between the SNAP benefits received by the Class B member's household during the month prior to the imposition of the SNAP sanction and the lesser amount of SNAP benefits received by the household during the first month in which the sanction is imposed.

SECTION V: MONITORING WITH RESPECT TO CLASS A

12. For Fair Hearing requests made on or after the first day of the first calendar month after the Effective Date, Defendant shall provide to Plaintiffs' counsel on a monthly basis, a report of all SNAP benefits only DAFHs for Class A members issued during that month

and each month thereafter for a period of twenty-four (24) months. This report shall contain at a minimum: (a) the name of the appellant; (b) the date of Fair Hearing requests; (c) the date Fair Hearings are held; (d) the date of issuance of the DAFHs; and (e) the number of days less adjournments (hereinafter referred to as "issuance days ") from the date of the Fair Hearing request to the date of issuance of all such DAFHs. Also, for Fair Hearing requests made on or after the first day of the first calendar month after the Effective Date, Defendant shall provide to Plaintiffs' counsel on a monthly basis, a report of all SNAP benefits only Fair Hearing requests for Class A members for which a DAFH has not yet been issued as of the last day of the monitored month. This report shall be provided each month thereafter for a total period of twenty-four (24) months. The monthly reports under this paragraph will be provided within thirty (30) days of the end of the month monitored in an unlocked Excel spreadsheet.

SECTION VI: MONITORING WITH RESPECT TO CLASS B

13. If Defendant seeks from the USDA any official clarification of, modification to, or extension of the Waiver, or requests that the Waiver be made permanent, or if Defendant provides any interim reports to USDA on implementation of the Waiver, Defendant will share with Plaintiffs' counsel copies of such correspondence and transmitted materials as are provided to USDA within fifteen (15) days from the date that such materials are provided to USDA.

SECTION VII: CONTINUING JURISDICTION

14. Plaintiffs, utilizing the reports provided to them by Defendant pursuant to paragraphs 10 and 12 of this Order, may monitor Defendant's performance for a period of twenty-four (24) months commencing with the first day of the first month following the Effective Date of this Order.
 - (a) If, at the conclusion of this period of twenty-four (24) months, Defendant has complied with the terms of paragraphs 1, 3, 6 and 7, and the monitoring provisions of paragraphs 10 and 12 herein, then the jurisdiction of this Court shall terminate for all purposes.
 - (b) If, at the conclusion of this twenty-four (24) month period, Defendant has not complied fully with the terms of the paragraphs listed in paragraph 14(a) herein, then the Plaintiffs, upon fifteen (15) days notice to Defendant, shall have the option of:
 - (1) restoring this matter to the calendar for litigation for purposes limited solely to the issue alleged to have been breached of this Order;
 - (2) with the concurrence of Defendant, asking the Court to modify the terms of this Order. Nothing in this paragraph shall be construed

to be a limitation on a new stipulation following the expiration of this Order; or

(3) having the jurisdiction of the Court terminate as to this action on the thirtieth (30) day following the receipt by Plaintiffs' counsel of the last reports specified in paragraphs 10 and 12 herein without prejudice to Plaintiffs' right to commence a new action.

(c) The failure of Plaintiffs to select any option in subparagraph (b) of this paragraph and so notify Defendants on or before the thirtieth (30) day following the receipt by Plaintiffs' counsel of the last of the reports specified in paragraphs 10 and 12 of this Order, shall result in the termination of the jurisdiction of the Court on the thirtieth (30) day following the receipt by Plaintiffs' counsel of the reports specified in paragraphs 10 and 12 of this Order in accordance with this paragraph.

(d) Nothing contained in this paragraph shall affect Plaintiffs' right to move at any time for relief or enforcement under this Order.

15. At the time of the Effective Date, all claims contained in the Amended Complaint, with the exception of those specifically reserved herein, shall be dismissed with prejudice. At the time of termination of jurisdiction, this Order shall be deemed unenforceable.
16. No provision in this Order shall infringe upon or restrict any class member's ability to seek individual relief through a Fair Hearing or a judicial proceeding, including but not limited to a proceeding brought pursuant to New York Civil Practice Law and Rules article 78, so long as the class member is not seeking to: (a) claim that Defendant, by virtue of implementing the Waiver it obtained from USDA is out of compliance with any federal or state statute, regulation or rule; or (b) challenge the form or sufficiency of a SNAP work related sanction notice because it fails to inform the recipient of the opportunity to avoid the imposition of a SNAP sanction by demonstrating compliance with SNAP work requirements before the commencement of the period of disqualification.

SECTION VIII: ATTORNEYS' FEES

17. Plaintiffs reserve the right to apply to the Court to recover such costs and fees within forty-five (45) days of the Effective Date and Defendant reserves the right to oppose such an application.

SECTION IX: GENERAL PROVISIONS

18. This Order constitutes the parties' entire agreement with respect to the matters set forth in this Order.
19. Notwithstanding the provisions of this Order, Defendant reserves the right to implement, change, or otherwise alter or amend the procedures and requirements of this Order if

required by intervening changes in federal statute or regulation or state statute inconsistent with this Order. Defendant shall provide notice to Plaintiffs' counsel in the manner set forth in paragraph 23 of this Order, of a required change at least thirty (30) days prior to the commencement of implementation, unless Defendant is required to implement the required change in less than thirty (30) days. If Defendant is required to implement a required change in less than thirty (30) days, it shall provide notice to the Plaintiffs' counsel no later than seven (7) working days after learning of a required change. Plaintiffs may move to challenge whether the change is required by federal statute or regulations or state statute.

20. In computing any time period specified by this Order, the following rules apply: (a) exclude the day of the event that triggers the period; (b) count every day, including intermediate Saturdays, Sundays, and New York State legal holidays; and (c) include the last day of the period, but if the last day is a Saturday, Sunday, or New York State legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.
21. Information disclosed pursuant to paragraphs 10 and 12 of this Order in the course of monitoring of compliance with this Order will reveal the identities and other personally-identifying information (“Confidential Information”) of applicants for or recipients of benefits under SNAP, who are not class members. Plaintiffs’ counsel shall protect the confidentiality of all information that is provided by Defendant under the terms of this Order and shall not disclose such information to any individual, other than Defendant and any individual whose case is involved, except to the extent necessary in any proceeding brought before this Court to enforce any right that any class member may have under this Order. In any motion for enforcement brought pursuant to this Order, all papers filed with the Clerk of the Court that contain Confidential Information shall be filed under seal and shall remain under seal until the Court orders otherwise. All documents or notices containing Confidential Information produced under this Order shall be destroyed or returned to the providing party by Plaintiffs’ counsel within sixty (60) days after the jurisdiction of the Court ends.
22. This Order is final and binding upon the parties, their successors, and their assigns.
23. Any notice, report, or communication required by or made pursuant to the terms of this Order, other than notices sent to individual class members, shall be sent by electronic mail and by first class mail, postage prepaid, to all of the people below:

To Plaintiffs:

Kenneth Stephens
kstephens@legal-aid.org
The Legal Aid Society
199 Water Street
New York, New York 10038

The National Center for Law and Economic Justice, Inc.
275 Seventh Avenue, Suite 1506
New York, New York 10001
cohan@ncelej.org

Bryan Hetherington
bhetherington@empirejustice.org
Empire Justice Center
One West Main Street, Suite 200
Rochester, New York 14614

To Defendant: Bonita S. Gutierrez
bonita.gutierrez@ag.ny.gov
Assistant Attorney General
New York State Office of the Attorney General
120 Broadway, 24th Floor
New York, New York 10271

24. Any party may change the above designated addressee or address by written notice to the other parties. A copy of such notice shall be filed with the Clerk of this Court.

Dated: April 1, 2013
New York, New York

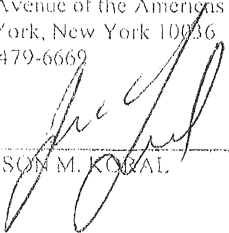
THE NATIONAL CENTER FOR LAW AND
ECONOMIC JUSTICE, INC.
Marc Cohan, Director of Litigation
275 Seventh Avenue, Suite 1506
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By: 
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(212) 479-6669

By: 
JASON M. KORBAL

Dated: April _____, 2013
Rochester, New York

EMPIRE JUSTICE CENTER
Bryan Hetherington, Chief Counsel
One West Main Street, Suite 200
Rochester, New York 14614
(585) 295-5809

By: 
BRYAN HETHERINGTON

Dated: April 1, 2013
New York, New York

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New York, New York 10271
(212) 416-8859

By: 
BONITA S. GUTIERREZ

Attorney for Defendant

SO ORDERED, this _____ day of _____, 2013:

Judge Jesse M. Furman