UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Henriot Auguste, *etc.*,

Plaintiff,

CV-96-1153 (CPS)

- against -

ORDER

Brian J. Wing, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

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For the reasons stated in this Court's Memorandum and Order of even date herewith, plaintiff's motion for a preliminary injunction is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York
November 18, 1996

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Henriot Auguste, *etc.*,

Plaintiff,

- against -

Brian J. Wing, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

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CV-96-1153 (CPS)

MEMORANDUM AND ORDER

SIFTON, Chief Judge.

Plaintiff Henriot Auguste, a homeless recipient of SSI and emergency state aid, brings this action pursuant to 42 U.S.C. §1983 challenging the State of New York's termination of his emergency aid without adequate notice or a predeprivation hearing. Defendant Brian Wing is the Acting Commissioner of the New York State Department of Social Services ("DSS").[1] Auguste seeks certification of a class of similarly-situated aid recipients and a preliminary injunction ordering the state to provide timely and adequate notice and restoration of benefits pending a hearing on the termination. For the reasons stated below, the motions are denied.

[1] Although most of the challenged actions were taken by city agencies, plaintiff has chosen to bring this action only against New York State.

STATUTORY FRAMEWORK

New York State has promulgated a series of regulations to ensure compliance with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which requires that a reduction or termination of public assistance benefits be preceded by adequate notice and a fair hearing. *See generally* 18 N.Y.C.R.R. Part 358. The regulations define "public assistance" as —

> aid to dependent children, home relief, emergency assistance to aged, blind or disabled persons, and emergency assistance to needy families including special grants and benefits available pursuant to Part 352 of this Title.

18 N.Y.C.R.R. Part 358.

Emergency Assistance to the Aged, Blind and Disabled Persons is also known as the Emergency Assistance to Adults (EAA). It is a joint state/local program which provides grants of assistance in defined circumstances to aged, blind or disabled persons who receive or have been found eligible to received federal SSI benefits. New York Social Services Law, Article 5, Title 8; 18 N.Y.C.R.R. Part 397.

Aid to Families with Dependent Children ("AFDC"), a joint federal/state program, is designed to encourage the care of needy dependent children by providing financial assistance to the children and their caretaker relatives. 42 U.S.C. §§601 *et seq.*, New York Social Services Law, Article 5, Title 10; 18 N.Y.C.R.R. Parks 352 and 369.

Home Relief ("HR") is a joint state/local program which assists persons who cannot provide for themselves and are not

receiving assistance and care under other provisions of the New York Social Services Law. New York Social Services Law, Article 5, Title 3; 18 N.Y.C.R.R. Parts 352 and 370.

Emergency Assistance to Needy Families with Children ("EAF") is a joint federal/state program which is designed to meet the emergency needs of families with children under 21 years of age who face destitution. 42 U.S.C. §606(e); New York Social Services Law §350-j; 18 N.Y.C.R.R. Part 372. Each of these programs is governed by the same notice requirements.

An adult is eligible for EAA when he (a) resides in New York State, (b) is eligible for SSI benefits or additional state payments, and (c) has "emergency needs that cannot be met by the regular monthly SSI benefits or by income or resources not excluded by the Federal Social Security Act and which if not met would endanger the health, welfare or safety of the applicant." 18 N.Y.C.R.R. §397.4.

The "emergency needs" are defined and circumscribed by regulations. Non-recurring EAA grants may meet one-time emergency needs, such as the replacement of furniture and clothing destroyed by a fire, flood or other catastrophe, the repair or replacement of major appliances, repairs to client-owned homes or the payment of utility arrears to prevent termination of service. 18 N.Y.C.R.R. §397.5(a), (h) and (l).

Other EAA grants provide ongoing assistance for recurring expenses such as temporary shelter or household

expenses while an individual is in the hospital. 18 N.Y.C.R.R. §397.5 (g) and (k). One of the enumerated categories is

> [t]he cost of essential storage of furniture and personal belongings during relocation, eviction or residence in temporary shelter ... for as long as the circumstances necessitating the storage and eligibility for emergency assistance for adults continue to exist.

18 N.Y.C.R.R. §397.5(k).[2]

The AFDC and HR programs figure a baseline standard of need which may also be supplemented by special allowances to meet a recurring expense such as the additional cost of meals for persons unable to pay meals at home, the additional expenses associated with pregnancy, or the cost of storage of furniture and personal belongings while an individual or family is homeless or in temporary shelter. New York Social Services Law §§131-a[1], [2][b] and [5][e]; 18 N.Y.C.R.R. §§352.1(c), 352.2(a)(3), 352.6(f), 352.7(c) and (k). The EAF program provides grants for any reason which can be included in the AFDC or HR standard of need.

In case the application is denied, unnecessarily delayed, or inadequate, the applicant has the right to appeal to the department and request a fair hearing. 18 N.Y.C.R.R. §397.8.

With certain exceptions, New York law provides that a public assistance recipient is entitled to "timely and adequate notice" before a public agency discontinues, suspends, or

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[2] The regulation was amended in July 1987 to remove an existing 60-day limitation on public assistance. The limitation was removed to harmonize the treatment of blind, aged, and disabled recipients with that of recipients under other programs whose aid was not subject to a durational limitation.

reduces the grant. 18 N.Y.C.R.R. §358-3.3(a)(i). A notice is "timely" when it "is mailed at least 10 days before the date upon which the proposed action is to become effective." 18 N.Y.C.R.R. §358-2.23. The agency may give notice "no later than the effective date of the proposed action" ("contemporaneous notice") when

> a special allowance granted for a specific period has been terminated and you had been informed in writing at the time that you were first granted the special allowance that the allowance would automatically terminate at the end of the specified period.

18 N.Y.C.R.R. §358-3.3(d)(2)(iii).

Notice is "adequate" when it sets forth, among other things, the action the agency is taking, the effective date of the action, the specific reasons for the action, the statutory and/or regulatory authority for the action, the recipient's right to request a fair hearing and/or agency conference, the procedure for requesting a fair hearing and/or agency conference, the circumstances under which aid-continuing will be authorized, and the recipient's right to review his or her case file. 18 N.Y.C.R.R. §358-2.2.

A public assistance recipient facing a reduction or termination has the right to request a fair hearing within 60 days of the challenged action. 18 N.Y.C.R.R. §358-3.5(b)(1). Where the agency is required to give prior and adequate notice, a recipient who has received notice has the right to "aid-continuing," a reinstatement of benefits within five business days, until a decision has been rendered in the fair hearing. 18

N.Y.C.R.R. §§358-3.4(a)(1)(i) and 358.6(a)(1)(ii). In the case of contemporaneous notice,

> [w]here the social services agency is required only to give you adequate notice but not timely notice and has discontinued, reduced, restricted or suspended your public assistance, ... you have the right to have your public assistance ... reinstated continued until a fair decision is issued only if you request a fair hearing within 10 days of the mailing of the agency notice of the action.

18 N.Y.C.R.R. 358-3.6(3)(i).

A request for aid-continuing is "timely" when (1) the request is made prior to the effective date of a timely and adequate notice or (2) the request is made within ten days of the day on which a contemporaneous notice is mailed. 18 N.Y.C.R.R. §358-3.6(a). Factual disputes regarding the timeliness or receipt of notice are to be resolved at the fair hearing, and aid-continuing should be granted until a determination is made. *Matter of York v. Sabol*, No. 25677/91 (Sup. Ct. Queens Co. 1992).

FACTS OF PLAINTIFF'S CASE

The following facts were established at a hearing held before the undersigned on April 15, 1996. Plaintiff Henriot Auguste receives SSI benefits for a psychiatric disability. On December 13, 1995, plaintiff was evicted from his home and rendered homeless. On January 18, 1996, plaintiff applied to the city agency for an EAA grant to store his belongings until he obtained housing. The city agency approved plaintiff's EAA application on January 29, 1996, and issued a two-party check to cover a month's storage fees. The check was accompanied by a

notice dated January 29, 1996 (the "January notice"). The January notice informed the plaintiff that the agency had accepted his request for emergency aid and issued a check for $168 for storage fees. The January notice did not state the grant was for only one month and did not specify a termination date. Boilerplate language on the bottom and back of the form informed plaintiff that he was entitled to a fair hearing if he disagreed with the decision. It provided all the information necessary to request a fair hearing.

When the plaintiff went to pick up the check, he was told that no further EAA grants for storage would be forthcoming. Plaintiff's case file contains a "Notice of Special Grant" stating that plaintiff had been issued a check for $168 to cover storage fees from 1/29/96 - 2/28/96. A handwritten note also appears on the form stating, "one shot deal." Plaintiff never received the Notice of Special Grant.

On February 4, 1996, plaintiff moved his belongings into storage at the Spectrum Storage Company and paid the $168 monthly storage fee with the city's two-party check. At the April 15 hearing, plaintiff testified that he stored a bed, furniture, his clothing, and other personal belongings.

On March 4, 1996, plaintiff's "representative," social worker Eugene Doyle, faxed a letter to the state agency requesting a fair hearing on "any Tuesday" to review the agency's termination of the plaintiff's EAA grant.[3] Doyle also asked the

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[3] The earliest Tuesday would have been March 12.

state to provide aid-continuing during the pendency of the fair hearing. Doyle based this request on the city agency's "statutory and regulatory duty to provide SSI recipients with recurring monthly EAA grants for storage as long as EAA eligibility and the need for storage continues."

Doyle argued that (a) the January notice provided neither timely nor adequate notice of termination and that plaintiff was therefore making a timely request for a fair hearing entitling him to aid-continuing during the pendency of that hearing or (b) that the notice did not unambiguously state that it was not a continuing grant and that plaintiff, by regulation, was entitled to a pre-termination hearing.

Even if the January notice did bring the $168 grant within the exception to timely notification for "special allowances for a specific period," Doyle's letter stated that the city had yet to provide such notice. Plaintiff's special allowance, if only intended to last a month, would have terminated on February 29, 1996. Because the January notice specified no termination date, the agency would therefore have been obliged to send a contemporaneous notice of termination when the grant ended. Accordingly, even if a notice had been sent, the ten-day fair hearing request deadline that would ordinarily apply to qualify for aid-continuing would not expire until March 9.

On March 8, the state agency faxed a copy of its computerized Fair Hearing Request Information to Doyle. The

expedited fair hearing was scheduled for March 19, 1996. Doyle surmised, and a state official later confirmed by telephone, that the state agency's associate counsel, Philip Nostramo, had denied the plaintiff's aid-continuing request.[4]

After a series of phone calls between Doyle and the state agency, the state gave three reasons for denying the aid-continuing request:

1. because the city agency's January notice only granted one month's aid, it incorporated by its terms an implied denial of ongoing aid which denial operated as contemporaneous notice;

2. the fair hearing request had been interpreted as a challenge to the amount of the grant, not its duration;

3. the aid-continuing regulation did not apply to single grants, but only ongoing assistance.

On March 8, Spectrum Storage informed plaintiff that his belongings would be padlocked and auctioned if his March storage fee was not paid by March 14. On March 11, Doyle spoke with Henry Pedicone and Joanne McGrath, Associate Counsel at the DSS, who refused to reconsider the aid-continuing request.

On March 12, plaintiff appeared at Doyle's office with a second notice that he had received earlier that week from the city agency.[5] The notice, dated February 6, 1996, (the "February notice") entitled "ACTION TAKEN ON YOUR APPLICATION,"

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[4] The relevant portion of the fax reads "Rep [presumably Doyle] seeking AC -- denied. EA FH [presumably Emergency Assistance Fair Hearing] scheduled for 3/19/96 at 1:30 p.m. Interim assistance issue scheduled separately."

[5] The notice was sent to the address that had appeared on the January notice. Apparently it was given to Auguste by a former neighbor who had agreed to receive his mail.

stated that "Our infor. [sic] as of 1/29/96 is that your emergency financial needs have been met and you are not eligible for further financial assistance."

The notice did not state a termination date. Although boilerplate language on the bottom and back of the form informed plaintiff of his right to request a fair hearing, it did not notify the plaintiff of his right to request aid-continuing during the pendency of that hearing.

By fax and phone, Doyle contacted the state agency to request a reconsideration of the state's position in light of the February notice. Doyle argued that the notice of discontinuance was untimely because it did not specify a termination date and inadequate because it did not advise the plaintiff under what circumstances he would qualify for aid-continuing. 18 N.Y.C.R.R. 358-2.2(a)(2) and (8). The request was denied the next morning by Deputy General Counsel Hanks.

On March 13, 1996, plaintiff brought this action under 42 U.S.C. §1983. In the meantime, proceedings went forward in the state system. The fair hearing was held on March 19. The parties' characterizations of the events at this hearing differ sharply, and neither has supplied a transcript. Doyle attests that the hearing was convened two hours early over his specific objections in plaintiff's absence.[6] Doyle further attests that the city's representative Helen Joyner, a fair hearing

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[6] Doyle happened to be there because he was representing another client that day.

supervisor, announced that she did not have the plaintiff's city agency case record and left halfway through the hearing.

When Doyle attempted to clarify which party bore the burden of proof at the hearing by asking whether the hearing was intended to address a termination issue or the adequacy of the amount of the grant, the ALJ declined to characterize the proceedings.[7] Doyle assumed that the plaintiff would be allocated the burden of proof in the hearing and accordingly asked for access to plaintiff's case record. The ALJ refused this request as "unnecessary."

For these reasons and because the plaintiff was not present and had not been given a meaningful opportunity to appear at his own hearing, Doyle requested an adjournment of the hearing.

Before this Court rendered a decision on Auguste's preliminary injunction motion, the state accelerated his fair hearing date. An ALJ heard plaintiff's case on April 16, 1996, and rejected plaintiff's claim that he was entitled to notice of termination. The ALJ reasoned that since, by definition, a grant for one month could not be discontinued, no notice was required under state regulations. The ALJ stated that "the legislature itself does not recognize the possibility of a discontinuance of EAA." After the ALJ's rendered his decision, the plaintiff conceded that his preliminary injunction motion in this action

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[7] The city agency must prove the correctness of a termination by substantial evidence. A plaintiff must prove inadequacy by substantial evidence. 18 N.Y.C.R.R. §358-5.9(a) and (b).

was moot and elected to pursue an Article 78 proceeding in New York State court.

The issues remaining before this Court are plaintiff's motion for class certification and motion for a preliminary injunction on behalf of putative class members. The complaint alleges that defendant Wing's practice of —

> not requiring his local agents to provides plaintiff and the members of the proposed class with timely and adequate notice prior to reducing or terminating public assistance special allowances deprives them of due process of law.

According to plaintiff, the state has never devised a form that informs recipients of special allowances that their grants will terminate at the end of an authorized period as required by 18 N.Y.C.R.R. §358-3.3 (d)(2)(iii). Because of this failure, the complaint alleges that the state is therefore bound by the timely and adequate notice requirements of 18 N.Y.C.R.R. §358-3.3(a). The complaint further alleges that, even where a plaintiff somehow learns of his right to an aid-continuing fair hearing, defendant does not direct his agent to restore benefits.

DISCUSSION

Plaintiff seeks an order pursuant to Fed. R. Civ. Pro. 23(a) and (b)(1) or (2) certifying two subclasses and a preliminary injunction enjoining defendant Wing from

1. allowing his local agents to reduce or terminate the public assistance special allowances of plaintiff and those similarly situated absent the issuance of timely and adequate notice of the proposed reduction or discontinuance of their Aid to Families with Dependent Children (AFDC), Home Relief (HR), Emergency Assistance

for Adults (EAA) and Emergency Assistance to Families with Needy Children (EAF) special allowances and,

2. refusing to order and compel his local agents to continue and/or reinstate public assistance special allowances at pre-reduction or pre-termination levels whenever a fair hearing has been timely requested to contest the reduction or discontinuance of AFDC, HR, EAA and EAF special allowances.

The Court turns first to the question of certifying a class.

Class Certification

Plaintiff moves to continue this action on behalf of the following two subclasses:

1. All New York state residents whose public assistance special allowances under the Aid to Families with Dependent Children (AFDC), Home Relief (HR), Emergency Assistance for Adults (EAA) and/or Emergency Assistance to Families with Needy Children (EAF) programs have been or will reduced or terminated without proper notice since April 1, 1993.

2. All New York state residents who timely requested or will timely request fair hearings to contest the reduction or termination of their public assistance special allowances under the AFDC, HE, EAA and/or EAF programs since April 1, 1993, but who have been or will be denied the continuation of their AFDC, HR, EAA and/or EAF special allowances at their pre-reduction or pre-termination during the pendency of their fair hearings.

Fed. R. Civ. Pro. 23(a) sets forth the requirements for class certification:

> One more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The party seeking certification has the burden of demonstrating that all of the criteria are met. *Bishop v. new York city*

Department of Housing Preservation and Development, 141 F.R.D. 229 (S.D.N.Y. 1992). The certification motion is not defeated by the fact that the named plaintiff's claim has become moot when the requirements for class certification are otherwise present. *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994).

The numerosity element requires that class number be so numerous that joinder is impracticable. In the present case, plaintiff has determined that the DSS processed 5,452 fair hearing requests for EAA, EAF, AFDC and HR special allowances during the program year ending September 30, 1994. Plaintiff believes that 4,178 of those fair hearings involved reductions or terminations and the remainder outright denials. Of the 4,178, plaintiff cannot say with certainty how many of those were affected by the improper notice claimed here.

Though the defendant argues that there is no showing of numerosity, the evidentiary hurdle is not as high as defendant would have it. *Dawes v. Philadelphia Gas Commission*, 421 F. Supp. 806 (D.C. Pa. 1976) (issue on motion for class certification is whether representative plaintiffs have demonstrated probability of existence of a sufficient number of persons similarly inclined and similarly situated). The fact that a plaintiff cannot exactly state how many members the class contains is no bar to the certification of a class where, as here, the defendant has the means to identify those persons at will. *Ventura v. New York City Health and Hospitals Corp.*, 125 F.R.D. 595, 599 (S.D.N.Y. 1989). The state has the ability to

separate the denials from reductions and terminations. A court is entitled to rely on common sense in making the numerosity determination. *In re VMS Securities Litigation*, 136 F.R.D. 466 (N.D. Ill. 1991) (finding of numerosity sufficient to support class action may be based on common sense assumptions).

There are problems, however, with both the commonality and typicality prongs. Plaintiff has asserted that there are grants that are, as a matter of law, recurring. The plaintiff has produced extensive evidence of the legislative history *of this allowance* to support such a finding. While the language of the regulation at issue in this case could be read to support a determination that the grant was ongoing, and it could be fairly said that the same conclusion applies to storage grants under the AFDC, HR, and EAF programs, plaintiff has simply assumed without discussion nor analysis that this conclusion is required of the remaining allowances. Plaintiff has painted his class with far too broad a brush and little evidentiary support.

For much the same reason, the plaintiff's claim cannot be said to be typical. The "commonality" and "typicality" requirements of Rule 23(a) tend to merge. *General Telephone Co. of Southwest v. Falcon*, 57 U.S. 147, 157 n.13 (1982). The defendant correctly argues that the plaintiff has produced "no evidence before this Court that there is a state-wide systemic problem of defective notices for special allowances." Plaintiff's evidence that his storage allowance was ongoing and that he was not provided with proper notice required an intricate

analysis of the legislative history of the specific grant and the interaction of the various notices he received with the statutory notice requirements. To certify a class on such a showing necessarily involves this Court in making *ad hoc* evaluations of written notices of individual claimants. Plaintiff's continual evocation of this Court's certification of a class in *Brown v. Giuliani* ignores the fact that there were seven plaintiffs who produced abundant evidence of a continual practice of delay in processing applications for aid. 158 F.R.D. 251, 255 (E.D.N.Y. 1994). Plaintiff's singular experience cannot substitute for such a showing.

Finally, the plaintiff's circumstances, in particular his depressed state and mental illness, make his claim of injury much more compelling. For this reason, however, he is hardly typical of the members of the putative class.

The motion for class certification is therefore denied. Because there is no class of plaintiffs on whose behalf to issue a preliminary injunction, because the plaintiff's preliminary injunction motion is concededly moot, and because it has not been shown that what happened to plaintiff here is likely to repeat itself in the immediate future or escape review, the preliminary injunction motion is also denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York
November 18, 1996

United States District Judge