Empire Justice Center

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Joint Legislative Public Hearings on 2017-2018 Executive Budget Proposal

Human Services

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INTRODUCTION

My name is Susan Antos and I am a Senior Attorney in the Albany office of Empire Justice Center. On behalf of my colleagues, I'd like to thank you for the opportunity to testify today about the Executive Budget as it pertains to human services.

Empire Justice Center is a statewide legal services organization with offices in Albany, Rochester, Westchester and Central Islip (Long Island). Empire Justice provides support and training to legal services and other community based organizations, undertakes policy research and analysis, and engages in legislative and administrative advocacy. We also represent low income individuals, as well as classes of New Yorkers in a wide range of poverty law areas including health, public assistance, domestic violence and SSI/SSD benefits.

As we all know, we have entered a period of great uncertainty. At Empire Justice, we have concerns that federal support for human services is precarious, at best. It is therefore perhaps as critical as at any time in recent memory that the Legislature act assertively to affirm its Constitutional commitment to aid and support the most vulnerable New Yorkers.

My testimony today will span three agencies: the New York State Office for the Aging, the Office of Children and Family Services, the Office of Temporary and Disability Assistance, and the Office of New Americans. We will discuss the positions set forth below:

1. **Invest a Total of $1.962 million in the Managed Care Consumer Assistance Program;**
2. **Restore the Investment in the Disability Advocacy Program at $8.26M;**
3. **Protect homeowners by preserving the Foreclosure Prevention Services Network at $30M for two years;**
4. **Enact Home Stability Support initiative to reduce homelessness and save money;**
5. **Reject the proposed creation of a central administrative hearing division, which lacks needed detail and protection for clients;**
6. **Reject the proposed lottery intercept expansion which is unfair and puts low-income individuals at risk;**
7. **Eliminate the requirement that public assistance recipients provide Social Services Districts a mortgage to their homes as a condition of eligibility for receiving public assistance**
8. **Respond to the urgent need for information, support and legal assistance for immigrants**
9. **Invest $100M for child care assistance**

RESTORE AND BUILD UPON THE INVESTMENT IN THE DISABILITY ADVOCACY PROGRAM (DAP)

For over 32 years, the Disability Advocacy Program (DAP) has been helping low income disabled New Yorkers who were denied or cut off federal disability (SSI/SSD) benefits. Since the inception of DAP in 1983 through June 2016, DAP providers, who work in every New York county:

- Assisted over 218,000 disabled New Yorkers.
- Helped put over $765 million in retroactive benefits in their hands to be spent in local economies.

- Generated over $216 million in federal funds paid back to New York State and the counties.
- Saved at least $293 million in avoided public assistance costs.

Consistently successful in about 74% of all cases, DAP services help stabilize people's incomes, which in turn helps to stabilize housing, health and quality of life overall. **For every dollar invested in DAP, at least $3 is generated to the benefit of New York's state and local governments.**

In last year's final budget, the DAP program was funded at $8.26 million, which included an additional investment of $3 million from the State Legislature over the Executive Budget allocation of $5.26 million. With this investment, combined with the previous year's funding increase, DAP providers have been able to enlarge their base of attorneys and paralegals, and adjust staffing patterns to handle the increase in capacity. The funding increases have allowed DAP providers around the state to increase staffing capacity by at least 15 additional DAP advocates and has resulted in an increase in the number of DAP cases opened. However, despite this progress, the demand for DAP services remain high. Providers estimate that they still turn away at least one person for every individual served. Each low income individual with a disability we cannot serve is left without assistance to navigate the complex Social Security Administration (SSA) benefits application process.

Thus, while DAP is once again funded in the Executive Budget at $5.26 million, that funding level is far from where it needs to be to come close to responding to the demand for DAP services. Clearly, without a restoration of the $8.26 million funding level, DAP providers will be unable to sustain the gains that have been made in staffing and number of cases opened in the past year, let alone be able to tackle the substantial unmet need across the state.

Recommendation: Given the increased investment from the State Legislature last year, and the evidence of increased capacity, we are asking the Legislature to once again invest in DAP to restore last year's level of funding and invest a total of $3 million to bring statewide funding to a total of $8.26 million. The additional funding will go a long way toward further stabilizing the long term future of DAP services and will allow providers to continue to chip away at the unmet need for services.

INVEST A TOTAL OF $1.962 MILLION IN THE MANAGED CARE CONSUMER ASSISTANCE PROGRAM (MCCAP)

The Managed Care Consumer Assistance Program (MCCAP), a statewide initiative run through the New York State Office for the Aging (NYSOFA), provides seniors and people with disabilities critical assistance in accessing Medicare services and reducing health care costs. We are grateful that the Executive Budget provides ongoing funding for MCCAP at its current level, $1.767 million. However, given that the funding has been at a reduced level for several years, we are asking that the Legislature provide additional funds to return MCCAP funding to its 2008-2009 level of $1.962 million. This additional investment will return the program to capacity and respond to the increased demand for Medicare navigation assistance brought about by a growing aging population and changes in the health care delivery and insurance landscape.

The six MCCAP agencies partner with the New York State Office for the Aging (NYSOFA), the New York State Department of Health (DOH) and the Center for Medicare and Medicaid Services (CMS) to provide training, technical support and assistance to local Health Insurance Information Counseling and Assistance Program (HIICAP) offices and other nonprofit organizations working directly with Medicare consumers across New York State. Additionally, MCCAP agencies work directly with consumers to provide education, navigational assistance, legal advice, informal advocacy and direct representation in administrative appeals. We serve clients in their communities and provide services in their native languages; consumers also increasingly reach us via internet and our telephone helplines, as well as through our educational materials and referrals from HIICAPs.

Now is a critical time to shore up funding for MCCAP. As the aging population increases, so does the number of Medicare beneficiaries in New York who need MCCAP's assistance in understanding and accessing their health benefits. In the last year, MCCAP continued its work helping individuals maximize their benefits under the highly complex Medicare Part D program, as well as assisting dual eligibles and other Medicare beneficiaries with health care access issues besides Part D. In addition, MCCAP has responded to a range of new needs that have resulted from the changing health care landscape. For example, MCCAP has fielded a high volume of calls from new Medicare beneficiaries in need of assistance transitioning from other forms of insurance, including the Essential Plan, Qualified Health Plans, Marketplace Medicaid and Medicaid Managed Care plans. These transitions, which are necessary because Medicare beneficiaries are, for the most part, excluded from Marketplace products and Medicaid Managed Care, can seriously disrupt care continuity if not navigated carefully.

MCCAP is also ideally positioned to help Medicare beneficiaries understand and adapt to any changes to Medicare, and other health coverage programs that work with Medicare, that may arise out of the federal debates about the future of healthcare in America. Already MCCAP has been contacted by Medicare recipients anxious to know what changes may lay ahead for them and what they can do to anticipate those changes.

Recommendation: We urge the Legislature to negotiate with the Executive to increase MCCAP funding by $195,000 for a total investment of $1.962 million.

PROTECT HOMEOWNERS BY PRESERVING THE FORECLOSURE PREVENTION SERVICES NETWORK

History of Program

New York State's Foreclosure Prevention Services Network consists of 94 non-profit service providers statewide, including 63 housing counseling agencies and 31 legal services providers. The majority of these agencies have been providing direct assistance to homeowners in default and foreclosure since around 2008, when New York started the network and provided funding through NYS Homes and Community Renewal (then called the NYS Division of Housing and Community Renewal) in response to the foreclosure crisis. Between 2008 and 2011, New York State provided approximately $50 million in funding for these services.

In 2012, the program moved to the Office of the Attorney General (OAG) after the agency was involved in the multi-million dollar National Mortgage Servicing Settlement. The OAG committed $20 million in annual funding for three years starting October 1, 2012. The OAG committed an additional $40 million from proceeds they were allocated to spend from a 2013 settlement with Chase Bank. The program is in its fifth and final year and will end September 30, 2017, with no hope for future settlement dollars being allocated directly by the OAG because of the change is state rules that now requires settlement dollars to escheat to the state budget. The program needs a $30 million commitment to go the NYS Homes and Community Renewal (HCR) to revitalize its Foreclosure Prevention Services Program, including $10 million for the 2017-18 fiscal budget to cover services starting October 1, 2017 through March 31 2018, and $20 million in stable funding for the following fiscal year. Without funding, these services will end statewide.

Ongoing Foreclosure Crisis

Unfortunately, the foreclosure crisis continues in New York State and the need is still great. According to the 2016 Report from the State of New York Unified Court System to the Legislature regarding the settlement conferences, there are 72,000 pending foreclosure cases in our courts, including nearly 34,000 new filings last year. Foreclosure filings comprise an alarming 26% of our supreme court's civil docket. As stated in that report, "These cases are of critical importance to the parties involved and have an undeniable economic impact on the State of New York and the vibrancy of our diverse communities." (2016 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009, November 2016, at 3.)

Delinquency numbers from the Department of Financial Services (DFS) are far higher. In 2016, there were a total of 200,788 filings made to the DFS. These numbers come from the monthly filings required by mortgage servicers after they send homeowners the ninety-day pre-foreclosure filing notice pursuant to PRAPL 1304. (The ninety days refers to the number of days the mortgage servicers must wait after sending the notice before they can file a foreclosure, not the number of days the homeowner is delinquent.) This represents more than 16,000 filings per month. An important side-note regarding these notices is that servicers are required by statute to provide a listing of at least five agencies in the geographic region of the homeowner along with the notices. DFS is mandated to provide this list which is primarily comprised of agencies funded solely through this network.

Success of the Program, Services Provided and Employment Impact

There is no question the network of providers is making a dent. Last year, over 27,000 families were served by this network, and since 2012, almost 72,000 families have been helped. Over 26,000 families have received modifications with an average monthly savings per family of $410, or $4,920 annually. We can't say why, exactly, there is such a huge contrast between the number of delinquency filings and foreclosure filings in the past year, but one explanation is that families get in to see housing counselors early enough in the process and the counselors are able to help the homeowner resolve the issue and avoid foreclosure altogether. There has been a strong emphasis on consumer education within the network and hopefully these numbers evidence that these early-intervention efforts are working.

Through this network, foreclosure prevention services are available to homeowners in every county of New York State. Homeowners come to these agencies through referrals from local government agencies, elected officials' offices, other non-profit organizations in the community, by word-of-mouth referrals, by referrals from the court or because of the ninety-day pre-foreclosure filing notice referenced above. The program has also funded a statewide homeowner hotline which has received almost 32,000 calls since 2013. (Homeowners who call the hotline are triaged and referred to the appropriate housing counseling or legal services agency in their area.) These non-profit agencies are well-established and well-known in the communities and often homeowners find them after attempts to work directly with their mortgage services on their own have frustrated them or failed.

The services provided by these agencies are critical for preserving homeownership and preventing properties from becoming vacant and abandoned eyesores in our communities. It is a well-oiled network, with housing counseling working in conjunction with the legal service providers in their area. Incredibly efficient and effective systems have been developed, provide basic, though important counseling to homeowners for whom continued homeownership is not an option, and more in-depth counseling and legal representation for homeowners who can afford to remain in their homes. These agencies assess homeowners for continued homeownership viability, provide budget counseling, collect documents and compile loss-mitigation applications, negotiate with mortgage services to obtain loan modifications, and represent homeowners in our court-mandated foreclosure settlement conferences. One of the greatest services they provide is to explain the complicated processes and the rights to homeowners and ensure that these rights are not trampled, and for homeowners who can no longer afford their homes, provide what is termed "soft-landings" such as assisting the homeowner in selling the home and establishing a time frame and game-plan for finding alternative housing.

The Network supports 545 jobs statewide. Since there is no other source of funding for these services, loss of this funding will not only mean a loss of these services across New York, but it will also mean significant job loss. These are professional-level jobs, for which the housing counselors and legal services providers have undergone extensive training. On-going training and technical assistance has been an important component of the program. Housing counselors must be certified through a training program provided by NeighborWorks America and they regularly attend monthly webinars and participate in conference calls and listservs providing updates.

Similarly, the lawyers in the network have received specialized training in foreclosure prevention and engage in ongoing training. This is an incredibly complicated area of the law with constantly evolving rules, best practices and programs. It is not an area of the law that one can dabble in and thus, despite major efforts to train the private bar, very few private attorneys are willing to take these cases and none in significant numbers. The Office of Court Administration reported in its October 2016 report to the Legislature that 62% of homeowners are represented in the settlement conferences. This is in stark contrast to pre-2008, when more than 90% of foreclosure cases ended in a default judgment against the homeowner. Without representation in court, homeowners are often overwhelmed and can get taken advantage of my by lenders, who are always represented by legal counsel. In addition, representation of homeowners has led to much greater efficiency in the courts, which would be stymied by an onslaught of pro se homeowners. In the more densely parts of the state, such as New York City, Long Island, and the major cities upstate, courts have established settlement conference days with regular attendance by housing counselors and lawyers in this network to provide immediate, on-site assistance to homeowners.

Economic Impact of Foreclosure and Zombie Properties

In terms of economic impact on New York State, in 2011, Empire Justice conducted an in-depth study and estimated that every foreclosure averted saves the state on average $41,134 in direct costs (if indirect costs are included, the average savings goes up to $186,695). Using just the average for direct costs, based on the 26,351 modifications obtained through the Network since 2012, these foreclosure prevention services have saved $1.084 billion dollars for New York State.

Foreclosure prevention benefits surrounding homeowners and communities. Foreclosures are generally considered to decrease the property values of surrounding homes by 1%, and a total neighborhood loss of $70,000. Analysis done by the Center for New York City Neighborhoods found that for every foreclosure averted, approximately $260,000 in equity is also saved for all homes within 750 feet — that's the aggregate property value that would have vanished had the homeowner gone into foreclosure. This figure varies statewide depending on property values and home density: for New York City, the ripple effect is $740,000, on Long Island it is $280,000, while in the Capital Region it is $34,000. Preventing foreclosures ensures the benefits of housing stability for many low- and moderate-income families and seniors who would struggle to afford rental units at current market rates. This is true for homeowners as well their renters when there is more than one unit in the home. Preventing foreclosures avoids disruption to school and community ties for children.

Counties across New York State are struggling to deal with vacant and abandoned properties, so much so that the issue was voted a priority by New York Conference of Mayors this year. When families are stabilized, it prevents homes from becoming vacant and abandoned, attracting blight, crime, and unsafe health conditions for neighbors. While $27,000 is a common number cited as the cost of a vacant property to a local government, a Schenectady official estimated that a vacant and abandoned property can cost the city $65,000 a year. Preventing foreclosures ensures continued payment of property taxes and other utilities, maintaining homes in good repair and keeping sidewalks and driveways shoveled. It also avoids additional fire, police, housing authority and other costs for local governments.

Emerging Trends and Leveraging Settlement Dollars

There are several emerging trends in foreclosures and the mortgage servicing world that make the continuation of services as critical as ever. First, advocates are seeing a steep uptick in the number of reverse mortgage foreclosures. This is attributed to a number of factors including a rise in the number of these mortgages made over the past several years, and an increase in tricks and traps employed by lenders in the making as well as servicing of these mortgages. By definition, reverse mortgages impact a particularly vulnerable class of senior homeowners who have lived in their homes for years, if not decades. Governor Cuomo recognized this emerging issue in his Executive Budget by including language that would mandate settlement conferences for homeowners with reverse mortgages. Yet no funding was provided for assistance to and representation of these homeowners. For New York judicial settlement conferences to be effective, it is imperative that homeowners have the assistance of folks who can steer them through the systems to enable them to avoid foreclosure.

Another emerging trend is an increase in property tax foreclosures. Each county operates differently and again, it is extremely difficult for homeowners to go through these processes alone and succeed. No one wants to displace homeowners and it is especially shameful for families to lose their homes when it could have been avoided. The Center for New York City Neighborhoods runs a Statewide Mortgage Assistance Program (MAP) that provides 0% interest rate loans up to $40,000 that sit as liens on a homeowner's property until sold. These loans help homeowners cure arrears, get into loan modifications and pay past due property taxes. There is no other source of funding for this sort of assistance. MAP is currently being funded by up to $80 million in settlement dollars directly due to the state by Goldman Sachs to be paid out over the next three years. MAP depends on the Foreclosure Prevention Services Network, however, to disseminate these dollars. The direct service providers screen homeowners for eligibility and submit applications. They are a critical part of leveraging these settlement dollars for New York State. Without the Network, it is questionable whether we as a state will benefit from the full amount available through MAP.

Similarly, last year New York State established the Community Restoration Fund (CRF) within HCR with a dedication of $10 million in funding flowing from a bank settlement with Morgan Stanley. The goal is to purchase a pool of distressed mortgage notes in New York State from HUD that would otherwise be sold to a Wall Street private investor, and to modify, foreclose and sell when necessary, and rehabilitate the vacant and abandoned properties within the pool. In order to do this, HCR has already depended on the assistance of foreclosure prevention providers in communities throughout New York State to go out and determine the status of properties. The expectation is that Network agencies will be instrumental in working with homeowners and connecting HCR to local revitalization services to reform the pool of loans. Without continued services, it is very uncertain how HCR will be able to achieve the goals set forth by the Legislature.

National trends are also impacting New York homeowners. The primary federal modification which streamlined loss mitigation efforts, the Home Affordable Modification Program (HAMP), ended in December 2016. This complicates the modification process for homeowners as they now have to navigate the individualized programs of each lender. Mortgage servicing standards adopted by the Consumer Financial Protection Bureau are at risk, as are all consumer protection statutes and regulations.

Recommendation

New York has done tremendous work in instilling protections for homeowners since 2008; arguably, the best in the country as we have set the national standard for foreclosure prevention. We've passed far-sighted legislation to ensure no home is illegally foreclosed upon and provided homeowners with a network of professional housing counselors and legal services attorneys to preserve homeownership. Among the best of these protections have been the mandatory settlement conferences in judicial foreclosure cases, though these conferences work best only when a homeowner has assistance. To lose these services would break the stride and be a severe setback in in the protections we've provided to preserve homeownership.

By committing $30 million in funding ($10 million for 2017-18 fiscal year and $20 million for following fiscal year) to HCR for the Foreclosure Prevention Services Program, the State can leverage the successes of an established network of service providers, as well as other programs such as MAP and the CRF, and refocus it so that it continues to mitigate home mortgage and tax foreclosures, and also becomes a direct response to emerging and growing problems like reverse mortgage defaults and zombie properties.

REJECT THE PROPOSED CREATION OF A CENTRAL ADMINISTRATIVE HEARING DIVISION, WHICH LACKS NEEDED DETAIL AND PROTECTION FOR CLIENTS

A broad array of disputes in our state are resolved, not in court, but by administrative hearing processes. Many state agencies conduct hearings that determine everything from motor vehicle violations to eligibility for Medicaid. Hearing processes vary widely from agency to agency, and we at Empire Justice would certainly be interested in efforts to modify the hearing process to improve fairness, accessibility and efficiency. But given the high stakes that are often involved, reform of the system must be undertaken with great care.

Part U of the Article VII bills would amend the Executive Law to create a Division of Central Administrative Hearings. This new body would have the authority to "...establish, consolidate, reorganize or abolish..." the administrative hearing function within any civil department, subject only to the approval of the director of the budget. The only stated criterion for action would be the Chief Administrative Law Judge's belief that the action would improve efficiency.

Empire Justice Center strenuously opposes the creation of a body with essentially standardless authority to combine administrative hearing functions across state government agencies. We are not inherently opposed to some form of consolidation, but any bill authorizing consolidation of hearing functions should, at a minimum:

- Set forth a list of the agencies whose hearing functions will be combined, or
- Define standards that will be used to decide whether to add agencies to the Central Administrative Hearing Division, and provide an opportunity for public comment, to ensure that issues and concerns can be aired and resolved prior to consolidation;
- Guarantee that an agency's specific procedures and processes will be maintained if they were adopted because of, for example, a constitutional mandate[1], or because of particular characteristics of that agency's clientele, will be maintained;

[1] *see e.g. Goldberg v. Kelly*, 397 U.S. 254 (1969) mandating certain procedures for hearings about eligibility for public assistance benefits

- guarantee that Administrative Law Judges have subject matter and legal expertise on the topics they will be adjudicating;
- provide protections, such as a duty to independently develop the record, for pro se individuals who are unfamiliar with hearing procedures and the substantive policies, rules and regulations relevant to the issues to be heard;
- adopt measures that protect the independence of Administrative Law Judges; and
- guarantee that processes and procedures required by the due process requirements of federal funding agencies will be observed.

The absence of any of these fundamental provisions in the bare-bones language of this Part make it impossible to warrant serious consideration of the proposal.

THE HOME STABILITY SUPPORT INITIATIVE WILL REDUCE HOMELESSNESS AND IS HIGHLY COST-EFFECTIVE

Empire Justice urges the Legislature to enact the Home Stability Support proposal, and thereby take a crucial step forward in addressing the crisis of homelessness throughout the State. As has been widely reported, New York State has reached the highest levels of homelessness since the Great Depression. Between 2007 and 2015, New York had the largest increase in homelessness of any state in the nation. Although homelessness decreased by 11 percent across the country during that time, New York was one of 18 states where it increased, and by an alarming 41 percent. It is estimated that there are over 150,000 homeless children in New York State and that approximately 80,000 households are on the brink of homelessness.

Being homeless harms families and compromises the future of New York's children. Stable housing is crucial for the overall mental and physical health of families, especially for a child's optimal development and educational success. "Homeless children have worse physical health, are less likely to have a regular source of medical care, and are more likely to use emergency rooms," as compared with other children who live in stable housing.

A 2016 report by the State Comptroller found that "...between 2014 and 2015 alone, New York State's homeless population jumped by 7,660," the largest increase in the nation for that year. In New York City, the number of homeless people has passed 60,000. While Empire Justice fully supports the important role that affordable housing plays in stabilizing families and communities, New Yorkers in crisis cannot afford to wait – they need solutions now that will prevent families from becoming homeless. Building new, affordable housing is an essential component to fighting homelessness, but *it is equally important to address the drastic disconnect between the cost of decent housing and the allowances provided to public assistance recipients to pay for housing.* New York State has some of the most expensive housing in the nation, yet the housing portion of the public assistance grant (known as the "shelter allowance") has not remotely kept pace with relentless rental cost increases. For households forced to rely on public assistance as their primary source of income, the current benefit sets people up to become homeless and contributes to the trauma and chaos that low-income families face on a daily basis in our State. Furthermore, the current system ensures that tax payers end up footing the bill in other, more costly ways. In his 2016 State of the State Address, the Governor explained that taxpayers expend over $1 billion for the statewide shelter system. Keeping families in their homes through the Home Stability Support proposal could save taxpayers millions of dollars while helping to achieve better outcomes in health, employment, and education.

A comparison of the allowable shelter grants given to families on public assistance with the "Fair Market Rents" (FMR) established by the Federal Department of Housing and Urban Development reveals the inadequacy of the shelter allowance. For example, in Albany County, the monthly FMR for a two-bedroom unit is $1,005, while the maximum shelter allowance for a household of three is $309 per month, or about 31% of the FMR. In Erie County, the two-bedroom FMR is $755, while the shelter allowance for a household of three is $301, or about 40% of the FMR. Finally, in Dutchess County, the FMR for one bedroom is $1,271, and the shelter allowance for three is $412—just over 32% of the FMR. There is no county in New York where the shelter allowance provides enough money to cover even half of the Fair Market Rent. For many poor New Yorkers living in more expensive locations, such as the New York City suburbs, the grant rarely amounts to even one third of the FMR, which is a measure of the cost of decent, but modest housing. The Court of Appeals has stated that "A schedule establishing assistance levels so low that it forces large numbers of families with dependent children into homelessness does not meet the statutory standard." Jiggetts v. Grinker, 75 NY.2d 411 (1990). Thus, New York State is currently failing to meet its legal obligations under the Social Services Law.

Further, for those households that pay for heat separately from their rent, which is the case in many areas outside New York City and its suburbs, the inadequacy of the additional allowance to pay for heating also contributes to housing instability. The heating allowance has not been raised since it was created in 1987, nearly 30 years ago. Over that time, the cost of heating oil has quadrupled and the cost of natural gas heat has doubled. Households receiving public assistance for basic needs, even if they receive an additional heating allowance, have been pushed further into poverty over time in New York because their entire grant is subsumed by their housing cost. And typically that isn't even enough to cover their housing.

The inevitable consequence of these grossly inadequate heating and shelter allowances is that households in need in New York State have little or no chance of retaining decent housing, and are thrust into crisis by a system purported to be the safety net. Families are forced to divert the part of their welfare grant designated for basic needs like clothing and transportation to attempt cover their rent, and even then are still at risk of being forced to live in overcrowded, substandard, even illegal housing in order to keep a roof over their heads.

The paradox in this situation is that, while families on public assistance are unable to afford sufficiently heated, stable housing with their welfare grant, the local counties are required to pay exponentially more to house these same families when they become homeless. Emergency housing is extremely expensive. As previously mentioned, New York State's homeless shelter system costs the state over $1 billion dollars annually. In 2008, Orange County estimated that "the average cost of providing services to a homeless family . . . equaled $157 per day ($4,710 per month)." The 2008 Fair Market Rent for a one-bedroom unit in Orange County was $901 per month, and for two bedrooms was $1,103. So, providing a family with sufficient rent for decent, stable housing would have cost less than one-quarter of the cost of placing them in emergency housing. It is startling to consider the cost savings and vastly improved quality of life for low income families that reasonable shelter and heating allowances would offer so many households.

Emergency housing and services for the homeless are essential, but the long term solution rests in enabling low income households to secure and retain decent, permanent housing on a workable budget. To that end, several social services districts throughout the State have decided to create optional rent supplement programs to help public assistance recipients pay their rent. These rent supplements are paid in addition to the household's shelter allowance. However, the vast majority of these rent supplements are inadequate. Moreover, most districts have complicated eligibility restrictions that prevent the vast majority of households from accessing these rent supplements. Those fleeing domestic violence or living in hazardous conditions are particularly disadvantaged by these eligibility restrictions. This is especially significant because, as noted in a recent article about the impact of domestic violence on homelessness in New York City, domestic violence is now the primary cause of homelessness, surpassing evictions. In 2015, a total of 11,585 survivors and their children sought assistance and shelter from domestic violence programs in New York State. However, this statistic only accounts for those survivors that sought shelter at a domestic violence program. There are many more that are homeless due to domestic violence that sleep at a friend or family member's place, in cars, or on the streets.

Recommendation: Home Stability Support would create a new statewide rent supplement program for families and individuals facing eviction, homelessness, or loss of housing due to domestic violence or hazardous conditions. The HSS rent supplement would bridge the gap between the current shelter allowance and 85% of the Fair Market Rent as determined by HUD. To account for the inadequacy of the current fuel allowance, HSS will also include an additional fuel supplement for those households that pay for heat separately from their rent.

Based on the available data, HSS would achieve significant savings throughout the State by preventing evictions and reducing shelter utilization as well as the costs associated with other homeless services. HSS would provide mandate relief to the localities by not only reducing the costs associated with emergency housing but by replacing all existing optional rent supplement programs. Furthermore, the rent supplements would be funded by State and federal dollars.

Finally, to encourage employment and avoid creating a "benefits cliff," HSS will include a one-year transitional benefit for households that increase their earnings enough to leave public assistance.

We were disappointed that the Governor did not include Home Stability Support in the executive budget, though we appreciate that some of his initiatives did recognize the current crisis in housing and homelessness. We believe that HSS will reverse the growing trend of homelessness in New York State and urge the Legislature to adopt the proposal. Keeping low-income families and individuals in their homes will not only achieve better social outcomes but will also save the taxpayers millions of dollars.

THE PROPOSED LOTTERY INTERCEPT EXPANSION IS UNFAIR AND PUTS LOW-INCOME INDIVIDUALS AT RISK

In New York State, even properly paid public assistance benefits are a debt that must be repaid if the recipient or former recipient comes into a windfall, such as an inheritance, a personal injury award or a lottery prize. Social Services Law (SSL) 131-r (1) already provides that 50% of any lottery prize over $600 shall be intercepted by the New York State Tax Department to repay any public assistance received for the last ten years. The Governor's Aid to Localities Article 7 bill (Part O) would amend SSL 131-r to make the entire award subject to that intercept. This change in the law is projected to generate $3.1 million in state and local revenue. There are a number of reasons why this law should not be enacted without significant amendment.

The governor has refused to credit the value of work against public assistance debt, despite the clear and unambiguous direction of the court of appeals.

Many public assistance recipients are assigned by their local social services districts to work off their grants. The number of hours they are assigned are determined by dividing the total of their public assistance grant and their SNAP benefits by the minimum wage. SSL 336-c(2)(b). The Court of Appeals has held that when individuals on public assistance are required to work off their public assistance debt though assignment to workfare or work experience programs they are entitled to the minimum wage protections of the federal Fair Labor Standards Act of 1938 and must receive credit for that work (*Carver v. State of New York*, 26 NY3d 272, 276 [2015]). Despite this clear and unambiguous holding, the Office of Temporary and Disability Assistance has refused to direct social services districts to comply with the law, and in at least one case, has expressly directed a district not to comply with the *Carver* decision. In light of these circumstances, the Governor's proposal should not be permitted to go through unless Social Services Law131-r(2) is also amended, as follows (new language is underlined):

> 5. Any inconsistent provision of this chapter or of any other law notwithstanding, a social services official may not assert any claim under any provision of any chapter to recover payments of public assistance if such payments were reimbursed by child support collections [.] <u>or where a recipient or former recipient of such assistance was required to participate in a work experience program, without first crediting against such recovery the number of hours that such person actually participated in the work experience program multiplied by the higher of the applicable state or federal minimum wage.</u>[2]

This language, incorporating the principle of the *Carver* decision, must be included in the Article VII bill to assure equity, fairness and compliance with the law.

Most public assistance recipients do not know that they owe a public assistance debt

Before 2016, the Office of Temporary and Disability Assistance had no notices advising public assistance applicants that properly paid public assistance is a debt subject to repayment. In June of 2016, the public assistance application was revised to include such notice, but unfortunately, the notice appears on page 24 of the standard public assistance application,[3] and is buried in seven pages of disclosures in 8 point type:

> PUBLIC ASSISTANCE RECOVERIES – Public Assistance (PA) you receive for yourself and for persons for whom you are legally responsible to support is recoverable from property or money you possess or may acquire. You may be required, as a condition of receiving PA, to execute a deed or mortgage of real property you own. Your tax refunds and portions of lottery winnings may be taken to repay your debt for PA.

This buried provision is not sufficient to adequately notify people of a debt. Because the recoupment of lottery winnings looks back ten years, many public assistance recipients and former public assistance recipients will be shocked and surprised by the interception. For example, Walter Carver, the plaintiff in the Court of Appeals case referenced above, had not received welfare for the seven years before he won the lottery prize and had no idea it would be intercepted.

Additionally, recipients are not advised, with one exception, of the amount of accruing debt. Beginning in 2016, as a result of an amendment to SSL 106-b, individuals required to sign a mortgage in favor of the social services district as a condition of eligibility, were advised of their accrued public assistance, and the law requires that they be so advised biennially. This is important because items such as SNAP, HEAP and child care subsidies are not recoverable, and social services districts make mistakes in calculating state debt. In the case of one Albany County recipient, a

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[2] Similar language is currently being introduced as stand-alone bill by Assemblywoman Michelle Titus (A.4655), and comparable language was in a bill was passed by the Assembly in 2015 (A.2050).
[3] The entire application can be reviewed here: http://otda.ny.gov/programs/applications/2921.pdf

$40,000 DSS mortgage was reduced to $20,000 after the recipient's lawyer discovered that the district had inadvertently included the value of benefits it should not have included.[4]

Therefore, any amendment to SSL 131-r should expand the disclosure requirement of 106-b to all public assistance recipients so that they are afforded the same protections as those who give the district a mortgage. Since the form has already been developed for individuals who have signed mortgages (see attached), it will not be an administrative burden to create the form. And advising recipients and former recipients of their debt is both fair and transparent.

The following language, which mirrors the language in SSL 106, should be added as a new section (5) to Social Services Law 104 and a new (3) at the end of SSL 131-r:

> 5. A social services official may not assert any claim under any provision of this chapter to recover payments made as part of Supplemental Nutrition Assistance Program (SNAP), child care services, Emergency Assistance to Adults or the Home Energy Assistance Program (HEAP).
>
> 6. For as long as a recipient or former recipient has a debt owed for public assistance benefits received, the social services district that issued such benefits shall issue and mail to the last known address of the person, or his or her estate or those entitled thereto, a biennial accounting of the public assistance incurred. The social services district shall provide such accounting no later than February first, two thousand eighteen and biennially thereafter.
>
> > (a) Such accounting shall include information regarding the debt owed as of the end of the district's most recent fiscal year including, but not limited to:
> > (1) an enumeration of all public assistance incurred by the recipient or former recipient to date;
> > (2) the current amount of recoverable public assistance;
> > (3) the amount of any credits against public assistance including but not limited to:
> > > A. the amount of child support collected and retained by the social services district as reimbursement for public assistance;
> > > B. recoveries made under section one hundred four of this title;
> > > C. recoveries made under section one hundred thirty-one-r of this chapter
> > > D. The value of any workfare performed based on the hours of work times the minimum wage at the time the work was performed.
> >
> > (4) Said accounting shall also provide information regarding the manner in which payments may be made to the social services district to reduce the amount of the mortgage or lien.
> > (b) In the event that a biennial accounting is not issued and mailed to the last known address of the recipient or former recipient, no public assistance shall be recoverable under this section.

[4] See page 11, *Don't Lien on Me, How Public Assistance Mortgages undermine Homeownership and Financial Stability*, available at: http://www.empirejustice.org/assets/pdf/publications/reports/welfare-lien-report-dec-2013/dont-lien-on-me-rev-2.pdf

The recovery of an entire lottery award could leave the recipient or former recipient liable for federal, state and local taxes

Lottery prizes are taxable as income under federal and state law as well as the laws of several cities, such as New York City.[5] The fact that the prize is intercepted does not exempt the prize from being treated as income for purposes of taxation. As you can see from the attached lottery intercept notice which was issued under the current law to a person winning a $10,000 prize, the entire amount was taxed, resulting in a withholding of $3550 in taxes ($2500 federal; $685 state and $365 local). After $5000 was offset for public assistance repayment, the prize winner took home only $1,450. If the entire amount of a lottery prize is offset, the individual will remain personally liable for taxes and being poor, will have no funds to pay them. This is a strong reason to leave the statute as it is, or at the very least, add language to the Article VII bill, as follows:

> Provided however, that the reimbursement to the department shall not be made until all applicable federal, state and local taxes have been deducted, as well as any child support arrears which are intercepted pursuant to 1613-a of the tax law.

ELIMINATE THE REQUIREMENT THAT PUBLIC ASSISTANCE RECIPIENTS PROVIDE SOCIAL SERVICES DISTRICTS A MORTGAGE TO THEIR HOMES AS A CONDITION OF ELIGIBILITY FOR RECEIVING PUBLIC ASSISTANCE

Although homeownership is the cornerstone of the American dream, New York State undermines this concept by requiring low income families that fall upon hard times to give local social services districts a mortgage in exchange for receiving public assistance benefits. The size of the mortgage is equal to the value of public assistance received. As a result, the debt continues to accrue as long as the individual or family receives welfare benefits – increasing the size of the mortgage with each subsequent benefits payment. This requirement, which is authorized by Social Services Law 106, affects between 1,000 - 2,000 public assistance recipients per year,[6] burdens them with debt and inhibits their ability to move ahead in life, due to the onerous mortgage on the property.

The taking of public assistance mortgages is an archaic and outdated practice. The practice generally affects people in transition - those who own their homes when they apply for welfare such as workers who become disabled and who are waiting for their social security benefits to come through. Or homemakers with small children who have gone through divorces and been given the home as part of the settlement, often the only marital asset. They are then shocked to learn that what they thought was a source of security is now the source of debt.

Assemblymember Barron has introduced a bill which would prospectively end this practice, A. 1570. This bill has gone through the Social Services Committee and been referred to Ways and

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[5] N.Y. Tax Law § 1600 *et seq.* (McKinney 2016); 26 U.S.C. § 3402(q) (2017); *see also General Rules*, N.Y. LOTTERY (Feb. 6, 2017), http://nylottery.ny.gov/wps/portal/Home/Lottery/Quick+Help/Legal/General+Rules (noting that "[t]he Gaming Commission is required to . . . withhold income taxes from Lottery prizes according State and federal law" including a 3.876% withholding in New York City and a 1.477% withholding in Yonkers).

[6] S. Antos, K. Brown, T. Frazier, K. Keefe, G. Grasso and E. Baer, *Don't Lien on Me: How New York's Public Assistance Mortgages Undermine Homeownership and Financial Stability*, at 17. Available at http://www.empirejustice.org/assets/pdf/publications/reports/welfare-lien-report-dec-2013/dont-lien-on-me-rev-2.pdf (accessed 2/5/2017). In the six years studied by that report the numbers of mortgages taken annually fluctuated between a low of 1,053 in 2006 and a high of 2271 in 2010.

Means. We urge the legislature enact this bill into law and help those who hit hard times and must temporarily rely on our welfare system for support.

Because the effect of this bill is prospective only, the fiscal implications are *de minimus* and will be gradual. Mortgages have been taken against the homes of public assistance recipients since at least 1937.[7] Reports from districts that show the date a lien was provided and the date it was satisfied suggest that these mortgages are in place for decades before they are recovered.[8] Therefore, if the practice is stopped prospectively, it is likely that the effect will be barely noticed in the first few years because the mortgages executed before the effective date of the legislation can continue to be redeemed.

Statewide, approximately $4.2 million a year is recovered from public assistance mortgages.[9] Over a six year period, only 12 out of 58 social services districts recovered more than $300,000 over the total course of that six years, and only four districts recovered more than $1 million over those six years.[10] Not all of that money goes to local social services districts. Districts must return funding to the state and to federal accounts in differing percentages depending upon the type of assistance provided and the date the benefits were provided. For example recoveries for safety net assistance that was provided before April 2011, are split evenly between the state and local government.[11] The state only gets 29% of any recoveries of safety net benefits that were provided after that date.[12] Recoveries for Aid to Families with Dependent Children benefits, or Family Assistance benefits paid before 2011, are split, with 50% going to federal accounts, 25% to the state and 25% to local districts.[13] For Family Assistance benefits provided after April 2011, local districts recover nothing; it is all returned to federal accounts.[14]

Only one other state in the country, Connecticut, requires those who receive benefits to execute a mortgage as a condition of eligibility for assistance.[15] We urge the legislature enact the Barron bill into law and help end this draconian practice.

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[7] In *First National Bank of Herkimer v. Dise*, 161 Misc. 488 (1937), the Herkimer County Supreme Court upheld the predecessor of SSL 106 against a constitutional challenge, so we know that the practice of taking public assistance mortgages is at least 80 years old.
[8] S. Antos, K. Brown, T. Frazier, K. Keefe, G. Grasso and E. Baer, *Don't Lien on Me: How New York's Public Assistance Mortgages Undermine Homeownership and Financial Stability* at 17. Available at http://www.empirejustice.org/assets/pdf/publications/reports/welfare-lien-report-dec-2013/dont-lien-on-me-rev-2.pdf (accessed 2/5/2017).
[9] Id at 15 and Appendix 1.
[10] Id. at 19 and Appendix 1.
[11] Social Services Law 153(1)(d),(e).
[12] *See* N.Y. Appropriations Budget, Ch. 53, §1, 385 (2011); Ch. 53, §1, 259, 279-80 (2012); Ch. 53, §1, 302 (2013); Ch. 53, §1, 290 (2014); Ch. 53, §1, 349 (2015); Ch. 53, §1, 336 (2016). The full text of the appropriation can be found at "Aid to Localities" at https://www.budget.ny.gov/pubs/publications.html.
[13] Social Services Law 153(1)(d),(e).
[14] *See* N.Y. Appropriations Budget, Ch. 53, §1, 154 (2012); Ch. 53, §1, 184 (2013); Ch. 53, §1, 170 (2014); Ch. 53, §1, 207 (2015); Ch. 53, §1, 206 (2016).
[15] Conn. Gen. Stat. §17b-93 (2016). Two other states allow mortgages to be taken only when assistance is paid for with local funds. New Hampshire permits the taking of a mortgage when assistance is provided by a town or city. N.H. Rev. Stat. Ann. §165:28 (2016). Two counties in Florida, Miami-Dade County and Palm Beach County, permit the taking of a mortgage when assistance is provided by the county. Miami-Dade County Code of Ordinances, Part II, Chap. 2, Art. XI, §2-88.1 (2016); Palm Beach County Code of Ordinances, Vol. I, App. G, Ch. 14, Art. III, §14-51 (2017).

NEW YORK MUST RESPOND TO THE URGENT NEED FOR INFORMATION, SUPPORT AND LEGAL ASSISTANCE FOR IMMIGRANTS

Clearly the world of immigration is changing and changing rapidly with little time to plan, organize or provide the services needed to ensure that individuals and families are given the due process they need and deserve.

While New York can and should do all it can to work with its federal partners to press for sensible and humane national immigration policies, as a state, New York should move aggressively to provide information, support and legal assistance to these communities so that they are afforded every protection possible. By supporting a network of immigrant legal assistance, New York will also help guard against the scams and frauds that so often target these communities in times of change and uncertainty.

There is a range of policies New York could adopt in this arena, but we want to highlight just three in our testimony today:

- The creation of policies aimed at supporting the children of parents who are facing detention or orders of deportation,
- Providing assistance to children in foster care who may be eligible to apply for Special Immigrant Juvenile (SIJ) status, and
- An expended investment in the Office for New Americans.

Helping to Arrange KinCare for Children Left Behind

The Washington Post recently reported that "... there are at least 5.1 million children living in the United States with a parent who is an unauthorized immigrant," citing an analysis published in January by the Migration Policy Institute. The report found that more than 70 percent of these children are U.S. citizens. We are extremely concerned that if deportation continues to ramp up, many parents will be faced with a desperate need to plan for the safety of their children. Parents who may be forced to return to countries they fled, may well choose to have their children remain in the United States. These children may be immigrants themselves or they may be American-born children. While we continue to oppose immigration policies that tear families apart, we need to do all we can to ensure that these children can be stabilized into the homes of family members.

New York is well-positioned to help in this area: we have an existing network of KinCare services and a well-established KinCare Navigator, a statewide service funded through the Office of Children and Family Services that provides training, support and technical assistance to the KinCare Network as they work to meet the needs of children and their KinCare families. KinCare providers – often grandparents, aunts, uncles, older siblings —step in when parents are no longer able to care for their children due to death, incapacity, substance abuse, or other factors that drive their inability to care for their children.

To creatively meet this potentially emerging need for KinCare arrangements within the immigration community, the state should move to expand KinCare services and increase the capacity of the KinCare networks to provide the legal and supportive work that will be needed by immigrant families as they seek to secure their children's living arrangements. Issues such as stand-by guardianships, approval to deal with school enrollment, health authorizations and other legal matters that will need to be put in place to ensure that the children of deported immigrant parents are not left without the supports they will need.

Children Currently Without Status

New York could also move creatively to help identify children without legal status who are already in the formal foster care system in New York. Many of these children are eligible for Special Immigrant Juvenile (SIJ) status but have no way to exercise their rights to seek such status. The state should get in front of these cases and help the community to work specifically to help those who are able to secure Special Immigrant Juvenile status to do so. This requires capacity and training for attorneys to handle both the immigration side of the case and the Family Court side.

To do this, the state could create a special project under which each Social Services District would be tasked with reviewing their foster care populations and identifying those children who are without immigration status. These children could be connected with immigration legal assistance through ONA Legal Counsels. The state could enlist the support of the private bar to assist in the Family Court cases and provide assistance to these children through the SIJ process so that they can secure status before they age out of the foster care system.

Expanding the Office of New Americans

In 2013, Governor Cuomo created the Office for New Americans (ONA) within the Department of State. Through a competitive bidding process, the Office now funds a network of 26 local Opportunity Centers that provide English-for-Speakers-of-Other-Languages (ESOL) classes, assistance to those preparing for their citizenship exams and support for those working their way through the naturalization application process.

We must continue to invest in legal services for immigrants, and make sure that immigrants have proper representation by expanding the scope of services from the Office for New Americans (ONA), and make sure the valuable contributions that immigrants make to communities across New York are preserved.

The ONA Opportunity Centers partner with other community-based organizations and government agencies to coordinate services, hosting citizenship drives and engaging pro bono assistance in providing legal assistance through the naturalization process.

Long Island
Central American Refugee Center-Suffolk
Literacy Nassau, Inc.-Nassau
Make the Road New York, Suffolk-Suffolk

New York City
Bronx Works-Bronx
Mercy Center, Inc.-Bronx
Asian American Federation-Brooklyn
Arab American Association of NY-Brooklyn
Opportunities for a Better Tomorrow-Brooklyn
Flushing YMCA-Queens
Korean Community Services of Metropolitan NY, Inc.-Queens
Make the Road New York, Queens-Queens
Queens Borough Public Library-Queens
Chinese-American Planning Council, Inc.-NYC
CUNY Uptown-NYC
Hispanic Federation-NYC

Staten Island YMCA-Staten Island

Hudson Valley
Catholic Charities-Dutchess
Catholic Charities-Orange
Literacy Solution NY, Inc.-Rockland
Neighbors Link-Westchester
Westchester Hispanic Coalition-Westchester

Capital Region and Central New York
USCRI-Albany
Mohawk Valley Resource Center for Refugees-Oneida
Catholic Charities- Syracuse-Onondaga

Western New York
Jericho Road Ministries-Erie
Catholic Family Center-Monroe

Through this service delivery model, ONA also funds Regional Legal Counsels to provide training, technical assistance and legal backup to the local Opportunity Centers; Empire Justice is proud to be the Legal Counsel for the Hudson Valley and Capital Region.

The need for these services is critical and rapidly increasing as confusion about federal immigration policy escalates. The immigrant communities in our state have been wracked with uncertainty and fear as changes have been announced without warning or preparation. We need to expand the services available to assist these communities.

Recommendation - We urge the Legislature to increase the budget of the Office for New Americans from the current $6.4 million to $15 million in order to expand and enhance the services available to those in need and to make an additional $15 million available to expand the network of legal assistance available to immigrants throughout the state.

INVEST $100M FOR CHILD CARE ASSISTANCE

Empire Justice Center joins Winning Beginning New York and asks the State to invest $100 million new dollars to restore and increase child care subsidies. As child care costs have increased, with no increased investment (the average child care subsidy per child has risen from $7,200 to approximately $7,574 since 2013), New York has passed some costs on to providers by dropping provider reimbursement from the 75th percentile of the market rate to the 69th percentile[16] and by reducing the number of children served. **Now, only 17% of eligible children in New York are served with a child care subsidy.**[17] This number could drop further if the State implements new

[16] 16 OCFS INF-06, p2. Available at: http://ocfs.ny.gov/main/policies/external/OCFS_2016/INFs/16-OCFS-INF-06%20Child%20Care%20Market%20Rates%20Advance%20Notification.pdf

[17] New York State law provides that working families are eligible for child care assistance if their income is under 200% of the federal poverty line (e.g., $40,320 for a family of 3). An analysis of Office of Child Care Administrative data and U.S. Census data done by the Center on Law and Social Policy show that 676k children were eligible in 2014. Only 92,000 of those eligible children were served at any time, or 17%. Source: CLASP Analysis of Office of Child Care administrative data 2010-2014 averages and U.S. Census American Community Survey five-year estimates (2010-2014). (Analysis on file at the Empire Justice Center). See also CLASP Disparate Access report which reports that only 20% of eligible children in New York State received

federal child care Development Fund Block Grant (CCDBG) regulations without increased investment. To keep vulnerable children in child care, we urge the State to invest an additional $100m (over the current $805.9m) to restore subsidies lost by escalating costs, and to increase the number of children served.

A. Child care is in crisis

Counties are running out money, even as the need grows. Some are simply refusing to accept new applications. Others, in an effort to cope with limited funds, are reducing financial eligibility, falling far short of the state's statutory eligibility level, 200% of poverty. As indicated below:

- **Niagara County** only serves those at or below **120%** of the federal poverty level ($24,192 for a family of three).[18]
- The eligibility levels in **Albany, Delaware and Suffolk Counties** are **125%** of poverty ($25,200 for a family of three).
- Although **New York City** has technically retained its eligibility levels at 200% of poverty, data show that few families over **135%** of poverty are being served.
- Four social services districts have lowered eligibility to **150%: Clinton, Oneida, Orange and Schenectady Counties;**
- **Livingston and Rensselaer Counties** have lowered eligibility to **160%** of poverty.
- The eligibility level in **Monroe County** is set at **165%** of poverty and the county is not opening new cases.
- In **Ontario and Saratoga Counties** eligibility is at **175%** of poverty.

Adequate funding for child care is critical to the success of New York's economic development initiatives and for working families with young children who are trying to pay the rent and pay for child care. For those families that leave welfare for work, it makes no sense to guarantee a child care subsidy for one year, and then remove that benefit when the family's wages remain below the county eligibility level, when research shows that without assistance, most families below 200% of poverty cannot pay for both child care and rent.[19]

B. Do not fund child care by taking money from other needy New Yorkers

The Executive Budget provides the same amount for child care subsidies for low income working families as it did in the 2016-17 budget - $805.9 million. However, the governor replaced $27 million of general fund money that was invested in subsidies last year, with $27 million in Title XX funding to be taken from social services districts. Funding child care with money already earmarked for critical social services, is not a proper way to fund child care.

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subsidies using 2013 Office of Child Care Administrative data and U.S. Census American Community Survey three-year estimates (2011-2013) at: http://www.clasp.org/resources-and-publications/publication-1/Disparate-Access.pdf at page 29.

[18] These numbers reflect the 2016 poverty level which for child care, are in effect until June 1, 2017. 2016 OCFS-INF-01, available at:. http://ocfs.ny.gov/main/policies/external/OCFS_2016/INFs/16-OCFS-INF-01%202016%20Income%20Standards%20for%20the%20Child%20and%20Family%20Services%20Plan.pdf

[19] Research done in 2010 developed a self-sufficiency wage for every county and 72 family types in New York State. See: http://www.fiscalpolicy.org/SelfSufficiencyStandardForNewYorkState2010.pdf Even under this dated standard, our eligibility levels fail to support working families that are below these wage levels set forth in this document.

New York State receives $98 million annually in Federal Title XX funding that it allocates to counties. Of this amount, the state budget allocates $66 million for Adult Protective and Domestic Violence Services, $5 million for training activities for county and State staff, and $27 million for all other services, which counties can use at their discretion to fund certain services. The Governor's proposed budget maintains last year's investment in child care by requiring that the $27 million for all other services be used to support child care subsidy costs, while reducing General Fund investment in child care.

Child care services should not be funded by taking funds from critical services that local districts use to support seniors and at risk children and families. Some examples of how counties use their funds are as follows:

- Westchester County uses its Title XX funds for child welfare services and eviction prevention;
- Onondaga County uses its funds to provide protective/preventive child care services;
- The NYC Human Resources Administration allocates its funding to the NYC Department of the Aging (DFTA). The Governor's proposed transfer of funds will result in a devastating loss of $17 million in senior center services for older adults in New York City. The Department for the Aging estimates that at least 65 centers—30 percent of the senior center network—would be forced to close if this funding change occurs.

C. The proposed Title XX allocation could result in losses to some counties:

The proposed budget language states that the $27 million in child care funds "shall be allocated ...in the same manner as the allocations...to social services districts for child care." (p. 368, Aid to Localities Budget). This causes a concern that some districts will end up financially worse off, since the Title XX allocations for "other services" for each local districts (see 16 OCFS-LCM-09) are allocated in a different way than the formula set forth in 16 OCFS-LCM-8 for child care funds.

This funding is used by local social service districts for critical programming, including preventive and protective services to children, eviction prevention, and services to seniors. This pits one vital service against another, and would result in a net loss for local Counties.

D. Investing in child care is critical to economic development

As a result of 1996 Federal Welfare reform, with its emphasis on "work first," public assistance rolls have plummeted as families left welfare for low wage jobs. In 1995, there were 1.5 million recipients of cash public assistance in New York State; 1.2 million received Aid to Families with Dependent Children (AFDC, the cash public assistance program before welfare reform). 803,000 of these recipients were children. By December 2016, the number of persons on Temporary Assistance had dropped to 564,208 (285,213 of those recipients were children)[20].

However, without assistance in paying for child care, low wage workers cannot make ends meet. The report on the Self-Sufficiency Standard for New York concludes that in order meet basic needs,

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[20] New York State Department of Social Services, Social Statistics, December 1996, Table A, p. 29, available at http://onlineresources.wnylc.net/OTDA%20Caseload%20Statistics.htm ; Statistics of the Office of Temporary and Disability Assistance, December 2016, Table A-2, p. 38, available at https://otda.ny.gov/resources/caseload/2016/2016-12-stats.pdf [accessed February 5, 2017]).

including child care, a family of three with a preschooler and a school age child needs the following hourly wage:[21]

- NYC (Northern Manhattan): $27.38 per hour
- Westchester/Yonkers: $32.38 per hour
- Erie: $22.33 per hour
- Suffolk: $37.37 per hour

These hourly wages are significantly above the wages earned by many families and illustrate how, without a subsidy, the cost of child care is out of reach to low wage families, and that without assistance, they face the bleak choice between paying the rent and paying for child care.

E. Child care must be affordable

The commentary to the federal child care regulations states that to assure equal access to child care, child care must be affordable, and recommends that parent copayments do not exceed 7% of household income.[22] As set forth more fully below, a 35% copayment is not an affordable copayment, especially for families over 150% of poverty. In twenty counties families at 200% of poverty pay 17.5% of their income as a copayment. As indicated by the attached chart, for lower income families the percentages are slightly better, but even families at 150% of poverty pay nearly 12% of their income if they reside in counties with 35% multipliers. As indicated by the chart on the next page, only eight counties have parent copayments requiring that families at 200% of poverty pay no more than 7.5% of their income.

This disparity exists because of the Office of Children and Family Services (OCFS) regulation at 18 NYCRR 415.3 [e] [3] sets forth the formula for calculating copayment amounts gives social services districts total discretion to choose a multiplier between 10% and 35% that is then applied to the family's income above the state income standard (the equivalent of the federal poverty level) to determine the household's copayment amount. The result is that the larger the multiplier chosen by the county, the smaller the child care benefit received by the family. The inequity in the child care benefit offered to similarly situated families (same family size, same income) varies by as much as 300% depending on the county in which a family resides.

It's time to address this inequity. Despite clear guidance in New York's Social Services Law 410-x(2)(a) requiring that families be provided "equitable access" to child care funds, and that parent copayment should be "based upon the family's ability to pay" SSL 410-x(6), this standardless formula has been in place, unchanged, since at least June 29, 1987, when the New York State Department of Social Services, the OCFS predecessor agency, directed all social services districts to adopt the methodology by June 1, 1988. Because OCFS authorizes each district to select a multiplier without further guidance, child care subsidies and copayment policies vary dramatically across the state. A county can opt to issue child care benefits that are approximately one-third of what the same family would receive in a neighboring county.

The inequity is vast across New York. As indicated by the chart below, in four social services districts parents pay 10% of their income over the poverty level as their child care copayment; in three districts parents pay 15% of their income over poverty; in thirteen districts, parents pay 20% of their income over poverty; in fifteen districts, parents pay 25% of their income over poverty; in one district parents pay

[21] D. Pearce, The Self Sufficiency Standard for New York State 2010, http://www.selfsufficiencystandard.org/docs/New%20York%20State%202010.pdf
[22] 81 Fed.Reg. 67438, 67516 (9/30/16).

27% of their income over poverty; in two districts, parents pay 30% of their income over poverty; and in twenty districts, parents pay 35% of their income over poverty.

COPAYMENT DISPARITIES BY COUNTY FOR A FAMILY OF THREE WITH AN INCOME OF $40,320/year
(200% of poverty)

COUNTY	COUNTY MULTIPLIERS	ANNUAL/WEEKLY FEE
*In **Cattaraugus, Livingston, Schuyler** and **Steuben** counties*	*parents pay **10%** of their income over the poverty level for a child care subsidy*	*this means they pay **$2016** per year, or **$38.77** per week (5% of their income)*
*In **Franklin, Oswego** and **St. Lawrence** counties*	*parents pay **15%** of their income over the poverty level for a child care subsidy*	*this means they pay **$3024** per year, or **$58.15** per week (7.5% of their income)*
*In **Allegany, Cayuga, Chautauqua, Clinton, Columbia, Essex, Nassau, Niagara, Ontario, Putnam, Saratoga, Suffolk** and **Tompkins** counties*	*parents pay **20%** of their income over the poverty level for a child care subsidy*	*this means they pay **$4032** per year, or **$77.54** per week (10% of their income)*
*In **Albany, Broome, Chemung, Delaware, Hamilton, Jefferson, Lewis, Madison, Oneida, Rensselaer, Rockland, Ulster, Warren, Washington** and **Wayne** counties*	*parents pay **25%** of their income over the poverty level for a child care subsidy*	*this means they pay **$5040** per year, or **$96.92** per week (12.5% of their income)*
*In **Westchester** County*	*parents pay **27%** of their income over the poverty level for a child care subsidy*	*this means they pay **$5443.20** per year, or **$104.68** per week (13.5% of their income)*
*In **Dutchess,** and **Otsego** counties*	*parents pay **30%** of their income over the poverty level for a child care subsidy*	*this means they pay **$6048** per year, or **$116.31** per week (15% of their income)*
*In **Chenango, Cortland, Erie, Fulton, Genesee, Greene, Herkimer, Monroe, Montgomery, New York City, Onondaga, Orange, Orleans, Schenectady, Schoharie, Seneca, Sullivan, Tioga, Wyoming** and **Yates** counties*	*parents pay **35%** of their income over the poverty level for a child care subsidy*	*this means they pay **$7056** per year, or **$135.69** per week (17.5% of their income)*

In response to recommendations made by the New York State Assembly Child Care Workgroup,[23] in the 2014-15 legislative session the Assembly passed A. 8928 (Russell), which would do much to curb

[23] *Child Care in Crisis: A Report from the Assembly Child Care Workgroup*, NYS ASSEMBLY, p. 4, http://assembly.state.ny.us/comm/ChildCare/20131220/index.pdf (last accessed February 5, 2017).

copayment disparities between counties and improve affordability by amending Social Services Law § 410-x to limit child care copayments to 20% of a family's income in excess of the corresponding poverty level.[24] This bill has been re-introduced by Assemblymember Jenne as A.1438, and we strongly urge its passage to assure equity and fairness in the distribution of child care subsidy funds.

A bill sponsored by Assemblywoman Titus and cosponsored by seventeen other Assemblymembers (A.4207) in the last legislative session, would also have ameliorated these inequities by providing that no family could be required to pay more than 10% of their gross income for child care. This bill still permits counties to choose their multiplier, but it imposes a second step in the copayment calculation – if the resulting number exceeds 10% of the family's gross income, the copayment is adjusted downward to that number. New York City actually implemented such a cap from 2007-2009,[25] but ended up adjusting the cap upward from 10% to 12% in May 2009[26] and then to 17% in 2011,[27] rendering the cap essentially meaningless, except for families in the facilitated enrollment program, who without such a cap can be required to pay over 22% of their income, often more than the cost of care, as a copayment.

Both bills continue to afford Social Services districts some flexibility. Neither bill would take away the authority of a local district to choose its multiplier, but it would require that, if after the calculation, the resulting number was more than the cap as defined in the bill, the copayment would have to be reduced to that number.

The existing regulation has resulted in a system that unequally distributes an important benefit and puts the cost of child care out of reach of some low income working families, but not others. As a consequence, the system is not equitable and not based upon a family's ability to pay.

Recommendation: Empire Justice Center urges the legislature to make copayments equitable and pass the Jenne bill (A.1438) bill or pass or an equivalent, such as the Titus bill discussed above, to assure that all parents can afford child care in New York State.

F. Prioritize Distribution of Scarce Child Care Dollars to Working Families: Exempt Parents of Very Young Children from the Welfare Work Rules when there is not Enough Funding to Serve All Eligible

Last year the New York State Assembly passed A.1805 (Titus)/ S.5176(Avella), which would have prioritized the use of child care funds to eligible parents who were employed by allowing unemployed parents on public assistance to choose a one year work exemption in social services districts where there was not enough funding to serve all eligible working families. Had the bill passed the Senate, more low income working families would have subsidies today. This is because allowing one parent on public assistance to choose an exemption frees up three slots for working families. The details of that calculation are explained below. Assemblymember Titus has reintroduced this bill this session (A.4662) and we urge its passage.

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[24] A.8928 (Russell) passed the New York State Assembly on March 5, 2014, was delivered to the Senate and referred to the Children and Family's Committee there.

[25] http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County312.pdf

[26] http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County310.pdf

[27] http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County305.pdf

Every year OCFS allocates the funding in the New York State Child Care Block Grant (NYSCCBG) to local social services districts according to a formula that is based on the average level of annual child care claims for the last five years, which is then reduced if the county has unspent roll-over child care block grant funding exceeding a certain percentage from the prior years.[28] The allocations which go to each district are not sufficient to serve all eligible families. The decisions regarding who to serve is in part determined by the law, which guarantees child care to certain categories of families, and in part based on district option. With respect to those families who are not guaranteed child care, OCFS allows districts to prioritize the use of their remaining limited funds in the county plan which is filed with OCFS.

Three categories of families are guaranteed a child care subsidy:

- those on public assistance;
- those under 200% of poverty who have left public assistance in the prior year for work or because of increased child support; and
- those who are eligible for public assistance but choose only to receive a child care subsidy.

The system is strained because the public cost of a subsidized child care slot, which has increased to $7,574 per year, is entirely paid with public funds when the recipient of a subsidy is on public assistance.[29] Public assistance recipients are required to participate in work programs as a condition of receiving assistance and are guaranteed child care subsidies to make it possible for the parent to work. Currently, under state statute and regulation, public assistance recipients are exempt from the work activities requirement only until their children are 3 months old.[30] After that, they are required to participate in work activities while their child attends fully-subsidized child care. Although there is evidence that work activities such as job search and work experience programs result in little or no economic gain for these families,[31] New York State prioritizes spending its limited child care dollars to

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[28] According to 13-OCFS-LCM-06, the allocation for SFY 2013-14 " reflects each LDSS's proportionate share of the block grant funds based on the average level of annual child care claims for the FFY 2007-08 through FFY 2011-12. Rollover of unspent NYSCCBG funds is taken into account for those LDSSs that meet the following two criteria:

• If the LDSS's FFY 2011-12 rollover into FFY 2012-13 is more than 15 percent of its FFY 2011-12 NYSCCBG claims; AND

• The LDSS's FFY 2011-12 rollover amount exceeded 75 percent of its FFY 2010-11 rollover amount. For any LDSS meeting both of these criteria, the base allocation is first reduced by an amount equal to 40 percent of the rollover amount from FFY 2011-12 into FFY 2012-13 (but not to exceed the five-year-average-claim base allocation).

The statewide allocation reduction is then redistributed among LDSSs as follows. For LDSSs whose FFY 2011-12 NYSCCBG claims exceeded the sum of their SFY 2013-14 base allocations (as adjusted) and FFY 2011-12 rollover amounts, the amount of allocation reduction is redistributed on a pro-rated basis, proportionate to counties' share of the total excess claims. The sum of each LDSS's five-year-average-claim base allocation, allocation reduction and redistribution is its final SFY 2013-14 allocation." 13-OCFS-LCM-06, *New York State Child Care Block Grant Subsidy Program Allocations for State Fiscal Year 2013-2014*, NYS OFFICE OF CHILDREN & FAMILY SERVICES (May 29, 2013), *available at* http://www.ocfs.state.ny.us/main/policies/external/OCFS_2013/LCMs/13-OCFS-LCM-06%20%20New%20York%20State%20Child%20Care%20Block%20Grant%20Subsidy%20Program%20Allocations%20for%20State%20Fiscal%20Year%202013%20-%202014.pdf (last accessed April 4, 2014).

[29] Average cost of subsidized care per child provided by OCFS. E-mail from Janice Molnar, Office of Children and Family Services to Susan Antos, dated 12/13/16 (on file with the author) .

[30] N.Y. SOC. SERV. LAW § 410-w(3); 18 NYCRR § 385.2(b)(7).

[31] D.Greenberg, V Deitch & G. Hamilton, *Welfare toWork Program:Benefits and Costs: A Synthesis of Research, pp. ES-4, ES-11* (MDRC, February, 2009). Available at: http://www.mdrc.org/sites/default/files/full_611.pdf (last accessed May 2, 2014).

support these activities when there is not enough funding to support low income working families with real jobs.

Working families with incomes over the poverty level, on the other hand, contribute to the cost of their subsidized child care by making copayments. For a low income working family, the state pays only part of the cost of child care, not the whole cost of care as they would for a family receiving public assistance. Specifically, a working family is expected to pay a percentage of the income they earn over the poverty level toward child care. The county then pays the difference between the family share and the actual cost of care, up to the market rate established by OCFS.

Cost Analysis: Each Infant Slot from an Exempted Public Assistance Parent Creates Three Slots for Working Families

As indicated in the table below, the funding that fully supports one infant slot for a working public assistance recipient with subsidized child care would actually fund three slots for working families, because the cost is shared between the government and low income families.[32] For example, in Erie County, infant care costs the county $9,620 per year for a public assistance recipient, but a child care subsidy for a working family with a preschool age child will cost the county only $3,739. This means that the amount of money saved by Erie County from one public assistance family that does *not* require full-time infant care can be allocated to pay for child care subsidies for 2.6 working families in need of preschool aged care, or 2.3 working families in need of infant care. In Yates County and a multitude of other smaller and predominately rural counties, the savings from one less public assistance household in need of infant care would fund 3.2 child care subsidies for working families of preschool aged children.[33]

The Assembly bill addresses this issue by shifting child care dollars that are being spent on welfare recipients in programs like job search and workfare to low income working families with real jobs. This was done by amending §410-x of the social services law to maximize and target child care subsidies to low income working families who are employed when local districts are unable to provide subsidies to all who are eligible. Specifically, the bill provides that when a social services district does not have sufficient funding to serve all eligible working families under 200% of poverty,[34] the district must offer a twelve month work exemption to welfare recipients who are personally providing care for a child less than one year of age.

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32 These calculations are conservative because the average cost of a subsidy includes the costs for a fully subsidized slot of a family on public assistance and the cost of a slot of a working family that has a copayment.
33 In the accompanying chart, the estimate of child care slots for working families that can be leveraged from a public assistance infant care slot was calculated by dividing the cost of one full-time infant care slot, fully paid for by the county, by the county's share of child care costs for a working family with a child in a full-time preschool or infant care program. The market rates are separated into five distinct geographical groups and a representative county was highlighted in each of these geographical groups. The calculation was run separately for each of the five different market rate groups at two different levels—to see how many working family infant care slots can be funded from one public assistance infant slot, and how many working family preschool slots can be funded from one public assistance infant slot because the cost of care is different between different age groups. Infant care is the most expensive level of care, and preschool aged care is the most commonly used category of care. Because the number we used as the cost per slot is actually the average cost spent on public assistance and non-public assistance families, it is actually likely that each public assistance infant slot will purchase more slots than are indicated in our conservative calculations.
34 The most recent information available indicates that New York City as well as, Cattaraugus, Cayuga, Chemung, Cortland, Dutchess, Fulton, Greene, Madison, Niagara, Ontario, Orange, Oneida, Livingston, Monroe, Schoharie, Suffolk, Washington, and Wayne Counties are not able to serve all eligible working families.

We estimate that this cost neutral action will make a total of $5.38 million in child care dollars, currently being used to support child care assistance for welfare recipients, available to provide child care subsidies to parents who are employed. In addition, we estimate an additional $3.96 million in administrative savings through the elimination of the connected work program expenses (e.g. expense of the workfare or soft skills program). **Total funds freed up would be $9.34 million.** A detailed chart explaining this cost savings appears below.

Those dollars will be stretched even further because working families have copayments and welfare recipients do not. As a result, each child care slot transferred from a welfare recipient will generate 2.4 slots for working parents on average. In addition, by reducing the amount of administrative time spent coordinating job search and workfare activities, local districts would see savings in administrative costs statewide.

We need to protect the jobs of low income working families! New York is facing a crisis of insufficient funding for child care subsidies for the working poor which undermines their ability to stay in the work force and off welfare. Reintroducing and passing this bill will free up the subsidized child care funding necessary to help maintain and expand slots for working families.

Comparison of County Contribution to Child Care Costs for PA and Working Families: High Family Share Counties[35]					
County	Westchester[36]	Erie[37]	Yates[38]	Orange[39]	NYC[40]
Annual cost: fulltime infant care	$15,340	$9,620	$7,800	$11,700	$10,400
Annual cost: fulltime preschool aged care	$14,300	$9,100	$7,800	$10,400	$9,100
For each infant of a PA family, the county pays the full cost of care.	$15,340	$9,620	$7,800	$11,700	$10,400
Working families contribute to their child care costs by paying a % of their income above the poverty level.	27%	35%	35%	35%	35%
Annually, a working family contributes to the cost of care:	$4,135.05	$5,360.25	$5,360.25	$5,360.25	$5,360.25
For each infant of a working family, the county pays	$11,204.95	$4,259.75	$2,439.75	$6,339.75	$5,039.75
1 PA infant slot provides infant care to working families	**1.37**	**2.26**	**3.20**	**1.85**	**2.06**
For each preschool child of a working family, the county pays	$10,164.95	$3,739.75	$2,439.75	$5,039.75	$3,739.75
1 PA infant slot provides fulltime preschool slots to working families	**1.51**	**2.57**	**3.20**	**2.32**	**2.78**

[35] Calculation conducted using market rates effective June 1, 2016, and copay percentages as of February 1, 2017. Family share and county share calculations are based on a household of three earning $35,735.00 (175% of the 2016 state income standard/federal poverty level in effect as of June 1, 2016). The type of child care assumed for this calculation were the weekly rate for a registered family day care in two different age categories: infant (0-1.5 years), and preschool (3-5 years).

[36] Westchester County lies in market rate group 1, with other downstate sub-urban counties. Group 1 includes Nassau, Putnam, Rockland, Suffolk and Westchester Counties.

[37] Erie County lies in market rate group 2, with other upstate urban and more expensive rural counties. Group 2 includes Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Schenectady, Tompkins and Warren Counties.

[38] Yates County lies in market rate group 3, with other upstate rural and small counties. Group 3 includes a total of 38 counties: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming and Yates.

[39] Orange County lies in market rate group 4, with other upstate high cost counties. Group 4 is made up of Albany, Dutchess, Orange, Saratoga, and Ulster Counties.

[40] Market Rate Group 5 is solely comprised of the five boroughs of New York City.

Recommendation: Prioritize the use of child care funds to eligible parents who are employed by allowing unemployed parents on public assistance to choose a one year work exemption in social services districts where there was not enough funding to serve all eligible working families.

Thank you once again for the opportunity to testify today. Please feel free to contact me should you have any questions.

February 8, 2017

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26 N.Y.3d 272, 44 N.E.3d 154, 23 N.Y.S.3d 79, 166 Lab.Cas. P 61,655, 25 Wage & Hour Cas.2d (BNA) 1109, 2015 N.Y. Slip Op. 08451

**1 In the Matter of Walter E. Carver, Respondent
v
State of New York et al., Appellants.

Court of Appeals of New York
139
Argued September 16, 2015
Decided November 19, 2015

CITE TITLE AS: Matter of Carver v State of New York

SUMMARY

Appeal, by permission of the Court of Appeals, from a stipulation and order of contingent settlement of the Supreme Court, Kings County (Sylvia G. Ash, J.), dated February 7, 2014. The stipulation ordered respondent New York State Office of Temporary and Disability Assistance (OTDA) to (1) pay petitioner's counsel $100,000, in full satisfaction of any and all claims for attorney's fees, costs and expenses, and (2) pay petitioner $5,000, the amount withheld from petitioner when he won a lottery prize in 2007. The appeal brings up for review a prior nonfinal order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 21, 2011. The Appellate Division order, insofar as sought to be reviewed, (1) modified, on the law, an order and judgment (one paper) of that Supreme Court (Martin Schneier, J.; op 24 Misc 3d 602 [2009]), which had, insofar as appealed from, (a) granted that branch of respondents' cross motion which was to dismiss the petition insofar as asserted against respondents OTDA and David A. Hansell, Commissioner of OTDA, seeking to annul a determination withholding one half of petitioner's lottery prize winnings; (b) denied the petition insofar as asserted against those respondents; and (c) dismissed the proceeding insofar as asserted against those respondents; (2) reinstated the fourth cause of action against those respondents; and (3) remitted the matter to the Supreme Court, Kings County, for further proceedings. The modification consisted of (1) deleting the provisions of the order and judgment granting that branch of respondents' cross motion which was to dismiss the fourth cause of action insofar as asserted against respondents OTDA and David A. Hansell, Commissioner of OTDA, and dismissing that cause of action against those respondents; and (2) substituting therefor a provision denying that branch of the cross motion.

Matter of Carver v State of New York, 87 AD3d 25, affirmed.

*273 HEADNOTE

Social Services
Public Assistance

Reimbursement from Lottery Winnings—Work Experience Program Participant "Employee" under Federal Fair Labor Standards Act

In a CPLR article 78 proceeding challenging respondent's retention of one half of petitioner's lottery prize winnings as reimbursement for public assistance benefits he received in exchange for work performed for the City of New York through its Work Experience Program (WEP), petitioner was an employee of the City within the meaning of the Federal Fair Labor Standards Act (FLSA) entitled to the protection of its minimum wage provisions. To determine whether an individual qualifies as an employee under the FLSA, a court must look to the economic reality, not the technical concepts, of the relationship. Under the "economic reality" test, the relevant factors include whether the alleged employer had the power to hire and fire the employees, supervised and controlled employee work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. The City had the power to hire and fire WEP workers, and the City and its WEP agencies supervised and controlled the work schedule of the workers. Furthermore, the City and its agencies maintained the employment records of the WEP workers. While the Social Services Law, not the WEP agencies or the City, determined the rate and method of payment of WEP workers, that is one factor, and the economic reality test encompasses the totality of the circumstances. Petitioner's work was no different from the janitorial services performed by salaried City employees at many offices and other locations. His benefits were compensation, given in exchange for his work—even if some of those benefits were not paid in cash—and he was entirely dependent on those benefits for years. Accordingly, petitioner was entitled to minimum wage for his hours worked as a participant in the WEP program, and respondent could not retroactively deprive him of a minimum wage by recouping the funds through petitioner's lottery prize.

RESEARCH REFERENCES

Am Jur 2d, Welfare Laws §§ 92, 93.

NY Jur 2d, Public Welfare and Elder Assistance §§ 96, 399.

ANNOTATION REFERENCE

See ALR Index under Welfare Benefits.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: public /2 assistance & lottery /3 prize win! & wage

POINTS OF COUNSEL

Eric T. Schneiderman, Attorney General, New York City (*Valerie Figueredo, Barbara D. Underwood* and *Anisha S. Dasgupta* of counsel), for appellants.

The Fair Labor Standards *274 Act's minimum wage requirements do not apply to the monetary grants the State of New York provides to public assistance recipients. (*Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290; *Brukhman v Giuliani*, 94 NY2d 387; *Matter of Siwek v Mahoney*, 39 NY2d 159; *O'Connor v Davis*, 126 F3d 112; *Nationwide Mut. Ins. Co. v Darden*, 503 US 318; *Community for Creative Non-Violence v Reid*, 490 US 730; *Graves v Women's Professional Rodeo Assn., Inc.*, 907 F2d 71; *Bucci v Village of Port Chester*, 22 NY2d 195; *Matter of Hull-Hazard, Inc. v Roberts*, 72 NY2d 900.)

Empire Justice Center, Albany (*Susan C. Antos* and *Saima A. Akhtar* of counsel), and *Empire Justice Center*, Rochester (*Peter O'Brian Dellinger* and *Bryan D. Hetherington* of counsel), for respondent.

I. The decision of the Appellate Division was correct: Mr. Walter Carver is entitled to the protection of the Fair Labor Standards Act. (*Nationwide Mut. Ins. Co. v Darden*, 503 US 318; *Rutherford Food Corp. v McComb*, 331 US 722; *Falk v Brennan*, 414 US 190; *United States v City of New York*, 359 F3d 83; *Frankel v Bally, Inc.*, 987 F2d 86; *Stone v McGowan*, 308 F Supp 2d 79; *O'Connor v Davis*, 126 F3d 112.) II. New York State has historically credited the value of workfare to reduce public assistance debt. (*Matter of Maiceo v City of Yonkers*, 263 App Div 914, 288 NY 689; *Matter of Walker v Shang*, 66 AD2d 6; *Barrentine v Arkansas-Best Freight System, Inc.*, 450 US 728; *Allen v City of New York*, 147 Misc 2d 62.) III. Work experience workers are employees under the Fair Labor Standards Act. (*Tennessee Coal, Iron & R. Co. v Muscoda Local No. 123*, 321 US 590; *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290; *Brooklyn Savings Bank v O'Neil*, 324 US 697; *Mitchell v Lublin, McGaughy & Associates*, 358 US 207; *Powell v United States Cartridge Co.*, 339 US 497; *United States v Rosenwasser*, 323 US 360; *Brock v Superior Care, Inc.*, 840 F2d 1054; *Bartels v Birmingham*, 332 US 126; *Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61; *United States v Silk*, 331 US 704.)

National Center for Law and Economic Justice, New York City (*Marc Cohan, J. Kelley Nevling, Jr.*, and *Leah Lotto* of counsel), for National Center for Law and Economic Justice and others, amici curiae.

I. The plain language of the Fair Labor Standards Act (FLSA) makes it clear that work experience program (WEP) workers are covered by its minimum wage provisions. (*Goldberg v Whitaker House Cooperative, Inc.*, 366 US 28; *Nationwide Mut. Ins. Co. v Darden*, 503 US 318; *Frankel *275 v Bally, Inc.*, 987 F2d 86; *United States v City of New York*, 359 F3d 83, 543 US 1146; *Walling v Portland Terminal Co.*, 330 US 148; *Rutherford Food Corp. v McComb*, 331 US 722; *United States v Rosenwasser*, 323 US 360; *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290; *Mitchell v Lublin, McGaughy & Associates*, 358 US 207; *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653.) II. WEP workers are protected by the FLSA's minimum wage provisions under the Supreme Court's "economic reality" test. (*Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290; *Goldberg v Whitaker House Cooperative, Inc.*, 366 US 28.) III. The Court below correctly reasoned that WEP workers are "employees." (*United States v City of New York*, 359 F3d 83; *Nationwide Mut. Ins. Co. v Darden*, 503 US 318; *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132; *Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61; *Brock v Superior Care, Inc.*, 840 F2d 1054.) IV. Congress has ratified the United States Department of Labor's determination that public assistance workers are "employees" within the meaning of the FLSA. (*Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290; *Sheet Metal Workers v EEOC*, 478 US 421; *Regents of Univ. of Cal. v Bakke*, 438 US 265; *North Haven Bd. of Ed. v Bell*, 456 US 512; *United States v Rutherford*, 442 US 544.) V. Appellants' arguments rely on factors and considerations that are not dispositive. (*Barfield v New York City Health & Hosps. Corp.*, 537 F3d 132; *Antenor v D & S Farms*, 88 F3d 925; *United States v City of New York*, 359 F3d 83; *State of N.Y. ex rel. Grupp v DHL Express [USA], Inc.*, 19 NY3d 278; *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105; *Helmer v Brandano*, 875 F2d 318; *Brock v Superior Care, Inc.*, 840 F2d 1054; *Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61; *Matter of Maiceo v City of Yonkers*, 263 App Div 914, 288 NY 689; *Matter of Gianvecchio v NYS Newark State School*, 19 AD2d 760.) VI. The *Brukhman v Giuliani* (94 NY2d 387 [2000]) and *Johns v Stewart* (57 F3d 1544 [10th Cir 1995]) cases relied on by the State of New York are not dispositive. (*Nationwide Mut. Ins. Co. v Darden*, 503 US 318; *United States v Rosenwasser*, 323 US 360; *Perrin v United States*, 444 US 37; *United States v City of New York*, 359 F3d 83; *Klaips v Bergland*, 715 F2d 477.) VII. This Court's decision will have ramifications beyond the narrow context of lottery winnings.

OPINION OF THE COURT

Chief Judge Lippman.

We hold that petitioner, who performed work for the City of *276 New York in exchange for cash public assistance and food stamps, is protected by the federal minimum wage provisions of the Fair Labor Standards Act (FLSA).

Petitioner Carver is a 69-year-old Vietnam War veteran who received public assistance from the City of New York, through the State-funded Safety Net Assistance Program (*see* Social Services Law §§ 61, 62, 157 *et seq.*), beginning in 1993 and continuing until March 2000. During that time, the City required, in accordance with the Social Services Law (*see* Social Services Law §§ 335-b, 336-c), that he work 35 hours per week in the "Work Experience Program" (WEP) of the City's Human Resources Administration (HRA) in order to receive public assistance benefits. HRA administers the State's public assistance programs for New York City, with oversight from the New York State Office of Temporary and Disability Assistance (OTDA) (*see generally* Social Services Law § 61).

Carver was assigned to the mailroom of Coney Island Hospital where he sorted and delivered the mail. In 1995, he was reassigned to the Manhattan Terminal of the Staten Island Ferry, where he would sweep the floors, spread salt in the winter and pick up trash. In return for performing these services, Carver received $176 every two weeks, along with food stamps. His cash compensation plus the food stamps equaled the minimum wage for the amount of hours that he worked. If he missed work, his assistance was reduced. Carver never received any training in how to perform these jobs, or participated in any vocational training classes during those years. He participated in only one week of classes, which concerned how to write a resume and look for a job at the end of the program.

In 2000, Carver was told that he would have to leave WEP, and on March 4, 2000, his benefits were terminated. On August 10, 2007, Carver won $10,000 in the New York State Lottery. The New York State Division of Lottery and OTDA invoked Social Services Law § 131-r (1), which authorizes the State to appropriate half of any lottery prize over $600 to "reimburse [itself] . . . for all . . . public assistance benefits paid to [the prizewinner] during the previous ten years."

In a letter dated September 27, 2007, Carver requested a review of OTDA's determination. On January 8, 2008, OTDA notified Carver that it would not refund any of the $5,000. Carver then filed the underlying CPLR article 78 proceeding in April 2008 against OTDA, among others, alleging that the *277 interception of his lottery winnings violated his rights under the FLSA and the New York State Minimum Wage Act (Labor Law § 652). Specifically, Carver contended that the OTDA required him to work 35 hours per week in order to receive public assistance benefits, and that his biweekly cash benefits, plus the value of the food stamps he received, equaled no more than the federal or New York State minimum wage. Thus, were OTDA permitted to recoup a portion of the benefits paid to him through Social Services Law § 131-r, then Carver would be paid less than minimum wage, in violation of the FLSA. The respondents cross-moved, inter alia, to dismiss the petition pursuant to CPLR 3211 (a) (7).

Supreme Court granted the cross motion and dismissed the proceeding (*Carver v State of New York*, 24 Misc 3d 602 [Sup Ct, Kings County 2009]). As relevant here, the court noted that the issue of whether WEP workers are deprived of minimum wage standards by the implementation of Social Services Law § 131-r is an issue of first impression. The court stated that Carver implicitly agreed to "[t]he statutory requirement of recoupment of previous public assistance monies [he] had received" because by purchasing the lottery ticket he "was subject to all of the rules, regulations and statutes with respect to that lottery ticket" (*id.* at 608). The court then stated that Carver's public assistance benefits were determined by "his household size, rent and other eligibility factors" under the Social Services Law, and not by the number of hours he worked per week in WEP (*id.*). Furthermore, the

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court determined that although the Social Services Law required Carver to engage in work activities "in return for [his public assistance] benefits," he was not an employee who earned wages because no "employer-employee relationship" existed "as no income tax W-2 statement was furnished to [him] or deductions made for FICA or Medicare taxes" (*id.*). Finally, the court determined that Carver was "not a federally protected worker" as he was not an employee, and thus the federal minimum wage law does not apply to him (*id.* at 608-609).

The Appellate Division unanimously modified by reinstating the FLSA cause of action against OTDA and its Commissioner and, as so modified, affirmed. The Court stated that the State's interception of Carver's lottery prize winnings did not violate the state minimum wage law, which specifically exempts employees of "federal, state or municipal government or political subdivision thereof," but that it did violate the FLSA (*Matter* *278 *of Carver v State of New York*, 87 AD3d 25, 29 [2d Dept 2011]). Applying the "economic reality test," the Court concluded that individuals like Carver, who receive public assistance benefits and participate in WEP, are employees under the FLSA.

On remand, Supreme Court granted Carver's petition against OTDA and its Commissioner, and directed respondents to return his $5,000. The parties then entered into a stipulation and order of contingent settlement which resolved all outstanding issues, including attorney's fees.

This Court then granted OTDA leave to appeal from the stipulation and order of contingent settlement (*Matter of Carver v State of New York*, 23 NY3d 906 [2014]), bringing up for review the prior, nonfinal Appellate Division order. The sole issue on appeal is whether as a result of his participation in WEP as a condition of his receipt of public assistance benefits under Social Services Law § 336 (1) (d), Carver was entitled to minimum wages under the FLSA.

The FLSA was passed by Congress in 1938 "to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions" and to eliminate low wages and long hours in an effort to "free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers" (*Rutherford Food Corp. v McComb*, 331 US 722, 727 [1947]). The FLSA was also enacted to prevent unfair competition through the use of underpaid labor (*see* 29 USC § 202 [a] [3]). The FLSA provides: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the" rates set forth in the statute (29 USC § 206 [a]). An "employee" is defined as "any individual employed by an employer" (29 USC § 203 [e] [1]). To "employ" is "to suffer or permit to work" (29 USC § 203 [g]). An employer includes "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency" (29 USC § 203 [d]). Although the FLSA does explicitly exempt certain employees from its purview, neither workfare nor public assistance recipients are included among those exemptions (*see* 29 USC § 213; *Powell v United States Cartridge Co.*, 339 US 497, 517 [1950] [stating that FLSA's exemptions are "narrow and *279 specific," and indicating that "(s)uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act"]).

To determine whether an individual qualifies as an employee under FLSA, we must look to the "economic reality," not the "technical concepts," of the relationship (*Goldberg v Whitaker House Cooperative, Inc.*, 366 US 28, 33 [1961]; *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290, 301 [1985]; *see also Bartels v Birmingham*, 332 US 126, 130 [1947]). More specifically,

> "[b]ecause [the FLSA] defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question, with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records' " (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999] [citations omitted], quoting *Bonnette v California Health & Welfare Agency*, 704 F2d 1465, 1470 [9th Cir 1983]; *see Goldberg*, 366 US at 33; *Johns v Stewart*, 57 F3d 1544, 1557 [10th Cir 1995] [stating that the economic reality test is the proper test to determine "the scope of employee coverage under" the FLSA]).

In *Johns v Stewart* (57 F3d 1544 [1995]), the Tenth Circuit, applying the economic reality test, determined that workers in Utah's work force program were not employees within the meaning of the FLSA. However, two years later, the United States Department of Labor

(DOL), the federal agency charged with enforcing the FLSA, issued a guidance letter entitled "How Workplace Laws Apply to Welfare Recipients," in which it undertook to explain, in question-answer format, which federal worker-protection laws applied to public assistance workers. The letter states:

> ***280** "Do federal employment laws apply to welfare recipients participating in work activities under the new welfare law in the same manner they apply to other workers?
>
> "Yes. Federal employment laws, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance (UI), and anti-discrimination laws, apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws" (DOL Guidance Letter, brief for respondent at 40, exhibit B [emphasis omitted]).

According to the DOL, "[w]elfare recipients would probably be considered employees in many, if not most, of the work activities described in the [federal public assistance law]" (*id.*). The FLSA charges the DOL with the duty of administering and interpreting the FLSA. Accordingly, the DOL's interpretation of the FLSA is "entitled to considerable weight in construing the Act" (*Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290, 297 [1985]). A 1997 conference report (HR Rep 105-217, 105th Cong, 1st Sess at 934, reprinted in 1997 US Code Cong & Admin News at 176, 555) leaves no doubt the Congress was aware of and considered the DOL's guidelines and accepted them, despite efforts to overturn DOL's interpretation of the FLSA.[1]

To that end, we must apply the economic reality test and, under that test, the City should be considered Carver's employer. The City had the power to hire and fire WEP workers, in that it was the City's responsibility to assign public assistance recipients to a WEP agency and the City could dismiss workers from WEP based upon their performance. Additionally, the City and its WEP agencies supervise and control the work schedule of the workers. Furthermore, the City and its agencies, such as HRA, maintain the employment records of the WEP workers. While the Social Services Law, not the WEP ***281** agencies or the City, determines the rate and method of payment of WEP workers, that is simply one factor. The economic reality test "encompasses the totality of [the] circumstances" (*Herman*, 172 F3d at 139).

For example, in *Alamo* (471 US 290), the United States Supreme Court applied the economic reality test to determine if certain individuals were "employees" under the FLSA. The Alamo Foundation was a not-for-profit organization founded to " 'establish, conduct and maintain an Evangelistic Church . . . and generally to do those things needful for the promotion of Christian faith, virtue, and charity.' " It supported itself by operating gas stations, stores and other businesses staffed by "associates." Associates "receive[d] no cash salaries, but the Foundation provide[d] them with food, clothing, shelter, and other benefits" (471 US at 292).

Noting that it "has consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction' " (*id.* at 296, quoting *Mitchell v Lublin, McGaughy & Associates*, 358 US 207, 211 [1959]), the Supreme Court found that the associates were "employees" (*Alamo*, 471 US at 301, citing *Goldberg*, 366 US at 33). The Court focused on three factors: (1) the associates received compensation, albeit "primarily in the form of benefits rather than cash," a distinction deemed "immaterial"; (2) they were "entirely dependent upon the Foundation for long periods, in some cases . . . years"; and (3) any other result would have undermined the purposes of the FLSA by giving the Foundation a competitive advantage and "exert[ing] . . . downward pressure on wages in competing businesses" (*Alamo*, 471 US at 301, 302).

The economic reality test, as applied in *Alamo*, compels the conclusion that Carver was an "employee" of the City. The Staten Island Ferry is an enterprise similar to a privately owned ferry service or the gas stations and stores operated by the Foundation in *Alamo*. Carver's work was no different from the janitorial services performed by salaried City employees at many offices and other locations. Like the associates in *Alamo*, Carver's benefits were "compensation," given in exchange for his work—even if some of those benefits were not paid in cash—and he was "entirely dependent" on those benefits for years.

Alamo also establishes that the employer's purposes and objectives are not relevant in determining a worker's status as an employee. The State argues that WEP workers are not ***282** employees because its declared goal is to prepare WEP workers for gainful employment. However, this appears to be no different from the Foundation's goals of Christian ministry. Had Carver spent most of his hours receiving training, or education in how to obtain employment outside of the WEP program, we might have reached a different conclusion. As the DOL stated, "individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance" are likely exempt from the FLSA "because these programs are not ordinarily considered employment under the FLSA" (DOL Guidance Letter, brief for respondent at 40, exhibit B). However, based on the record before us, Carver spent his full-time hours doing work for the City. The dissent's likening of Carver's 7-year, 35-hour-workweek engagement through WEP to perform services typical of any other non-WEP employee to that of a "student or trainee" patently ignores the economic reality of Carver's situation (*see* dissenting op at 293). Moreover, contrary to the dissent's contention, the policies supporting the passage of the FLSA do weigh in favor of finding coverage here. Were the City permitted to hire and engage WEP workers for less than minimum wage, it could effectively suppress the market and impede the FLSA's goal of eliminating unfair competition through the use of underpaid labor.

Furthermore, in *United States v City of New York* (359 F3d 83 [2d Cir 2004]), the Second Circuit determined that public assistance recipients obliged to participate in WEP are employees within the meaning of title VII of the Civil Rights Act of 1964, and were thus entitled to title VII's protection against sexual and racial harassment (*id.* at 86-87). The court determined that (1) the receipt of cash payments and food stamps, which equaled the minimum wage times the number of hours the WEP workers worked; and (2) the fact that a plaintiff who "refused to work would lose the portion of the family's grant attributable to her . . . results in the conclusion that [the plaintiffs] were employees" (*id.* at 92). Although the FLSA was not the focus of the case in *City of New York*, the Second Circuit distinguished *Johns* and stated that even with respect to the FLSA, "the [DOL], the agency charged with interpreting the FLSA, has rejected the *Johns* approach" (*id.* at 94).

Following *City of New York*, two New York federal district courts have applied the same reasoning to cases involving minimum wage violation claims by public assistance recipients ***283** participating in WEP, holding that they were employees (*see Elwell v Weiss*, 2007 WL 2994308, 2006 US Dist LEXIS 96934 [WD NY, Sept. 29, 2006, No. 03-CV-6121]; *Stone v McGowan*, 308 F Supp 2d 79 [ND NY 2004]). Accordingly, as the law stands today, Carver is correct in asserting that he was an "employee" of the City under the FLSA when he participated in the WEP program.

It is true that, in *Brukhman v Giuliani* (94 NY2d 387 [2000]), this Court, holding that the plaintiffs did not qualify for a prevailing wage, stated that WEP workers "simply are not in the employ of anyone" (*id.* at 395-396 [internal quotation marks omitted]). This Court, however, expressly limited the opinion, stating "we decide no more than is before us" (*id.* at 397 [limiting its holding to apply to the requirements of the New York Constitution's wage provision]). Here, the Appellate Division rejected the State's reliance on *Brukhman* because this Court did not apply the economic reality test, which, under federal law, is the applicable test for determining who is an employer under the FLSA. Additionally, *Brukhman* is distinguishable from this case because the plaintiffs there argued that they should have been paid at the prevailing state wage for their participation in WEP, whereas Carver's claim is under the FLSA's minimum wage standards. Quite simply, we are now confronted with an issue of federal law.[2] The Supreme Court has made clear that the FLSA, which "defines the verb 'employ' expansively to mean 'suffer or permit to work.' 52 Stat. 1060, § 3, codified at 29 U. S. C. §§ 203(e), (g)," has "striking breadth" and "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles" (*Nationwide Mut. Ins. Co. v Darden*, 503 US 318, 326 [1992]; *see Rutherford Food Corp.*, 331 US at 728-729). Thus, *Brukhman* is not controlling here.

The State contends that WEP workers cannot be employees because their assistance depends on "economic need," measured by "specific household expenses," and on "household size," rather than on the type of work done or the workers' skill. There is no reason, however, why the formula used to set a worker's pay should affect whether or not he is an employee. ***284** As the United States Supreme Court stated in *Alamo*, what matters under the FLSA is that, like Carver, the associates expected to receive in-kind benefits in exchange for services and were dependent upon those benefits (471 US at 301).

The State also relies on language in the state laws and regulations and the City's Employment Process Manual stating that "the monetary grant . . . [for] participating in work-experience activities is not a wage for the performance of such activities" (internal quotation marks omitted; *and see* 18 NYCRR 385.9 [a] [4]). Such state law provisions, however, cannot override the FLSA. To the extent that any state or city laws come into conflict with governing provisions of the FLSA, they are preempted (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008]).

Finally, the State attempts to sidestep two key factors which indicate that WEP workers can be employees. First, the State contends that WEP workers' right to workers' compensation benefits "has little if any significance" because volunteers also have limited rights to such benefits. Carver, however, is no volunteer. He worked full-time in the WEP program because he had to if he wanted to receive his needed benefits. Second, the State argues that the work performed by Carver does not have true monetary value because a WEP worker cannot replace the job of an actual City employee. However, regardless of whether Carver's duties and responsibilities were identical to that of a non-WEP City worker, he qualifies as an employee under the economic reality test for FLSA purposes.

The gist of Carver's argument is that he is entitled to minimum wage for his hours worked as a participant in the WEP program, and that the State cannot retroactively deprive him of a minimum wage by recouping the funds through his lottery prize. Carver's request is actually consistent with the current practice. As mandated by Social Services Law § 336-c (2) (b),

> "[t]he number of hours a participant in work experience activities authorized pursuant to this section shall be required to work in such assignment shall not exceed a number which equals the amount of assistance payable with respect to such individual (inclusive of the value of food stamps received by such individual, if any) divided by the higher of (a) the federal minimum wage provided that such ***285** hours shall be limited as set forth in subdivision four of section three hundred thirty-six of this title, or (b) the state minimum wage."

Carver's particular situation compels the conclusion that he is entitled to minimum wage. While participating in the WEP program, Carver worked 35 hours per week, and the State concedes that this is not the norm. Additionally, the State's actions here led to a particularly unfair result in that Carver was taxed on the full amount of his $10,000 lottery winnings, while being forced to surrender half of those winnings to the State.

Accordingly, the judgment of the Supreme Court appealed from and the order of the Appellate Division insofar as sought to be reviewed should be affirmed, without costs.

Abdus-Salaam, J. (dissenting). The majority holds that petitioner Walter E. Carver, who received government assistance under the City of New York's work experience program (WEP), was an "employee" of the City within the meaning of the federal Fair Labor Standards Act (FLSA) (*see* 29 USC § 201 *et seq.*), and that therefore the minimum wage provisions of that statute entitle him to withhold a portion of his lottery winnings that would otherwise be owed to the New York State Office of Temporary and Disability Assistance (OTDA) pursuant to Social Services Law § 131-r. Tellingly, the majority does not dispute that FLSA and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (*see* Pub L 104-193, 110 US Stat 2105 [104th Cong, 2d Sess, Aug. 22, 1996]) do not expressly declare that public assistance recipients who must meet work requirements are employees of the government for FLSA purposes. Nor does the majority contend that the legislative history of those statutes reveals that Congress viewed petitioner and other such public assistance or "workfare" recipients as government "employees" who could obtain the benefits of FLSA. Rather, in the absence of clear textual or historical support for its conclusion that WEP participants are City "employees" within the meaning of FLSA, the majority maintains that an evaluation of petitioner's relationship with the City under the "economic reality" test, which the United States Supreme Court has adopted to determine whether an individual is the type of "employee" that Congress meant to protect via FLSA (*see Goldberg v Whitaker House Cooperative, Inc.*, 366 US 28, 33 [1961]), reveals that he is protected by FLSA.

***286** However, while courts should employ the economic reality test to ensure FLSA coverage for the broad class of individuals whom Congress truly meant to protect under the statute, the test cannot be used as a mere device to skip over the glaring lack of any legislative support for the extension of the statute's minimum wage provisions to public assistance or workfare recipients. Indeed, the economic reality test "does have its limits," and chief among them is the principle that the application of the test must be "consistent with congressional direction" (*Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290, 295-296 [1985], quoting *Mitchell v Lublin, McGaughy & Associates*, 358 US 207, 211 [1959]). Consonant with that most important limitation, the United States Court of Appeals for the Tenth Circuit has concluded that Congress did not intend to confer the protections of FLSA upon public assistance recipients simply because those individuals must meet certain conditions and engage in work activities in order to continue receiving government benefits (*see Johns v Stewart*, 57 F3d 1544, 1558 [10th Cir 1995]). Thus, as the Tenth Circuit's analysis demonstrates, and as the text and history of the relevant statutes show, petitioner and other similarly situated individuals are not "employees" within the meaning of FLSA, but instead receive government benefits in exchange for performing tasks relevant to the goals of PRWORA. Because the majority's contrary holding runs afoul of that persuasive authority and does not comport with any sort of reality, economic or otherwise, I respectfully dissent.

I.

The text and history of FLSA and PRWORA refute the majority's conclusion that, in enacting those statutes, Congress placed local governments and beneficiaries of government assistance in an employer-employee relationship that falls within the scope of FLSA. Regarding FLSA, that statute establishes, among other things, a minimum wage and a maximum number of work hours for any covered "employee," and the statute unhelpfully defines that critical term as "any individual employed"—that is, "suffer[ed] or permit[ted] to work"—by "an employer" (29 USC §§ 203 [e] [1]; [g]; *see* 206 [a] [1]; 207 [a]). In adding context to the vague term "employee," the statute specifies that some people who perform work for the government are protected "employees," but, significantly, it does not list public assistance recipients among them; rather, the statute lists a variety of traditional government positions which would entitle their occupants to the protections of FLSA, and nothing ***287** on that list mentions, applies to, or describes public assistance recipients in a manner that would qualify them as statutory "employees" (*see* 29 USC § 203 [e] [2] [A]-[C]). In fact, the statute does not refer to the recipients of government assistance at all, belying the majority's contention that the statute sets the wages and working conditions of those to whom the government gives benefits in exchange for their satisfaction of work-related requirements.

Nor does it seem that Congress had recipients of government benefits in mind when it passed and then amended FLSA over the years, for Congress appears to have focused primarily on rooting out abusive labor practices in traditional employment relationships established by commercial enterprises and their nonprofit or governmental equivalents. In its official declaration of the policy behind FLSA and its amendments, Congress expressed concern that "*industries* engaged in *commerce* or in the production of goods *for commerce*" had established "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," which conditions were harmful to, and spread via the abuse of, interstate commerce (29 USC § 202 [a] [emphases added]). As a result, FLSA made it the policy of the federal government "to correct and as rapidly as practicable to eliminate the conditions above referred to in *such industries* without substantially curtailing employment or earning power" (29 USC § 202 [b] [emphasis added]).

Upon the initial passage of FLSA in 1938, President Roosevelt likewise suggested that FLSA was intended to address the abuse of laborers who had been hired by commercial enterprises to produce goods in exchange for a wage, rather than assistance recipients, for he described FLSA as necessary legislation to combat "the evil of child labor" and "the exploitation of unorganized labor," which were incompatible with "[e]nlightened business" and would allow "[g]oods produced under conditions which do not meet rudimentary standards of decency" to "pollute the channels of interstate trade" (HR Rep 93-913, 93rd Cong, 2d Sess, reprinted in 1974 US Code Cong & Admin News at 2811, 2818 [quoting the 1937 speech without attribution]). Subsequent amendments to FLSA also reflected Congress's desire to protect traditional commercial workers, not public assistance recipients, as Congress increased the minimum wage and expanded FLSA's coverage to student workers, retail workers and domestic service workers (*see* Pub L 93-259, 88 US ***288** Stat 55 [93rd Cong, 2d Sess, Apr. 8, 1974]; HR Rep 93-913, 93rd Cong, 2d Sess, reprinted in 1974 US Code Cong & Admin News at 2811). Along those lines, upon debating the 1974 amendments to FLSA, Senators did not once mention public assistance recipients or similar individuals, instead focusing on the plight of child laborers on farms, domestic workers, firemen and the like (*see* 120 Cong Rec S4691-S4702 at 43-45 [daily ed Mar. 28, 1974]).

Even when congressional reports condemned those who sought to use misleading labels or hidden arrangements to disguise the type of employer-employee relationship to which FLSA would obviously apply, they did not make any reference to public assistance recipients, either in general or in the context of state programs that feature work-related requirements for the acquisition of assistance. Instead, Congress sought to remedy situations where commercial employers established labor arrangements with students and minors, who would otherwise be covered by the statute, and yet improperly tried to hide the true nature of those employer-employee relationships to avoid complying with the statute (*see* 120 Cong Rec S4691-S4702 at 37-42 [daily ed Mar. 28, 1974]). Therefore, the text and history of FLSA reveal that, in general, the statute covers only ordinary wage earners hired by private and public employers to send goods and provide services via the channels of interstate commerce, and that public assistance beneficiaries are not covered.

In the same vein, PRWORA does not apply the provisions of FLSA to participants in workfare programs administered under the statute. Although PRWORA does expressly grant the protections of some other federal statutes to participants in programs funded pursuant to that law, FLSA is not among them (*see* 42 USC § 608 [d], as added by Pub L 104-193, tit I, § 103 [a] [1], 110 US Stat 2105, enacting PRWORA of 1996, tit IV, § 408 [c], as amended), and consequently, PRWORA does not bring workfare recipients within the ambit of FLSA. In fact, PRWORA distinguishes between workfare participants and the sort of "employees" who might qualify for the protections of FLSA in several notable ways.

In that regard, while PRWORA compels individuals receiving temporary assistance for needy families to "participat[e] in work activities," such as unsubsidized employment, subsidized ***289** employment, job training or work experience (42 USC § 607 [c] [1] [A]; [d] [1]-[12], as added by Pub L 104-193, tit I, § 103 [a] [1], 110 US Stat 2105, enacting PRWORA of 1996, tit IV, § 407 [c] [1] [A]; [d] [1]-[12]), the act does not treat this "work activities" requirement as some form of public sector employment that might trigger the provisions of FLSA. PRWORA neither labels program participants as "employees" nor labels the state as their "employer," and it contains measures crafted to place program participants in actual "employment" in the private sector, as distinct from the participants' existing positions as the recipients of government benefits (*see e.g.* 42 USC §§ 604 [f] [allowing states to use PRWORA funds to pay for agencies that provide "employment placement services" to people who are not employees but rather are "individuals who receive assistance under the State program funded under this part"]; 608 [b] [2] [A] [i] [states may prepare individual responsibility plan that "sets forth an employment goal for the individual and a plan for moving the individual immediately into private sector employment"]; 607 [d] [4] ["work experience" in repairing public housing and similar roles qualifies as requisite "work activities" only "if sufficient private sector employment is not available"], as added by Pub L 104-193, tit I, § 103 [a] [1], 110 US Stat 2105, enacting PRWORA of 1996, tit IV, §§ 404 [f]; 408 [b] [2] [A] [i]; 407 [d] [4]). In addition, PRWORA refers to payments to program participants as "assistance" (*see* 42 USC §§ 604 [f]; 607 [e]) or "benefits" (42 USC § 601 [a] [2]) rather than wages paid to an employee, and in imposing a penalty upon any participant who fails to meet the mandatory work requirements, the statute declares that such a penalty "shall *not* be construed to be a reduction in any *wage* paid to the individual" (42 USC § 608 [c] [emphases added], as added by Pub L 105-33, tit V, subtit A, § 5001 [h] [1] [B], 111 US Stat 251, amending PRWORA of 1996, tit IV, § 408 [c]), thereby clarifying that participants are not employees who receive a wage from the government.

Moreover, the application of FLSA's minimum wage, overtime and other provisions to workfare participants is incompatible with PRWORA's primary goal of moving people off the public assistance rolls and into unsubsidized regular jobs, instead of making public assistance recipients state "employees" who are guaranteed a minimum wage subsidized by the federal government. ***290** [1] As the act's official statement of purpose puts it, PRWORA is meant to "increase the flexibility of States in operating a program designed to . . . end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage" (42 USC § 601 [a] [2], as added by Pub L 104-193, tit I, § 103 [a] [1], 110 US Stat 2105, enacting PRWORA of 1996, tit IV, § 401 [a] [2]), and thus, Congress could not have intended to limit states' flexibility in cutting benefits and incentivizing departure from the public assistance rolls by forcing the states to guarantee beneficiaries assistance in the amounts of the minimum wages specified by FLSA. Indeed, far from seeking to make a generous offer of state "employment" to workfare participants at a "wage" equivalent to FLSA's minimum wage, the House members who supported PRWORA bemoaned the fact that, prior to the act's passage, public assistance recipients were allegedly receiving benefits in excessive amounts far greater than the salary of many regularly employed individuals, and they wished to make the new workfare programs less generous, not more, than the sort of ordinary employment to which FLSA's minimum wage provisions would apply (*see* HR Rep 104-651, 104th Cong, 2d Sess at 4, reprinted in 1996 US Code Cong & Admin News at 2183, 2185). In short, the express terms of FLSA and PRWORA do not apply FLSA's protections to workfare recipients, and Congress plainly intended to establish the kind of arrangement between the government and workfare beneficiaries that would remove them from the ambit of FLSA.

II.

The majority does not seriously contest the clear evidence that Congress had no intention of turning participants in PRWORA programs into government "employees" covered by FLSA, but it insists that WEP participants qualify as government "employees" within the meaning of FLSA under the economic reality test (*see* majority op at 280-284). However, where, as here, Congress's intent to exempt a class of individuals from the reach of FLSA is plain from the text and history of relevant statutes, the judge-made economic reality test cannot ***291** serve to confer FLSA's protections upon those who Congress thought should not receive the statute's benefits because, as previously noted, a court must apply the test in a manner consistent with Congress's intent (*see Tony & Susan Alamo Foundation*, 471 US at 295-296; *cf. O'Connor v Davis*, 126 F3d 112, 115 [2d Cir 1997]). Indeed, as will be explained herein, when the economic reality test is properly applied in light of the legislative scheme, it leads to the inescapable conclusion that petitioner is not a City "employee" for FLSA purposes.

A.

The Supreme Court has not exhaustively defined the parameters of the economic reality test or set forth any particular list of factors to be considered in every case. However, the Court has indicated that one must look at "the circumstances of the whole activity" of the parties to discern the economic reality of a person's status under FLSA (*Rutherford Food Corp. v McComb*, 331 US 722, 730 [1947]). In conducting that practical and comprehensive analysis, the Supreme Court has focused on the individual's expectation of wages or in-kind remuneration beyond what one might expect as a trainee or student (*see Tony & Susan Alamo Foundation*, 471 US at 299-300; *Walling v Portland Terminal Co.*, 330 US 148, 150-153 [1947]), the employer's ability to "expel [workers] for substandard work or for failure to obey [workplace rules]" (*Goldberg*, 366 US at 33), and the employer's arrangement of its enterprise as a "device" which is "transparent[ly]" designed to evade FLSA's strictures (*id.*). Similarly, the United States Courts of Appeals have attempted to distill the Supreme Court's precedents and Department of Labor regulations regarding the economic reality test into a multifactor framework, concluding that "the relevant factors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records' " (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], quoting *Bonnette v California Health & Welfare Agency*, 704 F2d 1465, 1470 [9th Cir 1983]; *see also Hodgson v Griffin & Brand of McAllen, Inc.*, 471 F2d 235, 237-238 [5th Cir 1973]).

In *Johns v Stewart* (57 F3d at 1544), the Tenth Circuit concluded that, under the economic reality test, workfare participants *292 in Utah were not the State's "employees" for FLSA purposes (*see id.* at 1556-1559). The court determined that, because the workfare participants had to meet financial, training and other criteria beyond the performance of work in order to receive benefits, the participants were not receiving benefits as a form of wage solely in exchange for work, and in light of the unusual tax and payroll treatment of the participants' benefits payments, Utah had not established a typical employment relationship with those individuals (*see id.* at 1558-1559). While the court recognized that not every aspect of the workfare program differed from employment, the court eschewed reliance on such isolated factors or any rigid application of a multifactor test, instead following "the Supreme Court's direction to focus upon the circumstances of the whole activity and the economic reality of the relationship" (*id.* at 1559 and n 21). Thus, observing that "[t]he work component of [Utah's workfare programs] [wa]s just one requirement of the comprehensive assistance programs," the court concluded that, under the circumstances of the whole activity of the State and the beneficiaries, "[t]he overall nature of the relationship between [the workfare participants] and [the State] [wa]s assistance, not employment" (*id.* at 1558).

Johns persuasively shows that a workfare participant generally cannot avail him- or herself of FLSA's minimum wage specifications. As *Johns* recognizes, under most workfare programs, a state does not hire, fire and supervise employees or pay them a wage in a traditional sense, but instead makes public assistance beneficiaries meet many different criteria, such as financial, family-related and work requirements, to obtain government assistance and job training so that they can transition into actual employment in the public or private sector. In addition, *Johns* makes the commonsense point that "the circumstances of the whole activity" of workfare participants and the government are fundamentally different from those of employers and employees whose relationship is governed by FLSA, notwithstanding that the two arrangements may share some "isolated factors" in common (*Rutherford Food Corp.*, 331 US at 730).[3]

*293 Under the rationale of *Johns* and the relevant considerations identified by the Supreme Court and the lower federal courts, petitioner here was not an "employee" of the City and hence was not entitled to collect a minimum wage under FLSA. In particular, the City did not have the power to "hire" petitioner to fill an existing position left vacant by layoffs or other circumstances, as the law specifically forbids the City to replace an actual City employee with a WEP participant (*see* Social Services Law § 336-c [2] [e]; 42 USC § 607 [f] [2]). And, although the City had the power to reduce petitioner's benefits based on his complete failure to participate in work activities (*see* Social Services Law §§ 131 [5]; 336), the City could not "fire" him in the sense of "expelling" him from the program based solely on "substandard work or for failure to obey [workplace rules]," as opposed to a complete refusal to work (*Goldberg*, 366 US at 33).

Furthermore, petitioner could not have had any expectation of remuneration of the kind that would make him a City "employee," as he was more akin to a student or trainee who trained for full-time employment in the ordinary work force by engaging in work activities as one of the conditions of receiving government assistance (*see*

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Walling, 330 US at 150-153). Indeed, both federal and New York law establish the clear expectation and reality that petitioner was not earning a wage in exchange for his work because the law declares that his benefits were not the equivalent of wages (*see* 42 USC § 608 [c]; 18 NYCRR 385.9 [a] [4]; *see also* 42 USC §§ 604 [f]; 607 [e]), and the amount of his benefits was not only based on the number of hours he worked, but also on his needs and family size, which were matters unrelated to his work activities (*see* Social Services Law §§ 131 [4]; 131-a).[3] Moreover, the City did not structure the WEP program as a "device" to skirt FLSA's requirements and flood the channels of interstate commerce with goods and services unfairly generated at below-market rates in substandard labor conditions (*Goldberg*, 366 US at 33). Instead, the City makes petitioner and other WEP participants perform job-related tasks in order to develop valuable skills for *294 their planned departure from the program and entry into genuine employment.

B.

The majority posits that, since petitioner did not learn any skills in a classroom or participate in a formal and systematic apprenticeship, the City used its professed desire to train and educate petitioner as a charade to disguise an ordinary employment situation subject to FLSA requirements (*see* majority op at 281-282). However, petitioner's work experience in a professional setting was no less educational than the process of obtaining job skills via classwork. By taking part in the WEP program, petitioner learned how to meet workplace expectations such as timely arrival at a job site, how to interact productively with colleagues, and how to complete his assignments properly—among the most essential and universal job skills. In fact, petitioner's hands-on training may have been more valuable to him than any academic discourse on professional development.

The majority also believes that, because the Social Services Law calculates a WEP participant's work hours by dividing the amount of his or her benefits by the minimum wage (*see* Social Services Law § 336-c [2] [b]), the statute deems a WEP participant's benefits to be wages, akin to the minimum wage, which must be paid as part of an employer-employee relationship covered by FLSA (*see* majority op at 284-285). But the New York statute's use of the minimum wage as a numerical factor to be considered in setting the work hours of WEP participants does not remotely indicate that WEP benefits are wages or that the legislature meant to give participants the minimum wage. To the contrary, the legislature may have simply sought to use the number of hours that a minimum wage earner might work in exchange for a particular amount of money as a convenient preexisting bench mark of a standard, fair number of working hours for WEP participants, who need to adjust to such conditions that prevail in the regular work force which they hope to enter. Surely, the legislature did not transform WEP participants into government employees by choosing the expedient of a maximum hours formula based on a familiar metric of appropriate working conditions, rather than inventing a new formula from scratch. Beyond that, as the majority concedes (*see* majority op at 280-281), this statutory formula weighs against a finding that petitioner was a City "employee" under FLSA because the statute, and not the *295 City, "determined the rate and method of payment" of petitioner's benefits (*Herman*, 172 F3d at 139 [internal quotation marks omitted]).

The majority insists that WEP is akin to the thinly disguised commercial enterprise at issue in *Tony & Susan Alamo Foundation v Secretary of Labor* (471 US at 290), which enterprise was found by the Supreme Court to be subject to FLSA (*see id.* at 295-303). But, that case is readily distinguishable from the one before us. In *Tony & Susan Alamo Foundation*, a nonprofit organization with an avowed religious purpose operated a plethora of "commercial businesses, which include[d] service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy" (*id.* at 292). The workers at those businesses, called "associates," were needy, homeless or drug-addicted individuals ostensibly aided and rehabilitated by the organization (*id.*). The organization gave the associates in-kind benefits, but not cash, in return for their labors (*see id.*). The Secretary of Labor commenced a regulatory action against the organization, asserting that, among other things, it "employed" the associates within the meaning of FLSA and yet had not complied with FLSA's minimum wage and overtime provisions (*see id.* at 293). The organization countered that it was not an "enterprise engaged in commerce" to which FLSA applied; FLSA coverage would violate its rights under the Free Exercise Clause of the First Amendment; and it was exempt from FLSA's strictures because the associates were "volunteers," not "employees" within the meaning of FLSA (*id.* at 293-295).

The Supreme Court held that the organization had to comply with FLSA (*see id.* at 293-295, 299-303, 306). First, the Court concluded that, because the lower courts had appropriately found that the organization ran commercial enterprises in competition with other ordinary businesses, the organization was a "commercial enterprise" subject to FLSA (*see id.* at 295-299). Noting that it had "consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction," the Court determined that neither the organization's expressed religious purpose nor its offer of services and food to the associates removed it from the ambit of the statute because both formal Department of Labor regulations and federal judicial decisions had established that the religious or charitable nature of an otherwise commercial enterprise did not serve to remove it from the reach of the ***296** statute (*id.* at 296-299 [internal quotation marks and citation omitted]). Importantly, the Court observed that "[t]he legislative history of the Act support[ed] this administrative and judicial gloss," and the Court relied on extensive legislative history showing that Congress intended to regulate enterprises like the organization under FLSA (*id.* at 297-298).

Furthermore, in the Court's view, the organization's associates were "employees" under FLSA based on the overall economic reality of their relationship with the organization (*see id.* at 299-303). The Court noted that, unlike students or trainees, the associates "must have expected to receive in-kind benefits—*and expected them in exchange for their services*"—such that those benefits were "wages in another form" (*id.* at 301 [emphasis added]). In addition to that expectation of wages, the Court relied on a number of factors that supported its determination that the associates were statutory "employees," including their many years of service and near-total dependency on the organization, their long work hours, their payment "on a 'commission' basis," and their having been " 'fined' " severely "for poor job performance" (*id.* at 301 and n 22). Furthermore, the Court rejected the notion that the associates could opt out of the statute's coverage, declaring that a supposedly voluntary waiver of the statute's protections would undermine the statute's goal by ultimately driving down "wages" in "competing businesses" (*id.* at 302). Finally, the Court rebuffed the organization's First Amendment argument and held that the associates could receive the protections of FLSA (*see id.* at 303-306).

Unlike the enterprise at issue in *Tony & Susan Alamo Foundation*, WEP is not the sort of commercial enterprise that FLSA seeks to regulate, as WEP does not compete with other businesses in the production of goods or supply of services in the channels of interstate commerce. And, as discussed, WEP participants like petitioner are not employees of the City because, while they may expect to obtain government assistance upon meeting a combination of work-related and other criteria, they do not expect those benefits solely "in exchange for their services" (*id.* at 301), as did the associates in *Tony & Susan Alamo Foundation*. Furthermore, although the City may penalize WEP participants for failure to meet minimal requirements of attendance and hours at work, the City does not, unlike the organization in *Tony & Susan Alamo Foundation*, reward or punish participants based on the quality of their ***297** work, as an ordinary commercial employer might, by giving them benefits on a " 'commission' basis" or " 'fin[ing]' [them] heavily for poor job performance" (*id.* at 301 n 22). More fundamentally, in *Tony & Susan Alamo Foundation*, the text and history of FLSA supported the conclusion that the entity in question had to comply with FLSA, whereas those authorities support the opposite conclusion here. It is not surprising, then, that the Tenth Circuit in *Johns* observed that *Tony & Susan Alamo Foundation* was fully consistent with the conclusion that workfare participants cannot obtain the protections of FLSA (*see Johns*, 57 F3d at 1557, citing *Tony & Susan Alamo Foundation*, 471 US at 295).

The majority's reliance on a Department of Labor document expressing the view that workfare recipients are "employees" within the meaning of FLSA is equally misplaced (*see* majority op at 279-280). While the Department of Labor's views are entitled to significant consideration based on its role as the agency charged with administering FLSA (*see Tony & Susan Alamo Foundation*, 471 US at 297), the deference owed to the agency's interpretation of the statute depends primarily on its "power to persuade" (*Christensen v Harris County*, 529 US 576, 587 [2000]), and in this instance, the persuasive power of the Department's document pales in comparison to the clear language, history and case law demonstrating that workfare participants are not government employees.[4] So, too, administrative guidance carries considerably less weight where, as here, it comes in the form of a document that has not been issued as "a formal adjudication or notice-and-comment rulemaking" (*id.*).[5]

***298** *United States v City of New York* (359 F3d 83 [2d Cir 2004]), cited by the majority (*see* majority op at 282), is inapposite. There, the Second Circuit held that WEP participants are covered by title VII of the Civil Rights Act of 1964 (*see* 359 F3d at 86-87), and in dictum, the court signaled that it might endorse the Department of Labor's view that FLSA covers workfare participants (*see id.* at 94). Obviously, the dictum in *City of New York* does not supply binding authority on the issue at hand, nor is it even persuasive, as it merely restates the Department of Labor's informal guidance without supplying significant analysis of the text and history of FLSA and PRWORA relating to this issue. In addition, while title VII, like FLSA, is not among the statutes explicitly referenced by PRWORA, the Second Circuit's determination that title VII nonetheless applies to workfare participants does not compel a similar conclusion with respect to FLSA. After all, some provisions of PRWORA reflect Congress's desire to administer workfare programs on a nondiscriminatory basis (*see e.g.* 42 USC § 608 [d]), and as a result, the application of title VII protections to workfare participants would not offend against the legislative intent behind PRWORA in the same manner as the coverage of such individuals under FLSA. Indeed, given Congress's broad desire to ensure that all assistance recipients would receive the job skills they needed via work experience programs under PRWORA, it is hard to imagine that Congress wished to leave the states free to offer the benefits and responsibilities of PRWORA only to certain people on a piecemeal, discriminatory basis.[6]

***299** Finally, the majority's holding, in addition to lacking any legal basis, may raise serious practical problems. Under the majority's rationale for deeming WEP participants to be City employees, taxpayers may ultimately have to foot the bill for an array of new expenses, including overtime, annual leave and sick leave. Collective bargaining rules may soon apply to all workfare recipients, not just those who participate in a subsidized public employment program with an outside employer (*see* Social Services Law § 336-e), thereby stymieing the orderly administration of WEP. And, the city, state and federal governments may have to reconcile the ordinarily tax-exempt status of WEP participants' assistance payments with the implication of today's decision that WEP participants essentially earn those payments as the sort of "wages" that are generally taxed in a regular employment context. The majority may protest that its holding can be confined in one way or another, but given the majority's imaginative characterization of workfare and invocation of legal authorities from clearly distinguishable contexts, attempts to limit the impact of the majority's decision to this case and this minimum wage statute will prove difficult at best and futile at worst. I would avoid this mess and follow existing law.[7]

III.

In its effort to fit the square peg of assistance into the round hole of employment under FLSA, the majority defies the will of Congress, ignores the teachings of the Supreme Court and needlessly creates a split in authority between this Court and the Tenth Circuit. Because the majority's decision sows confusion in this important area of federal law, courts throughout New York and, potentially, the Nation must now struggle in vain to reconcile the majority's illogical holding with the relevant legislative scheme and common sense, and thus the majority's opinion will likely reverberate in unfortunate ways ***300** throughout the legal system. Since the plain language of FLSA and PRWORA, as well as the legislative purpose behind those statutes, show that WEP participants are not City "employees" entitled to the protections of FLSA, I dissent and vote to reverse the order of the Appellate Division.

Judges Rivera, Stein and Fahey concur; Judge Abdus-Salaam dissents in an opinion in which Judge Pigott concurs.

Supreme Court judgment appealed from and Appellate Division order insofar as sought to be reviewed affirmed, without costs.

FOOTNOTES

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Footnotes

1 The United States Department of Health and Human Services has also concluded that the FLSA applies to public assistance recipients under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), also known as the "Welfare Reform Act" (*see* 45 CFR 260.35 [b] ["Federal employment laws (such as the Fair Labor Standards Act [FLSA], the Occupational Safety and Health Act [OSHA] and unemployment insurance [UI]) and nondiscrimination laws . . . apply to (Temporary Assistance for Needy Families) beneficiaries in the same manner as they apply to other workers"]).

2 It is mystifying why, on a question of federal law, the dissent feels compelled to follow a Tenth Circuit decision predating the adoption of PRWORA and to amplify the import of *Brukhman*, while castigating the more recent teaching of the Second Circuit and the guidelines of the Labor Department (*see* dissenting op at 286, 297-298, 298-299 n 6).

1 In passing similar legislation prior to PRWORA, the New York Legislature also expressed a desire to reduce the

number of public assistance recipients in the state and encourage them to transition to genuine full-time employment in the private sector (*see generally* Bill Jacket, L 1990, ch 453; *see also* Bill Jacket, L 1997, ch 436).

2 To be sure, *Johns* predates PRWORA, but that is of no moment because, as explained above, PRWORA actually strengthens the rationale of *Johns* by revealing Congress's intent to place workfare participants in a very different position than that of an "employee" under FLSA.

3 In fact, unlike wages that can be freely spent by an employee and taxed by the government, state and federal law place significant restrictions on the taxation and expenditure of workfare benefits (*see* 42 USC § 608 [a] [12] [A]; 18 NYCRR 381.1; *see also* 20 CFR 416.1124 [c] [2]; Internal Revenue Service Publication No. 525: Taxable and Nontaxable Income [1995-2013 eds]).

4 Citing a congressional conference report on 1997 budget legislation, the majority claims that Congress "considered the DOL's guidelines and accepted them" (majority op at 280). But, in the cited report, Congress merely mentioned the existence of the Department's opinion on the subject of FLSA coverage for workfare participants, noted the House's view that workfare participants were not entitled to wages or a salary in any traditional sense, and declined to pass any legislation addressing that specific issue (*see* HR Rep 105-217, 105th Cong, 1st Sess at 934, reprinted in 1997 US Code Cong & Admin News at 176, 555). Congress certainly did not agree to enact the Department's guidance on this issue into law, and its failure to invalidate the Department's document, unlike the failure to overrule a binding Supreme Court decision on the subject, is hardly a sign that the agency's guidance has become the law of the land.

5 As the majority observes (*see* majority op at 280 n 1), the Department of Health and Human Services has issued a formal regulation indicating that participants in programs governed by PRWORA are protected by FLSA (*see* 45 CFR 260.35). But, the Department of Health and Human Services is charged with joint responsibility for interpreting PRWORA, not FLSA, and hence its opinion on the meaning of FLSA is entitled to even less respect than that of the Department of Labor. In any event, as previously noted, the views of administrative agencies simply cannot override the text, history and judicial interpretations of FLSA.

6 To the extent cases dealing with employment issues outside the FLSA context are relevant, we should follow the logic of our own decision in *Brukhman v Giuliani* (94 NY2d 387 [2000]) instead of the Second Circuit's decision in *City of New York*. In *Brukhman*, we decided that WEP participants are not government employees protected by the prevailing wage provision of the State Constitution (*see Brukhman*, 94 NY2d at 391-397). Although we were careful to limit our holding to the interpretation of that constitutional provision (*see id.* at 397), we reached the conclusion that WEP participants are not City "employees" under the Constitution based on many of the same factors which demonstrate that they are not City "employees" under FLSA, including the lack of any salary paid to participants in direct exchange for their services and WEP's goal of moving participants from a government assistance program into genuine employment (*see id.* at 395-396). In light of those factors and the others listed above, petitioner and other WEP participants are not "employees" of the City within the meaning of FLSA.

7 It is unclear under the majority's decision whether the government would ever be able to recoup lottery winnings from a WEP participant, since the government does not recover wages that it pays to employees. Presumably, even if petitioner had won a multi-million dollar lottery prize, the majority would let him keep every penny.

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NEW YORK LOTTERY

New York State Lottery
One Broadway Center
P.O. Box 7533
Schenectady, NY 12301

Prize Claim Receipt

Claim No:	07081010051-01-00
Date:	08/10/2007
Total Prize:	$10,000.00
Withholding Tax:	$3,550.00
Offset Total:	$5,000.00
Check Amount:	$1,450.00
Check No.:	11735956

	MW Game	Yr/Book	TSN/VIRN	Prize Won
1.	IG-458	458541576	183583368813256535	$10,000.00
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
				$10,000.00

Withholding:	Federal	$2,500.00	Offset:	Public Assistance	$5,000.00
	State	$685.00			
	NYC	$365.00			
	Total:	$3,550.00		Total:	$5,000.00

Tear at Perfora

LDSS-5069 (Rev. 7/15)

BIENNIAL ACCOUNTING LETTER

Case Name:	Date:
Case Address:	Property Owner:
Case Number(s):	Address of Real Property:

Dear Property Owner,

A Social Services District (SSD) may place a lien on real property to recover any Temporary Assistance grant paid to you, your household, or by voucher to a vendor on your behalf (e.g. direct payments to a landlord or utility company). This lien is effective from 10 years prior to the date a lien is signed until the lien is satisfied.

Property owners who have had liens placed on their real property by SSDs must receive an accounting every two years of:

- All Temporary Assistance payments issued to the household to date. This includes repairs and taxes paid on the property; and
- Amount of recoveries the SSD received to reduce the amount of debt owed.

This accounting will be mailed to the property owners last known address or to their estate.

A SSD is not allowed to recover ANY Temporary Assistance payments for a two-year fiscal period by enforcement of this real property lien when the SSD fails to send a Biennial Accounting Letter as required, but MAY recover payments from applicants, recipients and former recipients by any other means available for that two year period.

As of ______________, the balance on your outstanding real property lien is: $______________. This was calculated as follows:

Period Reviewed for Temporary Assistance Payments and Recoveries	
Amount of Temporary Assistance Received During the Accounting Period	
Amount of Recoveries Received During the Accounting Period	
Outstanding Balance on Real Property Lien	

Payments from Supplemental Nutrition Assistance Program (SNAP); Child Care Services; Emergency Assistance to Adults (EAA); or Home Energy Assistance Program (HEAP), have not been added to your outstanding real property lien total.

Below is the breakdown of the Temporary Assistance payments recovered.

RECOVERY SOURCE	**DOLLAR AMOUNT USED TO REDUCE DEBT OWED**
Child Support: Collected and disbursed to the SSD	$
Lawsuit settlements	$
Lottery Intercept	$
Recoupment	$
Utility Repayment Agreement	$
Shelter Repayment Agreement	$
Interim Assistance Reimbursement (IAR)	$
Cash or payments made to SSD	$
Workfare prior to 1997	$
Tax Offset	$
Liens or Mortgages from real property other than listed above	$
Total amount recovered and used to reduced debt owed	$

Calculations in this letter are inclusive of assistance granted and recoveries received, from ______________ only, during the biennial accounting period. The amount reported in this letter is the amount that can be recovered through the lien process as of the end date of ______________. Additional assistance payments issued and recoveries received after the end date of the biennial accounting period must be taken into consideration when the property is sold.

If you would like information on how you can make payments to the SSD to reduce the amount of the outstanding real property lien, contact ______________________________ at ______________.

New Americans in New York State

New York State continues to be a gateway for immigrants and we are proud of it. Today, 4.3 million of New Americans reside and prosper in our communities across New York State. This infographic outlines contributions New Americans make to our communities and their successes as they participate in the State's civic and economic life.

NEW YORK STATE OFFICE for NEW AMERICANS

Top NYS Cities with New American Population

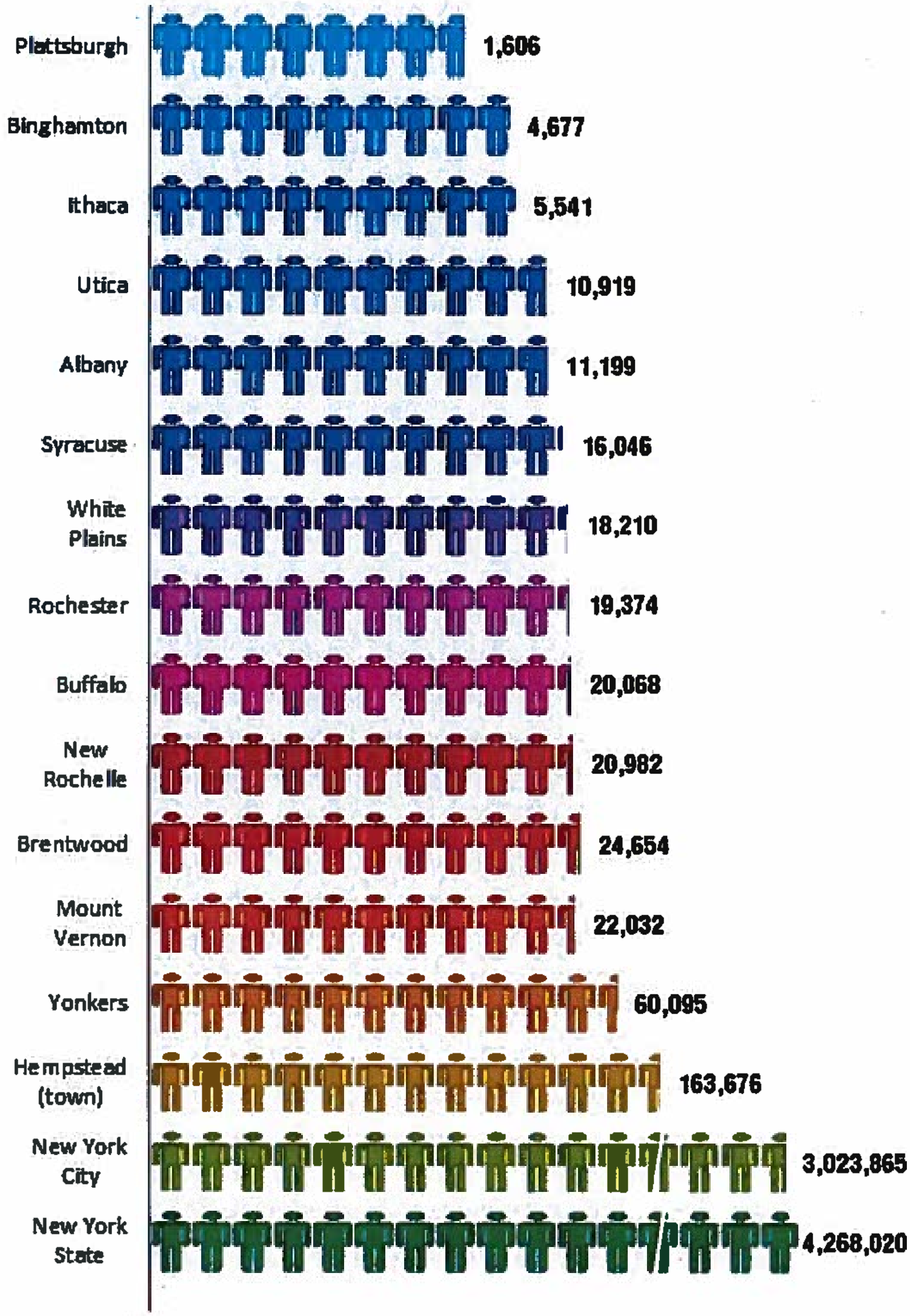
U.S. Census Bureau, 2008-2012 American Community Survey

1 IN 4 WORKERS
1 in 4 New Yorkers of working age are foreign born.

12.6 BILLION
12.6 billion in net business income contributions by New American business owners.

31.2 PERCENT
31.2 percent of New York State business owners are immigrants.

4.2 MILLION
4.2 million immigrants live in New York State.



	2012	2010	2000
Plattsburgh	1,606	1,494	1,085
Binghamton	4,677	4,581	4,006
Ithaca	5,541	5,064	4,650
Utica	10,919	9,141	7,231
Albany	11,199	11,344	8,222
Syracuse	16,046	14,855	11,214
White Plains	18,210	16,700	15,572
Rochester	19,374	17,281	16,077
Buffalo	20,068	18,599	12,856
New Rochelle	20,982	20,595	19,722
Brentwood	24,654	23,162	18,721
Mount Vernon	22,032	20,888	19,882
Yonkers	60,095	58,821	51,687
Hempstead (town)	163,676	160,052	134,598
New York City	3,023,865	2,971,143	2,871,032
New York State	4,268,020	4,180,075	3,868,133

Child Care Copayments as a Percentage of Household Income 2016-7

[effective 6/1/16-5/30/17 (16 OCFS INF-01)]

Family size = 1*

Eligibility	FPL (100%)		125%		140%		150%		167%	
Annual Income	$11,880.00		$14,850.00		$16,632.00		$17,820.00		$19,839.60	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$297.00	2.0%	$475.20	2.9%	$594.00	3.3%	$795.96	4.0%
15.0%	$0.00	0.0%	$445.50	3.0%	$712.80	4.3%	$891.00	5.0%	$1,193.94	6.0%
20.0%	$0.00	0.0%	$594.00	4.0%	$950.40	5.7%	$1,188.00	6.7%	$1,591.92	8.0%
25.0%	$0.00	0.0%	$742.50	5.0%	$1,188.00	7.1%	$1,485.00	8.3%	$1,989.90	10.0%
30.0%	$0.00	0.0%	$891.00	6.0%	$1,425.60	8.6%	$1,782.00	10.0%	$2,387.88	12.0%
35.0%	$0.00	0.0%	$1,039.50	7.0%	$1,663.20	10.0%	$2,079.00	11.7%	$2,785.86	14.0%

Eligibility	175%		200%		225%		250%		275%	
Annual Income	$20,790.00		$23,760.00		$26,730.00		$29,700.00		$32,670.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$891.00	4.3%	$1,188.00	5.0%	$1,485.00	5.6%	$1,782.00	6.0%	$2,079.00	6.4%
15.0%	$1,336.50	6.4%	$1,782.00	7.5%	$2,227.50	8.3%	$2,673.00	9.0%	$3,118.50	9.5%
20.0%	$1,782.00	8.6%	$2,376.00	10.0%	$2,970.00	11.1%	$3,564.00	12.0%	$4,158.00	12.7%
25.0%	$2,227.50	10.7%	$2,970.00	12.5%	$3,712.50	13.9%	$4,455.00	15.0%	$5,197.50	15.9%
30.0%	$2,673.00	12.9%	$3,564.00	15.0%	$4,455.00	16.7%	$5,346.00	18.0%	$6,237.00	19.1%
35.0%	$3,118.50	15.0%	$4,158.00	17.5%	$5,197.50	19.4%	$6,237.00	21.0%	$7,276.50	22.3%

*Child only families are those where the care giver is not financially responsible for the child, such as if a child lives with a grandparent who has custody or guardianship but has not adopted the child.

Family size = 2

Eligibility %	FPL (100%)		125%		140%		150%		167%	
Annual Income	$16,020.00		$20,025.00		$22,428.00		$24,030.00		$26,753.40	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	& of Income
10.0%	$0.00	0.0%	$400.50	2.0%	$640.80	2.9%	$801.00	3.3%	$1,073.34	4.0%
15.0%	$0.00	0.0%	$600.75	3.0%	$961.20	4.3%	$1,201.50	5.0%	$1,610.01	6.0%
20.0%	$0.00	0.0%	$801.00	4.0%	$1,281.60	5.7%	$1,602.00	6.7%	$2,146.68	8.0%
25.0%	$0.00	0.0%	$1,001.25	5.0%	$1,602.00	7.1%	$2,002.50	8.3%	$2,683.35	10.0%
30.0%	$0.00	0.0%	$1,201.50	6.0%	$1,922.40	8.6%	$2,403.00	10.0%	$3,220.02	12.0%
35.0%	$0.00	0.0%	$1,401.75	7.0%	$2,242.80	10.0%	$2,803.50	11.7%	$3,756.69	14.0%

Eligibility %	175%		200%		225%		250%		275%	
Annual Income	$28,035.00		$32,040.00		$36,045.00		$40,050.00		$44,055.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$1,201.50	4.3%	$1,602.00	5.0%	$2,002.50	5.6%	$2,403.00	6.0%	$2,803.50	6.4%
15.0%	$1,802.25	6.4%	$2,403.00	7.5%	$3,003.75	8.3%	$3,604.50	9.0%	$4,205.25	9.5%
20.0%	$2,403.00	8.6%	$3,204.00	10.0%	$4,005.00	11.1%	$4,806.00	12.0%	$5,607.00	12.7%
25.0%	$3,003.75	10.7%	$4,005.00	12.5%	$5,006.25	13.9%	$6,007.50	15.0%	$7,008.75	15.9%
30.0%	$3,604.50	12.9%	$4,806.00	15.0%	$6,007.50	16.7%	$7,209.00	18.0%	$8,410.50	19.1%
35.0%	$4,205.25	15.0%	$5,607.00	17.5%	$7,008.75	19.4%	$8,410.50	21.0%	$9,812.25	22.3%

Prepared by the Empire Justice Center, Revised February 1, 2017.

Child Care Copayments as a Percentage of Household Income 2016-7
[effective 6/1/16-5/30/17 (16 OCFS INF-01)]

Family size = 3

Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$20,160.00		$25,200.00		$28,224.00		$30,240.00		$33,667.20		$35,280.00		$40,320.00		$45,360.00		$50,400.00		$55,440.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$504.00	2.0%	$806.40	2.9%	$1,008.00	3.3%	$1,350.72	4.0%	$1,512.00	4.3%	$2,016.00	5.0%	$2,520.00	5.6%	$3,024.00	6.0%	$3,528.00	6.4%
15.0%	$0.00	0.0%	$756.00	3.0%	$1,209.60	4.3%	$1,512.00	5.0%	$2,026.08	6.0%	$2,268.00	6.4%	$3,024.00	7.5%	$3,780.00	8.3%	$4,536.00	9.0%	$5,292.00	9.5%
20.0%	$0.00	0.0%	$1,008.00	4.0%	$1,612.80	5.7%	$2,016.00	6.7%	$2,701.44	8.0%	$3,024.00	8.6%	$4,032.00	10.0%	$5,040.00	11.1%	$6,048.00	12.0%	$7,056.00	12.7%
25.0%	$0.00	0.0%	$1,260.00	5.0%	$2,016.00	7.1%	$2,520.00	8.3%	$3,376.80	10.0%	$3,780.00	10.7%	$5,040.00	12.5%	$6,300.00	13.9%	$7,560.00	15.0%	$8,820.00	15.9%
30.0%	$0.00	0.0%	$1,512.00	6.0%	$2,419.20	8.6%	$3,024.00	10.0%	$4,052.16	12.0%	$4,536.00	12.9%	$6,048.00	15.0%	$7,560.00	16.7%	$9,072.00	18.0%	$10,584.00	19.1%
35.0%	$0.00	0.0%	$1,764.00	7.0%	$2,822.40	10.0%	$3,528.00	11.7%	$4,727.52	14.0%	$5,292.00	15.0%	$7,056.00	17.5%	$8,820.00	19.4%	$10,584.00	21.0%	$12,348.00	22.3%

Family size = 4

Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$24,300.00		$30,375.00		$34,020.00		$36,450.00		$40,581.00		$42,525.00		$48,600.00		$54,675.00		$60,750.00		$66,825.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$607.50	2.0%	$972.00	2.9%	$1,215.00	3.3%	$1,628.10	4.0%	$1,822.50	4.3%	$2,430.00	5.0%	$3,037.50	5.6%	$3,645.00	6.0%	$4,252.50	6.4%
15.0%	$0.00	0.0%	$911.25	3.0%	$1,458.00	4.3%	$1,822.50	5.0%	$2,442.15	6.0%	$2,733.75	6.4%	$3,645.00	7.5%	$4,556.25	8.3%	$5,467.50	9.0%	$6,378.75	9.5%
20.0%	$0.00	0.0%	$1,215.00	4.0%	$1,944.00	5.7%	$2,430.00	6.7%	$3,256.20	8.0%	$3,645.00	8.6%	$4,860.00	10.0%	$6,075.00	11.1%	$7,290.00	12.0%	$8,505.00	12.7%
25.0%	$0.00	0.0%	$1,518.75	5.0%	$2,430.00	7.1%	$3,037.50	8.3%	$4,070.25	10.0%	$4,556.25	10.7%	$6,075.00	12.5%	$7,593.75	13.9%	$9,112.50	15.0%	$10,631.25	15.9%
30.0%	$0.00	0.0%	$1,822.50	6.0%	$2,916.00	8.6%	$3,645.00	10.0%	$4,884.30	12.0%	$5,467.50	12.9%	$7,290.00	15.0%	$9,112.50	16.7%	$10,935.00	18.0%	$12,757.50	19.1%
35.0%	$0.00	0.0%	$2,126.25	7.0%	$3,402.00	10.0%	$4,252.50	11.7%	$5,698.35	14.0%	$6,378.75	15.0%	$8,505.00	17.5%	$10,631.25	19.4%	$12,757.50	21.0%	$14,883.75	22.3%

Prepared by the Empire Justice Center, Revised February 1, 2017.

Child Care Copayments as a Percentage of Household Income 2016-7
[effective 6/1/16-5/30/17 (16 OCFS INF-01)]

Family size = 5																				
Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$28,440.00		$35,550.00		$39,816.00		$42,660.00		$47,494.80		$49,770.00		$56,880.00		$63,990.00		$71,100.00		$78,210.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$711.00	2.0%	$1,137.60	2.9%	$1,422.00	3.3%	$1,905.48	4.0%	$2,133.00	4.3%	$2,844.00	5.0%	$3,555.00	5.6%	$4,266.00	6.0%	$4,977.00	6.4%
15.0%	$0.00	0.0%	$1,066.50	3.0%	$1,706.40	4.3%	$2,133.00	5.0%	$2,858.22	6.0%	$3,199.50	6.4%	$4,266.00	7.5%	$5,332.50	8.3%	$6,399.00	9.0%	$7,465.50	9.5%
20.0%	$0.00	0.0%	$1,422.00	4.0%	$2,275.20	5.7%	$2,844.00	6.7%	$3,810.96	8.0%	$4,266.00	8.6%	$5,688.00	10.0%	$7,110.00	11.1%	$8,532.00	12.0%	$9,954.00	12.7%
25.0%	$0.00	0.0%	$1,777.50	5.0%	$2,844.00	7.1%	$3,555.00	8.3%	$4,763.70	10.0%	$5,332.50	10.7%	$7,110.00	12.5%	$8,887.50	13.9%	$10,665.00	15.0%	$12,442.50	15.9%
30.0%	$0.00	0.0%	$2,133.00	6.0%	$3,412.80	8.6%	$4,266.00	10.0%	$5,716.44	12.0%	$6,399.00	12.9%	$8,532.00	15.0%	$10,665.00	16.7%	$12,798.00	18.0%	$14,931.00	19.1%
35.0%	$0.00	0.0%	$2,488.50	7.0%	$3,981.60	10.0%	$4,977.00	11.7%	$6,669.18	14.0%	$7,465.50	15.0%	$9,954.00	17.5%	$12,442.50	19.4%	$14,931.00	21.0%	$17,419.50	22.3%

Family size = 6																				
Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$32,580.00		$40,725.00		$45,612.00		$48,870.00		$54,408.60		$57,015.00		$65,160.00		$73,305.00		$81,450.00		$89,595.00	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$814.50	2.0%	$1,303.20	2.9%	$1,629.00	3.3%	$2,182.86	4.0%	$2,443.50	4.3%	$3,258.00	5.0%	$4,072.50	5.6%	$4,887.00	6.0%	$5,701.50	6.4%
15.0%	$0.00	0.0%	$1,221.75	3.0%	$1,954.80	4.3%	$2,443.50	5.0%	$3,274.29	6.0%	$3,665.25	6.4%	$4,887.00	7.5%	$6,108.75	8.3%	$7,330.50	9.0%	$8,552.25	9.5%
20.0%	$0.00	0.0%	$1,629.00	4.0%	$2,606.40	5.7%	$3,258.00	6.7%	$4,365.72	8.0%	$4,887.00	8.6%	$6,516.00	10.0%	$8,145.00	11.1%	$9,774.00	12.0%	$11,403.00	12.7%
25.0%	$0.00	0.0%	$2,036.25	5.0%	$3,258.00	7.1%	$4,072.50	8.3%	$5,457.15	10.0%	$6,108.75	10.7%	$8,145.00	12.5%	$10,181.25	13.9%	$12,217.50	15.0%	$14,253.75	15.9%
30.0%	$0.00	0.0%	$2,443.50	6.0%	$3,909.60	8.6%	$4,887.00	10.0%	$6,548.58	12.0%	$7,330.50	12.9%	$9,774.00	15.0%	$12,217.50	16.7%	$14,661.00	18.0%	$17,104.50	19.1%
35.0%	$0.00	0.0%	$2,850.75	7.0%	$4,198.60	9.2%	$5,701.50	11.7%	$7,640.01	14.0%	$8,552.25	15.0%	$11,403.00	17.5%	$14,253.75	19.4%	$17,104.50	21.0%	$19,955.25	22.3%

Prepared by the Empire Justice Center, Revised February 1, 2017.

Child Care Copayments as a Percentage of Household Income 2016-7
[effective 6/1/16-5/30/17 (16 OCFS INF-01)]

Family size = 7

Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$36,730.00		$45,912.50		$51,422.00		$55,095.00		$61,339.10		$64,277.50		$73,460.00		$82,642.50		$91,825.00		$101,007.50	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$918.25	2.0%	$1,469.20	2.9%	$1,836.50	3.3%	$2,460.91	4.0%	$2,754.75	4.3%	$3,673.00	5.0%	$4,591.25	5.6%	$5,509.50	6.0%	$6,427.75	6.4%
15.0%	$0.00	0.0%	$1,377.38	3.0%	$2,203.80	4.3%	$2,754.75	5.0%	$3,691.37	6.0%	$4,132.13	6.4%	$5,509.50	7.5%	$6,886.88	8.3%	$8,264.25	9.0%	$9,641.63	9.5%
20.0%	$0.00	0.0%	$1,836.50	4.0%	$2,938.40	5.7%	$3,673.00	6.7%	$4,921.82	8.0%	$5,509.50	8.6%	$7,346.00	10.0%	$9,182.50	11.1%	$11,019.00	12.0%	$12,855.50	12.7%
25.0%	$0.00	0.0%	$2,295.63	5.0%	$3,673.00	7.1%	$4,591.25	8.3%	$6,152.28	10.0%	$6,886.88	10.7%	$9,182.50	12.5%	$11,478.13	13.9%	$13,773.75	15.0%	$16,069.38	15.9%
30.0%	$0.00	0.0%	$2,754.75	6.0%	$4,407.60	8.6%	$5,509.50	10.0%	$7,382.73	12.0%	$8,264.25	12.9%	$11,019.00	15.0%	$13,773.75	16.7%	$16,528.50	18.0%	$19,283.25	19.1%
35.0%	$0.00	0.0%	$3,213.88	7.0%	$5,142.20	10.0%	$6,427.75	11.7%	$8,613.19	14.0%	$9,641.63	15.0%	$12,855.50	17.5%	$16,069.38	19.4%	$19,283.25	21.0%	$22,497.13	22.3%

Family size = 8

Eligibility %	FPL (100%)		125%		140%		150%		167%		175%		200%		225%		250%		275%	
Annual Income	$40,890.00		$51,112.50		$57,246.00		$61,335.00		$68,286.30		$71,557.50		$81,780.00		$92,002.50		$102,225.00		$112,447.50	
Multiplier	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income	Yearly Copay	% of Income
10.0%	$0.00	0.0%	$1,022.25	2.0%	$1,635.60	2.9%	$2,044.50	3.3%	$2,739.63	4.0%	$3,066.75	4.3%	$4,089.00	5.0%	$5,111.25	5.6%	$6,133.50	6.0%	$7,155.75	6.4%
15.0%	$0.00	0.0%	$1,533.38	3.0%	$2,453.40	4.3%	$3,066.75	5.0%	$4,109.45	6.0%	$4,600.13	6.4%	$6,133.50	7.5%	$7,666.88	8.3%	$9,200.25	9.0%	$10,733.63	9.5%
20.0%	$0.00	0.0%	$2,044.50	4.0%	$3,271.20	5.7%	$4,089.00	6.7%	$5,479.26	8.0%	$6,133.50	8.6%	$8,178.00	10.0%	$10,222.50	11.1%	$12,267.00	12.0%	$14,311.50	12.7%
25.0%	$0.00	0.0%	$2,555.63	5.0%	$4,089.00	7.1%	$5,111.25	8.3%	$6,849.08	10.0%	$7,666.88	10.7%	$10,222.50	12.5%	$12,778.13	13.9%	$15,333.75	15.0%	$17,889.38	15.9%
30.0%	$0.00	0.0%	$3,066.75	6.0%	$4,906.80	8.6%	$6,133.50	10.0%	$8,218.89	12.0%	$9,200.25	12.9%	$12,267.00	15.0%	$15,333.75	16.7%	$18,400.50	18.0%	$21,467.25	19.1%
35.0%	$0.00	0.0%	$3,577.88	7.0%	$5,724.60	10.0%	$7,155.75	11.7%	$9,588.71	14.0%	$10,733.63	15.0%	$14,311.50	17.5%	$17,889.38	19.4%	$21,467.25	21.0%	$25,046.13	22.3%