

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

---

In the Matter of the Application of

**LISA JOHNSON**, and her next friend and grandson,  
**L.R.** on behalf of themselves, and on behalf of all  
individuals similarly situated,

Petitioners-Plaintiffs,

**Oral Argument  
Requested**

—against—

**VERIFIED PETITION  
AND CLASS ACTION  
COMPLAINT**

**SAMUEL D. ROBERTS**, as  
Commissioner of the New York State Office  
of Temporary and Disability Assistance,

Index No. 07871-16

*and*

**MICHELE MCCLAVE**, as Commissioner of the  
Albany County Department of Social Services,

Respondents-Defendants.

For a Judgment Pursuant to § 3001, and Articles 9, 78 and 86  
of the Civil Practice Law and Rules

---

RECEIVED  
2016 DEC 28 PM 3:46  
ALBANY COUNTY CLERK

**PRELIMINARY STATEMENT**

1. The number of children in New York State who are cared for by adults who are not their parents has been increasing as a result of parental incarceration, drug addiction and mental health issues. These children, most often raised by grandparents and other relatives, are eligible for a special public assistance grant called a “child only” or non- parent grant. This grant is available regardless of the income and resources of the caregiver, except in one situation – when the

caregiver is herself on public assistance. Caregivers on public assistance receive an increase in their public assistance grant to help meet the needs of the child in their care, but it is a smaller amount than the amount provided to non-parent caregivers who are not on assistance.

2. Petitioner-Plaintiff (hereinafter Plaintiff) Lisa Johnson, brings this class action as a hybrid Article 78 proceeding and declaratory judgment action under CPLR 3001, on behalf of herself and her grandson, L.R., as well as all similarly situated individuals. In particular, she asks this Court to determine that the Social Services Law and regulations require that non-parent caregivers who are on public assistance and seek a “child only” grant for the child their care are entitled to the same grant as non-parent caregivers who are not on public assistance.

3. When a non-parent caregiver is not on public assistance and applies for a “child only” grant for the child in her care, the Respondent-Defendants (hereinafter Defendants) treat the child as a “separate economic unit,” meaning that none of that caregiver’s income and resources will count against the child’s eligibility for assistance. As a result, the child will receive the full amount of a public assistance grant for a household of one person.

4. However, the Defendants treat a child differently when the child’s caregiver receives public assistance benefits. Instead of giving the child a public assistance grant for one person, the Defendants treat the caregiver and the child as one economic unit and prorate the child’s public assistance grant. This means that a child such as L.R. receives one half of a grant for a household of two – an amount much smaller than a grant for a household of one – solely because he lives with a grandmother who receives public assistance benefits rather than a grandmother who has any other source of income. This violates the law.

5. If Lisa Johnson were not in receipt of public assistance, her income and resources would not be considered in determining the amount of assistance that her grandson, L.R. receives. If

Lisa Johnson did not receive public assistance, L.R. would be entitled to a full public assistance grant for one person.

6. Plaintiff brings this class action on behalf of herself and her grandchild, L.R., and on behalf of all children who reside with caregivers who are not their parents, and whose non-parent caregivers, within three years prior to the filing of this petition, and at any time thereafter, currently receive, have applied for, or will apply for public assistance in any county in New York State for themselves and the child in their care. Ms. Johnson also seeks to represent a sub-class of all non-parent caregivers who receive or have received or will be eligible to receive public assistance in the Safety Net Assistance category, who are entitled to a special budgeting methodology called essential person budgeting.

7. Plaintiff seeks the reversal of the decision after Fair Hearing # 7264433H rendered by the Defendant New York State Office of Temporary and Disability Assistance (hereinafter OTDA) dated September 1, 2016 (attached hereto as Exhibit A), which upheld the determination of the Albany County Department of Social Services not to budget Ms. Johnson and her grandson as separate economic units.

8. Plaintiff seeks an Order pursuant to CPLR 7803 (3) and 7806 declaring the decision after Fair Hearing to be arbitrary and capricious, an abuse of discretion, and in violation of state laws and regulations. She also asks this Court to restore lost benefits to her grandson, and to enjoin the Defendants from prorating the public assistance grants of other similarly situated non-parent caregivers and the children in their care.

9. Plaintiff seeks a Declaratory Judgment pursuant to CPLR § 3001, stating that, when a non-parent caregiver of a minor child is herself on public assistance, the Social Services Law and regulations require that the caregiver and the child be budgeted as separate economic units.

10. Plaintiff also seeks an Order directing the Defendant OTDA to:

- a. identify all class members who have been deprived of an adequate public assistance grant as a result of the Defendants' failure to budget as separate economic units those children who are living with non-parent caregivers in receipt of public assistance;
- b. direct local social services districts to:
  - (1) re-determine the eligibility of all identified class members; and
  - (2) provide all identified class members with adequate written notice of the re-determination of public assistance eligibility and the calculation to correct their public assistance underpayment; and
  - (3) correct all public assistance underpayments to all identified class members.

#### **THE PARTIES**

11. Plaintiff, Lisa Johnson, lives with her minor grandson, L.R. (d.o.b. 2012), in Albany County, New York. Ms. Johnson received public assistance for herself and L.R from the Albany County Department of Social Services and requested a fair hearing on March 18, 2016, to challenge the adequacy of the public assistance provided to herself and her grandson by its failure to treat them as separate economic units.

12. Defendant Samuel Roberts is the Commissioner of the State of New York Office of Temporary and Disability Assistance and is responsible for the administration of public assistance programs in New York State and for the agency's compliance with the New York State Social Services Law and the regulations promulgated thereunder.

13. Defendant Michele McClave is the Commissioner of the Albany County Department of Social Services and is responsible for the administration of public assistance programs in Albany

County and for the agency's compliance with the Social Services law and regulations promulgated thereunder.

### **VENUE**

14. Venue is proper in Albany County, pursuant to CPLR 506 (b) and 7804 (b) in that it is the residence of the named Plaintiffs and the principal place of business of both Defendant Office of Temporary and Disability Assistance and Defendant Albany County Department of Social Services (hereinafter ACDSS).

### **CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK**

15. Article XVII, § 1 of the New York State Constitution provides:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means as the legislature may from time to time determine.

16. Social Services Law § 131 (1) imposes a duty on social services officials "to provide adequately for those unable to maintain themselves."

17. In fulfillment of the constitutional duty to aid the needy, New York has enacted two public assistance programs: Family Assistance and Safety Net Assistance (SSL § 2 [19]; Art 5, Titles 1, 3, and 10).

18. The Family Assistance program is a 5-year time limited program for households with children that is federally funded. When the five year Family Assistance time limit is exhausted or for those who have no children in their public assistance household, Safety Net Assistance is available as a state and county funded public assistance program. (Social Services Law §§ 158 [1] [a]; 350 [2].)

19. The amount of a household's public assistance grant in New York is set in statute and regulation, providing distinct allowances that combine to form the total household public assistance grant. This includes a basic needs allowance, home energy allowance, supplemental home energy allowance, shelter allowance and fuel for heating allowance. (Social Services Law 131-a (2); 18 NYCRR 352.2, 352.3, 352.5.)

20. When a minor applies for public assistance, the Social Services Law requires that parents and minor siblings who live with the applying child also apply for assistance and be included in the household for purposes of determining eligibility and grant amounts. (SSL § 131-c; 18 NYCRR 352.30 [a].)

21. In contrast, when a minor lives with a non-parent caregiver, "eligibility for [public assistance] is based solely on the [child's] income and resources." (*Temporary Assistance Policy: Non-Parent Caregiver Cases and TA*, 05-INF-24 at 5, full text available at <https://otda.ny.gov/policy/directives/2005/INF/05-INF-24.pdf> and relevant pages attached as Exhibit B.)<sup>1</sup> This Informational Letter provides numerous examples of child only budgeting when the grandparent has her own income that delineate the way this "separate economic unit" budgeting is calculated. (See also *Temporary Assistance Source Book*, Ch. 3, sec. I p.3-13, ¶9 [Eligibility for TA is based solely on the child(ren)'s income and resources] [relevant pages attached as Exhibit C].)

22. In New York State, only parents and step-parents are legally responsible for the financial support of the children in their care. Social Services Law §101.

---

<sup>1</sup> The following references in this Verified Petition and Complaint - Informational Letters (INFs), Administrative Directives (ADMs) and the Temporary Assistance Sourcebook (TASB), are sub-regulatory guidance issued by the Defendant OTDA available on the OTDA website at the links in the text.

23. Additionally, state regulation and subregulatory guidance provide special budgeting rules for individuals on Safety Net Assistance who can be considered “essential persons” in relation to a child’s Family Assistance case. An essential person is an individual, like Ms. Johnson, who has applied for and is eligible to receive, or is receiving Safety Net Assistance, who lives with a child recipient of Family Assistance, and whose presence is essential to the child’s well-being. 18 NYCRR 369.3(c)(2); *Essential Persons*, 09 ADM-09, pp. 2-3, full text available at <https://otda.ny.gov/policy/directives/2009/ADM/09-ADM-09.pdf> and relevant pages attached as Exhibit D.

24. The essential person is allowed to designate him or herself as a separate public assistance case from the household of the child receiving public assistance when there are no legal lines of responsibility and any one of the following three conditions is met: 1) the essential person does not pool substantially all income and resources with the family assistance household; or 2) the essential person purchases and prepares meals separately from the family assistance household; or 3) the essential person does not share the cost of major household expenses like utilities, insurance, or car maintenance with the family assistance household. This rule about creating a separate case for the essential person evolved from prior litigation in a case called *Danks v. Perales* (NDNY CV 81-1042), and is referred to as *Danks* budgeting. *Cooperative Cases (Danks v. Perales)*, 85 ADM-09, relevant pages attached as Exhibit E.

25. When the essential person has no legal lines of responsibility to the other household members and is a separate economic unit, *Danks* budgeting applies. *Danks* budgeting requires that public assistance may not be prorated when the household contains an essential person who is not a legally responsible relative. Temporary Assistance Source Book, Chapter, 9, section P, page 9-71(attached as Exhibit F). *See also* 85 ADM-9. p. 3. (Attached as Exhibit E).

## STATEMENT OF THE FACTS

26. Plaintiff L.R. has lived with his grandmother, Plaintiff Lisa Johnson since his birth in 2012.

27. Ms. Johnson has an order granting her custody of L.R. from Albany County Family Court which is dated and entered September 3, 2014.

28. Ms. Johnson is L.R.'s primary caregiver, but as his grandmother, is not legally responsible for his financial support.

29. Many years ago, Ms. Johnson was a recipient of Family Assistance, residing with her son and her daughters (who were minors at that time). She reached her 60 month Family Assistance time limit before L.R. was born in 2012, and thereafter she was a recipient of public assistance in the Safety Net Assistance category. Because L.R. did not reside with Ms. Johnson when she reached the 60 month time limit, his public assistance case type is Family Assistance, not Safety Net Assistance. *Child Only Questions and Answers*, 07 INF-14 (Question 23 at, pp. 5-6). Full text available at <https://otda.ny.gov/policy/directives/2007/INF/07-INF-14.pdf> and relevant pages attached as Exhibit G.

30. At all relevant times herein, Ms. Johnson and L.R. have lived with Sabrina Gladney, Ms. Johnson's adult daughter and Sabrina's infant son M.C. Ms. Gladney is not L.R.'s mother; she is L.R.'s aunt.

31. L.R.'s mother has not lived in the household with him, Ms. Johnson, Ms. Gladney and M.C. at any time relevant to this proceeding.

32. On or shortly after January 21, 2016, Defendant ACDSS sent two notices to Ms. Johnson changing her public assistance grant and L.R.'s public assistance grant effective February 1,

2016. Ms. Johnson requested a fair hearing to challenge the adequacy of their grants on March 18, 2016. Copies of these notices are attached as Exhibit H.

33. In order to determine how public assistance amounts were calculated, counsel for Ms. Johnson requested copies of her budget and the budget for L.R. These budgets illustrate that Albany County determined to provide ½ of a two person grant to L.R. and ½ of a two person grant to Ms. Johnson. Copies of these budgeting print outs are attached at Exhibit I.

34. In Albany County, the monthly public assistance grant exclusive of shelter and fuel, for one person is **\$183.10**. [\$158 for basic needs plus \$14.10 for the Home Energy Payment (HEA) plus \$11 for the Supplemental Home Energy Payment (SHEA)]. (18 NYCRR 352.2 [d], schedules SA-2a, SA-2b, and SA-2c.)

35. The monthly public assistance grant in Albany County, exclusive of shelter and fuel, for two people is: **\$291.50** (\$252 for basic needs plus \$22.50 for the HEA plus \$17 for the SHEA). (*Id.*)

36. As indicated by their budgets (attached as Exhibit I – relevant numbers highlighted), effective February 1, 2016, Ms. Johnson and L.R. were each provided ½ of the allowance for a two person grant - \$126 for basic needs, \$11.25 for HEA and \$8.50 for the SHEA for a total of **\$145.75** per month, before their rent and fuel was paid.

37. The attached notices and budgets, Exhibits H and I, demonstrate that neither Ms. Johnson, nor L.R. received \$183.10 per month, the full grant for one person described at ¶ 35 above. This is confirmed by the computerized case comments in the file dated 1/20/16, “this case is a single economic unit with P191023.” (attached as exhibit J)

38. Subsequently, by a decision dated March 2, 2016, Lisa Johnson was found disabled by the Social Security Administration, and determined to be eligible for Supplemental Security Income (SSI) retroactive to October 28, 2013.

39. The Social Security Administration reimbursed ACDSS in the amount of \$9050.22 in interim assistance from Ms. Johnson's retroactive award for the public assistance ACDSS provided Ms. Johnson from June 2014 through March 2016.

40. Effective April 1, 2016, Lisa Johnson began receiving SSI in the amount of \$733 per month.

41. On or about March 16, 2016, Ms. Johnson was notified that effective April 1, 2016, L.R.'s grant would be increased. The notice advises that there is now only one person on L.R.'s case. (attached as Exhibit J).

42. Thus, by the time of the administrative hearing on June 1, 2016, to challenge Ms. Johnson's and L.R.'s prorated public assistance budgets, the Defendants had applied the rule of separate economic units and increased L.R.'s grant to a grant for one person because Ms. Johnson was no longer a recipient of public assistance.

43. Because ACDSS had been reimbursed for the public assistance Ms. Johnson received while her SSI application was pending, and because Ms. Johnson received retroactive SSI above that amount, the only issue remaining at the time of the hearing was whether, for the months of February and March 2016, L.R. should have received a full grant for one person, as opposed to ½ of a grant for two people.

44. On September 1, 2016, the Defendant OTDA issued fair hearing decision #7264433H, which is attached hereto as Exhibit A, that affirmed the determination of ACDSS to give Ms.

Johnson and L.R. each ½ of a two person grant rather than give them each a full one person grant.

### **CLASS ACTION ALLEGATIONS**

45. Plaintiff brings this class action pursuant to CPLR Article 9 on behalf of all past, present, and future children in New York State who within 3 years of the filing of this petition, reside or will reside with caregivers who are not their parents and whose non-parent caregiver receives or has applied for or will apply for public assistance in either the Family Assistance or Safety Net Assistance category, for themselves and the child in their care, and who received a prorated grant of public assistance, rather than a separate grant for their needs.

46. Plaintiff also brings this action on behalf of a subclass of non-parent caregivers who, within 4 months of the filing of this petition, receive or have received or will be eligible to receive public assistance in the Safety Net Assistance category, who care for children receive or have received or who will be eligible to receive Family Assistance, and who are or were or will be entitled to a special budgeting methodology called essential person budgeting which would entitle them and the child in their care to non-prorated grants of public assistance.

47. The members of the class and sub-class are so numerous that joinder of all members is impracticable.

48. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members, to wit, whether a child living with a non-parent caregiver in receipt of public assistance, is entitled to a full grant for one person, or a prorated grant which includes the caretaker in the household.

49. The claims of the Plaintiff are typical of the claims of the plaintiff class. All claims arise from the Defendant OTDA's wrongful course of practice and administrative conduct.

50. The Plaintiff will fairly and adequately protect the interests of the class. Plaintiff is represented by the Empire Justice Center, a public interest law firm with extensive class action experience in the courts of New York State and in the United States District Courts in New York. Counsel for the Plaintiff will diligently and expeditiously press the claims of the class.

51. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Indeed, only a class remedy will afford relief to those who have been victimized by the challenged policies and practices of the Defendant OTDA, who is improperly budgeting the neediest children in New York State – those who live with caretakers who are not their parents and receive public assistance. Due to the complexity of the issues raised by this class action and the scarcity of legal services attorneys available to take public assistance cases, it is unlikely that a substantial number of individual proceedings would be brought by the members of the proposed class.

52. Because this litigation challenges the continuing policies and practices of Defendant OTDA, a declaratory judgment class action, in addition to the underlying individual Article 78 proceedings, is proper.

## **LEGAL CLAIMS**

### **AS AND FOR A FIRST CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF**

53. The September 1, 2016 Fair Hearing Decision # 7264433H issued by the Defendant OTDA is arbitrary and capricious and contrary to law insofar as it fails to follow Social Services Law § 131-c which requires that minor children and their parents be part of the same household,

but which contains no such requirement for children who live with persons other than their parents.

**AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF**

54. The September 1, 2016 Fair Hearing Decision issued by the Defendant OTDA is arbitrary and capricious and contrary to law insofar as it ignores the essential person rule which allows non-parent caregivers who receive or who were or will be eligible to receive Safety Net Assistance, to receive a non-pro-rated grant of public assistance, separate from the Family Assistance grant received by the children in their care, which also should not be pro-rated. 18 NYCRR 369.3(c)(2).

**AS AND FOR A THIRD CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF  
AND THE PLAINTIFF CLASS**

55. The policy and practice of the Defendant Office of Temporary and Disability Assistance requiring local social services districts to budget children who live with nonparent caregivers on public assistance in a different manner than children who live with non-parent caregivers who are not on public assistance is a violation of Social Services Law 131-c which requires only that minor parents and their children be part of the same public assistance household, but which contains no such requirement for children who live with persons other than their parents.

**AS AND FOR A FOURTH CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF  
AND THE PLAINTIFF SUBCLASS**

56. The policy and practice of the Defendant Office of Temporary and Disability Assistance which directs local districts to ignore the essential person rule when children on Family Assistance reside with nonparent caregivers on Safety Net Assistance is a violation of state regulations at 18 NYCRR at 369.3(c) (2) and other policies promulgated pursuant to that regulation.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff on behalf of herself and her grandson, and on behalf of the proposed class, respectfully requests that the Court issue an Order and Judgment:

**RELIEF FOR THE PLAINTIFF**

- A. ANNULING AND REVERSING Defendant OTDA's Fair Hearing Decision #7264433H dated September 1, 2016, which affirmed Defendant ACDSS's determination to provide Plaintiff and her grandson each with ½ of a public assistance grant for two people as opposed to providing each with a grant for one person on the basis that said determination was arbitrary and capricious, an abuse of discretion, and in violation of state laws and regulations;
- B. DIRECTING Defendant ACDSS to award Plaintiff L.R. any and all benefits to which he would have been entitled if he had been given a grant for one person rather than a pro-rated grant;

## **RELIEF FOR THE PLAINTIFF AND THE PROPOSED CLASS AND SUBCLASS**

C. DECLARING that the policy of Defendant OTDA and his agency regarding the budgeting of children who reside with non-parent caregivers is contrary to law;

D. PERMANENTLY ENJOINING the Defendant OTDA from continuing to budget children who live with non-parent caregivers who are on public assistance as part of the same household as their caregivers and directing that such children be treated as separate households as provided in Social Services Law §131-c;

E. CERTIFYING this action and proceeding, pursuant to CPLR Article 9, as a class action, with the class consisting of all past, present, and future children in New York State who within 4 months of the filing of this petition, reside or will reside with caregivers who are not their parents and whose non-parent caregiver receives or has applied for or will apply for public assistance for themselves and the child in their care, and who received a prorated grant of public assistance, rather than a separate grant for their needs, as well a sub-class of non-parent caretakers who receive public assistance in the Safety Net Assistance category and the children in their care who care who are or were or will be in receipt of public assistance in the Family Assistance category and who received a prorated grant of public assistance, rather than a separate grant for their needs.

F. ORDERING Defendant OTDA to (i) identify all members of the class and sub-class who have been underpaid public assistance benefits as a result of the budgeting methods employed heretofore by the Defendants; (ii) redetermine the eligibility of all identified class members; (iii) to correct all public assistance underpayments to all identified class members; and (iv) to provide all identified class members with adequate written notice of the

redetermination of the public assistance eligibility and of the calculation of the correction of their public assistance underpayment.

**ADDITIONAL RELIEF**

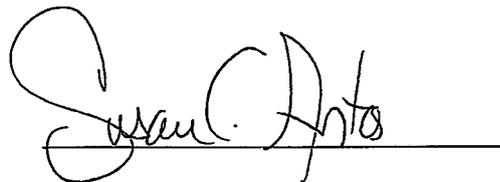
G. AWARDING costs and disbursements pursuant to Articles 81 and 83 of the CPLR and counsel fees pursuant to CPLR 909 and/or Article 86 as well as any other relevant state or federal provisions; and

H. GRANTING Plaintiff such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 7804 of the CPLR, the Defendant OTDA shall file with his answer a certified transcript of the record of the proceedings under consideration, and any answering papers shall be served on the undersigned no later than eight (8) days before the return date of the Petition.

Dated: December 28, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan C. Antos", is written over a horizontal line.

Susan C. Antos,  
Saima A. Akhtar  
Raymond Burke  
Empire Justice Center  
Attorneys for the Plaintiff  
119 Washington Ave., 3d floor  
Albany, NY 12210  
(518) 935-2845  
santos@empirejustice.org