

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
SYLVIA FABELO; JUDY MENCZER, on behalf of E.M., a  
minor; LIAM BECK, on behalf of M.B., a minor; ICHO  
COHEN, on behalf of S.C., a minor; CONSTANTIN KEHAYA;  
ARON BRAVER, on behalf of R.B., a minor; NABIL SARGA,  
on behalf of K.S., a minor; and STAVROULA KAPELES,

**FIRST  
AMENDED  
COMPLAINT**

Plaintiffs,

2015 CV 07429 (FB)

-against-

CAROLYN W. COLVIN, Acting Commissioner of Social  
Security, and FRED M. MAURIN, Regional Commissioner  
of Social Security, New York Region,

Defendants.

-----X

Plaintiffs, by their attorneys, allege as follows:

**PRELIMINARY STATEMENT**

1. Plaintiffs or their minor children are or were all recipients of Supplemental Security Income (“SSI”) benefits. The Social Security Administration (“SSA” or “the agency”) has determined that they are ineligible or have been overpaid SSI benefits or both, and attempted to file appeals of the agency’s determinations. This case concerns the continuous and repeated failure of defendants Carolyn W. Colvin, the Acting Commissioner of Social Security, and Fred M. Maurin, the SSA New York Regional Commissioner, to follow the agency’s regulations and written procedures in New York City to process appeals and document them in its system in a timely manner. This failure blocks plaintiffs and their children from exercising their due process, statutory, and regulatory rights because those rights are triggered with the filing of an appeal. These rights include the right to continued benefits, the right to appear and submit evidence, the right to cross-examine witnesses, and to present arguments, which are guaranteed

by the Social Security Act (“the Act”), SSA’s regulations and written procedures, and the United States Constitution. SSA regulations and procedures comport with due process protections; the agency simply fails to adhere to them.

2. Defendants are directly responsible for the implementation of a reliable, consistent, and uniform practice in New York City to timely document appeals in its system to comply with federal law. However, under defendants’ current practice, there are significant, unjustified, unnecessary, and illegal delays in documenting appeals.

3. By continuing to operate this dysfunctional practice in SSA offices in New York City, defendants have repeatedly and unjustifiably denied eligible SSI recipients access to crucial benefits and due process protections, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, the Act, and SSA’s own regulations and written procedures.

4. Low income disabled and elderly residents of New York City are unnecessarily suffering a loss of the very means by which to live as a result of defendants’ abject failure to follow their own regulations and written procedures to timely document appeals related to ongoing eligibility for SSI benefits.

#### **JURISDICTION, VENUE, and RELIEF**

5. This Court has subject matter jurisdiction over the federal claims under 28 U.S.C. § 1331 for questions arising under the Constitution and the laws of the United States.

6. This court has subject matter jurisdiction under 28 U.S.C. § 1361 by which this Court has original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to a plaintiff. Mandamus jurisdiction is especially appropriate here because plaintiffs allege that there is a

system-wide practice that is in direct violation of the established regulations and written procedures of a federal agency.

7. This Court has subject matter jurisdiction under 42 U.S.C. § 405(g) for the collateral procedural issue of whether SSA offices in New York City afford plaintiffs or their children the regulatory and constitutional due process protections required by federal law prior to reducing or terminating their SSI benefits. In the circumstances of this case, it would be futile for them to exhaust their administrative remedies because the available remedies will not provide the procedural safeguards they should have received prior to SSA's actions to reduce or terminate their SSI benefits. Due to SSA's periodic reviews of the financial and medical eligibility of SSI recipients, there is reasonable expectation that the plaintiffs or their children could be found ineligible for or overpaid SSI benefits in the future, and SSA will utilize the same unlawful practices challenged in this lawsuit, leading the plaintiffs or their children to once again suffer irreparable harm.

8. Plaintiffs reside in the New York State counties of Kings, Queens, or New York. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. §§ 1391(b) and 1391(e).

9. Plaintiffs seek declaratory and injunctive relief authorized by 28 U.S.C. § 2201(a), § 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure and mandamus relief authorized by 28 U.S.C. § 1361.

## **PARTIES**

### **Plaintiffs**

10. Plaintiff Sylvia Fabelo ("Ms. Fabelo") resides in New York, New York.
11. Ms. Fabelo is over 65 years of age and receives SSI benefits based on her age and poverty.

12. Plaintiff Judy Menczer (“Ms. Menczer”) is suing on behalf of her minor child, E.M.

13. Ms. Menczer and E.M. reside in Brooklyn, New York.

14. E.M. receives SSI benefits based on her disability and her family’s poverty.

15. Plaintiff Liam Beck (“Mr. Beck”) is suing on behalf of his minor child, M.B.

16. Mr. Beck and M.B. reside in Brooklyn, New York.

17. M.B. receives SSI benefits based on her disability and her family’s poverty.

18. Plaintiff Icho Cohen (“Mr. Cohen”) is suing on behalf of his minor child, S.C.

19. Mr. Cohen and S.C. reside in Brooklyn, New York.

20. S.C. receives SSI benefits based on her disability and her family’s poverty.

21. Constantin Kehaya (“Mr. Kehaya”) resides in New York, New York.

22. Mr. Kehaya is over 65 years of age and receives SSI benefits based on his age and poverty.

23. Plaintiff Aron Braver (“Mr. Braver”) is suing on behalf of his minor child, R.B.

24. Mr. Braver and R.B. reside in Brooklyn, New York.

25. R.B. receives SSI benefits based on his disability and family’s poverty.

26. Plaintiff Nabil Sarga (“Mr. Sarga”) is suing on behalf of his minor child, K.S.

27. Mr. Sarga and K.S. reside in Queens, New York.

28. K.S. receives SSI benefits based on his disability and family’s poverty.

29. Stavroula Kapeles (“Ms. Kapeles”) resides in Queens, New York.

30. Ms. Kapeles receives SSI benefits based on her disability and poverty.

**Defendants**

31. Defendant Carolyn W. Colvin, as the acting Commissioner of Social Security, has full power and responsibility to ensure that the SSI program is administered in compliance with the United States Constitution, the Act, and SSA regulations and written procedures. She is being sued in her official capacity.

32. Defendant Fred W. Maurin, as the Regional Commissioner for SSA's New York Region, which includes New York City, has full power and responsibility to ensure that SSA's local offices in New York City comply with the United States Constitution, the Act, and SSA regulations and written procedures. He is being sued in his official capacity.

33. The defendants are collectively referred to as SSA or the agency.

## **STATUTORY, REGULATORY, AND PROCEDURAL SCHEME**

### **Constitutional and Federal Law Framework**

34. The Fifth Amendment to the United States Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law."

35. The Declaratory Judgment Act states that a federal court "upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201(a). The Declaratory Judgment Act also permits further necessary relief based on a declaratory judgment, such as injunctive relief. 28 U.S.C. § 2202.

36. Mandamus jurisdiction is appropriate under 28 U.S.C. § 1361 where a federal agency has a clear duty to follow its own regulations and procedures; the plaintiffs, as recipients of federal benefits administered by the agency, have a clear right to the relief sought (proper application of the agency's regulations and procedures); no other adequate remedy is available to

the plaintiffs because the regulations and procedures are already in place but there is a systemic failure of the federal agency to follow those regulations and procedures; and the claims are procedural, and unrelated to the merits of the plaintiffs' actual claims for federal benefits.

### **Procedural Scheme**

37. "The basic purpose underlying the [SSI] program is to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110. "[P]ayments are made under conditions that are as protective of people's dignity as possible." 20 C.F.R. § 416.110(c).

38. SSA stores and maintains data concerning applicants for or recipients of benefits in a federal electronic database. The SSA computer system includes various storage subsystems including the Supplemental Security Master Record ("SSR"), the Modernized Supplemental Security Income Claims Systems ("MSSICS"), and the notice retrieval system. MSSICS stores financial eligibility information obtained from SSI applicants. MSSICS was designed as an on-line computer system available to SSA workers during interviews with applicants or recipients so that SSA workers can view data on file and add data to the file. Moreover, MSSICS stores data obtained from applicants or recipients during interviews to evaluate initial and ongoing SSI eligibility.

39. While MSSICS does not itself perform any of the computations necessary to assess eligibility or determine benefits, it employs a separate software program to perform such calculations and feeds the results back to MSSICS so that SSA workers can view the results of new information added to MSSICS.

40. SSA periodically reviews an SSI recipient's financial eligibility to ensure the recipient is still eligible and receiving the correct amount of SSI benefits. This review generally happens annually and deals with the requirements for eligibility other than whether the recipient is still blind or disabled. 20 C.F.R. § 416.204.

41. SSA may also redetermine an SSI recipient's financial eligibility when SSA learns of a change in the recipient's situation that affects eligibility or the amount of the SSI benefits. 20 C.F.R. § 416.204.

42. SSA also periodically reviews an SSI recipient's impairments to determine if the recipient is still eligible for SSI benefits based on blindness or disability. 20 C.F.R. §§ 416.989, 416.989a, and 416.990.

43. As a result of these periodic reviews, an SSI recipient could be found to be no longer eligible for SSI benefits or to have been overpaid benefits.

44. A recipient determined by SSA to be ineligible for continued SSI benefits or to have received an overpayment of benefits can appeal by filing a Request for Reconsideration ("reconsideration request") or a Request for Waiver of Overpayment Recovery ("waiver request") or both. When a recipient files either type of appeal request, SSA is required to document it in MSSICS. POMS<sup>1</sup> SI 04020.020 and 02260.001.

45. When a reconsideration request or waiver request is timely made and documented in MSSICS, significant due process protections are triggered, especially the right to have SSI benefits continue unchanged pending the appeal. If a reconsideration request or waiver request is

---

<sup>1</sup> The SSA Program Operations Manual System ("POMS"), a manual promulgated by the Commissioner of Social Security, is SSA's authorized means for issuing written program instructions for adjudicating claims and performing its mission. The POMS is a primary source of information used by SSA employees to process claims.

timely made but not documented in MSSICS, no due process protections attach and benefits are terminated or reduced.

### **Reconsideration Requests**

46. SSI benefits are paid based on numerous factors, such as living arrangements, income, and resources. 20 C.F.R. §§ 416.1100, 416.1201, and 416.1210.

47. SSA follows the rules and guidelines contained in its regulations and procedures to determine if an SSI recipient no longer meets the income or resource criteria for SSI. 20 C.F.R. §§ 416.1320 – .1340.

48. If SSA determines that an SSI recipient is no longer financially eligible for benefits and intends to reduce benefits, SSA must provide the recipient with advance written notice. The recipient has the right to appeal the determination of ineligibility within 60 days by filing a reconsideration request. 20 C.F.R. § 416.1336.

49. If SSA determines that an SSI recipient was overpaid benefits yet remains financially eligible and SSA intends to reduce benefits, SSA must provide the recipient with advance written notice. 20 C.F.R. § 416.535. The notice must explain SSA's determination and the reasons for the overpayment. 20 C.F.R. § 416.558 and POMS SI 02201.025. The recipient has the right to appeal an overpayment determination within 60 days by filing a reconsideration request. 20 C.F.R. § 416.1413b.

50. 20 C.F.R. § 416.1404 provides assurance that, "If our initial determination is that we must suspend, reduce or terminate your benefits, the notice will also tell you that you have a right to a reconsideration before the determination takes effect (see § 416.1336)."



51. Any writing or timely submission of additional evidence by the SSI recipient after receipt of an initial determination notice that clearly implies a disagreement with that determination constitutes a reconsideration request. POMS SI 04020.020.

52. Upon the filing of a reconsideration request, SSA must review the case and issue a written reconsideration determination. 20 C.F.R. §§ 416.1413 and 416.1422.

53. A reconsideration request affords the SSI recipient with the right to rebut the agency's findings. These rights include the ability to request a case review, which allows the recipient to review the paper file on the issues and then to present oral or written evidence to the agency. 20 C.F.R. § 416.1413(a). Or, the recipient may ask for an informal conference, with all the rights of the case review, plus the right to present witnesses. A summary of the informal conference becomes part of the record. 20 C.F.R. § 416.1413(b). As a third alternative, the SSI recipient can challenge the findings through a formal conference. A formal conference gives all the rights of the informal conference, plus the right to subpoena adverse witnesses and relevant documents, and the right to cross-examine adverse witnesses. A summary record also is made for the formal conference and becomes part of the record. 20 C.F.R. § 416.1413(c). If a recipient is unsatisfied with the reconsideration determination the recipient has the right to appeal by requesting review by an administrative law judge. 20 C.F.R. § 416.1407.

54. The reconsideration appeal, be it case review or a form of conference, occurs at the recipient's local SSA office. 20 C.F.R. § 416.1413c.

55. Conferences, informal or formal, should generally be scheduled within 15 days of the request. 20 C.F.R. § 416.1413c. The agency shall set a time, place, and date for the conference as soon as it receives the request. 20 C.F.R. § 416.1413a.

56. If a reconsideration request is filed within 15 days<sup>2</sup> of the date of the notice, SSI benefits shall remain unchanged pending review of the reconsideration request and written notice of SSA's determination. 20 C.F.R. § 416.1336(b); POMS SI 02301.300. For recipients facing termination of their SSI benefits, this means that their benefits will not terminate. For recipients facing a reduction in their SSI benefits, this means that their benefits will not be reduced.

57. Most importantly, recipients facing a reduction in benefits who file a request for reconsideration within the 60-day time period are entitled to have the reduction stopped pending a determination on the reconsideration request. POMS SI 02220.017.

### **Waiver Requests**

58. If SSA believes an SSI recipient was overpaid benefits but remains financially eligible for benefits, the recipient has the right to request that full recovery of the overpayment be waived by filing a waiver request. 20 C.F.R. § 416.550.

59. SSA will waive an overpayment of benefits if: “(a) [t]he overpaid individual was without fault in connection with an overpayment, and (b) [a]djustment or recovery of such overpayment would either: (1) [d]efeate the purpose of title XVI, or (2) [b]e against equity and good conscience, or (3) [i]mpede efficient or effective administration of title XVI due to the small amount involved.” 20 C.F. R. § 416.550. *See also* 42 U.S.C. § 1383(b) and 20 C.F.R. §§ 416.552–.554.

60. 42 U.S.C. § 1383(b)(1) specifically directs the Commissioner of Social Security to recover overpayments from individuals “with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment.”

---

<sup>2</sup> Whenever SSA sends any notice, it assumes that the notice was received within 5 days, unless otherwise proven. For example, a recipient has 15 days to appeal a 10-day notice. 20 C.F.R. §§ 416.1336(b) and 416.1401. In addition, SSA can extend the time to request a reconsideration. 20 C.F.R. § 416.1409(b).

61. Waiver of an overpayment “frees” the overpaid person from the obligation to repay. 20 C.F.R. § 416.551.

62. A waiver request can be filed at any time. POMS SI 02220.017.

63. If SSA cannot grant a waiver request made on the record, the agency must provide a personal conference. 20 C.F.R. § 416.557. At a personal conference, the recipient has the right to appear personally, testify, cross-examine witnesses, and make arguments. 20 C.F.R. § 416.557(c)(1). The recipient also has the right to be represented and to submit documents. 20 C.F.R. § 416.557(c)(2)-(3).

64. At a personal conference, the decisionmaker must be a person who has not previously made a determination in the case. 20 C.F.R. § 416.557(d)(1). The decisionmaker is charged with writing a determination that includes findings of facts and conclusions that support the determination to approve or to deny the waiver. 20 C.F.R. § 416.557(e).

65. If the decisionmaker denies the waiver, the recipient has the right to appeal by requesting reconsideration of the waiver denial. 20 C.F.R. § 416.557(f). At that point, all the rights for reconsideration requests apply.

66. Receipt of the waiver request stops overpayment recovery in the month SSA receives the written waiver request. POMS SI 02260.001. Further, if the agency cannot make a waiver determination within 10 days of the date the request is filed, it stops or adjusts any reductions to SSI benefits and refunds any amount reduced for the month in which the waiver is filed and any subsequent months. POMS SI 02260.001A. Recovery must not commence, or, if has begun, must stop, until SSA issues a determination denying the waiver request.

67. If SSA determines that full recovery cannot be waived, SSA can adjust ongoing benefits to recoup the overpaid benefits. 20 C.F.R. § 416.570. This means that SSA can adjust ongoing benefits *only after* it determines that a waiver is not applicable. 20 C.F.R. § 416.570(a).

## STATEMENT OF FACTS

### Background

68. SSI recipients depend on SSI benefits for food, shelter, and other necessities of life. SSI benefits are extremely modest. A person living alone in New York State in 2016 could receive a maximum of \$820 a month. SSI recipients also receive SSI-related Medicaid benefits. When SSI benefits are reduced or terminated, recipients face irreparable harm in the form of rent and utility arrears, loss of medical coverage, and often a decompensation of chronic medical or psychiatric conditions.

69. Even a small reduction in SSI benefits can be the difference between maintaining a delicate financial equilibrium and facing hunger, eviction proceedings, and homelessness. “Back payments can have some ameliorative effect; they at least set the Secretary's ledgers straight. Yet they cannot erase either the experience or the entire effect of several months without food, shelter or other necessities.” *Briggs v. Sullivan*, 886 F.2d 1132, 1140 (9th Cir. 1989).

70. When SSA determines that a recipient has been overpaid, it immediately schedules an automatic reduction or termination of benefits to start the following month. This automatic change in benefits is scheduled without regard to a recipient's right to appeal or to maintain ongoing benefits. If a reconsideration request or waiver request is not timely documented in MSSICS, the automatic change takes effect without allowing the recipient to exercise their right to be heard.

71. The United States Supreme Court, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), held that the basic elements of due process require that public assistance recipients receive advance notice of a proposed adverse action and an effective opportunity to defend by confronting witnesses and presenting arguments and evidence before the adverse action is taken. “Thus, the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.” 397 U. S. at 265.

72. When SSA fails to timely document reconsideration requests and waiver requests in MSSICS, the agency violates the most basic due process protections provided under the Due Process Clause in the Fifth Amendment to the United States Constitution, as well as its own regulations and written procedures.

73. Plaintiffs, like all SSI recipients, are among the poorest and most vulnerable citizens, and they depend upon continued benefits to meet their basic financial and medical needs. Because of plaintiffs’ critical dependency on SSI benefits, “an erroneous termination [of benefits] would damage [Plaintiffs] in a way not recompensable through retroactive payments.” *Mathews v. Eldridge*, 424 U.S. 319, 331, (1976).

#### **SSA’s Failure to Follow Rules to Process Appeals**

74. SSA workers in New York City routinely disregard regulations and written procedures that allow SSI recipients to exercise their due process rights, including the right to appeal a planned action to reduce or terminate SSI benefits prior to SSA’s taking the action.

75. SSA workers in New York City routinely and wrongly instruct SSI recipients to submit a reconsideration request or waiver request in person at the recipient’s local SSA office.

76. However, submission of reconsideration requests and waiver requests in person is only one of several methods recipients can utilize. Other methods include submission by regular mail, certified mail, and by facsimile.

77. Recipients cannot submit reconsideration requests or waiver requests over the internet.

78. SSA workers in New York City routinely instruct SSI recipients that reconsideration requests and waiver requests can only be submitted on SSA forms (SSA's Request For Reconsideration form (SSA-561) or Request For Waiver Of Overpayment Recovery Or Change In Repayment Rate form (SSA-632)) and that SSA is unable to accept attachments with the forms, including advocacy letters and supporting evidence.

79. However, any writing or timely submission of additional evidence by the recipient to SSA, clearly indicating a disagreement with a planned action, constitutes a reconsideration request. In addition, SSA offices in New York City resist acceptance of advocacy letters and supporting evidence, which directly violates the recipient's due process, statutory, and regulatory rights to be heard.

80. All timely reconsideration requests and waiver requests must be accepted and processed. On many occasions, when a reconsideration request form or waiver request form is proffered in person, the recipient is told, wrongly, by an SSA worker in New York City that the recipient does not have a good reason to appeal the determination and the SSA worker refuses to even accept the proffered form.

81. A vast number of reconsideration requests and waiver requests must be submitted two or more times in SSA offices in New York City before SSA workers document the requests in MSSICS. Even if a recipient is able to submit a request (in person, by mail or by facsimile),

SSA fails to follow its own regulations and written procedures to ensure that the appeal is documented in MSSICS. Recipients and advocates following up on these requests are regularly told that the requests are not in MSSICS but “might be on someone’s desk.”

82. The timely submission of a reconsideration request or waiver request has the dual impact of stopping a pending action (reduction or termination of benefits) and triggering significant due process, statutory, and regulatory rights. However, in practice, none of these protections are triggered until an SSA worker actually documents a reconsideration request or waiver request in MSSICS.

83. SSA currently lacks a reliable, consistent, and uniform practice to ensure that timely reconsideration requests and waiver requests are in fact documented in MSSICS in SSA offices in New York City in sufficient time to prevent the reduction or termination of SSI benefits. As a result, due process, statutory, and regulatory protections are not triggered and benefits are reduced or terminated despite the timely filing of a request.

#### **Documentation of Violations**

84. From 2014 to 2015, in a significant number of cases at 16 local SSA offices in New York City, the New York Legal Assistance Group (“NYLAG”) documented SSA’s failure to enter reconsideration requests into MSSICS in a timely manner, which would have prevented the reduction or termination of SSI benefits.

85. Out of 24 SSI reconsideration requests filed, 17 had to be submitted more than once before SSA workers documented the request in MSSICS.

86. In SSI overpayment cases, where the underlying overpayment itself was in dispute, out of 27 reconsideration requests filed, 10 had to be submitted more than once before SSA workers documented the requests in MSSICS. Generally, repeated telephone calls had to be

made to ensure that the reconsideration requests were found and then documented in MSSICS, so that benefits were continued.

87. Often, despite advocacy, SSI benefits were not continued and the recipient only received the withheld benefits after a favorable determination had been made on the reconsideration request.

88. From 2014 to 2015, in a significant number of cases at 15 local SSA offices in New York City, NYLAG tracked SSA workers' failure to timely document waiver requests in MSSICS.

89. For overpayment cases, out of 41 waiver requests filed, 19 had to be submitted more than once. Generally, repeated telephone calls were necessary to ensure that the waivers were found and documented in MSSICS.

90. Many follow up telephone calls were also required to ensure that the recoupment was stopped pending a determination on the waiver request.

91. Often, despite advocacy, the recoupment continued unchanged and the recipient only received the withheld benefits after the waiver request had been granted.

92. In 2014, SSA attempted to address the overwhelming paper work load at local offices by requiring the local offices to "clear the decks," which meant, in part, to enter the paper appeals into the system. This was a one-time temporary fix to address untended paper requests; however, no new practice was adopted to ensure timely documentation of reconsideration requests or waiver requests in MSSICS.

93. SSA workers in New York City themselves acknowledge they are unable to meet the demands. Workers have made the following comments to NYLAG representatives: One worker said, when asked to comply with time sensitive request, "I know what the rules are but I



am only one person and you have to be realistic.” At the Flushing and Midtown Manhattan field offices, separate workers asked the NYLAG representative to contact a supervisor so that a supervisor could set aside time for the worker to work on those cases. At the Boro Hall field office, although she understood the urgency of the case, the worker commented that there were so many more requests like the one just made waiting to be processed. Another worker at Boro Hall indicated that there was no one available to work on a case because of understaffing.

**Plaintiff Sylvia Fabelo**

94. Ms. Fabelo has been in receipt of SSI benefits since 2013, when she turned 65 years of age. Her local SSA office is the Midtown Office in New York, New York.

95. Ms. Fabelo meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

96. In September 2014, Ms. Fabelo began receiving foster care benefits for her grandson.

97. Under the SSI program, foster care benefits are not considered income of the foster care parent.

98. On January 15, 2015, Ms. Fabelo attended an SSI redetermination appointment at her local SSA office and provided information about the foster care benefits. SSA immediately scheduled the automatic termination of Ms. Fabelo’s SSI benefits. She was told to provide additional proof of the source of the foster care payments by January 30, 2015.

99. On January 30, 2015, Ms. Fabelo returned to her local SSA office with a letter from the foster care agency documenting the exempt income; however, she was told that the letter was insufficient evidence and she was turned away at the check-in window. SSA provided no additional information about what would constitute sufficient evidence.

100. Ms. Fabelo did not receive her SSI benefits in February 2015.

101. Ms. Fabelo did not receive any advance notice that she would not receive her SSI benefits in February 2015.

102. On February 17, 2015, Ms. Fabelo received a notice of termination that indicated her SSI benefits had been terminated as of February 1, 2015, and that she had been overpaid from September 2014 to January 2015.

103. On March 20, 2015, Ms. Fabelo's representative filed a reconsideration request with Ms. Fabelo's local SSA office appealing the termination of benefits.

104. SSA failed to follow procedures to document Ms. Fabelo's reconsideration request in MSSICS. Her representative contacted Ms. Fabelo's local SSA office seven times by telephone, from April 1, 2015 to May 4, 2015, to obtain information regarding the processing of the reconsideration request. Despite these telephone calls, the reconsideration request was never processed and Ms. Fabelo was not provided with continuing benefits pending a determination on her reconsideration request.

105. On May 5, 2015, Ms. Fabelo's representative accompanied her to her local SSA office. At the appointment, the SSA worker requested additional information from the foster care agency, which was promptly submitted.

106. Ms. Fabelo's representative contacted the office three times by telephone, from May 14<sup>th</sup> to May 18<sup>th</sup> 2015, to check on the status of the case since Ms. Fabelo was still without her SSI benefits.

107. On May 19, 2015, a favorable reconsideration decision was issued.

108. On May 27, 2015, Ms. Fabelo's SSI benefits were finally reinstated but she was not issued the benefits withheld for February, March, and April 2015. Due to her representative's continued advocacy, Ms. Fabelo's missing benefits were released on June 24, 2015.

109. Ms. Fabelo's only source of income is her SSI benefits, which she relies upon to pay all her living expenses. During the period she did not receive her benefits (February to May 2015), her daughter had to loan her money to pay her rent. She also fell behind in paying her electricity and telephone bills.

110. SSA failed to provide Ms. Fabelo with statutory and regulatory due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: provide timely notice of the termination and overpayment prior to the termination; timely document her reconsideration request in MSSICS; and provide the right to reconsideration before the determination took effect and her benefits were terminated.

111. SSA's wrongful behavior toward Ms. Fabelo reasonably can be expected to reoccur. A redetermination of Ms. Fabelo's financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in her situation. If SSA finds Ms. Fabelo to be once again ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

112. In fact, Ms. Fabelo and her representative received a letter dated April 21, 2016, indicating that her local SSA office had reviewed a written statement made by Ms. Fabelo on January 11, 2016, and needed additional information regarding two overpayments.

113. Ms. Fabelo's statement read, "For the months 6/2015 – 8/2015 I received retroactivity SSI payments (2/2015-4/2015) in the amount of \$1979.10. I am not responsible for the overpayment for that period." SSA's letter requested clarification on whether this statement

was a request for reconsideration or waiver. The statement had been completed at the local SSA office so it is not clear why the appropriate form was not completed at the same time as the statement was taken. SSA also requested clarification about whether the statement pertained to the overpayment on her record from February to April 2015 or for the overpayment from June to August 2015.

114. Ms. Fabelo's representative contacted Ms. Fabelo's local SSA office and attempted to obtain a copy of the original overpayment notice for the period June to August 2015. The office was inexplicably unable to provide a copy of that notice or any additional information regarding the cause of the overpayment.

115. On May 9, 2016, a reconsideration request was submitted by facsimile at Ms. Fabelo's local SSA office. The representative called the office on May 12, 2016 to confirm that the request was received. The SSA worker remembered it coming in but told the representative she needed to follow up with a different worker to get it processed and entered into the system. The representative left a message for that worker on May 12, 2016 and May 17, 2016, but received no response.

116. When Ms. Fabelo's representative called her local SSA office on May 20, 2016, the SSA worker who answered the phone was unable to confirm the reconsideration request had been processed. The representative left a message for the worker assigned to the case.

117. On May 24, 2016, the representative called Ms. Fabelo's local SSA office and was transferred to the worker assigned to the case who checked MSSICS for the reconsideration but did not see it.

118. The representative asked for more information about the June to August 2015 overpayment. The worker confirmed that this overpayment was caused by SSA's erroneously

counting Ms. Fabelo's SSI retroactive payment (for February to April 2015) as a resource, and she stated that the overpayment for that period had already been removed from her record. However, the worker stated there was also an overpayment for the period February to April 2015 due to excess resources in her bank accounts, not foster care payments.

119. The representative subsequently called Ms. Fabelo, who stated that when she went to her local SSA office in January 2016, she told SSA that one of those accounts held the foster care funds belonging to her foster son. The SSA worker told Ms. Fabelo that she needed to change the name on the account, which she did.

120. On May 31, 2016, her representative filed a new reconsideration request by facsimile for the February to April 2015 overpayment. The representative provided bank statements and a summary of Ms. Fabelo's resources. The bank statements showed that SSA had erroneously included her foster son's bank account as one of Ms. Fabelo's resources, despite her explanation that it only contained foster care funds. SSA also used the account balances for the account as of the 20<sup>th</sup> or 22<sup>nd</sup> of each month, rather than as of the 1<sup>st</sup> of each month, as required. These errors led SSA to believe that Ms. Fabelo's resources exceeded the \$2,000 limit.

121. On May 31, 2016, the representative left a message for the worker assigned to the case, to inform her that the new reconsideration request had been faxed. On June 7, 2016, the representative left another message for the same worker.

122. The representative subsequently received a "Request for Reconsideration Summary" dated June 2, 2016, which erroneously stated that the representative had requested a case review rather than an informal conference. A case review does not allow the recipient the opportunity to meet with an SSA worker face-to-face to dispute the overpayment.

123. On June 8, 2016, the representative called Ms. Fabelo's local SSA office and explained to the worker who answered the phone that there was an error with the processing of the reconsideration request. The worker advised the representative that Ms. Fabelo needed to file a waiver request in order to receive a personal conference. The representative explained to the worker that Ms. Fabelo was entitled to an informal conference based on the reconsideration request. The worker then checked MSSICS and saw that a favorable decision had already been made on the reconsideration request on June 2, 2016.

**Plaintiff Judy Menczer, on behalf of her minor child, E.M.**

124. E.M. is a disabled 14-year-old girl who lives with her parents. Her local SSA office is the Bushwick Office in Brooklyn, New York.

125. E.M. meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

126. An SSA bank data match for the family brought up three bank accounts: an account for E.M.'s SSI benefits, a joint account owned by her parents, and a business account owned by her uncle.

127. Under SSA regulations, the business account is not a countable resource because her father's name is on the account solely to access it for business purposes.

128. In 2012, E.M.'s SSI benefits were terminated, an overpayment was posted to her SSI record, and she was not reinstated until SSA had accepted all the business account documents and found the business account to not be a countable resource. This took nine months, from the date of the notice to the final resolution.

129. In 2014, E.M.'s SSI benefits were again terminated and an overpayment was posted to her SSI record because of the same business account. That took five months to resolve.

130. In 2015, for the third time, E.M.'s SSI benefits were terminated and an overpayment was posted to her SSI record because of the same business account.

131. The first SSA notice was dated August 5, 2015, and SSA immediately scheduled the automatic reduction or termination of E.M.'s SSI benefits.

132. E.M.'s parents timely filed a request for reconsideration. A reconsideration request was sent by facsimile to E.M.'s local SSA office that same day with a request for continued benefits under SSA's *Goldberg v. Kelly* provisions.

133. The second notice, which added additional months to the overpayment, was dated August 6, 2015, and within 15 days a second reconsideration request was sent by facsimile to E.M.'s local SSA office with a request for continued benefits.

134. On August 17, 2015, supporting documentation, including bank statements and an advocacy letter were mailed to E.M.'s local SSA office with the two previously submitted reconsideration requests.

135. SSA failed to follow procedures to document E.M.'s reconsideration requests in MSSICS. On August 20, 2015, E.M.'s local SSA office received the documentation, bank statements, and advocacy letter. The next day an SSA worker stated that the reconsideration requests were not in MSSICS but it "might be on someone's desk." Two more follow up telephone calls were made to the local SSA office without response.

136. SSA immediately scheduled the automatic termination of E.M.'s SSI benefits. E.M. did not receive her SSI benefits for September 2015, despite the timely reconsideration request, so another telephone call was placed to her local SSA office. The worker stated that she did not "see" any appeal on file in MSSICS. A request for continued benefits was again made but SSA took no action.

137. A week later, a notice scheduling an informal conference was received but benefits were still not restored pending the conference. At the September 18, 2015, conference, the issue was apparently resolved once again in E.M.'s favor. However, by notice dated October 7, 2015, the reconsideration request was denied.

138. On October 16, 2015, E.M. filed an appeal by requesting review by an administrative law judge.

139. E.M.'s SSI benefits have not been restored despite the timely filing of the reconsideration request. An appeal is currently pending.

140. SSA failed to provide E.M. with statutory and regulatory due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: timely document her reconsideration requests in MSSICS; provide the right to reconsideration before the determination took effect and benefits were terminated; provide continued benefits under SSA's *Goldberg v. Kelly* provisions after timely filing of a reconsideration request and a request for continued benefits; and reinstate her SSI benefits pending a decision on the reconsideration request after learning that it had been timely filed.

141. SSA's wrongful behavior toward E.M. reasonably can be expected to reoccur. A redetermination of E.M.'s financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in her situation. A review of her continued disability also occurs periodically. If SSA determines E.M. to once again be ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

142. SSA has terminated E.M. on this same issue three times despite previously resolving the issue in her favor twice. SSA's repeated terminations of E.M.'s SSI benefits and its



failure to document in MSSICS timely reconsideration requests caused and continues to cause this family increased stress and significant financial instability.

**Plaintiff Liam Beck, on behalf of his minor child, M.B.**

143. M.B. is 11 years old and receives SSI benefits for her severe mental illness. Her local SSA office is the Boro Hall Office in Brooklyn, New York.

144. M.B. meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

145. M.B.'s family belongs to a religious congregation, where M.B.'s father assists with the accounting. Mr. Beck's name, along with other names, appears on the congregation's bank account.

146. On June 29, 2015, SSA sent M.B.'s family a notice indicating her SSI benefits would be terminated in August 2015 because M.B.'s family no longer met the SSI program's financial eligibility criteria. Specifically, the notice indicated that SSA was counting the congregation's bank account as a resource belonging to M.B. SSA immediately scheduled the automatic termination of M.B.'s SSI benefits.

147. On July 13, 2015, M.B. appealed by filing a request for reconsideration objecting to the allegations in the notice, and provided SSA with copies of bank statements explaining the congregation's bank account.

148. SSA failed to follow procedures to document M.B.'s reconsideration request in MSSICS. M.B.'s family filed the reconsideration request three times and their representative placed six telephone calls to M.B.'s local SSA office.

149. On July 31, 2015, SSA notified M.B.'s family that more information was needed to process the reconsideration request.

150. M.B. did not receive her SSI benefits in early August 2015, as expected, but with legal assistance, M.B.'s family was able to secure her August 2015 SSI benefits later in the month.

151. Because of SSA's failure to provide continued benefits pending the outcome of the reconsideration, the family was late paying rent and had to borrow money to pay M.B.'s school fees.

152. SSA failed to provide M.B. with due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: timely document her reconsideration request in MSSICS; provide the right to reconsideration before the determination took effect and benefits were terminated; and provide continued benefits under SSA's *Goldberg v. Kelly* provisions after timely filing of a reconsideration.

153. SSA's wrongful behavior reasonably can be expected to reoccur. A redetermination of M.B.'s financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in her situation. A review of her continued disability also occurs periodically. If SSA finds M.B. to once again be ineligible or to be overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

154. If SSA once again retrieves the congregation's account by data match and counts it as a resource of M.B., she could once again be found to have excess resources and her SSI benefits could be terminated. It is not clear whether SSA has input into MSSICS information sufficient to guarantee that the congregation's account will not again counted as M.B.'s resource.

**Plaintiff Icho Cohen, on behalf of his minor child, S.C.**

155. S.C. is a 17-year-old disabled girl. Her local SSA office is the New Utrecht Office in Brooklyn, New York.

156. S.C. lives with her parents.

157. S.C. meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

158. S.C. was in receipt of SSI benefits until January 2014 when SSA immediately scheduled the automatic termination of her SSI benefits and placed an overpayment on her record due to excess resources.

159. The resource in question was an exempt business loan made to S.C.'s mother by S.C.'s grandfather.

160. On February 14, 2014, S.C.'s father, Mr. Cohen, filed a timely request for waiver of the overpayment in person at S.C.'s local SSA office. A reconsideration was apparently discussed but the SSA worker refused to provide continuing benefits pending the outcome of an appeal in the belief that the family continued to be ineligible due to excess resources.

161. On May 22, 2014, a second waiver request was filed, by certified mail, to S.C.'s local SSA office.

162. On June 23, 2014, a third waiver request was filed, by certified mail, to the SSA Mid-Atlantic Service Center in Philadelphia, Pennsylvania, because an overpayment notice had been sent to S.C.'s family from that office.

163. SSA failed to follow procedures to document S.C.'s waiver request in MSSICS.

164. On September 5, 2014, Mr. Cohen and his representative attended an appointment at S.C.'s local SSA office. The SSA worker claimed that the waiver request was never received. Mr. Cohen's attempt to give the worker a copy of the waiver request was refused on the ground that the worker did not handle overpayment waivers.

165. In September 2014, the representative filed the waiver request with S.C.'s local SSA office by facsimile and certified mail.

166. On October 3, 2014, Mr. Cohen received a letter from S.C.'s local SSA office for an October 3rd appointment about the waiver request. Mr. Cohen tried to reschedule the appointment by telephone due to lack of timely notice, but SSA refused to reschedule the appointment.

167. On April 2, 2015, S.C.'s local SSA office informally denied the waiver request. No written waiver denial was sent to S.C. or S.C.'s representative.

168. On May 24, 2015, a reconsideration of the waiver denial was filed at S.C.'s local SSA office by S.C.'s representative based on SSA's oral representation that the waiver had been denied. The appeal of the waiver denial was also denied orally and no written denial has ever been received.

169. On July 14, 2015, S.C. appealed by filing a request for review by an administrative law judge.

170. On January 21, 2016, an administrative law judge issued an unfavorable decision.

171. On March 4, 2016, S.C. filed an appeal by requesting review by the Appeals Council. The request is pending.

172. SSA failed to provide S.C. with due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: timely document her waiver request in MSSICS; provide written notice of the denial of the waiver request; and provide written notice of the denial of the reconsideration of the waiver denial.

173. S.C.'s SSI benefits have not been restored due to deeming of her parents' current income but a large overpayment is still posted to her record.

174. SSA's wrongful behavior toward S.C. reasonably can be expected to reoccur in the next eligibility review made when she turns age 18 and can apply for SSI and not have her parent's income is counted as available to her. If SSA finds S.C. to once again be ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit. In addition, SSA still holds S.C. liable for the overpayment in question.

**Plaintiff Constantin Kehaya**

175. Mr. Kehaya, aged 71, receives SSI benefits based on his age. His local SSA office is the Uptown Office, in New York, New York.

176. Mr. Kehaya meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

177. SSA requires Mr. Kehaya to receive his SSI benefits by electronic deposits directly into a bank account.

178. In May 2014, two SSI payments were electronically deposited into his bank account: one in the beginning of the month and one at the end of the month. He did not receive his SSI benefits in the calendar month of June because the SSI deposit in late May was actually his benefits for June.

179. In both August and October 2014, two SSI payments were electronically deposited into his bank account in a single calendar month – following the same pattern with benefits electronically deposited in the beginning of the month and at the end of the month. He did not receive his SSI benefits in September 2014 or November 2014. Instead, the second benefit payment received in August was an early deposit of his benefits for September. Likewise, the second benefit payment received in October was an early deposit of his benefits for November.

180. In December 2014, Mr. Kehaya's local SSA office asked him to come in for an interview on January 20, 2015, in order to redetermine his financial eligibility for SSI benefits.

181. On January 19, 2015, the day before the scheduled interview, SSA issued Mr. Kehaya a notice that he had been overpaid SSI benefits for three months in 2014 because his bank balances in June, September, and November 2014 appeared to exceed the \$2,000 SSI resource limit for a single person. SSA considered the second SSI payments electronically deposited into his bank account in the same month to be "savings" so that it appeared as if Mr. Kehaya had excess resources. Mr. Kehaya was informed that the overpaid benefits would be added to a prior overpayment on his record. SSA immediately applied the new overpayment amount to the prior overpayment and continued the reduction of his SSI benefits.

182. The prior overpayment arose in 2013, when SSA also paid Mr. Kehaya two SSI payments in a single calendar month. SSA treated the double-month payments as extra "savings" in 2013 as well. In addition, Mr. Kehaya had a small overpayment caused by a modest annuity that had placed him barely over the resource limit.

183. Overall, SSA assessed Mr. Kehaya an overpayment of more than \$9,000.

184. The January 2015 notice informed Mr. Kehaya that SSA would reduce his monthly SSI benefits in order to recoup the overpayment. It did not inform him that he could appeal this reduction in his benefits.

185. On February 20, 2015, after consultation with counsel, a reconsideration request was timely submitted to SSA, pointing out the errors in the overpayment determination.

186. SSA failed to follow procedures to document the reconsideration request in MSSICS and or to stop recoupment following its submission.

187. In April 2016, SSA contacted Mr. Kehaya to request a copy of the February 2015

Request for Reconsideration.

188. In May 2016, Mr. Kehaya submitted a copy of the February 2015 request, plus additional documents.

189. Mr. Kehaya has no control over the timing of when his SSI benefits are electronically deposited into his bank account. On occasion, multiple SSI benefit payments are issued in a single calendar month. Mr. Kehaya did not request this payment pattern, nor is he told in advance that it will happen. SSI calls this method of payment an “early deposit month” and benefits paid in this manner are supposed to be treated as income in the following month, not as a resource.

190. SSA failed to provide Mr. Kehaya with due process when SSA immediately scheduled the automatic reduction of his SSI benefits and failed to: timely document his reconsideration request in MSSICS; provide the right to reconsideration before the determination took effect and benefits were reduced; and restore his benefits pending a decision on the reconsideration after learning that it had been timely filed.

191. Mr. Kehaya’s SSI benefits have not been fully restored despite the timely filing of a reconsideration request.

192. SSA’s wrongful behavior toward Mr. Kehaya reasonably can be expected to reoccur. A redetermination of Mr. Kehaya’s financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in his situation. If SSA finds Mr. Kehaya to once again be ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit. It appears likely that Mr. Kehaya will again receive more than one SSI benefit payment in a calendar month so this exact issue can reoccur for him.

**Plaintiff Aron Braver, on behalf of his minor child, R. B.**

193. R.B. is 8 years old and disabled. Her local SSA office is the Boro Hall Office, in Brooklyn, New York.

194. R.B. meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

195. In October 2013, R.B. received a settlement from the medical malpractice lawsuit filed on her behalf in 2011.

196. The malpractice settlement precludes R.B. and her parents from accessing the settlement funds until she is 18 years old without court approval.

197. R.B.'s parents received a Notice of Planned Action from SSA dated December 15, 2014, to terminate R.B.'s SSI benefits because of the settlement funds. SSA immediately scheduled the automatic termination of R.B.'s SSI benefits.

198. On December 24, 2014, R.B.'s parents timely filed a request for reconsideration advising SSA that R.B. and her parents did not have access to the settlement funds and included a copy of the court-ordered settlement.

199. Despite the timely filing of the reconsideration request, R.B.'s SSI benefits were discontinued in January 2015.

200. SSA failed to timely document R.B.'s reconsideration request in MSSICS. R.B.'s parents obtained legal assistance on January 12, 2015. When R.B.'s local SSA office was asked about the status of R.B.'s request for reconsideration of the termination, the representative was told that no record existed in MSSICS but it was likely sitting somewhere on a desk.

201. The objections and documentation were resent to R.B.'s local SSA office and an additional follow up call was made by the representative. R.B.'s benefits were reinstated on January 22, 2015.



202. Months later, SSA issued a new notice of termination, dated October 9, 2015, stating that R.B.'s benefits would be terminated as of November 2015.

203. The notice indicated R.B. had been found to be over the resource limit due to funds kept in a separate savings account. SSA immediately scheduled the automatic termination of SSI benefits.

204. The separate savings account is a dedicated account that SSA requires minors, such as R.B., to have for their retroactive SSI benefits. The dedicated account is excluded as a resource for eligibility purposes.

205. The dedicated account had been with Capital One Bank until January 2014, when it was transferred to a different bank in order to secure a higher interest rate.

206. It appears that SSA thought it had discovered a "new" account and failed to realize that it was actually the same retroactive monies now in a different account.

207. On October 23, 2015, R.B.'s father sent the Request for Reconsideration form and bank statements, by facsimile, to the R.B.'s local SSA office. This appeal was filed within 15 days of the date of the notice.

208. SSA failed to follow procedures to document R.B.'s reconsideration request in MSSICS. R.B.'s father followed up with the local SSA office on October 29, 2015, only to be told that the reconsideration request had not been recorded in MSSICS. In response, R.B.'s father submitted the documents again, by facsimile.

209. On October 30, 2015, R.B.'s father confirmed that R.B.'s local SSA office had received the reconsideration request and bank statements. He was also informed that SSA could not provide continuing benefits because the documents lacked a signed statement from him.

210. R.B.'s father drafted and signed a statement and sent it, by facsimile, to R.B.'s

local SSA office.

211. SSA immediately scheduled the automatic termination of R.B.'s SSI benefits. No SSI benefits were paid to R.B. in November 2015.

212. In November 13, 2015, a notice to R.B. from SSA indicated the reconsideration request had been granted.

213. Further inquiry to SSA yielded a statement from R.B.'s local SSA office that R.B.'s November 2015 benefits would be released on December 1, 2015.

214. In December 2015, R.B. received SSI benefits for December 2015 but did not receive the withheld November 2015 benefits. The representative contacted SSA four times from December 3rd to 16th regarding R.B.'s November 2015 SSI benefits. In late December 2015, the SSA finally released R.B.'s November 2015 benefits.

215. SSA failed to provide R.B. with due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: timely document her reconsideration request in MSSICS; provide the right to reconsideration before the determination took effect and benefits were terminated; provide continued benefits under SSA's *Goldberg v. Kelly* provisions after timely filing of a reconsideration; and reinstate benefits pending a decision on the reconsideration after learning that the reconsideration had been timely filed.

216. SSA's wrongful behavior toward R.B. reasonably can be expected to reoccur. A redetermination of R.B.'s financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in her situation. A review of her continued disability also occurs periodically. If SSA finds R.B. to once again be ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

217. In fact, on April 11, 2016, SSA sent a notice to R.B. requesting a copy of the

court order from the medical malpractice settlement (which had previously been provided to SSA) and documentation about which account or accounts held the funds since the court order was signed. The notice stated that R.B.'s SSI may be stopped if she did not respond to SSA by May 11, 2016.

218. SSA contacted R.B.'s new representative on April 14, 2016, to request this information. A copy of the court order was once again provided to SSA. SSA then contacted the representative on May 5, 2016, to request additional financial records that are all related to issues that were already resolved by the prior two reconsiderations.

**Plaintiff Nabil Sarga, on behalf of his minor child, K.S.**

219. K.S. is 13 years old and disabled. His local SSA office is the Flushing Office in Queens, New York.

220. K.S. meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

221. In April 2014, K.S.'s SSI benefits were terminated due to excess resources from June 2013 to April 2014 but because a timely reconsideration was not filed his SSI benefits were terminated and an overpayment was posted to his record.

222. K.S.'s father, Mr. Sarga, had deposited his own tax refund into Mr. Sarga's bank account, which made K.S. appear to have excess resources. However, tax refunds are exempt as a resource for 12 months after receipt.

223. K.S.'s father filed a new application for SSI benefits for K.S., which was granted.

224. On January 9, 2015, K.S. received a Notice of Planned Action from SSA stating that his SSI benefits would be terminated in February 2015 due to excess resources from June 2014 to the present. SSA immediately scheduled the automatic termination of K.S.'s SSI

benefits.

225. Mr. Sarga had again deposited his tax refunds into his bank account which made K.S. appear to have excess resources.

226. K.S. did not receive his SSI benefits in February 2015.

227. On February 2, 2015, K.S. received a Notice of Overpayment for \$2,221.00 for the June 2014 to January 2015 overpayment. The notice stated that the new overpayment was in addition to the prior overpayment of \$6,803.00.

228. On February 18, 2015, K.S. filed a timely request for reconsideration appealing the 2015 termination and the overpayment, with bank statements attached, by facsimile, with K.S.'s local SSA office.

229. SSA failed to follow procedures to document K.S.'s reconsideration request in MSSICS. K.S.'s representative had to follow up with the local office on February 20<sup>th</sup> and 26<sup>th</sup> before the reconsideration request was entered into MSSICS.

230. On March 2, 2015, K.S.'s representative was told by telephone that K.S. had been found not to have had excess resources from December 2014 to April 2015 and his SSI benefits would be reinstated in April 2015, with retroactive benefits to follow. However, SSA failed to address the excess resource issue back to June 2014.

231. On April 17, 2015, K.S.'s family received a written favorable decision finding K.S. did not have excess resources and ongoing benefits were reinstated. K.S. received the missing SSI benefits for February and March 2015.

232. However, SSA failed to resolve the overpayment piece of the reconsideration that arose due to the same alleged resource.

233. On June 8, 2015, K.S.'s representative spoke with SSA about the overpayment

and was told K.S. had filed a request for waiver of overpayment previously and that a personal conference had been held on April 14, 2015. K.S.'s family had filed a waiver request prior to engaging a representative and filing the more appropriate reconsideration; however, they had never attended a personal conference.

234. On June 9, 2015, K.S.'s representative was informed that the original request for reconsideration had been only partially approved as of December 2014 and an appointment was scheduled to bring in tax returns and bank statements.

235. On June 30, 2015, the representative and K.S.'s father attended a personal conference at K.S.'s local SSA office and showed the tax returns and spenddown of the exempt resources within 12 months. The SSA worker said she did not have time to make copies of all the bank statements and asked that they be dropped off at the SSA office in an envelope to her attention within 10 days.

236. On July 10, 2015, the representative and K.S.'s father went to K.S.'s local SSA office with the requested documentation but SSA refused to accept it. A manager was requested, who told them they needed to wait to see someone even though a personal conference had already been held. They waited for two hours until K.S.'s father had to leave to return to work.

237. On July 21, 2015, K.S.'s father received a denial of K.S.'s waiver request.

238. On August 4, 2015, the representative faxed a request for reconsideration of the waiver denial to K.S.'s local SSA office.

239. On August 17, 2015, the representative called the K.S.'s local office regarding the reconsideration of the waiver denial and was transferred to an SSA worker's voice mail. On August 26, 2015, she was able to reach the worker who said she could not see the reconsideration of the waiver denial in MSSICS and asked that it be resubmitted by mail. It was

resent and followed by additional calls to SSA.

240. On September 30, 2015, the SSA worker assigned to the reconsideration request told the representative that the overpayment should have been addressed by the person who handled the original reconsideration request back in April 2015. In that case, a waiver would not have been necessary.

241. On October 13, 2015, the SSA worker called K.S.'s father and asked him to come in for an appointment the next day. On October 14, 2015, the representative and K.S.'s father went to K.S.'s local SSA office but they were sent home since the worker said he needed time to review the case and would call them for another appointment.

242. On October 20, 2015, a different SSA worker called K.S.'s father to come in for an appointment. The representative called the original worker and was told to disregard that phone call.

243. After repeated attempts, the representative was able to schedule an appointment for November 13, 2015. After the appointment, they waited for a determination on the reconsideration of the waiver denial to arrive in the mail.

244. On February 18, 2016, the representative spoke with the SSA worker who said he was having technical problems with the waiver of overpayment but expected to resolve the issue within the next week.

245. Beginning March 2016, K.S.'s new representative has contacted K.S.'s local SSA office nine times. The reconsideration request remains pending with the SSA worker.

246. K.S. is still being recouped 10% of his SSI benefits each month.

247. SSA failed to provide K.S. with due process when SSA immediately scheduled the automatic termination of his SSI benefits and failed to: timely document his reconsideration

requests in MSSICS; provide the right to reconsideration before the determination took effect and benefits were terminated; timely document his waiver request in MSSICS; and stop reduction of his SSI benefits pending a determination on the waiver request.

248. SSA's wrongful behavior toward K.S. reasonably can be expected to reoccur. A redetermination of K.S.'s financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in his situation. A review of his continued disability also occurs periodically. If SSA finds K.S. to once again be ineligible for or overpaid SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

249. SSA does not distinguish between exempt and non-exempt resources when it data matches bank account balances. Thus because tax returns are filed annually the issue could be expected to reoccur every year the family receives an exempt tax return. In addition, issues that appear to be resolved by a favorable reconsideration decision continue to be unresolved more than a year after the original resolution and recoupment continues.

**Plaintiff Stavroula Kapeles**

250. Ms. Kapeles is 24 years old and disabled. Her local SSA office is the Flushing Office in Queens, New York.

251. Ms. Kapeles meets the categorical and financial eligibility requirements for entitlement to SSI benefits.

252. On August 22, 2013, plaintiff's mother set up a modest third party supplemental needs trust ("SNT") for the benefit of Ms. Kapeles. The trust conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts Law and should therefore not be counted as a resource under SSA regulations.

253. In 2015, Ms. Kapeles underwent a periodic disability review and was found to

remain disabled and eligible for SSI benefits.

254. Ms. Kapeles' local SSA office reviewed her financial eligibility for SSI and found the SNT to be a countable resource. A Notice of Planned Action dated January 12, 2016, stated that her SSI benefits would terminate in February 2016 and that she had been overpaid benefits. SSA immediately scheduled the automatic termination of SSI benefits.

255. On January 20, 2016, SSA issued a Notice of Termination.

256. On January 22, 2016, Ms. Kapeles visited her local SSA office and appealed by filing a Request for Reconsideration and continued benefits.

257. SSA failed to follow procedures to document her reconsideration request in MSSICS. Ms. Kapeles was not paid SSI benefits on February 1, 2016.

258. On February 3, 2016, an Overpayment Notice was issued for \$20,846.88. By that point, her Medicaid health insurance had been terminated as well.

259. On March 15, 2016, Ms. Kapeles went to her local SSA office for what she thought was an appointment regarding her appeal. However, the reconsideration and the request for continued benefits was not in MSSICS and Ms. Kapeles was treated as a walk-in. She waited for three hours to be seen. At the meeting, Ms. Kapeles had to submit the reconsideration and request for continued benefits a second time but it was not documented in MSSICS at that time either.

260. A new appointment was given for March 22, 2016, SSA refused to provide access to the case file on the overpayment and refused to allow any additional evidence or argument to be submitted. The representative later resubmitted all the documentation, including information about the SNT as well as deposits and disbursements from it, which had been previously submitted at the March 15, 2016 meeting, to the office manager.



261. In April 2016, Ms. Kapeles began receiving her SSI benefits again, including her missing benefits from February and March 2016.

262. On June 22, 2016, her local SSA office denied the reconsideration request, stating that Ms. Kapeles had missed a conference appointment and had not submitted new documentation.

263. On June 30, 2016, Ms. Kapeles appealed by filing a request for review by an administrative law judge.

264. Ms. Kapeles is not currently receiving her SSI benefits.

265. Ms. Kapeles has experienced a great deal of stress. She lost her Medicaid coverage and was unable to access services at her treating mental health care provider. She has been unable to pay her share of the rent. Her mother must to cover her portion of the rent while Ms. Kapeles is not receiving SSI benefits.

266. SSA failed to provide Ms. Kapeles with due process when SSA immediately scheduled the automatic termination of her SSI benefits and failed to: timely document her reconsideration request in MSSICS; provide the right to reconsideration before the determination took effect and benefits were terminated; provide continued benefits under SSA's *Goldberg v. Kelly* provisions after timely filing of a reconsideration and a request for continued benefits; provide access to the plaintiff's case file; and to allow the plaintiff to submit documentation to support her request for reconsideration.

267. SSA's wrongful behavior reasonably can be expected to reoccur. A redetermination of financial eligibility for SSI benefits generally occurs annually and can occur at any time if there is a change in the recipient's situation. A review of her continued disability also occurs periodically. If SSA finds the plaintiff to be once again be ineligible for or overpaid

SSI benefits, SSA will utilize the same unlawful practices challenged in this lawsuit.

## STATEMENT OF CLAIMS

### FIRST CLAIM: Violation of Federal Regulations

268. Plaintiffs repeat and reallege the above paragraphs as if fully set forth herein.

269. Plaintiffs are or have been eligible for SSI benefits and have legitimate claims to those benefits.

270. When plaintiffs are confronted with a determination by SSA that they have been paid too much in SSI benefits, they have the right under federal regulations to appeal. 20 C.F.R. §§ 416.550 and 416.1336. Appeal rights include the right to appear in person, to cross-examine witnesses, to submit evidence that rebuts the determination, and to present arguments. *See, for example*, 20 C.F.R. §§ 416.1336, 416.1413, 416.557. These rights also include the right to continued benefits. 20 C.F.R. §§ 416.1336 and 416.570(a).

271. These protections attach once the plaintiffs file an appeal. 20 C.F.R. §§ 416.1336, 416.1413, 416.557; *see also* 20 C.F.R. §§ 416.1336 and 416.570(a).

272. Plaintiffs are entitled to secure their due process rights by being allowed to file and to have SSA properly and timely document the filing of reconsideration requests and waiver requests.

273. It is SSA's practice to intentionally and negligently fail to follow its own regulations and procedures mandating the timely documenting of reconsideration requests and waiver requests in MSSICS. SSA's practice, in failing to follow regulations and procedures, effectively denies plaintiffs access to their due process rights.

274. SSA's unlawful practice is aggravated by SSA's intentional adoption of a shortcut which immediately schedules the reduction or termination of SSI benefits where it is alleged that

the recipient is ineligible for continued SSI benefits or has been overpaid SSI benefits. The automatic reduction or termination is only stopped when a worker timely documents a recipient's reconsideration request or waiver request in MSSICS.

275. SSA's practice of intentionally and negligently failing to ensure that its workers in its local offices in New York City timely document plaintiffs' or their children's reconsideration requests and waiver requests in MSSICS causes plaintiffs or their children to suffer substantial and irreparable harm by denying access to due process rights, including the right to be heard and the right to maintain SSI benefits pending the determination of their appeal.

276. By blocking access to due process protections and reducing or terminating plaintiffs' or their children's SSI benefits, defendants violated their rights under the Act and its own regulations and written procedures, 42 U. S. C. § 1383(b)(1); 20 C. F. R. §§ 416.1336 and 416.1404; POMS §§ SI 02301.300, SI 02220.017, and SI 02260.001.

277. Plaintiffs, their children and other SSI recipients in New York City remain at considerable risk of suffering substantial and irreparable harm of having their rights violated under the Act and SSA regulations and procedures when SSA intentionally and negligently failing to ensure that its workers in its local offices in New York City timely document plaintiffs' or their children's reconsideration requests and waiver requests in MSSICS in sufficient time to prevent the reduction or termination of their SSI benefits.

**SECOND CLAIM: Violation of Due Process Clause**

278. Plaintiffs repeat and reallege the above paragraphs as if set forth fully above.

279. The Due Process Clause to the Fifth Amendment of the U.S. Constitution guarantees that individuals shall not be deprived of property, including statutorily created entitlements, without due process of law.

280. Plaintiffs are or have been eligible for SSI benefits and have legitimate claims to those benefits. As such, they have a property right to those benefits.

281. Plaintiffs' and their children's interest in continuing to receive SSI benefits is a property right covered by the Due Process Clause of the Fifth Amendment to the United States Constitution, which protects individuals from deprivations of life, liberty, and property without due process of law.

282. Plaintiffs are entitled to secure their due process rights by being allowed to file, and having SSA properly and timely document the filing of, reconsideration requests and waiver requests.

283. It is SSA's practice to intentionally and negligently fail to follow its own regulations and procedures mandating the timely documenting of reconsideration requests and waiver requests in MSSICS. SSA's practice, in failing to follow regulations and procedures, effectively denies plaintiffs access to their due process rights.

284. SSA's unlawful practice is aggravated by SSA's intentional adoption of a shortcut which immediately schedules the automatic reduction or termination of SSI benefits where it is alleged that the recipient is ineligible for continued SSI benefits or has been overpaid benefits. The automatic reduction or termination is only stopped when a worker timely documents a recipient's reconsideration request or waiver request in MSSICS.

285. SSA's practice of intentionally and negligently failing to ensure that its workers in its local offices in New York City timely document plaintiffs' or their children's reconsideration requests and waiver requests in MSSICS causes plaintiffs and/or their children to suffer substantial and irreparable harm by denying access to due process rights, including the right to be heard and the right to maintain SSI benefits pending the determination of their appeal.

286. The reduction or termination of plaintiffs' or their children's SSI benefits violated their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

287. Plaintiffs, their children and other SSI recipients in New York City remain at considerable risk of suffering substantial and irreparable harm of having their rights violated under the Due Process Clause when SSA intentionally and negligently failing to ensure that its workers in its local offices in New York City timely document plaintiffs' or their children's reconsideration requests and waiver requests in MSSICS in sufficient time to prevent the reduction or termination of their SSI benefits.

**THIRD CLAIM: Mandamus**

288. Plaintiffs repeat and reallege the above paragraphs as if fully set forth herein.

289. Defendants are required by their own regulations and written procedures to accept and to document requests for both reconsideration and waiver. 20 C.F.R. §§ 416.1336, 416.1413b, and 416.550.

290. Under the regulations and written procedures, requests for reconsideration must be filed within specific timeframes; accordingly, defendants must accept and document appeals in a timely manner. 20 C.F.R. §§ 416.1336, 416.1413(a-c), and 416.550; see also 20 C.F.R. § 416.1336(b) and POMS SI 02301.300 and 02260.001A.

291. Also, under the regulations and written procedures, defendants have a duty to permit plaintiffs or their children to exercise their due process, regulatory and statutory rights to appeal planned adverse determinations. 20 C.F.R. §§ 416.1336, 416.1413b, and 416.550. Accordingly, defendants have a duty to accept and document appeals in a timely manner so that plaintiffs or their children are not, in effect, blocked for exercising important rights.

292. Defendants' actions to accept and to document appeals are official actions.

293. Defendants' duty to act is plainly prescribed and without discretion.

294. Defendants fail to perform a non-discretionary administrative duty owed to plaintiffs or their children when workers in its local offices in New York City fail to timely document reconsideration requests and waiver requests in MSSICS, which results in the unlawful reduction or termination of plaintiffs' or their children's SSI benefits and blocks access to due process protections and any meaningful right to be heard.

295. By failing to follow current regulations and written requirements for processing requests for reconsideration and requests for waiver, SSA has violated 20 C.F.R. §§ 416.1336, 416.1413, 416.557.

296. Plaintiffs seek to compel defendants to perform this non-discretionary administrative duty owed by a federal agency to plaintiffs or their children.

297. No alternative means of relief exists.

### **REQUEST FOR RELIEF**

Wherefore, plaintiffs request that this Court enter a final judgment:

(a) Declaring, pursuant to 28 U.S.C. § 2201(a) and Rule 57 of the Fed. R. Civ. P., that SSA's practice of intentionally and negligently failing to ensure that its SSA offices in New York City timely documented plaintiffs' or their children's reconsideration requests and waiver requests in MSSICS violated their rights under current law, regulations, and the Due Process Clause of the Fifth Amendment to the United States Constitution; 42 U. S. C. § 1383(b)(1); 20 C.F.R. §§ 416.1336 and 416.1404; POMS §§ SI 02301.300, SI 02220.017, and SI 02260.001;

(b) Compelling, pursuant to 28 U.S.C. § 1361, defendants to comply with current law, regulation and written procedures to ensure that its SSA offices in New York City timely

document reconsideration requests and waiver requests in MSSICS as required by the Due Process Clause of the Fifth Amendment to the United States Constitution; 42 U. S. C. § 1383(b)(1); 20 C.F.R. §§ 416.1336 and 416.1404; POMS §§ SI 02301.300, SI 02220.017, and SI 02260.001;

(c) Declaring, pursuant to 28 U.S.C. § 2201(a) and Rule 57 of the Fed. R. of Civ. P., that SSA's practice in its SSA offices in New York City of immediately scheduling the automatic reduction of plaintiffs' or their children's SSI benefits, while also blocking plaintiffs' and their children from asserting appeal rights when it continuously and repeatedly fails to comply with its duty to document appeals, violates their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution; 42 U.S.C. § 1383(b)(1); 20 C.F.R. §§ 416.1336 and 416.1404 POMS §§ SI 02301.300, SI 02220.017, and SI 02260.001;

(d) Granting injunctive relief, pursuant to 28 U.S.C § 2202 and Rule 65 of the Fed. R. Civ. P.,: (1) enjoining SSA from allowing its offices in New York City to fail to timely document reconsideration requests and waiver requests in MSSICS; (2) directing SSA to implement a practice to ensure that its offices in New York City timely document reconsideration requests and waiver requests in MSSICS; (3) enjoining SSA from allowing its offices in New York City to reduce or terminate SSI benefits without first allowing recipients access to due process protections and a meaningful right to be heard.

(e) Granting reasonable attorney fees, and costs and disbursements; and

(f) Granting such other and further relief as this Court may deem just and proper.

Dated: July 1, 2016  
New York, New York

By: \_\_\_\_/s\_\_\_\_\_  
NEW YORK LEGAL ASSISTANCE GROUP  
7 Hanover Square, 18th Floor  
New York, New York 10004  
Beth E. Goldman, President  
Michelle Spadafore, Of Counsel  
(212) 613-5024  
[mspadafore@nylag.org](mailto:mspadafore@nylag.org)

By: \_\_\_\_/s\_\_\_\_\_  
ANN P. BIDDLE  
QUEENS LEGAL SERVICES  
89-00 Sutphin Boulevard, 5<sup>th</sup> Floor  
Jamaica, New York 11435  
(347) 592-2214  
[abiddle@qls.ls-nyc.org](mailto:abiddle@qls.ls-nyc.org)  
Ian F. Feldman, Of Counsel

*Attorneys for Plaintiffs*