STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

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NOTICE OF MOTION FOR LEAVE TO APPEAL AND PERMISSION TO PROCEED AS A POOR PERSON

Supreme Court, Suffolk County –Index No. 10161/15

PLEASE TAKE NOTICE, that upon the reasons outlined below in the Petitioner-Appellant's Memorandum of Law in Support of Motion for Leave to Appeal to the Court of Appeals and the exhibits thereto, the annexed affirmations of Beth C. Zweig, Esq., dated July 24 2018, and upon all prior pleadings and proceedings herein served and had by and between the parties, the undersigned will move this Court at a term thereof to be held at the Court of Appeals at 20 Eagle Street, Albany, New York, on August 13, 2018 at 9:30 o'clock in the forenoon of that day as soon thereafter as counsel can be heard,

1. for an order pursuant to CPLR §§ 5602(a)(1)(i), 5513(b), and 22 NYCRR §§ 500.21 and 500.22 granting Petitioner-Appellant permission to appeal to the Court of Appeals from a portion of the Order and

Decision of the Appellate Division, Second Department, dated February 28, 2018, affirming an Amended Decision issued by the New York State Office of Temporary and Disability Assistance which upheld the Suffolk County Department of Social Services' determination to discontinue LEGGIO's Supplemental Nutrition Assistance Program benefits, and from the Order and Decision of the Appellate Division, Second Department, dated June 28, 2018, denying reargument or, in the alternative, for leave to appeal to the Court of Appeals, with costs of $100 and

2. for an order pursuant to CPLR 1101 permitting the Petitioner-Appellant to proceed as a poor person in the above-captioned appeal, and

3. for such other and further relief as to the court may seem just and proper in the circumstances.

Dated: Islandia, New York
July 24, 2018

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STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

----------X

AFFIRMATION IN SUPPORT OF LEAVE TO APPEAL

Supreme Court, Suffolk County –Index No 10161/15

BETH ZWEIG, an attorney duly admitted to practice in the State of New York, under penalty of perjury, hereby affirms:

1. I am an attorney at NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC., of Counsel to Jeffrey Seigel, attorney for TINA LEGGIO (hereinafter "Petitioner-Appellant"), and I am fully familiar with the facts and circumstances of this case.

2. For the reasons stated in the appended "Memorandum of Law in Support of Motion to Leave to Appeal to the Court of Appeals", this motion for leave to appeal should be granted.

Dated: Islandia, New York
July 24, 2018

Beth Zweig

BETH C. ZWEIG, of Counsel to

Jeffrey Seigel, Director of
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STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

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- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

----------x

Supreme Court,
Suffolk County –
Index No.
10161/15

PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Respectfully submitted,

BETH C. ZWEIG, of Counsel to
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PRELIMINARY STATEMENT

The principal issue raised in this appeal is whether the income, including the child support income, received by a college student who resides in the Supplemental Nutritional Assistance Program (hereinafter "SNAP") household but who is ineligible to participate in the SNAP program due to his or her "ineligible college student" status, is countable as income to the SNAP household for purposes of eligibility and benefit level. The Appellate Division, Second Department properly determined that child support income is income of the child, not the parent, but incorrectly held that any income of an ineligible college student who resides in the SNAP household is countable towards the SNAP household's income, explaining that the "inclusion of income from certain specific persons who shall not be considered members of the household is explicitly provided for in 7 CFR § 273.11(c)....The college students...were disqualified primarily because of their failure to comply with work requirements". *Matter of Leggio v. Devine*, 158 A.D.3d 803, 805 [2d Dept 2018][1]. In their erroneous and unprecedented application of 7 CFR § 273.11(c) to the income of ineligible college students, the Appellate Division overlooked and failed to address 7 CFR §273.5(d), which states in full: "The income and resources of an ineligible student shall be handled as outlined in § 273.11(d)" (Emphasis added). 7 CFR § 273.11(d) states that the income of those

nonhousehold members who qualify under this section "shall not be considered available to the household with whom the individual resides" (Emphasis added). By applying 7 CFR § 273.11(c) instead of 7 CFR § 273.11(d) to the income of ineligible college students, the Appellate Division contradicts the express language of 7 CFR §273.5(d). The Appellate Division's legal error adversely impacted the outcome of the case in a manner which was clearly harmful to LEGGIO ("Petitioner-Appellant"). As a direct result of applying the incorrect regulation, the Appellate Division erroneously affirmed the determination of the New York State Office of Temporary and Disability Assistance ("OTDA") to discontinue the SNAP benefits of Petitioner-Appellant.

Crucially, DEVINE[2] ("State Respondent") and Petitioner-Appellant agree that the Appellate Division made a legal error in holding that the income of ineligible college students is countable as income to the SNAP household. State Respondent and Petitioner-Appellant agree that the federal regulations under § 273.11(d) uncontrovertibly require that income received by an ineligible college student residing in the household is excluded from the SNAP household's income for purposes of eligibility and benefit level, and State Respondent and Petitioner-Appellant agree that the Appellate Division's application of §273.11(c)(1) to the

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1 See Ex. D.

2 Devine has been replaced by Samuel Roberts as Commissioner of New York State OTDA.

income of ineligible college students contravenes federal regulations. By improperly applying §273.11(c)(1) toward the income of ineligible college students, the Appellate Division's decision violates federal regulations, upends longstanding policy and practice of OTDA and creates confusion for SNAP applicants and recipients throughout the state.

The Appellate Division further erred in their failure to address the Petitioner-Appellant's alternative argument that the ineligible college students' pro-rata share of care and maintenance must be excluded from the SNAP household's income since SNAP regulations expressly exclude payments intended for the care and maintenance of a nonhousehold member from counting as income to the SNAP household. 7 CFR §273.9(c)(6), 18 NYCRR §387.11(i). The federal regulation which details the treatment of income and resources of ineligible students, 7 CFR §273.5(d), requires that the income of the ineligible student be handled as outlined in 7 CFR §273.11(d), which is entitled: "Treatment of income and resources of other nonhousehold members" (Emphasis added). 7 CFR §273.5(d) squarely places ineligible college students in the category of "other nonhousehold members", which means that under 7 CFR §273.9(c)(6), the ineligible college students' pro-rata share of the care and maintenance must be excluded.

Finally, the Appellate Division erred in assessing costs to Petitioner-Appellant of $100. Pursuant to CPLR 5519(a)(3), service of an affirmation of

intention to move to appeal stays all proceedings to enforce the judgment or order appealed from when such a judgment directs payment of a sum of money. As a result, the Appellate Division's order assessing costs of $100 must be stayed.

STATEMENT OF FACTS

The following are the undisputed facts that are supported by the record below. Petitioner-Appellant recertified for SNAP benefits beginning October 1, 2014. As of the date of this application for continued benefits, Petitioner-Appellant resided with six children who were ages 22, 19, 18, 16, 12 and 9 years old. The Petitioner-Appellant's 22 year old son was not included in the SNAP recertification. The Petitioner-Appellant's 18 and 19 year old sons were deemed ineligible college students and were not included in the Petitioner's SNAP household. The Petitioner-Appellant had a SNAP household count of four persons (including herself and the 16, 12 and 9 year old children) for the purposes of the recertification period in question.

Pursuant to a divorce decree, the Petitioner-Appellant's ex-spouse was to pay for the support of the parties' un-emancipated children. The divorce decree lists five of her children – aged 19, 18, 16, 12 and 9 as of October 1, 2014 – as recipients of the child support. Suffolk County Department of Social Services ("DSS") calculated the total child support received by the Petitioner for her five children

listed in the above-cited divorce decree as $2,572.92 per month ($593.75/week x 4.333333).

By notice dated October 16, 2014, DSS advised the Petitioner-Appellant of its determination to discontinue the Petitioner-Appellant's SNAP benefits, effective October 1, 2014, due to excess income. In its SNAP budget calculation, DSS included the entire $2,572.92 per month received for the support of the Petitioner-Appellant's five children as unearned income for the SNAP household. DSS did not exclude the ineligible students' pro-rata share of the child support income, or two-fifths of the child support income, from the total child support budgeted. Had DSS excluded the ineligible students' pro-rata share of the child support income, the Petitioner-Appellant would have been eligible for SNAP benefits. Because the federal regulation at 7 CFR § 273.11(d) requires that the income of ineligible college students be excluded from the SNAP household's income, DSS erred in failing to exclude the ineligible students' pro-rata share of the child support income from the SNAP household's eligibility and benefit level, and therefore erred in discontinuing the Petitioner-Appellant's SNAP benefits. Alternatively, because the ineligible students qualify as nonhousehold members because they are not members of the SNAP household, 7 CFR §273.9(c)(6) requires that the care and maintenance benefiting the ineligible college students be excluded from household income.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

Petitioner-Appellant makes this timely motion for leave to appeal pursuant to CPLR §§ 5513(b), 5602(a)(1)(i) and § 500.22 of the Court's Rules of Practice. Petitioner-Appellant brought an Article 78 proceeding on June 9, 2015 to reverse an Amended Decision issued by OTDA which upheld the Suffolk County Department of Social Services' determination to discontinue the Petitioner-Appellant's SNAP benefits and found that as a matter of law, the pro-rata share of the child support income earned by ineligible students living in the household cannot be excluded from the SNAP household's budget. The matter was transferred to the Appellate Division, Second Department by order of the Honorable James Hudson, a Justice of the New York State Supreme Court in Suffolk County, by order dated April 13, 2016, entered with the Suffolk County Clerk on April 20, 2016.

Petitioner-Appellant perfected the appeal to the Appellate Division, Second Department on September 29, 2016. By unanimous decision of Justices L. Priscilla Hall, J.P., Sylvia O. Hinds-Radix, Joseph J. Maltese, Angela G. Iannacci, JJ, the Appellate Division Second Department issued a Decision and Order, dated February 28, 2018, affirming New York State OTDA's Amended Decision, with a notice of entry, service-by-mail, of March 1, 2018. On March 16, 2018, within 35 days of the March 1, 2018 date of service-by mail of the notice of entry, Petitioner-Appellant served the Notice of Motion for Reargument and/or Leave to Appeal to

the Court of Appeals on Respondents DEVINE and O'NEILL. On June 28, 2018, the Appellate Division, Second Department denied Petitioner-Appellant's Motion for Reargument and/or Leave to Appeal to the Court of Appeals, with $100 costs, with a notice of entry, service-by-mail, of June 29, 2018. This motion is being served on or before August 3, 2018, within 35 days of the June 29, 2018 date of service-by-mail of the notice of entry.

JURISDICTIONAL BASIS FOR LEAVE TO APPEAL

This Court has jurisdiction of the motion and proposed appeal pursuant to CPLR § 5602(a)(1)(i). The orders of the Appellate Division are final determinations since they completely dispose of the case. Petitioner-Appellant has no right to appeal, but herein seeks leave of this Court to appeal from a Decision and Order of the Appellate Division which finally determines the action and which is not appealable as of right, pursuant to CPLR § 5602(a)(1)(i).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

This case presents two questions of fundamental importance to all SNAP applicants and recipients in this state:

1. *Is the income, including the child support income, received by a college student who resides in the SNAP household but is ineligible for SNAP benefits countable against the SNAP household for purposes of eligibility and*

benefit level?[3]

Answer: No. The federal regulations at 7 CFR §273.5(d) state in full: "The income and resources of an ineligible student shall be handled as outlined in § 273.11(d)". 7 CFR § 273.11(d) states that the income of those nonhousehold members who qualify under this section "shall not be considered available to the household with whom the individual resides". State Respondent and Petitioner-Appellant agree that the federal regulations under § 273.11(d) clearly require that income received by an ineligible college student residing in the household is not countable against the SNAP household for purposes of eligibility and benefit level. The Appellate Division erroneously relied on 7 CFR §273.11(c)(1) in finding that the income of a college student ineligible to receive SNAP benefits is countable against the SNAP household. State Respondent and Petitioner-Appellant agree that the Appellate Division's reliance on 7 CFR §273.11(c)(1) in determining that the income of ineligible college students is countable to the household was erroneous.

2. *In the alternative, is the care and maintenance received by a college student who resides in the SNAP household but is ineligible for SNAP benefits excluded from SNAP household income because these ineligible college*

3 This issue was preserved at: "Petitioner-Appellant's Brief" pgs. 10-12, 16-17; "Petitioner-Appellant's Notice of Motion for Reargument and/or leave to Appeal to Court of Appeals", ¶¶ 4-7; "Petitioner-Appellant's Reply Affirmation in Further Support of Motion for Reargument and/or Leave to Appeal to the Court of Appeals", ¶¶ 2-12.

students are "nonhousehold members" per the SNAP regulations?[4]

Answer: Yes. The ineligible college students' pro-rata share of care and maintenance must be excluded from the SNAP household's income since SNAP regulations expressly exclude payments intended for the care and maintenance of a nonhousehold member from counting as income to the SNAP household. 7 CFR §273.9(c)(6), 18 NYCRR §387.11(i). An ineligible college student is not a member of the SNAP household, and is therefore a "nonhousehold member" per 7 CFR §273.9(c)(6). Moreover, 7 CFR § 273.11(d), which is the controlling regulation for the income and resources of "ineligible college students", expressly applies to other "nonhousehold members", thereby further indicating that ineligible college students qualify as nonhousehold members. The Appellate Division rendered no opinion on this question.

ARGUMENT

I. The Income, Including the Child Support Income, of Ineligible College Students Is Excluded from the SNAP Household's Countable Income.

The Appellate Division correctly concluded that child support income is the child's income instead of the parents' income. The Appellate Division explained,

> ....OTDA contends, among other things, that the child support attributable to the college students should not be excluded from the income calculation of the petitioner's household because child support payments are income to the

4 This issue was preserved at: "Petitioner-Appellant's Brief", pgs. 13-15; "Petitioner-Appellant's Reply Brief", pgs. 3-7.

> parent, not income to the child. OTDA's contention is without merit. A child support obligation differs from alimony or spousal support, in that it is an obligation "to the child, not to the payee spouse, [therefore] the death of the payee spouse does not terminate the obligation' (Matter of Modica v. Thompson, 300 A.D.2d 662, 663, 755 N.Y.S.2d 86). " 'A custodial parent, a foster parent or the Commissioner of Social Services are no more than conduits of that support from the noncustodial parent to the child' " (id. at 663, 755 N.Y.S.2d 86, quoting Matter of Commissioner of Social Servs. v. Grifter, 150 Misc.2d 209, 212, 575 N.Y.S.2d 259 [Fam. C.t, N.Y. County]). The regulations provide for the prorating of a single payment which is for the benefit of several persons (see 7 CFR 273.9[c][6]; 18 NYCRR 387.11 [i]). In this case, the pro rata portion of the child support award attributable to each child can be readily identified by dividing the award by the number of children.

Matter of Leggio at 804, 805.[5] Petitioner-Appellant is not appealing from this portion of the Appellate Division's decision and order since the Appellate Division's conclusion that child support income is the child's income under New York State law is correct.[6]

Petitioner-Appellant is appealing from the portion of the decision where the Appellate Division made the erroneous and unprecedented leap of determining that any income of college students who are ineligible for SNAP benefits, including the child support income, is countable against the SNAP household, incorrectly reasoning that "inclusion of income from certain specific persons who shall not be considered members of the household is explicitly provided for in 7 CFR §

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5 See Ex. D.

6 See Ex. G, ¶¶ 4-7 for Petitioner-Appellant's review of why the Appellate Division, Second Department correctly determined that child support income is the income of the child instead of the parent.

273.11(c)....The college students...were disqualified primarily because of their failure to comply with work requirements" *Matter of Leggio* at 805.[7] Petitioner-Appellant is also appealing from the Appellate Division's resulting determination to affirm New York State OTDA's amended decision upholding DSS's discontinuance of the Petitioner-Appellant's SNAP benefits. The Appellate Division's reliance on the wrong subsection of the regulation was an error of law which adversely affected the outcome of the case in a manner harmful to the Petitioner-Appellant.

In their opposition papers, the State Respondent acknowledged that the Appellate Division's conclusion that the child support income of the ineligible college students was properly included in the SNAP household income rested on a construction of the regulations that was not the best reading.[8] Specifically, the State Respondent acknowledged that the structure and history of the SNAP program demonstrates a conscious decision by Congress and the U.S. Department of Agriculture to exempt college students from work requirements and exclude the income of ineligible college students from counting as income to the SNAP household.[9] The State Respondent acknowledged that college students, including the Petitioner-Appellant's two SNAP-ineligible college aged children, are best

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7 See Ex. D.
8 See Ex. F, ¶ 31

understood as having their eligibility dictated by requirements set forth in 7 CFR §273.5(b), and that any failure to meet those eligibility requirements makes them ineligible for SNAP benefits but also makes their income and resources excludable from the SNAP household under 7 CFR §273.5(d) and 7 CFR § 273.11(d).[10] Simply, the State Respondent recognized that Appellate Division erred in relying on 7 CFR § 273.11(c), and therefore the Appellate Division erred in its conclusion that the income of ineligible college students is countable to the SNAP household.

The State Respondent discussed in depth why the Appellate Division was wrong to rely on CFR § 273.11(c) in its determination that the income of ineligible college students counts against the SNAP household. In their opposition papers, State Respondent explained,

> [The] structure and history evince an intent to exempt college students from the work requirements set forth in 7 C.F.R. § 273.7(a) altogether and to have their SNAP eligibility instead determined entirely on the basis of the separate student-eligibility criteria will prevent the student from receiving SNAP benefits—but will not subject the student to the work requirements of 7 C.F.R. § 273.7. See Food Stamp Work Program: Work Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 64 Fed. Reg. 72,196, 72,199 (Dec. 23, 1999), 1999 WL 1242262 (noting statutory exemption from SNAP work requirements if an individual is 'a student,' and noting that exempted persons are 'no longer subject to the work requirements or to the attendant penalties for noncompliance'); 7 U.S.C. § 2015(d)(2)(C), (e) (exempting students from work requirements while providing that college students are ineligible for SNAP unless they meet

9 See Ex. F at ¶¶ 34-47.
10 Id. at ¶ 48.

separate SNAP-eligibility rules applicable only to students).[11]

State Respondent discussed the history of the SNAP program, explaining that prior to the adoption of the Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, 94 Stat. 357, and its implementing regulatory amendments, 1980 Food Stamp Amendments; Eligibility Limits, 45 Fed. Reg. 46,036 (July 8, 1980), students were subject to work requirements in certain circumstances, but that the Food Stamp Act Amendments of 1980 and its implementing regulations eliminated the provisions subjecting students to work requirements, replacing those provisions with a general prohibition from students from receiving SNAP benefits, with limited exceptions for those who met the student eligibility criteria to be codified at 7 § CFR. 273.5.[12] State Respondent further explained,

> In adopting these new eligibility criteria, the Department of Agriculture specified that students who did not meet them would be ineligible to receive SNAP, but would nevertheless have their income and resources excluded from household income under 7 C.F.R. § 273.11(d). See Fed. Reg. at 46,040 (adopting 7 § C.F.R. 273.5(b), currently codified at 7 C.F.R § 273.5(d)). The Department accordingly removed ineligible students from the category of 'disqualified' individuals whose income and resources were included in the income of the households with which they resided under 7 C.F.R. § 273.11(c). See 45 Fed. Reg. at 46, 040 (revising § 273.1(b)(7); see also 7 C.F.R. §§ 273.1(b)(6)-(7), 273.5(b)(5), 273.11(c)-(d) (1981). The student eligibility provisions adopted in 1980 remain substantially in place today. Student eligibility continues to be governed by the criteria set forth in 7 C.F.R. § 273.5(b), and 7 C.F.R. § 273.5 continues to provide that the income and resources of a student who fails to fulfill those eligibility requirements

11 See Ex. F at ¶ 35.
12 Id. at ¶¶ 36-42.

'shall be handled as outlined in 7 C.F.R. § 273.11(d),' 7 C.F.R. § 273.5(d) – i.e., excluded from the household income.[13]

In short, State Respondent fundamentally agrees with the Petitioner-Respondent that the Appellate Division's decision is internally inconsistent. Once the Appellate Division concluded that the child support income is the ineligible college students' income, 7 C.F.R. § 273.11(d) uncontrovertibly requires that the child support income of the ineligible college students in the present case be excluded from the SNAP household's income.

By erroneously applying 7 CFR § 273.11(c) to the income of the ineligible college student, the Appellate Division, in effect, has determined that any income of an ineligible college student, earned or unearned, child support or not, is countable against the SNAP household. This determination clearly violates federal law and also subverts longstanding policy and practice by New York State OTDA. In their own SNAP Sourcebook at Section 13, page 267, New York State OTDA expressly states: "The earned or unearned income of an individual determined ineligible as an ineligible student cannot be considered available in determining household eligibility or benefit levels".[14] Throughout these hereinbefore mentioned proceedings, State Respondent's position never has been that the income received or earned by an college student who is ineligible to participate in SNAP benefits is

13 See Ex. F at ¶¶ 43-44.

countable to the SNAP household, because such a policy or practice would violate federal law.

In their opposition to the Petitioner-Appellant's Motion to Reargue and/or Leave to Appeal, State Respondent explains that "the parties essentially agree in principle on the treatment of income that, unlike the child support at issue here, is properly attributed to a SNAP ineligible college student"[15] and that "the issue of whether ineligible students' income is properly treated under 7 CFR 273.11(d)(1) as opposed to 7 CFR 273.11(c)(1) is irrelevant to the outcome of this case because the child support...was not those children's income in the first place".[16] This suggests that the intent of State Respondent is to ignore the two key legal holdings of the Appellate Division: specifically, to ignore the Appellate Division's proper conclusion that child support is the income of the child instead of the parent, and to ignore the Appellate Division's incorrect, unprecedented holding that the income of college students ineligible for SNAP benefits is countable against the SNAP household. This underscores just how crucial it is for this Court to grant Petitioner-Appellant's request for Leave to Appeal to the Court of Appeals. State Respondent has signaled that they intend to disregard the entire basis for the Appellate Division's decision with the exception of their determination to uphold New York

14 See Ex. H.
15 See Ex. F, ¶ 52.

State OTDA's Amended Decision to discontinue the Petitioner-Appellant's SNAP benefits. This is not a tenable position for legal precedent. If the Appellate Division, Second Department's decision were to stand, the case law would be in disarray, over 35 years of New York State policy and practice would be upended, and confusion would ensue for New York State OTDA, for local social services districts, and for advocates and SNAP applicants and recipients throughout the state.

II. In the Alternative, Payments for the Care and Maintenance of Ineligible College Students are Excluded from the SNAP Household Because Ineligible Students are Nonhousehold Members.

Federal and state regulations, at 7 CFR §273.9(c)(6)[17] and 18 NYCRR §387.11(i) respectively, exclude from counting as income to the SNAP household those payments intended for the care and maintenance of a nonhousehold member. The language in the federal and state SNAP regulations identify college students as nonhousehold members who are ineligible for SNAP benefits, which plainly contradicts the State Respondent's assertion that an ineligible college student is a

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16 See Ex. F, ¶ 51.

17 7 CFR §273.9(c)(6) states: "If the intended beneficiaries of a single payment are both household and nonhousehold members, any identifiable portion of the payment intended and used for the care and maintenance of the nonhousehold member shall be excluded. If the nonhousehold member's portion cannot be readily identified, the payment shall be evenly prorated among intended beneficiaries and the exclusion applied to the nonhousehold member's pro rata share or the amount actually used for the nonhousehold member's care and maintenance, whichever is less."

member of the SNAP household.

First, the federal regulation which details the treatment of income and resources of ineligible students, 7 CFR §273.5(d), specifically states that the income and resources of the ineligible student must be handled as outlined in 7 CFR §273.11(d), which is entitled: "Treatment of income and resources of other nonhousehold members" (Emphasis added). Thus, 7 CFR §273.5(d) squarely places ineligible college students in the category of "other nonhousehold members". The only reasonable conclusion to be drawn is that the ineligible student is a nonhousehold member.

For purposes of the SNAP program, a "household" is functionally a term of art, expressly defined in 7 CFR §273.1(a). The definition of the SNAP household is not solely dependent on who may reside together, but by certain relationship configurations and the requirement that food be purchased and prepared together within that household unit. The SNAP regulation regarding household compositions directs that children under age 22 who live with either their natural, adoptive, or step parents be counted as a single SNAP household, as a general principle. 7 CFR § 273.1(b)(1)(ii). However, the regulatory section expressly leaves open the possibility that this principle is not absolute or universal by indicating that the required household combinations will apply "unless otherwise specified." 7 CFR § 273.1(b)(1). In the present case, Petitioner-Appellant's two ineligible-

student children are barred from participating as a member of any SNAP household. Hence, these ineligible college students are nonhousehold members.

Additionally, federal and state regulations consistently reference as "nonhousehold members" those individuals who reside with members of the SNAP household but are ineligible for benefits. For instance, while 7 CFR §273.11(d) identifies those "other nonhousehold members" whose income is excluded from the SNAP household (this includes the income of ineligible students), 7 CFR §273.11(c) identifies those "nonhousehold members" whose income is not excluded, including those individuals who have an Intentional Program violation, felony drug conviction, or fleeing felon disqualifications, and workfare or work requirement sanctions. Likewise, in the state regulations, 18 NYCRR §387.16(d) states that the "income and resources of non-household members who have not been disqualified for an intentional program violation, ineligible alien status...must not be considered available to the household", once again confirming that in the context of SNAP regulations, the phrase "non-household" refers to the non-SNAP household, without regard to whether the member lives outside the household or not. The phrase "nonhousehold members" within both federal and state regulations refers to non-SNAP household members, and includes those individuals who are physically in the household but are ineligible for benefits for various reasons.

Finally, in the Amended Decision issued by New York State OTDA, State

Respondent determined that "...[T]he Appellant established that the pro-rata share of these [child support] funds were used solely for the care and maintenance of her two sons who attend college full-time. Appellant credibly testified the pro-rata share of the child support monies in question were used exclusively for the Appellant sons' everyday expenses, such as school, clothing and food."[18] State Respondent has already concluded that a pro rata share of the support income is used for the care and maintenance of the ineligible college students. Because the pro rata share of the child support payment is intended and used for the care and maintenance of nonhousehold members – in this case, the ineligible college students – the pro rata share, or two-fifths, of the child support income must be excluded from the SNAP household's income.

Since 7 CFR §273.9(c)(6) clearly requires that payments received by a household to be used for the care and maintenance of a nonhousehold member be excluded, and 7 CFR §273.5(d) plainly categorizes ineligible students as "other nonhousehold members", the child support received by the household which is used to care for the ineligible college student must be excluded from the SNAP household's countable income. The Appellate Division erred in ignoring 7 CFR §273.9(c)(6) and in failing to render an opinion on the question of whether the care

18 See Ex. A.

and maintenance for the benefit of ineligible college students is excluded from SNAP household income. The Appellate Division should have determined that the ineligible college students' care and maintenance is excludable under 7 CFR §273.9(c)(6), and, as a result, the Appellate Division should have overturned OTDA's Amended Decision affirming the county's discontinuance of the Petitioner-Appellant's SNAP benefits.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner-Appellant's Motion for Leave to Appeal to the Court of Appeals.

SELECTED EXHIBITS

Selected Decisions, Judgments and Orders

Selected Memoranda of Law and Briefs

New York State OTDA "SNAP" Policy Manual

EXHIBIT A

STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST: November 4, 2014
[redacted]
AGENCY: Suffolk
FH #: 6878939Z

In the Matter of the Appeal of

[redacted]

from a determination by the Suffolk County Department of Social Services

AMENDED DECISION AFTER FAIR HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on December 2, 2014, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Social Services Agency

Ms. Lugo, Fair Hearing Representative

ISSUE

Was the Agency's determination to discontinue the Appellant's SNAP benefits correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 50, has been in receipt of SNAP benefits for a household of five persons. Residing with the Appellant are her six children, ages 22, nineteen, eighteen, sixteen, twelve and nine. The Appellant's 22 year old son was not included in the SNAP recertification. The Appellant's eighteen and nineteen year old sons were deemed ineligible college students and were not included in the Appellant's SNAP household count. The

Appellant had a SNAP household count of four for the purposes of this recertification period. None of the aforementioned was in dispute.

2. By notice dated October 16, 2014, the Agency advised the Appellant of its determination to discontinue the Appellant's SNAP benefits.

3. The household's income as of October 16, 2014 was as follows:

Unearned Income

The Appellant's Social Security Disability	$902.00
The Appellant Child's Social Security Dependent benefits	$72.00
The Appellant Child's Social Security Dependent benefits	$72.00
The Appellant Child's Social Security Dependent benefits	$72.00
Child Support ($593.75/wk. x 4.333333)	$2,572.92

4. Pursuant to a divorce decree, the Appellant's ex-spouse was required to deposit $5,400.00 per month in the Appellant's bank account to contribute towards the Appellant household's monthly bills and expenses, including the Appellant's mortgage. The Agency did not include any such income in its SNAP budget calculations for the Appellant. Upon recent submission of verification of the Appellant's payment of her monthly mortgage and medical expenses, the Agency calculated a subsequent budget, wherein, it found that the Appellant remained ineligible for receipt of SNAP benefits.

5. The Agency re-computed the Appellant's SNAP budget as follows:

Income		
Gross Earned Income	$0.00	
Unearned Income:		
Appellant's Social Security Disability	$902.00	
The Appellant Child's Social Security Dependent Benefits	$72.00	
The Appellant Child's Social Security Dependent Benefits	$14.40	
Child Support	$2,572.92	
Gross Unearned Income	$3,561.32	
Total Income (Gross Earned Income plus Gross Unearned Income)		$3,561.32
Deductions		
Earned Income Deduction	$0.00	
Standard Deduction	$165.00	

Allowable Medical Costs	$62.60	
Dependent Care	$0.00	
Total Deductions	$227.60	
Adjusted Income (Total Income minus Total Deductions)		$3,333.72
Shelter Costs		
Rent or Mortgage	$1,545.72	
Combined Heating/Cooling, Utilities and Telephone	$732.00	
Other Shelter Costs	$0.00	
Total Shelter Costs	$2,277.72	
50% of Adjusted Income	$1,666.86	
Excess Shelter Costs (Total Shelter Cost minus 50% of Adjusted Income)	$610.86	
Shelter Deduction (maximum allowable)	$610.86	
Net Income (Adjusted Income minus Shelter Deduction)	$2,722.86	
Monthly SNAP Entitlement (from USDA Table)		$0.00

6. Upon review of the aforementioned Agency's SNAP budget re-calculation and Social Security Award letters submitted and not in dispute, the Agency found that it had erred in the input of the Social Security Dependent Benefits for two children by entering $14.40 instead of $144.00 ($72.00 multiplied by two children). The following is the corrected SNAP budget calculation. The Agency determined that Appellant's household remains ineligible for continued receipt of SNAP benefits.

Income		
Gross Earned Income	$0.00	
Unearned Income:		
The Appellant's Social Security Disability	$902.00	
The Appellant Child's Social Security Dependent benefits	$72.00	
The Appellant Child's Social Security Dependent benefits	$72.00	
The Appellant Child's Social Security Dependent benefits	$72.00	
Child Support	$2,572.92	
Gross Unearned Income	$3,690.92	
Total Income (Gross Earned Income plus Gross Unearned Income)		$3,690.92
Deductions		
Earned Income Deduction	$0.00	
Standard Deduction	$165.00	
Allowable Medical Costs	$62.60	
Dependent Care	$0.00	
Total Deductions	$227.60	

Adjusted Income (Total Income minus Total Deductions)		$3,463.32
Shelter Costs		
Rent or Mortgage	$1,545.72	
Combined Heating/Cooling, Utilities and Telephone	$732.00	
Other Shelter Costs	$0.00	
Total Shelter Costs	$2,277.72	
50% of Adjusted Income	$1,731.66	
Excess Shelter Costs (Total Shelter Cost minus 50% of Adjusted Income)	$546.06	
Shelter Deduction (maximum allowable)	$546.06	
Net Income (Adjusted Income minus Shelter Deduction)	$2,917.26	
Monthly SNAP Entitlement (from USDA Table)		$0.00

7. The Appellant's household contains a member sixty years of age or older or disabled.

8. The Appellant's household is not a household in which all members are recipients or authorized to receive Family Assistance, Safety Net Assistance, Supplemental Security Income (SSI) benefits or TANF-funded services.

9. The Appellant incurs a monthly expense for shelter in the amount of $1,545.72.

10. The Appellant's household has received a Home Energy Assistance Program (HEAP) benefit during the most recent program year.

11. On November 4, 2014, the Appellant requested this fair hearing.

12. A fair hearing was held on December 2, 2014 and in a Decision After Fair Hearing dated December 5, 2014, the determination of the Agency to discontinue the Appellant's SNAP benefits was reversed by the Commissioner. Subsequently, after a review, it was determined that the prior Decision After Fair Hearing dated December 5, 2014 was incorrect as a matter of law. Accordingly, the prior Decision After Fair Hearing dated December 5, 2014 is vacated and the foregoing Amended Decision After Fair Hearing is issued in its place.

APPLICABLE LAW

The level of SNAP benefits to which a household is entitled is based on the household's net income. A household's net income is computed by subtracting from the gross household income certain exclusions and deductions which are allowable under the Federal Food and Nutrition Act (7 USC 2014), Code of Federal Regulations (7 CFR 273.9, 273.10 and 273.11), specific United States Department of Agriculture (USDA) instructions and the Regulations of the New York State Department of Social Services (18 NYCRR 387.11 and 387.12).

Pursuant to Department regulations at 18 NYCRR 387.12 and 18 NYCRR 387.15 and federal regulations at 7 CFR 273.9 and 273.10, allowable deductions include:

(1) A 20% deduction from earned income.

(2) A standard deduction equal to 8.31 percent of the applicable net income limit (poverty level) based on household size or $134, whichever is greater, and up to a maximum deduction equivalent to the deduction for a household of six persons.

(3) Actual dependent care costs which consist of costs for the care of a child or other dependents including an incapacitated adult when necessary for a household member to accept or continue employment, seek employment in compliance with the job search criteria (or an equivalent effort by those not subject to job search) or to attend training or to pursue education in preparation for employment. For the period beginning October 1, 2008, there is no limit to this deduction. Prior to that date, the deduction is capped at $200 per month for each dependent under age two, and $175 per month for each dependent age two and over.

(4) Excess shelter costs computed by subtracting 50% of adjusted income from the sum of the following items:

a. actual rent or mortgage payments;

b. if the household is billed separately and on a recurring basis for heating/cooling costs, the heating/cooling standard. If the household is eligible for the standard allowance for heating and/or cooling, or if the household is receiving a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment, the household is entitled to the combined standard allowance for heating and/or cooling, non-heat related utilities and telephone.

c. if the household is billed separately and on a recurring basis for utility costs other than heat, the utility standard. If the household is not eligible for the standard allowance for heating and/or cooling but is eligible for the standard allowance for utilities, the household is entitled to the combined standard allowance for non-heat related utilities and telephone.

d. if the household is not eligible for the standard allowance for heating and/or cooling or for the standard allowance for utilities, the household is entitled to the standard allowance for telephone;

e. any other allowable shelter costs.

The excess shelter deduction is limited to an amount published annually in the general notices in the Federal Register unless the household contains a member

sixty years of age or older or disabled. Where the household contains such a member, there is no limitation on the amount of the deduction.

(5) Allowable unreimbursed medical costs in excess of $35 monthly for those household members who are elderly or disabled.

Once the household's net income is determined, SNAP entitlement is determined by multiplying the net income amount by 30 percent. That figure, rounded up to the next whole dollar, is subtracted from the maximum SNAP allotment for the household size to determine the monthly SNAP entitlement. Alternatively, reference to the USDA Basis of Coupon Issuance Tables also provides the household's level of SNAP entitlement.

Under the SNAP Program in order to be eligible for SNAP benefits all households must meet a monthly gross income eligibility standard (gross income test) unless the household meets certain exemption requirements. Households in which all members are recipients of or authorized to receive Family Assistance, Safety Net Assistance or Supplemental Security Income are deemed categorically eligible for SNAP benefits and therefore are exempt from the gross and net income tests. 7 CFR 273.2(j), 18 NYCRR 387.14(a)(5). In addition, households containing a member who is elderly (sixty years of age or older) or who is disabled are not subject to the gross income test. Such households, however, must meet a net income eligibility standard. 7 CFR 273.9(a) and 18 NYCRR 387.10(a).

For households subject to the gross income test, the monthly gross income eligibility standard is 130 percent of the annual federal income poverty level divided by twelve. 7 CFR 273.9(a), 18 NYCRR 387.10(a).

For purposes of determining SNAP eligibility and entitlement, a household is composed of any of the following individuals or groups of individuals:

(a) An individual living alone; or

(b) An individual living with others but customarily purchasing food and preparing meals for home consumption separate and apart from others; or

(c) A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

7 CFR 273.1(a); 18 NYCRR 387.1.

The following individuals living with others or groups of individuals living together must be considered as customarily purchasing food and preparing meals together, even if they do not do so:

(a) a spouse of a member of the household;

(b) a child or children under 18 years of age, other than a foster child or foster children, under the parental control of an adult household member who is not the child's or children's parent or stepparent;

(c) parents and their child(ren) or stepchild(ren) 21 years of age or younger. For determinations prior to September 21, 1996, however, children or stepchildren age 21 or younger could be granted separate household status if they lived with their own children or spouses.

7 U.S.C. 2012(i); 7 CFR 273.1(a); 18 NYCRR 387.1.

Federal regulations at 7 CFR 273.5, and Department regulations at 18 NYCRR 387.1 dealing with SNAP eligibility for students at institutions of higher education, provide in pertinent part, as follows:

(a) Applicability. An individual who is enrolled at least half-time in an institution of higher education shall be ineligible to participate in the SNAP Program unless the individual qualifies for one of the exemptions contained in paragraph (b) of this section. An individual is considered to be enrolled in an institution of higher education if the individual is enrolled in a business, technical, trade or vocational school that normally requires a high school diploma or equivalency certificate for enrollment in the curriculum or if the individual is enrolled in a regular curriculum at a college or university that offers degree programs regardless of whether a high school diploma is required. In addition, Informational Letter 11 INF-06 clarifies that individuals enrolled in correspondence or online courses at least half time as defined by the institution will be considered full-time students if enrollment requires a high school diploma or equivalent.

Regulations at 18 NYCRR 387.11(i), provide that if the intended beneficiaries of a single payment are both household and non-household members, any identifiable portion of the payment intended and used for the care and maintenance of the non-household member shall be excluded. If the non-household member's portion cannot be readily identified, the payment shall be evenly prorated among intended beneficiaries and the exclusion applied to the non-household member's pro rata share or the amount actually used for the non-household member's care and maintenance, whichever is less.

DISCUSSION

At the hearing, the Appellant's representative asserted that the Agency only erred in its inclusion of the child support income for the two ineligible students which are not included in the Appellant's SNAP household. The representative argued that the pro-rata share of the Appellant's two sons who are excluded from the Appellant's SNAP household should be deducted from the Appellant's countable child support income, leaving a countable child support income of $356.25 for the purposes of the SNAP budget calculations. The representative submitted Title 18 NYCRR Section 387.11(5)(i), which indicates that any monies received and used for the care and maintenance of a third-party beneficiary who is not a household member should be excluded. The representative also submitted Decisions After Fair Hearing FH #

[redacted] and FH #[redacted] as basis for her argument. The representative argued that the facts in the aforementioned fair hearing decisions are strikingly similar to the instant case and it was held that the pro rata share of the child support of a child not included in the SNAP household should not be utilized as countable income in the SNAP budget. The representative respectfully requested that the Agency determination be reversed and the Agency be directed to re-calculate the Appellant's SNAP budget deducting the pro rata share of the child support received on behalf of the Appellant's two children which were removed from the Appellant's SNAP household count on the grounds that they were ineligible students.

The Appellant testified that the income from her ex-spouse has been sporadic, but acknowledged the receipt of $593.75 per week in child support. The Appellant contended that she utilizes the child support for all of her children, including her two older sons which were not included in her SNAP household. The Appellant stated that her older sons still reside with her even though they are not part of her SNAP household and she is responsible for the care and maintenance of them both and utilizes the child support funds to do so.

The Agency acknowledged that the shelter expense and medical expenses were not included in the original SNAP budget as verification of such expenses were not received prior to the issuance of the notice in question. The Agency stated that pursuant to the receipt of the verification of the Appellant's payment of the shelter expense and medical expenses and in preparation for this fair hearing, a subsequent budget was calculated and the Appellant remained ineligible for continued receipt of SNAP benefits.

The Agency then noted that the only income, aside from the Appellant household's Social Security income, included in the SNAP budget was the child support. The Agency further noted that the child support monies are received directly by the Appellant to be used as the Appellant wishes. The Agency submitted Title 18 NYCRR Section 387.10(3)(iii) which states, "unearned income shall include, but not be limited to: support or alimony payments made directly to the household from non-household members" in support of the Agency's position. The Agency noted that the Appellant's submission of Title 18 NYCRR Section 387.11, does not specifically cite child support of a non-household member as excludable income in such section.

There was no dispute as that the Appellant's eighteen and nineteen year old sons are ineligible students and the Appellant is in receipt of $593.75 per month in child support on behalf of her five children. The Appellant's sons attend college full-time and are not employed. While the child support benefit of $593.75 per month is received by the Appellant, the Appellant established that the pro-rata share of these funds was used solely for the care and maintenance of her two sons who attend college full-time. The Appellant credibly testified the pro-rata share of the child support monies in question were used exclusively for the Appellant sons' everyday expenses, such as school, clothing and food.

However, a review of the above-cited Regulation at 18 NYCRR 387.11(i) found that only the pro-rata share of the child who is living outside of the household should be excluded. Child support income is considered income to the household that is paid to and under the control of the parent. While exclusion of child support income paid for a child who is no longer a member of

the SNAP household is permitted when it can be demonstrated that the support is going to the child who is out of the household, there is no basis for excluding child support income paid to the parent for a child who is a member of a SNAP household, even if the child is an ineligible member due to student or employment status. The income for an ineligible child living at home who is otherwise required to be member of the SNAP should not be excluded, even on a pro-rata basis, simply because it is not his/her income. This income is given to the parent and is under the parent's control. Only a pro-rata share of the child support income for an ineligible student who is living outside of the SNAP household should be excluded as income.

The prior Decision After Fair Hearing number 6479136L cited by the Appellant's representative is distinguishable from the instant case in that the cited case involved the inclusion as income of one separately identifiable child support check that was issued for one ineligible college student in a household that consisted of the student and the parent and was being used exclusively for the support and maintenance of the child for whom it was intended. It was on this basis that the Commissioner found that this check should be excluded as income in computing eligibility for SNAP benefits for the parent.

In addition, the Appellant's representative also cited prior Decision After Fair Hearing number 6571007K in support of her position. However, that case is also distinguishable from the instant case in that the appellant in this cited case was receiving a separate and identifiable child support payment for a child who was residing outside of the household. The Decision After Fair Hearing number 6571007K found that on this basis, this income should be excluded from determining eligibility for SNAP.

Based on the foregoing, the Agency correctly determined to discontinue the Appellant's SNAP benefits by including child support payments in the amount of $593.75 per month in its computation of eligibility.

DECISION

The Agency's determination to discontinue the Appellant's SNAP benefits is correct.

DATED: Albany, New York
12/30/2014

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By

Commissioner's Designee

EXHIBIT B

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

In the Matter of Tina Leggio,

Petitioner,

-against-

SHARON DEVINE, as Executive Deputy Commissioner of the State of New York Office of Temporary Disability Assistance, and JOHN O'NEIL, as Commissioner of the Suffolk County Department of Social Services,

Respondents.

x----------x

INDEX NO.:10161/2015

SEQ. NOS.:001-MOT D
002-MOT D

JEFFREY A. SEIGEL, ESQ.
By: Beth Zweig, Esq.
Attorney for Petitioner
Nassau/Suffolk Services, Committee, Inc.
175 Veterans Highway, Suite 50
Islandia, NY 11749

ERIC T. SCHNEIDERMAN
Attorney General
By: Susan M. Connolly, Esq.
Attorney for Respondent
Sharon Devine
300 Motor Parkway, Suite 230
Hauppauge, NY 11788

DENNIS M. BROWN
Suffolk County Attorney
Attorney for Respondent
Suffolk County Dept. Of Social Services
By: Christopher M. Gatto, Esq.
H. Lee Dennison Building,
PO Box 6100, 100 Vets. Mem. Highway
Hauppauge, NY 11788-0099

Upon the following papers numbered 1 to 27 read on this Motion/Order to Show Cause for Article 78 (001); Notice of Motion/ Order to Show Cause and supporting papers 1-22; Notice of Cross Motion and supporting papers 23-25 (002); ~~Answering Affidavits and supporting papers 0;~~ Replying Affidavits and supporting papers 26-27; Other 0; ~~(and after hearing counsel in support and opposed to the motion)~~, it is

ORDERED, that Respondent, John O'Neil as Commissioner of the Suffolk County Department of Social Services' cross-motion to dismiss is granted. The petition is dismissed as to that Respondent; and with the exception of the claim against Commissioner O'Neil and DSS, it is further

ORDERED that this proceeding is respectfully transferred to the Appellate Division, Second Judicial Department, in accordance with CPLR 7804 (g).

Petitioner, Tina Leggio, brings the instant petition for an order pursuant to CPLR Article 78, vacating and annulling the decisions of Respondents, New York State Office of Temporary and Disability Assistance [OTDA] and Suffolk County Department of Social Services [DSS], which rendered a determination to discontinue Petitioner's Supplemental Nutrition Assistance Benefits. Respondent OTDA has filed an answer to the petition and Respondent DSS has cross-moved to dismiss.

The Court first considers the cross-motion to dismiss, which Petitioner opposes. Respondent DSS so moves pursuant to CPLR Rule 3211 and § 7804, arguing that it is bound by the DOH determination. The Court agrees. DOH's fair hearing decision is final and bonding upon DSS and DSS must comply with it and therefore the proceeding must be dismissed as against it, see, 18 NYCRR 358-6.1(b); ***Matter of Weiss v Suffolk County Department of Social Services***, 121 AD3d 703 (2nd Dept 2014); ***Matter of Niosi v Blass***, 94 AD3d 892 (2nd Dept 2012); ***Matter of Fells v Hansell***, 77 AD3d 841 (2nd Dept 2010); ***Matter of Loiacono v Demarzo***, 72 AD3d 969 (2nd Dept 2010); ***Matter of Baker v Mahon***, 72 AD3d 811 (2nd Dept 2010). The Second Department has consistently upheld the dismissal of actions equivalent to this one as to County Departments of Social Services, citing the language of 18 NYCRR 358-6.1(b), which states:

> (b) Upon Issuance, the decision is final and binding upon social services agencies and must be complied with in accordance with section 358-6.4 of this Subpart.

The petition therefore is dismissed as to Respondent Suffolk County DSS.

With regard to Petitioner's remaining contentions, she raises the issue of substantial evidence and remaining Respondent also recognizes this issue as unresolved. When an Article 78 petition raises an issue as to whether an administrative hearing determination is supported by substantial evidence, the court in which the action is commenced must transfer the proceeding to the Appellate Division (CPLR 7803 [4]; CPLR 7804 [g]; *see* ***Vega v Coughlin,*** 202 AD2d 597, 609 NYS2d 262 [2d Dept 1994]). Since lack of substantial evidence has been raised by Petitioner, this Court is bound to transfer the remaining

proceeding against Sharon Divine as Executive Deputy Commissioner of the State of New York Office of Temporary Disability Assistance to the Appellate Division (*see* ***Kaplowitz v Jackson,*** 267 AD2d 239, 699 NYS2d 312 [2d Dept 1999]). Accordingly, this proceeding is respectfully transferred to the Appellate Division, Second Judicial Department. The Clerk of this Court is directed to transfer the file in this matter to the Clerk of the Supreme Court, Appellate Division, for the Second Judicial Department.

The foregoing constitutes the decision and Order of the Court.

DATED: APRIL13, 2016
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

FILED

2016 APR 20 P 12:35

JUDITH A. PASCALE
SUFFOLK COUNTY CLERK

EXHIBIT C

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M216002
E/ct

MARK C. DILLON, J.P.
RUTH C. BALKIN
SANDRA L. SGROI
HECTOR D. LASALLE, JJ.

2016-05966 DECISION & ORDER ON MOTION

In the Matter of Tina Leggio, petitioner,
v Sharon Devine, etc., et al., respondents.

(Index No. 10161/15)

Motion by the petitioner pro se for leave to prosecute a proceeding pursuant to CPLR article 78, which was transferred to this Court by an order of the Supreme Court, Suffolk County, dated April 13, 2016, as a poor person.

Upon the papers filed in support of the motion and no papers having been filed in opposition or in relation thereto, it is

ORDERED that the branch of the motion which is for leave to prosecute the proceeding on the original papers is granted, and the proceeding will be heard on the original papers (including the transcript of the proceedings, if any) and on the briefs of the parties, who are directed to file nine copies of their respective briefs and to serve one copy on each other; and it is further,

ORDERED that the branch of the motion which is to waive payment of the filing fee is denied as unnecessary as no filing fee is payable in a proceeding pursuant to CPLR article 78 that was transferred to this Court by an order of the Supreme Court; and it is further,

ORDERED that the motion is otherwise denied.

DILLON, J.P., BALKIN, SGROI and LASALLE, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

August 5, 2016

EXHIBIT D

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL

March 1, 2018

Beth Cristol Zweig
Nassau Suffolk Law Service Committee, Inc.
1757 Veterans Highway, Suite 50
Islandia, NY 11749

Re: *Matter of Leggio v. Devine*, No. 2016-05966

Dear Ms. Zweig:

Please take notice that the enclosed is a true and correct copy of the Decision and Judgment entered on February 28, 2018 by the Office of the Clerk of the Appellate Division, Second Department in *Matter of Matter of Leggio* v. Devine, No. 2016-05966.

Please be advised that service of a cover letter together with an order or judgment constitutes service of that order or judgment with notice of entry. *Norstar Bank of Upstate N.Y. v. Office Control Sys., Inc.*, 78 N.Y.2d 1110 (1991).

Sincerely,

Andrew W. Amend
Senior Assistant Solicitor General
212-416-8022

Encl.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D54473
C/hu

_____AD3d_____

Argued - November 13, 2017

L. PRISCILLA HALL, J.P.
SYLVIA O. HINDS-RADIX
JOSEPH J. MALTESE
ANGELA G. IANNACCI, JJ.

2016-05966

DECISION & JUDGMENT

In the Matter of Tina Leggio, petitioner, v Sharon Devine, etc., et al., respondents.

(Index No. 10161/15)

Jeffery Seigel, Islandia, NY (Beth C. Zweig of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York, NY (Andrew W. Amend and Philip V. Tisne of counsel), for respondent Sharon Devine.

Proceeding pursuant to CPLR article 78 to review an amended determination of a designee of the Commissioner of the New York State Office of Temporary and Disability Assistance dated December 30, 2014, which, after a fair hearing pursuant to Social Services Law § 22 and 18 NYCRR part 358, affirmed a determination of the Suffolk County Department of Social Services discontinuing the petitioner's Supplemental Nutritional Assistance Program benefits.

ADJUDGED that the amended determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, without costs or disbursements.

In October of 2014, the petitioner applied to the Suffolk County Department of Social Services (hereinafter the agency) to continue her Supplemental Nutritional Assistance Program (hereinafter SNAP) benefits, commonly known as food stamps. At that time, the petitioner lived with, among others, five of her children, who were all under the age of 21 years. Two of the petitioner's children, then 18 and 19 years old, respectively, were full-time college students (hereinafter together the college students). When determining whether the petitioner was eligible to have her SNAP benefits continued, the agency did not count the college students as part of the household because they were adults over the age of 18 years attending college full time who did not qualify for an exemption from work requirements (*see* 7 CFR 273.5[a]; 18 NYCRR 387.1[x], [jj]). However, the agency did count as household income the entire amount of child support received by the petitioner for all five of her children under the age of 21 years, including the college students.

Based upon those calculations, the agency, by notice dated October 16, 2014, advised the petitioner that her SNAP benefits were discontinued (hereinafter the October 2014 determination).

After a fair hearing, in an amended determination dated December 30, 2014, the New York State Office of Temporary and Disability Assistance (hereinafter OTDA), by a designee of its Commissioner, affirmed the October 2014 determination. OTDA determined that the child support attributable to the college students should be included in household income, on the grounds that the college students were not living outside the household, and the child support was given to the petitioner and was under her control. The petitioner commenced this proceeding pursuant to CPLR article 78 challenging the amended determination. The Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804(g) to consider whether the determination was supported by substantial evidence.

The facts of this case are for the most part undisputed, and the crux of this case is an interpretation of the applicable regulations. Therefore, as the petition did not raise a question of substantial evidence, the transfer of this proceeding to this Court was erroneous. Nevertheless, in the interest of judicial economy, this Court will decide the proceeding on the merits (*see Matter of Benjamin v McGowan*, 275 AD2d 290, 291; *Matter of Church v Wing*, 229 AD2d 1019, 1019-1020; *Matter of Molloy v Bane*, 214 AD2d 171, 173; *Matter of City School Dist. of City of Elmira v New York State Pub. Empl. Relations Bd.*, 144 AD2d 35, 37, *affd* 74 NY2d 395).

The petitioner's primary contention is that she was entitled to SNAP benefits because "the income of college students who are ineligible for SNAP benefits must be excluded from the income calculation of the SNAP household" pursuant to federal and state regulations. She also claims that this exclusion is supported by a determination made by OTDA in a different case on November 8, 2013 (hereinafter the November 2013 determination). In response, OTDA contends, among other things, that the child support attributable to the college students should not be excluded from the income calculation of the petitioner's household because child support payments are income to the parent, not income to the child. OTDA's contention is without merit. A child support obligation differs from alimony or spousal support, in that it is an obligation "to the child, not to the payee spouse, [therefore] the death of the payee spouse does not terminate the obligation" (*Matter of Modica v Thompson*, 300 AD2d 662, 663). "'A custodial parent, a foster parent or the Commissioner of Social Services are no more than conduits of that support from the noncustodial parent to the child'" (*id.* at 663, quoting *Matter of Commissioner of Social Servs. v Grifter*, 150 Misc 2d 209, 212 [Fam Ct, NY County]). The regulations provide for the prorating of a single payment which is for the benefit of several persons (*see* 7 CFR 273.9[c][6]; 18 NYCRR 387.11[i]). In this case, the pro rata portion of the child support award attributable to each child can be readily identified by dividing the award by the number of children.

The petitioner's contention that OTDA must apply the reasoning of the November 2013 determination to the instant case is without merit. Administrative agencies are "free, like courts, to correct a prior erroneous interpretation of the law" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519). The November 2013 determination was erroneous and, therefore, should not be followed. In that case, and in the instant case, the college students were part of the household pursuant to 7 USC § 2012(m)(2) and 18 NYCRR 387.1(x)(2)(i)(c). They were disqualified from receiving benefits, primarily because they do not comply with work requirements. Therefore, they could not be counted in determining the number of persons in the household, but

their pro rata share of child support was includable in household income.

The petitioner contends that the income of the college students should have been excluded pursuant to 7 CFR 273.11(d) and 18 NYCRR 387.16(d), both of which address the "treatment of income and resources of other nonhousehold members." However, inclusion of income from certain specific persons who shall not be considered members of the household in determining house size is explicitly provided for in 7 CFR 273.11(c)(1). These include persons disqualified because of "an intentional Program violation, a felony drug conviction, their fleeing felon status, noncompliance with a work requirement of [7 CFR] 273.7, or imposition of a sanction while they were participating in a household disqualified because of failure to comply with workfare requirements" (7 CFR 273.11[c][1]). The college students, as noted above, were disqualified primarily because of their failure to comply with work requirements.

Pursuant to 7 CFR 273.7(a)(1), "[a]s a condition of eligibility for SNAP benefits, each household member not exempt under paragraph (b)(1) of this section must comply with the following SNAP work requirements," including registering for work. According to 7 CFR 273.7(b)(1)(viii), students enrolled at least half time in institutions of higher education are only exempt if they meet "the student eligibility requirements listed in" 7 CFR 273.5(b), which includes students under 18, students with special needs, students in work study programs, or students employed for a minimum of 20 hours per week.

Similarly, 18 NYCRR 387.16(d) provides for the inclusion of income from nonhousehold members who have been disqualified for an intentional program violation, ineligible alien status, failure to attest to citizenship or alien status, or failure to comply with a food stamp work registration or work requirement as provided in 18 NYCRR 385.3. Under 18 NYCRR 385.3 and 18 NYCRR 387.1(jj), such students are not exempt from work requirements, and are not eligible for food stamps. Pursuant to 18 NYCRR 387.16(d) their income has to be included in household income.

The college students were not employed a minimum of 20 hours per week or otherwise eligible for an exemption. Accordingly, their income was properly included in household income.

In view of the foregoing, the amended determination was correct.

HALL, J.P., HINDS-RADIX, MALTESE and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

EXHIBIT E

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

June 29, 2018

Beth C. Zweig, Esq.
Nassau Suffolk Law Services Committee, Inc.
1757 Veterans Highway, Suite 50
Islandia, NY 11749-1535

Re: *Leggio v. Devine*, No. 2016-05966

Dear Ms. Zweig:

Please take notice that the enclosed is a true and correct copy of the Decision and Order on Motion entered on June 28, 2018 by the Office of the Clerk of the Appellate Division, Second Department in *Leggio v. Devine*, No. 2016-05966. Please be advised that service of a cover letter together with an order or judgment constitutes service of that order or judgment with notice of entry. *Norstar Bank of Upstate N.Y. v. Office Control Sys., Inc.*, 78 N.Y.2d 1110 (1991).

As authorized by this Decision and Order on Motion, please remit a check for $100.00 payable to "New York State Department of Law." The total represents statutory costs ($100) pursuant to C.P.L.R. article 82. You may send the check to my attention.

Sincerely,

Andrew W. Amend
Senior Assistant Solicitor General
212-416-8022

Encl.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M251808
E/sl

SYLVIA O. HINDS-RADIX, J.P.
JOSEPH J. MALTESE
HECTOR D. LASALLE
ANGELA G. IANNACCI, JJ.

2016-05966 DECISION & ORDER ON MOTION

In the Matter of Tina Leggio, petitioner,
v Sharon Devine, etc., et al., respondents.

(Index No. 10161/15)

Motion by the petitioner for leave to reargue a proceeding pursuant to CPLR article 78 to review an amended determination of a designee of the Commissioner of the New York State Office of Temporary and Disability Assistance dated December 30, 2014, which was determined by decision and judgment of this Court dated February 28, 2018, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

HINDS-RADIX, J.P., MALTESE, LASALLE and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

June 28, 2018

MATTER OF LEGGIO v DEVINE

EXHIBIT F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

In the Matter of the Application of

TINA LEGGIO,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules

-against-

SHARON DEVINE, et al.,

Respondent-Respondent.

Docket No. 2016-05966
Supreme Court,
Suffolk County
Index No. 10161/15

AFFIRMATION IN OPPOSITION TO MOTION FOR REARGUMENT AND LEAVE TO APPEAL

ANDREW W. AMEND, an attorney admitted to practice law in the State of New York, who is not a party to this appeal, under penalty of perjury affirms:

1. I am a Senior Assistant Solicitor General in the Office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for respondent Sharon Devine, sued in her official capacity as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance (OTDA),[1] in this C.P.L.R. article 78 proceeding. I submit this affirmation in opposition to petitioner Tina Leggio's motion for reargument of,

[1] Barbara Guinn is currently Executive Deputy Commissioner of OTDA.

or alternatively, leave to appeal from, this Court's decision and order dated February 28, 2018.

2. In its decision, this Court upheld OTDA's denial of petitioner's application for benefits under the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. *Matter of Leggio v. Devine*, 158 A.D.3d 803, 803 (2d Dep't 2018). Petitioner's application for reargument should be denied because that outcome was correct. Alternatively, should reargument be granted, it should be limited to modifying the opinion, but not the result, in accordance with the points set forth below. In any event, her application for leave to appeal should be denied because she fails to identify any leave-worthy issue.

BACKGROUND

3. The statutory, regulatory and factual background of this case is set forth in respondent's brief. See Brief for State Respondent ("State Br.") at 3–10. The following recitation is provided for the Court's convenience.

4. SNAP is a federal program that provides assistance to low-income households to buy food. *See* 7 U.S.C. § 2011. The program is created by federal statute, *see id.* §§ 2011–2036c, and is implemented through detailed federal and state regulations, *see* 7 C.F.R. §§ 273.1–285.5; 18 N.Y.C.R.R. §§ 387.0–387.25.

5. The SNAP program provides benefits to "households," which, as relevant here, are groups of individuals who live together and typically purchase food and consume meals together. *See* 7 U.S.C. § 2012(m)(1)(B); *see also* 7 C.F.R. § 273.1; 18 N.Y.C.R.R. § 387.1(x). Certain groups of individuals, including "parents and their children 21 years of age or younger who live together," *must* be treated as households regardless of their actual food-purchasing and meal-consumption habits. 7 U.S.C. § 2012(m)(2).

6. A household is eligible for benefits based on its total income, less certain enumerated deductions and exclusions, which is compared against an income threshold to determine what benefits, if any, the household is entitled to receive to supplement its food-purchasing power. *See id.* § 2014; *see also* 7 C.F.R. § 273.9; 18 N.Y.C.R.R. §§ 387.10–387.12. The SNAP regulations about income—including income exclusions and deductions—are referred to herein as the "SNAP income rules."

7. This case concerns how to treat child support payments under the SNAP income rules.

8. The relevant facts are undisputed. At all relevant times, petitioner resided with her five children under the age of twenty-two and received from

her former spouse a monthly child support payment to support all five of them.[2] Two of those children were ineligible to receive SNAP benefits, however, because they were enrolled full-time in college and had not complied with the program's eligibility rules for students. See State Br. at 8; *see also* 7 C.F.R. § 273.5 (student eligibility requirements); 18 N.Y.C.R.R. §§ 387.1(aj), 387.9(a)(3) (same).

9. In the determination challenged here, OTDA included in petitioner's household income the entire child support payment received from her former spouse. As a result, petitioner's household income exceeded the applicable threshold to qualify for SNAP. Suffolk County Department of Social Services accordingly denied her application for SNAP benefits, and OTDA upheld the denial. See State Br. at 9–10. Petitioner then challenged the denial by bringing this article 78 petition in Supreme Court, Suffolk County, which transferred the matter to this Court.

10. This Court confirmed the denial of benefits, denied the petition, and dismissed the proceeding on the merits. *Matter of Leggio*, 158 A.D.3d at 803. In doing so, this Court disagreed with OTDA's position that the child

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[2] A sixth child who is twenty-two years old also lives with the petitioner but was not included in her SNAP application and therefore is not pertinent to the issues in this litigation. See State Br. at 8.

support petitioner received to care for her two ineligible-student children should be treated as her income rather than the children's income (*id.* at 804), but it held that the money should be included in petitioner's household income in any event because one of the SNAP income rules, that prescribed by 7 C.F.R. § 273.11(c)(1), requires inclusion of the income of individuals who are ineligible for SNAP for failing to comply with the program's general work requirements imposed by 7 C.F.R. § 273.7. *Matter of Leggio*, 158 A.D.3d at 805–06.

11. Petitioner now seeks reargument, contending that the disputed child support should have been excluded from her household income because a different SNAP income rule, that prescribed by 7 C.F.R. §§ 273.5(d) and 273.11(d)(1), requires exclusion of the income of individuals who are ineligible for SNAP for failing to comply with the program's specific student-eligibility requirements imposed by 7 C.F.R. § 273.5. *See* Aff. in Support of Mot. for Reargument and/or Leave to Appeal ("Pet. Aff.") ¶¶ 4–6. Alternatively, petitioner seeks leave to appeal to the Court of Appeals. For the reasons that follow, both branches of the motion should be denied.

REASONS REARGUMENT SHOULD BE DENIED

12. The question presented in this litigation is whether OTDA rightly included in petitioner's household income the child support paid to petitioner to care for her two SNAP-ineligible student children. The answer to that question is yes, notwithstanding petitioner's argument that the income of

ineligible students should be excluded from their households' income under 7 C.F.R. §§ 273.5(d) and 273.11(d)(1) rather than included in household income under 7 C.F.R. § 273.11(c)(1). Granted, petitioner's argument would appear to have merit if the child support at issue here was in fact the income of her two SNAP-ineligible students—but it is not.

13. Child support paid to a custodial parent for the care of children under age twenty-two who live at home is properly treated as income of the custodial parent, and not that of the child, regardless of whether the child is a SNAP-ineligible college student. Accordingly, the child support at issue here is not subject to 7 C.F.R. § 273.11(c)(1) *or* 7 C.F.R. § 273.11(d)(1). Both of those provisions apply to the income of SNAP-ineligible household members. The child support at issue here does not qualify because it is not the income of petitioner's SNAP-ineligible children. Instead, it is petitioner's.

A. The Child Support Paid to Petitioner to Support All of Her Children, Including Her Two SNAP-Ineligible Student Children, Is the Petitioner's Income and Not Her Children's.

14. Petitioner is not entitled to SNAP benefits because, for the limited and specific purpose of applying the SNAP income rules, child support payments are properly considered income of the custodial parent to whom the support is paid (in this case, the petitioner), not income of the supported child (in this case, petitioner's five youngest children, including her two SNAP-ineligible student children).

15. As the State's brief explained (at 13–21), this rule is reasonable in light of the particular nature and purposes of SNAP. When, as here, child support is paid to a custodial parent to care for children living in the home, that parent retains the sole right to control and use the funds received. It thus makes sense to attribute child support to the custodial parent, particularly for purposes of assessing the food-purchasing power of that parent's household: once the support is received, the custodial parent has wide discretion to spend it on goods or services that benefit the entire household, including food.

16. In addition, the federal tax treatment of child support payments supports the conclusion that they should be treated as parental income for purposes of SNAP. Federal tax law does not treat child support payments as income to the child; instead, it treats it as a transfer of parental income—specifically, as a transfer (that is not itself subject to taxation) of after-tax income from the noncustodial parent to the custodial parent. *See* Dep't of the Treasury, Internal Revenue Service Publication 504, at 17 (Nov. 3, 2016).

17. Moreover, while petitioner argued that child support payments should be treated as child income and not parental income based on materials relating to the Supplemental Security Insurance (SSI) program, the legislative history contradicts that claim. It shows that Congress intended household income under the Food Stamp Program (now SNAP) to include child support payments in their entirety, *see* H.R. Rep. No. 95-464, at 24, 29, *reprinted in*

1977 U.S.C.C.A.N. 1978, 2001, 2006, 1977 WL 16051, even though it was aware that child support was treated differently for purposes of SSI, *see id.* at 24, 1977 U.S.C.C.A.N. at 2000–01. As the State explained (State Br. at 17–18), this different treatment made sense because SSI is designed to ensure that qualifying *individuals* have a minimum level of resources, whereas SNAP focuses on the food-purchasing power of *households*, and child support is a form of income available to the custodial parent to purchase food for the entire household.

18. To be sure, this Court reached a different conclusion in determining that the child support at issue here should be treated as the income of petitioner's two SNAP-ineligible student children, rather than of petitioner, for purposes of SNAP. *Matter of Leggio*, 158 A.D.3d at 804. This Court relied for that conclusion on decisions broadly stating that child support is considered an obligation "to the child, not to the payee spouse," *Matter of Modica v. Thompson*, 300 A.D.2d 662, 663 (2d Dep't 2002), and that custodial parents are "'no more than conduits of that support from the noncustodial parent to the child,'" *id.* (quoting *Matter of Commissioner of Social Servs. v. Grifter*, 150 Misc. 2d 209, 212 (Fam. Ct. N.Y. County 1991)). *See Matter of Leggio*, 158 A.D.3d at 804. Notwithstanding the broad language of those decisions, however, they do not warrant the rejection of OTDA's conclusion that child support received by a custodial parent should be treated as parental

income, not child income, for purposes of SNAP—an interpretation of the SNAP income rules that is rational and entitled to deference (see State Br. at 17).

19. *Matter of Modica* and *Grifter* both involved disputes over the source and scope of a parent's obligation to pay child support as a matter of state law. Neither decision addressed the distinct question of whether child support payments received by a custodial parent are parental income under the federal SNAP program. In fact, neither decision involved the SNAP program at all—and no decision of which we are aware has applied the principles they state to disputes over the SNAP income rules at issue here.

20. Indeed, neither decision addressed the question of whether child support payments constitute parental income as opposed to child income for any purpose.

21. In *Matter of Modica*, a noncustodial father sought reimbursement of child support collected through the garnishment of his wages by a child support collection unit after the death of the children's custodial mother. *See* 300 A.D.2d at 662; *see also* Social Services Law § 111-h (requiring every social services district to establish support collection unit to assist private parties in enforcing child support orders). This Court rightly rejected the father's argument that the death of the children's mother terminated his obligation to pay child support. *Matter of Modica*, 300 A.D.2d at 662–63. And it rightly

granted the competing application of one of the children's grandparents, who obtained custody after the mother's death, to collect the accrued child support from the support collection unit and modify the support order to reflect the change of custody. *Id.* At no point, however, did this Court address the issue of whether the child support the father owed (and continued to owe after his former wife's death) should be treated as income of the children, as opposed to their mother, or, later, their grandparents. That issue simply did not arise.

22. *Grifter* likewise involved an improper attempt by a noncustodial father to claim that his obligation to pay child support ceased once his daughter stopping living with her mother. *See id.* at 209–10. The child support order in that case had been obtained by the Commissioner of Social Services pursuant to assignment from the mother at a time when the child lived with the mother. *Id.* at 210. The child was later placed in foster care as the result of a child protective proceeding against the mother under article 10 of the Family Court Act. *Id.* The father then sought termination of the support order and a refund of all child support paid to the Commissioner following the child's placement in foster care, on the theory that the support order had in effect been obtained by the Commissioner standing in the place of a then-custodial parent who no longer had custody. *Id.* The Family Court rightly rejected the father's argument that his daughter's placement in foster care terminated his obligation to support her. *Id.* at 212. The court did not decide, however,

whether the child support the father owed (and continued to owe) should be treated as income of the child, as opposed to her mother, or her foster parents, or any other person with custody and the concurrent obligation to care for her. As in *Matter of Modica*, that issue did not arise.

23. To be sure, *Grifter* used sweeping terms, echoed by *Matter of Modica*, to describe custodial parents (among others responsible for the collection of child support or care of a supported child) as "no more than conduits" of child support from a noncustodial parent to the child. 150 Misc. 2d at 212. However, it would be a mistake to apply that broad language to require that child support is *income* of the child, as opposed to the child's custodial parent, for any purpose—let alone for the particular purposes of the federal SNAP program, which was not at issue in *Grifter* or *Matter of Modica*.

24. In fact, New York law recognizes in important respects that a child support payment belongs *not* to the supported child, but instead (as relevant here) to the custodial parent to whom the support is owed and paid. For instance, it is widely recognized that "the right to receive child support belongs to the custodial parent, not to the child." *Miller v. Miller*, 82 A.D.3d 469, 470 (1st Dep't 2011). Thus, "barring unusual circumstances, children have no standing to enforce the periodic support provisions of their parents' separation agreement." *Drake v. Drake*, 89 A.D.2d 207, 212 (4th Dep't 1982). Furthermore, even if such circumstances are present, such as where a custodial parent

refuses to seek enforcement of a child support provision, "any waiver of past due periodic support payments effectuated by the failure of the [custodial parent] to compel enforcement will effectively bind the [custodial parent] as to such payments," and "such waiver is effective against the beneficiary"—i.e., the supported child—as well. *Id.* at 212–13.

25. These principles are inconsistent with the notion that child support should be treated as income belonging to the supported child, as opposed to his or her custodial parent. So, too, is this Court's decision in *Dembitzer v. Rindenow*, 35 A.D.3d 791 (2d Dep't 2006). That case involved a dispute over arrears in child support that had accrued prior to the death of the children's mother, who had been their custodial parent; at the time of the litigation, the children were living with their father, who had formerly been their noncustodial parent and who owed the arrears. *Id.* at 792–93. This Court held that the arrears must be paid to the mother's estate. *See id.* In doing so, it rejected the trial court's view that paying the arrears to the estate would improperly "divert[] funds needed for the children's current needs, without any assurance that the children would receive any benefit from the estate after satisfaction of debts." *Id.* at 793. That outcome contradicts the idea that a custodial parent is for all purposes simply a conduit for child support, as opposed to the owner of the support—including all amounts payable under a support order designating him or her as the payee.

26. In any event, nothing in the relevant statutes or legislative history suggests that when Congress designed the *federal* SNAP program, it intended to have *state*-law principles governing the obligation to pay child support control whether that support, once paid, constitutes income of the supported child or the receiving parent. To the contrary, Congress was aware when it revamped that program in 1977 that the governing income rules would be *sui generis* and might conflict with other areas of the law. *See* H.R. Rep. No. 95-464, at 24, 29, *reprinted in* 1977 U.S.C.C.A.N. at 2000–01, 2006.

27. All of these points reinforce the conclusion that child support is properly treated as income of the custodial parent for purposes of the SNAP income rules at issue in this case. OTDA therefore properly included in petitioner's household income the child support she received to care for all of her supported children, and petitioner's SNAP application was rightly denied.

B. Because of the Foregoing Analysis, Petitioner's Contention That the Income of SNAP-Ineligible College Students Should Be Excluded from Household Income Is Rendered Irrelevant.

28. Petitioner's core contention is that this Court erred in determining that the child support she received to care for her two SNAP-ineligible student children should be included in her household income under 7 C.F.R. § 273.11(c)(1), rather than excluded under 7 C.F.R. §§ 273.5(d) and 273.11(d)(1). *See* Pet. Aff. ¶¶ 4–6. That contention is irrelevant to the outcome of this case because the application of either 7 C.F.R. § 273.11(c)(1) or

7 C.F.R. § 273.11(d)(1) requires a threshold finding that the child support at issue is income belonging to petitioner's SNAP-ineligible student children, and not to petitioner. For the reasons stated above (at ¶¶ 14–27), no such finding can be made here.

29. Nevertheless, in the interests of completeness, and of aiding the Court in the proper disposition of SNAP cases that do involve income and resources belonging to SNAP-ineligible college students, we address here petitioner's argument that such income and resources are properly excluded from household income under 7 C.F.R. §§ 273.5(d) and 273.11(d)(1), rather included under 7 C.F.R. § 273.11(c)(1).

30. Petitioner's argument may be appropriate as applied to income and resources that, unlike the child support at issue here, belong to a college student who is ineligible to receive SNAP—such as wages from a job at which the student works fewer than twenty hours a week. *Cf.* 7 C.F.R. § 273.5(b)(5) (requiring that college students work at least twenty hours a week to be eligible for SNAP). However, this is not the case at bar.

31. In any event, this Court's conclusion rested on an understandable construction of 7 C.F.R. §§ 273.7 and 273.11(c)(1), one that is facially consistent with the language of those regulations—but one that the overall regulatory structure and history indicate is ultimately not the best reading.

32. In particular, this Court relied on 7 C.F.R. § 273.11(c)(1)'s language requiring the inclusion in household income of any income and resources belonging to individuals ineligible to participate in SNAP due to, among other things, "noncompliance with a work requirement of [7 C.F.R.] § 273.7." As this Court pointed out, 7 C.F.R. § 273.7(a) imposes work requirements on every member of a household seeking SNAP benefits unless he or she qualifies for an exemption enumerated in 7 C.F.R. § 273.7(b). *See Matter of Leggio*, 158 A.D.3d at 805. In addition, this Court reasoned, 7 C.F.R. § 273.7(b)(1)(viii), which applies to college students (such as petitioner's children), exempts them from the work requirements of 7 C.F.R. § 273.7(a) only "if they meet 'the student eligibility requirements listed in' 7 C.F.R. § 273.5(b).'" *Id.* (quoting 7 C.F.R. § 273.7(b)(1)(viii)).

33. This Court thus read 7 C.F.R. § 273.7(b)(1)(viii) as exempting college students from the work requirements of 7 C.F.R. § 273.7(a), but solely on the condition that those students fulfill the separate student-eligibility criteria outlined in 7 C.F.R. § 273.5(b). On that view, where, as here, a student does not meet those separate student-eligibility criteria, the student loses his or exemption from the work requirements of 7 C.F.R. § 273.7(a) and becomes subject to them—such that a failure to fulfill them means the student is in "noncompliance with a work requirement of [7 C.F.R.] § 273.7" and must have his or her income included his or her household's income, 7 C.F.R. § 273.11(c)(1).

34. Although that reading of 7 C.F.R. §§ 273.7 and 273.11(c)(1) is understandable in light of the language of those provisions, the overall structure and history of the SNAP reflect a conscious decision by Congress and the U.S. Department of Agriculture—the federal agency responsible for implementing the federal SNAP statute and issuing federal SNAP regulations—to treat college students and their income differently.

35. That structure and history evince an intent to exempt college students from the work requirements set forth in 7 C.F.R. § 273.7(a) altogether and to have their SNAP eligibility instead determined entirely on the basis of the separate student-eligibility criteria set forth in 7 C.F.R. § 273.5(b). Thus, a student's failure to fulfill those separate eligibility criteria will prevent the student from receiving SNAP benefits—but will not subject the student to the work requirements of 7 C.F.R. § 273.7. *See* Food Stamp Program: Work Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 64 Fed. Reg. 72,196, 72,199 (Dec. 23, 1999), 1999 WL 1242262 (noting statutory exemption from SNAP work requirements if an individual is "a student," and noting that exempted persons are "no longer subject to the work requirements or to the attendant penalties for noncompliance"); 7 U.S.C. § 2015(d)(2)(C), (e) (exempting students from work requirements while providing that college students are ineligible for SNAP unless they meet separate SNAP-eligibility rules applicable only to students).

36. This distinctive treatment of students dates to the adoption of the Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, 94 Stat. 357, and implementing regulatory amendments, 1980 Food Stamp Amendments; Eligibility Limits, 45 Fed. Reg. 46,036 (July 8, 1980) (available in Westlaw).

37. Prior to the adoption of the 1980 Act and regulatory amendments, students were subject to different eligibility requirements and different rules governing the treatment of their income if they were ineligible.

38. With respect to eligibility, students were subject to the same work requirements as all other household members during any school vacation or recess of more than thirty days. *See* 45 Fed. Reg. at 46,036; 7 U.S.C. § 2015(d)(1), (d)(2)(D), (e) (Supp. III 1980). In addition, they were required to register to work at least twenty hours a week during the school year unless they met certain other criteria (such as already working twenty hours a week). *See* 45 Fed. Reg. at 46,036; 7 U.S.C. § 2015(d)(1), (d)(2)(D), (e) (Supp. III 1980). Moreover, no student was eligible for Food Stamps under any circumstances if a family member could claim him or her as a dependent for federal income-tax purposes, unless the family member also qualified for Food Stamps. *See* 45 Fed. Reg. at 46,036; 7 U.S.C. § 2015(e)(3)(A) (Supp. III 1980).

39. The income and resources of ineligible students were treated differently depending on the basis for the student's ineligibility. Students who failed to meet the work requirements were considered "disqualified," and their

income and resources—like those of individuals disqualified from the Food Stamp Program for fraud—were *included* in the income of the households with which they resided under 7 C.F.R. § 273.11(c). *See* 7 C.F.R. § 273.11(c) (1980); *id.* § 273.1(b)(7) (1980). By contrast, the income and resources of students who were ineligible due to their tax-dependent status was *excluded* from household income under 7 C.F.R. § 273.11(d). *See id.* §§ 273.1(b)(6), 273.5(c), 273.11(d) (1980).

40. The Food Stamp Act Amendments of 1980 and implementing regulations changed both the eligibility requirements for students and the rules governing the income of ineligible students.

41. With respect to eligibility, the Act and regulations eliminated the provisions subjecting students to the program's general work requirements during long vacations and requiring them to register to work half-time during the school year (unless they were already working). *See* 45 Fed. Reg. at 46,036; 7 U.S.C. § 2015(d)(2)(D), (e) (Supp. IV 1981). The Act and regulations also eliminated the provision making students ineligible based on their tax-dependent status. *See* 45 Fed. Reg. at 46,036; 7 U.S.C. § 2015(d)(2)(D), (e) (Supp. IV 1981).

42. As the Department of Agriculture explained, the prior eligibility provisions had proved difficult to administer and ineffectual in practice. 45 Fed. Reg. at 46,036. Accordingly, they were replaced by a broad prohibition

on students receiving Food Stamps, with limited exceptions for those who met a distinct set of student-eligibility criteria to be codified at 7 C.F.R. § 273.5. *See* 45 Fed. Reg. at 46,036–37, 45,040.

43. In adopting these new eligibility criteria, the Department of Agriculture specified that students who did not meet them would be ineligible to receive SNAP, but would nevertheless have their income and resources *excluded* from household income under 7 C.F.R. § 273.11(d). *See* 45 Fed. Reg. at 46,040 (adopting 7 C.F.R. 273.5(b)(5), currently codified at 7 C.F.R. 273.5(d)). The Department accordingly removed ineligible students from the category of "disqualified" individuals whose income and resources were included in the income of the households with which they resided under 7 C.F.R. § 273.11(c). *See* 45 Fed. Reg. at 46,040 (revising § 273.1(b)(7)); *see also* 7 C.F.R. §§ 273.1(b)(6)–(7), 273.5(b)(5), 273.11(c)–(d) (1981).

44. The student-eligibility provisions adopted in 1980 remain substantially in place today. Student eligibility continues to be governed by the criteria set forth in 7 C.F.R. § 273.5(b), and 7 C.F.R. § 273.5 continues to provide that the income and resources of a student who fails to fulfill those eligibility requirements "shall be handled as outlined in § 273.11(d)," 7 C.F.R. § 273.5(d)—i.e., excluded from household income.

45. To be sure, some interpretive difficulty arises from the fact that 7 C.F.R. § 273.11(d)(1) states that it applies to the income and resources of

"nonhousehold members defined in [7 C.F.R.] § 273.1(b)(1) and (b)(2)," whereas ineligible students are "[i]neligible household members" as defined in 7 C.F.R. § 273.1(b)(7)(i). However, regulatory history helps resolve this issue as well.

46. When 7 C.F.R. § 273.11(d)(1)'s language referring to "nonhousehold members defined in [7 C.F.R.] § 273.1(b)(1) and (b)(2)" was written, 7 C.F.R. § 273.1(b)(1) and (b)(2) in fact defined various categories of "nonhousehold members," unlike today. And those categories included students who failed to meet the eligibility requirements set forth in 7 C.F.R. § 273.5. *See* 7 C.F.R. § 273.1(b)(1), (b)(2)(i) (2000).

47. In 2000, the Department of Agriculture revised 7 C.F.R. § 273.1(b) to eliminate the "nonhousehold member[ ]" label and re-categorize the relevant individuals—including ineligible students—as "ineligible household members," *see* Food Stamp Program: Non-Discretionary Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 65 Fed. Reg. 64,581, 65,483, 65,487 (Oct. 30, 2000), 2000 WL 1607318. Although the Department did not adopt conforming amendments to 7 C.F.R. § 273.11, it left unaltered 7 C.F.R. § 273.5(d)'s language requiring the income and resources of ineligible students to be treated as outlined in 7 C.F.R. § 273.11(d), and there is no reason to believe the Department intended to change the treatment of students and their income.

48. The history and structure of the relevant federal SNAP provisions thus indicates that students such as petitioner's children are not in fact subject to the work requirements of 7 C.F.R. § 273.7, the failure to fulfill which would make their income and resources includable in their households' income under 7 C.F.R. § 273.11(c). Instead, such students are best understood as having their eligibility for SNAP dictated by the distinct student-eligibility requirements set forth in 7 C.F.R. § 273.5(b)—the failure to fulfill which makes them ineligible to receive benefits but makes their income and resources excludable from their households' income under 7 C.F.R. §§ 273.5(d) and 273.11(d).

49. That consideration does not change the outcome here, however, because the child support paid to petitioner to care for her SNAP-ineligible college-student children is not the income of those children in the first place, but instead of petitioner. See *supra* ¶¶ 14–27. Moreover, because the outcome of the case was correct, reargument is unnecessary. Alternatively, should reargument be granted, it should be limited to modifying the opinion, but not the result, in accordance with the points set forth herein.

REASONS LEAVE TO APPEAL SHOULD BE DENIED

50. Leave to appeal also should be denied. Discretionary leave to appeal is properly reserved for cases presenting a conflict with a decision of the Court of Appeals or with another Appellate Division decision, or for cases

whose significance otherwise transcends the particular dispute between the parties and whose resolution will contribute substantially to the development of the law. *See* 22 N.Y.C.R.R. § 500.22(b)(4). The present case does not meet that description.

51. Petitioner's leave motion identifies a single issue that she claims warrants leave—namely, that of whether the income of SNAP-ineligible college students should be included in household income under 7 C.F.R. § 273.11(c)(1), rather than excluded under 7 C.F.R. §§ 273.5(d) and 273.11(d)(1).[3] Petitioner contends that applying 7 C.F.R. § 273.11(c)(1), rather than 7 C.F.R. §§ 273.5(d) and 273.11(d)(1), to such income would have far-reaching effects on the administration of SNAP across the State. *See* Pet. Aff. ¶¶ 7–8. But for the reasons stated above (see *supra* ¶¶ 14–27), the issue of whether ineligible students' income is properly treated under 7 C.F.R. § 273.11(d)(1) as opposed to 7 C.F.R. § 273.11(c)(1) is irrelevant to the outcome of this case because the child support petitioner received for her ineligible-student children was not those children's income in the first place.

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[3] Petitioner does not seek leave on the issue of whether the child support at issue here was her income or her children's, nor does respondent seek leave on that issue (nor could she, given her status as the prevailing party).

52. Furthermore, even if the income at issue in this case were that of the ineligible students, this case still would not present a controversy warranting discretionary leave to appeal to the Court of Appeals. To the contrary, the parties essentially agree in principle on the treatment of income that, unlike the child support at issue here, is properly attributed to a SNAP-ineligible college student.

53. The lone issue on which petitioner seeks leave therefore does not warrant leave to appeal, in any event, and petitioner's application for leave should be denied accordingly.

WHEREFORE respondent respectfully requests that this Court deny petitioner's motion in its entirety.

Dated: New York, New York
April 27, 2018

ANDREW W. AMEND

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

----------X

Supreme Court, Suffolk County –Index No. 10161/15

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR REARGUMENT AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

Docket No. 2016-05966

BETH C. ZWEIG, duly admitted to practice in the State Courts of New York, under penalty of perjury hereby affirms:

1. I am of Counsel to JEFFREY SEIGEL, attorney for the Petitioner-Appellant, and I submit this Reply Affirmation in Further Support of the Petitioner-Appellant's Motion for Reargument and/or Leave to Appeal to the Court of Appeals, in response to State Respondent's Affirmation in Opposition to Motion for Reargument and Leave to Appeal. I am fully familiar with the facts and circumstances of this case.

ARGUMENT

A. State Respondent Properly Acknowledged that the Income of Ineligible College Students is Excluded from the SNAP Household's Income

2. In their opposition, the State Respondent acknowledged that this Court's conclusion that the child support income of the ineligible college students was properly included in the SNAP household income rested on a construction of the regulations that was not the best reading. *See* Aff. in Opposition of Motion for Reargument and Leave to Appeal ("State. Aff.") ¶

31. Specifically, the State Respondent acknowledged that the structure and history of the SNAP program demonstrates a conscious decision by Congress and the U.S. Department of Agriculture to exempt college students from work requirements and exclude the income of ineligible college students from counting as income to the SNAP household. *See* State Aff. ¶¶ 34-47. The State Respondent acknowledged that college students, including the Petitioner's two SNAP-ineligible college aged children, are best understood as having their eligibility dictated by requirements set forth in 7 CFR §273.5(b), and that any failure to meet those eligibility requirements makes them ineligible for SNAP benefits but also makes their income and resources excludable from the SNAP household under 7 CFR §273.5(d) and 7 CFR § 273.11(d). *See* State. Aff. ¶ 48. Without saying so directly, the State Respondent recognized that the Court simply erred in relying on 7 CFR § 273.11(c), and therefore erred in its conclusion that the income of ineligible college students is countable to the SNAP household.

3. By agreeing with the Petitioner-Appellant that the income of ineligible college students is excluded from the income of the SNAP household, State Respondent underscored just how crucial it is for this Court to grant a reargument and/or leave to appeal to the Court of Appeals. This Court based their conclusion that the income of ineligible college students is countable to the SNAP household on an interpretation of the regulations which both the State Respondent and Petitioner-Appellant agree is erroneous. Because this Court correctly held that child support income is income to the child and not the parent's income, this Court's conclusion that the college students' income was properly included in the SNAP household income is untenable and contrary to federal regulations. This Court must rectify this error and find that the ineligible college students' child support income is excluded from the income of the SNAP household.

B. This Court Correctly Held that Child Support is the Income of the College Students, not the Parent's Income

4. State Respondent's opposition rests solely on challenging this Court's proper determination that the child support income of the two SNAP-ineligible college aged children is the college students' income rather than the custodial parent's income. This Court has already rejected State Respondent's assertion that the child support income is the custodial parent's income, explaining in its Decision that OTDA's contention that "child support attributable to the college students should not be excluded from the income calculation of the petitioner's household because child support payments are income to the parent, not income to the child....is without merit". *Matter of Leggio*, 158 A.D.3d at 804. Specifically, this Court explained that "A child support obligation differs from alimony or spousal support, in that it is an obligation 'to the child, not to the payee spouse, [therefore] the death of the payee spouse does not terminate the obligation' (*Matter of Modica v. Thompson*, 300 A.D.2d 662, 663)." *Id.* at 804. Moreover, this Court explained that "A custodial parent, a foster parent or the Commissioner of the Social Services are no more than conduits of that support from the noncustodial parent to the child' (*Id.* at 663, quoting *Matter of Commissioner of Social Servs. v. Grifter*, 150 Misc 2d 209, 212 [Fam Ct, NY County])." *Id.* at 804.

5. State Respondent rejects this Court's application of *Matter of Modica* and *Grifter*, arguing broadly that first, neither decision involved the SNAP program specifically, and second, that neither decision specifically found that child support payments constitute the child's income. *See* State Aff. ¶¶ 19-20.

6. The State Respondent's objections lack merit. First, the legal question of whether the income of child support is income of the custodial parent or the child must be evaluated separately from the SNAP program's rules and regulations since no SNAP-related regulations,

legislative history, or case law address the issue of whether child support is income to the parent or child. Second, *Matter of Modica* clearly demonstrates that the obligation of child support is to the child, not to the parent, and insofar as this Court in *Grifter* found that custodial parents are "no more than conduits" of support to the child, *Grifter* clearly supports a finding that child support payments constitute the child's property interest rather than the parent's. "It is important to note that, in essence, the order of support is in favor of the child, not her mother, the Commissioner or the foster parent. A custodial parent, a foster parent or the Commissioner of Social Services are no more than conduits of that support from the noncustodial parent to the child." *Grifter* at 212.

7. Moreover, New York expresly recognizes that child support payments are the property interest of the child instead of the parent. In New York, "the custodial parent does not have an ownership interest in the [child support] funds." *Shipman v. City of New York Support Collection Unit*, 183 Misc. 2d 478, 485 (700 N.Y.S.2d 389, 2000 N.Y.Slip Op., 20068). "The child support amount awarded to the custodial parent is not merely for reimbursement of the custodial parent...instead, the funds are awarded to the custodial parent in trust for the support and maintenance of the minor children" *Id.* at 485 (citing *Richards v. Richards*, 86 A.D.2d 771, 448 N.Y.S.2d (4th Dept. 1982); *Parker v. Stage*, 43 N.Y.2d 128, 400 N.Y.S.2d 794, 371 N.E.2d 513 (1977)). "Although the custodial parent and/or the support collection unit receive the money, an ownership interest in the funds is not obtained by the custodial parent or the support collection unit". *Id.* at 486 (citing *Sue Davidson, P.C., v. Naranjo*, 904 P.2d 354 (Wyo. 1995), *Law Office of Tony Center v. Baker*, 185 Ga.App. 8909, 366 S.E.2d 167). In New York, the child has the property interest in child support funds, not the custodial parent.

8. In drafting the rules regarding exempting certain personal property from the

satisfaction of a money judgment, the New York State Legislature also has indicated that child support is the child's income rather than the parent's income. C.P.L.R. § 5205(d)(3) provides that exempt personal property includes "payments pursuant to an award in a matrimonial action, for the support of a wife, where the wife is the judgment debtor, or for the support of a child, where the child is the judgment debtor; where the award was made by a court of the state, determination of the extent to which it is unnecessary shall be made by that court". By stating that exempt personal property includes child support "where the child is the judgment debtor", C.P.L.R. § 5205(d)(3) clearly indicates that funds awarded for child support belong to the child rather than to the custodial parent. *See Shipman* at 487.

9. In response to this Court's determination that child support income is income to the child instead of the parent, State Respondent asserts that under New York law, the "right to receive child support belongs to the parent" (*Miller v. Miller*, 82 A.D.3d 469, 470 (1st Dept. 2011)) and that generally speaking, "children have no standing to enforce the periodic support provisions of their parents' separation agreement". (*Drake v. Drake*, 89 A.D.2d 207, 212 (4th Dept. 1982). *See* State Aff. ¶ 24. State Respondent also relies on *Dembitzer v. Ridenow*, 35 A.D.3d 791, stating that because this Court found that child support arrears must be paid to the estate of the mother, who had been the custodial parent before her death, child support income belongs to the custodial parent. *See* State Aff. ¶ 25.

10. State Respondent's reliance on these cases to support the claim that child support is the custodial parent's income is misplaced. In *Dembitzer*, this Court relied on *Matter of Modica* in concluding that "the obligation to pay child support survives the death of the custodial parent"; as per *Matter of Modica*, the reason why the obligation to pay child support survives the death of the custodial parent is because the support obligation is to the child and <u>not</u> to the

custodial parent. *See Matter of Modica* at 663. Moreover, while the cases cited by State Respondent demonstrate that under New York Law, the parent has a right to enforce the child support interest, none of the cases cited by State Respondent find that the custodial parent instead of the child holds the property interest in that support. The view in New York and in many other jurisdictions is that "child support is a property interest belonging to the child. The custodial parent merely has a right to enforce the child's property interest" *In re King*, 233 B.R. 176 (29 Colo. Bankr. Ct. Rep. 119), (citing *In re Anders,* 151 B.R. 543, 546 (Bankr.D.Nev.1993)).

11. Finally, State Respondent asserts that Congress did not intend to have state law principles governing the federal SNAP program. *See* State Aff. ¶ 26. Yet in the absence of specific federal guidance, property rights generally are determined by state law. *See, e.g., Butner v. United States,* 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). In this case, New York state law clearly finds that child support is the property interest of the child, not the parent. Moreover, the legal question of whether the income of child support is income of the custodial parent or the child must be evaluated separately from the SNAP program's rules and regulations because no SNAP-related regulations, legislative history, or case law address the issue of whether child support is the income of the child or the parent. That said, a similar federal program, the Supplemental Security Income (SSI) program, expressly counts child support as income to the child; the Social Security Administration's Program Operations Manual System (POMS) Section SI 00830.420(B)(1) states, in relevant part, that "[w]hen an eligible child receives child-support payments…the payments are unearned income to the child". (*See also* Petitioner-Appellant's Brief at pg. 16) ("Pet-Brief"). Because the SNAP program's rules and regulations do not expressly address the matter of whether child support is the child's income, the treatment of child support in the context of the federal SSI program should be instructive to

this Court.

12. Notwithstanding New York State law or the SSI program, this Court's conclusion that the child retains an ownership interest in child support is also consistent with how the Internal Revenue Service treats child support income; according to IRS rules, child support is not counted as taxable income to the custodial parent. 26 U.S.C.A. § 71(c), 26 C.F.R. § 1.71-1(e). (*See* Pet-Brief at pg. 17). "[U]nlike alimony or maintenance, child support payments are not considered income in the calculation of the custodial parent's taxes, nor can the noncustodial spouse take a deduction for the support payments. This fact also implies that the custodial parent does not have an ownership interest in the child support funds." *Shipman* at 487 (citing *Naranjo*, 904 P.2d 354, 357).

CONCLUSION

13. In their affirmation, State Respondent seeks to re-litigate the issue of whether child support is income to the child or the parent. This Court has already properly concluded that OTDA's contention that child support is the parent's income lacks merit, and State Respondent has presented insufficient grounds for this Court to overturn its determination that child support is the child's property. In contrast to the State Respondent's affirmation which challenged this Court's well-reasoned determination regarding the property interest of child support, the Appellant-Petitioner's affirmation is grounded in challenging what State Respondent and Petitioner both agree was a misapplication of federal law: that is, Petitioner-Appellant seeks to challenge this Court's faulty conclusion that the income of ineligible college students is countable to the SNAP household. If this Court does not address and rectify this error and acknowledge that the income of ineligible college students is excluded from the SNAP household, a decision which rests on a fundamentally flawed reading of federal law will be on

the books. Moreover, failure to rectify this matter by granting a rearguement or, alternatively, leave to appeal to the Court of Appeals will create confusion for New York State OTDA, local social services districts, and for advocates and SNAP applicants and recipients throughout the state, since implementing this Decision would run contrary to federal law. *See* Petitioner-Appellant's Affirmation in Support of Motion to Reargue ¶ 7.

14. I hereby certify under penalty of perjury and as an officer of the Court that I have no knowledge that the substance of any of the factual submissions contained in this document is false.

WHEREFORE, it is respectfully requested that the Appellate Division Second Department grant reargument or, alternatively, leave to appeal to the Court of Appeals.

Dated: Islandia, New York
May 4, 2018

BETH C. ZWEIG, of Counsel to
Jeffrey Seigel, Director of
NASSAU/SUFFOLK LAW SERVICES
COMMITTEE, INC.
Attorney for the Petitioner-Appellant
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EXHIBIT H

INCOME OF INELIGIBLE INDIVIDUALS

POLICY

1. INTENTIONAL PROGRAM VIOLATION, INDIVIDUAL SANCTIONED FOR FAILURE TO COMPLY WITH WORK REQUIREMENTS OR FLEEING FELON - The earned or unearned income of an individual determined ineligible because of disqualification for Intentional Program Violation, for failing to comply with a FS work requirement or because of fleeing felon status must be counted in its entirety to the remaining household members.
2. AN INELIGIBLE ALIEN, INELIGIBLE ABAWD OR AN INDIVIDUAL WHO REFUSES TO APPLY FOR OR PROVIDE A SOCIAL SECURITY NUMBER - A prorata share of the earned or unearned income of an individual determined ineligible for being an ineligible alien or for refusal to apply for or provide an SSN shall be counted as income to the remaining household members. This prorata share is calculated as follows:
   a. Subtract allowable income exclusions from the ineligible individuals' income;
   b. Divide the remaining countable income evenly among the household members including the ineligible individuals;
   c. Subtract the ineligible individuals' share; and
   d. Count all but the ineligible individuals' share as income to the remaining household members.
3. INELIGIBLE STUDENT - The earned or unearned income of an individual determined ineligible as an ineligible student cannot be considered available in determining household eligibility or benefit levels.

NOTE: Cash payments to a participating household by an ineligible student or work registration sanctioned individual are considered income.

NOTE: If a FS household includes an individual who would be disqualified according to paragraph 2, above and who is also an ineligible student (as described in FSSB Section 5), the budgeting rules described in paragraph 2, above take precedence.

The ineligible individual's income is pro-rated, deductions for earned income, shelter costs and dependent care expenses are pro-rated (FSSB Sections 11); and the individual's resources are counted in their entirety (FSSB Section 16).

Reference	Related Item
387.10	Resource Limits (FSSB)
387.16	Students (FSSB)
89 INF-70	Earned Income Deduction (FSSB)
	Dependent Care Deduction (FSSB)
	Shelter Deduction (FSSB)

STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

----------X

AFFIRMATION IN SUPPORT OF MOTION FOR POOR PERSONS' RELIEF

Supreme Court, Suffolk County –Index No. 10161/15

BETH ZWEIG, an attorney duly admitted to practice in the State of New York, under penalty of perjury, hereby affirms:

1. I am an attorney at NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC., of Counsel to Jeffrey Seigel, attorney for TINA LEGGIO, and fully familiar with the facts and circumstances of this case.

2. I believe that there is merit to this motion, and to the underlying appeal, as explained more fully in the attached moving papers.

3. I certify under penalty of perjury and as an officer of the Court that to the best of my knowledge, information and belief formed after an inquiry reasonable under the circumstances, the claims raised by the Petitioner-Appellant in the underlying appeal are not frivolous.

4. I believe that there is merit to this case and a strong likelihood of success. I will prosecute this proceeding without compensation to Nassau Suffolk Law Services Committee, Inc. from the Petitioner-Appellant.

5. NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC. is a non-profit organization that provides free legal assistance to persons of low-income.

6. I certify that NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC. has, to the best of its ability, determined that the Petitioner-Appellant is unable to pay the costs, fees and expenses necessary to prosecute this proceeding, and request waiver of all fees and costs related to the filing and service of this matter pursuant to CPLR 1101(e) [see the attached "Affidavit" of Tina Leggio].

7. The Appellate Division, Second Department granted TINA LEGGIO's request for leave to prosecute the proceeding on the original papers.

8. No prior application for relief sought herein has been made to this Court.

WHEREFORE, it is respectfully requested that the Petitioner-Appellant be permitted to prosecute this proceeding as a poor person; that pursuant to § 500.14(1) of the Court's Rules of Practice the clerk of this Court obtain the original file, which includes all record material in this matter, from the Suffolk County Clerk; that she be permitted to proceed in this matter on the original record; and that

the necessary filing fees be waived.

Dated: Islandia, New York
July 24, 2018

BETH ZWEIG, of Counsel to
Jeffrey Seigel, Director of
NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC.
Attorney for the Petitioner-Appellant
1757-50 Veterans Memorial Highway • Islandia, NY 11749
(631) 232-2400 ext. 3337

STATE OF NEW YORK
COURT OF APPEALS

----------X

In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

----------X

AFFIDAVIT IN SUPPORT OF MOTION FOR POOR PERSONS' RELIEF

Supreme Court, Suffolk County –Index No. 10161/15

STATE OF NEW YORK)
) SS.:
COUNTY OF SUFFOLK)

TINA LEGGIO, being duly sworn, deposes and says:

1. I submit this affidavit in support of my application to proceed as a poor person.

2. I reside at 122 North Clinton Avenue in Bayshore, New York, in Suffolk County, with four (4) of my children, aged 22, 20, 16 and 12 years old. In addition, my disabled 29 year old child lives with me part time.

3. My five youngest children receive child support in the amount of approximately $2166 per month. In addition, I receive Social Security Disability in the amount of approximately $917 per month. My 16 year old and 12 year old each receive Social Security dependents' benefits in the amount of $99 per month each. My 22 year old earns approximately $2900 per month which she uses exclusively for her own expenses. We also receive Medicaid.

5. My automobile is a 2007 Chrysler Town and Country and I make payments on the car of $180 per month. I own a home and pay $1912 per month for my mortgage, taxes and homeowners insurance. I pay $303 per month in child support.

6. I have no checking or savings account. I have approximately $50 on hand at present.

7. I am not able to pay the costs, fees and expenses necessary to prosecute this appeal.

8. No other person is beneficially interested in the outcome of this appeal.

9. BETH C. ZWEIG, of counsel to JEFFREY SEIGEL at Nassau/Suffolk Law Services Committee, Inc., has agreed to represent me in this action without fee or compensation and has informed me that I am eligible for free civil legal services.

10. I have not made, nor has anyone on my behalf made any prior application to this court, justice or judge for the relief sought herein.

11. I therefore respectfully request that I be granted leave to prosecute this appeal as a poor person, pursuant to the provisions of C.P.L.R. Section 1101, et. seq.

Dated: Islandia, New York
July 20, 2018

Tina Leggio

Sworn to before me this
20th day of July 2018

NOTARY PUBLIC

BETH C. ZWEIG
Notary Public, State of New York
No. 02ZW6318694
Qualified in Kings County
Commission Expires Feb. 2, 2019

Attorney Certification Pursuant to 22 NYCRR 130-1.1

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief, and after reasonable inquiry, the contentions made in the annexed documents ["Motion for Leave to Appeal and Permission to Proceed as a Poor Person"] are not frivolous.

Dated: July 24, 2018

Signed:

BETH C. ZWEIG, of Counsel to
Jeffrey Seigel, Director
NASSAU/SUFFOLK LAW SERVICES
COMMITTEE, INC.
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