

SUPREME COURT OF THE STATE OF NEW YORK  
COURT OF APPEALS

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In the Matter of **TINA LEGGIO**,

Petitioner-Appellant,

**No. APL-2018-00208**

—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,

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**PROPOSED BRIEF OF MOVANT EMPIRE JUSTICE CENTER IN SUPPORT OF OF  
ITS MOTION FOR *AMICUS CURIAE* RELIEF**

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Dated: November 22, 2019

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## **I. Preliminary Statement**

Proposed amicus curiae submits this brief in support of the appeal by Petitioner-Appellant, Tina Leggio, from a Decision and Judgment of the Appellate Division, Second Department, which affirmed a fair hearing decision of the Office of Temporary and Disability Assistance that found the Appellant ineligible for Supplemental Nutrition Assistance Program (hereinafter “SNAP”) benefits. Ms. Leggio receives child support for her five children in one monthly sum. At issue is the proper treatment of this child support income when determining SNAP eligibility. Two of the children who receive this support are ineligible for SNAP because of their status as college students. The Appellate Division correctly determined that child support awarded to Ms. Leggio’s household in one monthly sum should be equally divided among the children who are the beneficiaries of the support order. However, the Appellate Division then incorrectly counted the pro rata share of child support for two college age children as income to the household of the other eligible family members when determining their eligibility for SNAP.

Proposed amicus, Empire Justice Center, is a not-for-profit law firm with offices in Rochester, Albany, White Plains, Yonkers and Central Islip, New York. Empire Justice Center operates as a statewide support center for legal services programs and community organizations, providing technical assistance and

training in the substantive law areas that have the most impact on low-income communities. Empire Justice Center attorneys work to ensure that low income individuals and families have access to public benefits including SNAP benefits, as well as health care access, foreclosure prevention, special education rights, immigration, civil and disability rights, non-mortgage consumer issues and employment law. In addition to training and technical support, Empire Justice Center provides direct representation to low-income individuals. Ensuring that low-income New Yorkers can access critical subsistence benefits is core to our mission.

SNAP benefits shield low income individuals and families from hunger and allow these households to use their limited financial resources for other essential needs like clothing, transportation or housing. Empire Justice Center works to secure the full scope of applicable due process protections for SNAP recipients facing the loss or reduction in their SNAP benefits. *Brooks v. Roberts*, (251 F Supp 3d 401 [ND NY 2017]), resulted in revised screening processes and improved notices to individuals in receipt of SNAP who were threatened with reduction or loss of their benefits for failing to meet the work requirements for Able Bodied Adults without Dependents.<sup>1</sup> In *Richard C. v. Berlin*, (12-cv 5942 [SD NY 2012]), the plaintiffs successfully challenged both delays in the issuance of SNAP fair

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<sup>1</sup> Full Stipulation and Order of Settlement available online at <https://empirejustice.org/wp-content/uploads/2019/08/Brooks-v-Roberts-Full-Settlement-Agreement.pdf>.

hearing decisions and the fact that SNAP recipients were not given notice of their right to “cure” a sanction imposed by an alleged violation of SNAP work rules by demonstrating compliance. The *Richard C.* settlement resulted in the restoration of \$75 million in federal SNAP benefits to 146,000 households.

In light of Empire Justice Center’s prior experience in SNAP-related litigation and work related to improving food security for low-income New Yorkers, the organization requests leave of the Court to proceed as amicus curiae in the instant appeal to: 1) describe food insecurity as a significant barrier to the success of low income college students; 2) support budgeting SNAP households containing ineligible college students in a manner that maximizes the income available for food purchasing by low income college students who are ineligible for SNAP; and, 3) ensure the State’s SNAP program operates within its proper legal framework. Empire Justice is gravely concerned that, if this Court affirms the decision of the Second Department, which was partly based on an error of law, low income college students will struggle unnecessarily with food insecurity in ways that will compromise their ability to reach their full academic potential.

## **II. The Questions Presented**

**Q.** When multiple children receive child support from an order that sets forth one monthly sum for all of the children, should the income be apportioned pro rata to each child when determining to whom the income belongs?

**A.** The Appellate Division correctly answered this in the affirmative.

**Q.** The regulations governing the Supplemental Nutrition Assistance Program provide that as a general rule, a college student is not eligible for SNAP benefits and when that student resides with his or her family, the student must be excluded from being counted in the SNAP household when calculating eligibility and degree of need. When such an ineligible student has income, should that student's income be counted when determining the eligibility and degree of need of the family members in the SNAP eligible household?

**A.** The Decision and Judgment of the Appellate Division relied upon a regulation that was not applicable to ineligible students to determine that the income of the ineligible student should be attributed to the other eligible household members. Treatment of ineligible student income in the manner set forth by the Appellate Court is contrary to SNAP regulations and contributes to household food insecurity by further disadvantage low-income college students who are ineligible for SNAP benefits.



### III. Statement of the Facts

This matter originated as an Article 78 Proceeding in the Suffolk County Supreme Court challenging amended fair hearing decision #6878939Z issued by the Defendant Office of Temporary and Disability Assistance (A-11 – A-62) which discontinued the Appellant’s SNAP benefits. On October 16, 2014, the Suffolk County Department of Social Services advised the Appellant that she was no longer eligible for SNAP due to excess income (A-40, A-150). The amount of SNAP benefits provided to a family depends on a number of factors. People who live and prepare food together are generally considered members of the same “SNAP household” (7 CFR 273.1).

At that time, the Appellant and her six children, ranging in age from nine to twenty-two, all lived in the family home (A-17, A-39). The parties agree that the 22 year old was not a member of the SNAP household because of his age (A-17, A-39). The parties also agree that the 18 and 19 year olds were not members of the SNAP household because college students are generally ineligible for SNAP unless they meet one of several exceptions (A-207; *see* 7 CFR 273.5 [a]-[b]). There is no dispute that the Appellant’s 18 and 19 year old college student children did not meet any of the exceptions that would make them eligible for SNAP (A-6, A-207).

The father of the Appellant's children paid child support in the amount of \$2572.92 per month for the five children under the age of 21 (A-27 – A-28, A-41). The family court order did not allocate the support among the children (A-27 – A-28). The issue at the fair hearing was whether the share of child support attributable to the 18 and 19 year old students should be applied to the income of the SNAP household (Appellant and three of the children), even though the 18 and 19 year olds were not part of the SNAP household (A-45).

Even though the Appellant “credibly testified that 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,” (A-46), the Administrative Law Judge ruled that all of the child support, including the 2/5ths attributable to the college students, must be applied to the four people in the SNAP household in determining their eligibility for SNAP benefits (A-46 – A-47). The fair hearing decision concluded that the \$593.75 pro rata share of the child support attributable to the 18 and 19 year old children could only be excluded from the SNAP household if the two college students lived outside the family home, even though they were not eligible to be part of the SNAP household (A-47).

By order dated April 13, 2016, (A-7 – A-10), the case was transferred to the Appellate Division, Second Department. On February 28, 2018, the Appellate Division affirmed the determination to discontinue the Appellant's SNAP benefits

but on different grounds than those set forth in the fair hearing decision (A-4 – A-6). First, the Appellate Division correctly determined that child support awarded in one monthly sum should be equally divided among the five children who were the beneficiaries of the support order (A-5).

Subsequently, for the reasons set forth more fully in the Appellant’s brief, the Second Department then committed a reversible error of law by relying upon the incorrect SNAP regulation to conclude that the child support attributable to the two ineligible college students must nevertheless be included as income to the SNAP household from which they were excluded (A-6). This error of law deprived the Leggio family of SNAP benefits, and effectively required the college student children to use their share of the child support income to feed their younger siblings, instead of applying that income to their own needs. Empire Justice Center urges this Court to modify the Decision and Judgment of the Second Department in *Leggio v Devine* (76 AD3d 188 [2d Dept 2010]) by affirming that portion of the decision that prorates the child support income among the Leggio siblings (A-5), and reversing that portion of the decision that found the income of two ineligible students available to the other SNAP household members (A-6).

## IV. Argument

### A. Hunger and Food Insecurity Are Pervasive Problems Among New York's College Students.

In May 2019, the New York Times published an article in response to the release of a study by Temple University's Hope Center for College, Community and Justice. The study "indicated that 45 percent of student respondents from over 100 [academic] institutions said they had been food insecure in the past 30 days. In New York, the nonprofit found that among City University of New York (CUNY) students, 48 percent had been food insecure in the past 30 days."<sup>2</sup> The Hope Center's survey was distributed to all undergraduate CUNY students, "yielding an estimated response rate of nearly 9%, or almost 22,000 student participants."<sup>3</sup> "A senior at Lehman College in the Bronx dreams of starting her day with breakfast. An undergraduate at New York University said he has been so delirious from hunger, he's caught himself walking down the street not realizing where he's going. A health sciences student at Stony Brook University on Long Island

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<sup>2</sup> Kaya Laterman, *Tuition or Dinner? Nearly Half of College Students Surveyed in a New Report Are Going Hungry*, NY Times, May 2, 2019 at <https://www.nytimes.com/2019/05/02/nyregion/hunger-college-food-insecurity.html> (accessed Nov. 21, 2019); Sara Goldrick-Rab, et. al., *City University of New York #RealCollege Survey*, March, 2018, at 5, available online at [https://hope4college.com/wp-content/uploads/2019/03/HOPE\\_realcollege\\_CUNY\\_report\\_final\\_webversion.pdf](https://hope4college.com/wp-content/uploads/2019/03/HOPE_realcollege_CUNY_report_final_webversion.pdf) (accessed Nov. 21, 2019).

<sup>3</sup> *CUNY #RealCollege Survey* at 5.

describes “poverty naps,” where she decides to go to sleep rather than deal with her hunger pangs.”<sup>4</sup>

Low income college students are experiencing significant degrees of hunger characterized as food insecurity by the United States Department of Agriculture (hereinafter “USDA”). The USDA defines food insecurity using two terms: (1) Low Food Security which indicates reports of reduced quality, variety, or desirability of a person’s diet; and (2) Very Low Food Security which means there are multiple indications of disrupted eating patterns and reduced food intake.<sup>5</sup>

Food insecurity “is increasingly on the radar of administrators, who report seeing more hungry students, especially at schools that enroll a high percentage of youths who are from low-income families or are the first generation to attend college.”<sup>6</sup> This can partially be attributed to the fact that nontraditional college students have taken over the majority of college seats. Seventy-one percent of modern college students are considered nontraditional students, meaning that they have at least one of the following characteristics: financially independent from parents; one or more dependents; single caregiver; no traditional high school

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<sup>4</sup> *Id.*

<sup>5</sup> United States Department of Agriculture, Economic Research Service, Definitions of Food Security, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security/> (accessed August 8, 2019).

<sup>6</sup> Tara Bahrapour, *More College Students Battle Hunger As Education and Cost of Living Costs Rise*, The Washington Post, April 9, 2014 at [https://www.washingtonpost.com/local/more-college-students-battle-hunger-as-education-and-living-costs-rise/2014/04/09/60208db6-bb63-11e3-9a05-c739f29ccb08\\_story.html](https://www.washingtonpost.com/local/more-college-students-battle-hunger-as-education-and-living-costs-rise/2014/04/09/60208db6-bb63-11e3-9a05-c739f29ccb08_story.html) (accessed on Nov. 21, 2019).

diploma; delayed college enrollment; enrolled part time; or employed full time during the school year.<sup>7</sup> Further, the percentage of undergraduate students with a household income at or below 130 % of the federal poverty line has increased from 28 % in 1996 to 39 % in 2016.<sup>8</sup>

Data compiled from several state-wide studies in different locations indicate that college hunger is increasing and that hunger may occur at a higher rate for college students than the national average for all age groups.<sup>9</sup> According to a 2016 report, *Hunger on Campus*, “[f]ood insecurity – the lack of reliable access to sufficient quantities of affordable, nutritious food – is common at colleges and universities across the country, potentially undermining the educational success of untold thousands of students.”<sup>10</sup> In the modern job market, a college degree is essential in most careers and “higher education is seen as key to financial security.”<sup>11</sup> However, tuition and living expenses have risen drastically and when a student is forced to choose between paying rent and buying food, food is usually the first to go because it is the most flexible.<sup>12</sup>

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<sup>7</sup> US Government Accountability Office, *Food Insecurity: Better Information Could Help Eligible College Students Access Federal Food Assistance Benefits* at 7 (Report 19-95, Dec. 2018) (hereinafter “GAO Report”).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> Bahrapour, n. 6.

<sup>10</sup> James Dubick, et. al., *Hunger on Campus: The Challenge of Food Insecurity for College Students* at 6 (October 2016), available online at [http://studentsagainsthunger.org/wp-content/uploads/2016/10/Hunger\\_On\\_Campus.pdf](http://studentsagainsthunger.org/wp-content/uploads/2016/10/Hunger_On_Campus.pdf) (accessed Nov. 21, 2019).

<sup>11</sup> Bahrapour, n. 6.

<sup>12</sup> *Id.*

That many college students are food insecure is unsurprising. A GAO report to Congress noted that “for many students, the maximum amount of grant aid available to them does not cover all of the costs associated with attending college.”<sup>13</sup> Further, college students are prohibited from receiving federal SNAP benefits as a general rule because of restrictions on student eligibility (7 CFR 273.5 [a]). Although the federal government invests billions in higher education grants and loans each year, “many low-income college students struggle to meet their basic needs . . . and may drop out of college as a result.”<sup>14</sup>

While SNAP is a critical anti-hunger tool in the general population, student eligibility restrictions limit the utility of this anti-hunger tool in the college population (*see* 7 CFR 273.5 [a]-[b]). Often, even if a student falls into one of the exemptions to the rule, they are unaware of their eligibility and therefore, do not apply for SNAP benefits. “[I]n a student discussion group at one community college, some students said they were uncertain about how SNAP student rules applied to them when they lived with their parents but received no financial support or food from them.”<sup>15</sup> Officials at another community college stated that they believe that college students are not eligible for SNAP benefits at all, indicating that the confusion around these rules is widespread, affecting even those

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<sup>13</sup> GAO Report at 28.

<sup>14</sup> GAO Report at 39-40.

<sup>15</sup> GAO Report at 35.

that advise students on the matter.<sup>16</sup> A senior official at the national office of the Food and Nutrition Service (“FNS”) “said that college student eligibility and the student exemptions were among the most complicated SNAP policies to explain and that they frequently receive questions from the general public about how the rules apply to certain students in certain situations.”<sup>17</sup>

*Hunger on Campus* documented that 48 percent of the 3,765 student respondents attending colleges in 12 states (including New York) “reported food insecurity in the previous 30 days, including 22 percent with very low levels of food security that qualify them as hungry.”<sup>18</sup> Food insecurity occurs at both two and four year schools; 25 percent of students at two-year schools and 20 percent of students at four-year schools qualified as having very low food security.<sup>19</sup> Moreover, food insecurity disproportionately impacts college students of color. Fifty-seven percent (57%) of African American or Black students surveyed and 40 percent of non-Hispanic white students surveyed reported food insecurity.<sup>20</sup>

In response to the *Hunger on Campus* study, Governor Andrew Cuomo announced the No Student Goes Hungry Program in New York in August of 2018. This program included an initiative requiring every public campus in the state to

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 36.

<sup>18</sup> *Hunger on Campus* at 6-7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.*



have a food pantry.<sup>21</sup> Within a matter of months, SUNY had established, or partnered with, a food pantry at every single one of its campuses.<sup>22</sup> Unfortunately, this program didn't cover the hundreds of private schools in New York, and it has not eliminated student food insecurity at either public or private colleges, universities, community colleges, or trade schools.

In addition to the burden of food insecurity, 64 percent of the college student respondents in the *Hunger on Campus* study reported experiencing housing insecurity, including difficulty paying rent, mortgage, or utility bills. Of the food insecure students in the study, 32 percent believed that hunger or housing problems had an impact on their education, including problems buying textbooks and missing or even dropping classes.<sup>23</sup>

Difficulties affording adequate food and housing are compromising the ability of low-income college students to fully reap the benefits of their educational opportunities. Food insecurity and hunger are salient concerns for thousands of students in New York,<sup>24</sup> who are low income and have extremely limited funds

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<sup>21</sup> Governor Andrew M. Cuomo, Press Release, August 28, 2018 <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-no-student-goes-hungry-initiative-provide-access-healthy> (accessed Nov. 15, 2019).

<sup>22</sup> State University New York Food Insecurity Task Force, *Food Insecurity Task Force Quarterly Report, July – October 2018*, <https://www.suny.edu/media/suny/content-assets/documents/university-life/Food-Insecurity-Task-Force-Quarterly-Report-Jul-Oct-2018.pdf> at 2 (accessed Nov. 21, 2019).

<sup>23</sup> *Hunger on Campus* at 7-8.

<sup>24</sup> Although a composite number of all college students experiencing food insecurity across New York State is unavailable, please note that the *#RealCollege Survey* (see n. 2) found that 48% of

with which to pay for basic living expenses like food while they are categorically ineligible for SNAP benefits as a food support.

**B. The Court Must Budget The Income of SNAP Ineligible College Students Consistent With SNAP’s Regulatory Framework In Order To Maximize Food Purchasing Power For Low Income College Students.**

In 1980, Congress amended federal law to exclude students who are enrolled in part or full time college from receiving SNAP benefits with a few exceptions (7 USC 2015 [e]). The amendment was intended to prevent traditional college students from receiving SNAP benefits when they appear to have low documented income while attending college but actually receive financial support from their parents.<sup>25</sup> “A traditional college student is generally considered to be someone who is enrolled in college full time immediately after graduating from high school, is financially dependent on [their] parents, and either does not work during the school year or works part time.”<sup>26</sup>

By regulation, students in higher education programs are ineligible for SNAP (7 CFR 273.5 [a]). However, students in post-secondary education who meet all other SNAP eligibility criteria may receive benefits if one of the following criteria are met: the student is not between the ages of 18 and 49; working at least 20 hours per week; participating in a federally funded work-study program;

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the approximately 22,000 students responding to the survey experienced food insecurity. This is more than 10,500 students in New York City alone, and undoubtedly thousands more in other educational institutions in the City and throughout the state.

<sup>25</sup> GAO Report at 8-9.

<sup>26</sup> GAO Report at 6.

parenting a child under 6, or 12 if a single parent; or receiving Temporary Assistance for Needy Families benefits (7 CFR 273.5 [b]). The income and resources of a college student who is not meeting a special eligibility criterion are not considered available to the members of the SNAP household, as if the student were not a household member (7 CFR 273.5 [d], 273.11 [d]).

The congressional perception of who was a college student in the late 1970's stands in stark contrast to the realities of this second decade of the 21<sup>st</sup> Century (*see supra* at 9-10). More than 70% of those now entering college are non-traditional students, with circumstances differing from those presumed common when the SNAP student eligibility restrictions were enacted (*id.*). Despite Congress' expectation that students could receive financial support from their parents while in colleges, the reality is otherwise for many college students from low-income households, attending two year colleges and identifiable as nontraditional students.

Both parties to this appeal agree that the Appellate Division improperly relied on income budgeting provisions for persons sanctioned as a result of failure to meet work requirements under 7 CFR 273.7 (Respondent's Brief at 55; Appellant's Brief at 15-19). In SNAP, a person serving a sanction is not permitted to receive SNAP for some duration of time, but their income still counts against the other household members on the same SNAP case (7 CFR 273.11 [c] [1]). By

treating the SNAP ineligible college students as if they were serving a sanction for violating the SNAP rules, the Appellate Division included their prorated share of the child support income with that of their siblings and mother when it found them to be over the income limit for a SNAP household of 4. The inclusion of this extra income belonging to Ms. Leggio's two college aged sons meant that their income was effectively designated for use by their mother and siblings for food purchasing in lieu of SNAP. When the Court upheld the denial of the family's SNAP benefits, it functionally instructed Ms. Leggio and her other children to buy food using the 40% share of the support intended for the two ineligible students. The attribution of the pro rata share of the child support for the college student children to the needs of their mother and minor siblings was an error of law that deprived these college students of income that would have otherwise been available to them for purchasing food.

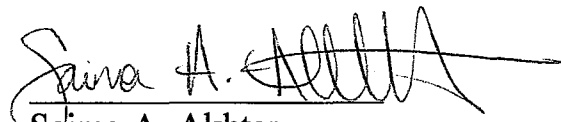
The Appellate Court decision which attributes the child support income of these ineligible students to their other family members renders the students food insecure by effectively and improperly applying their income to their siblings. Moreover, if this decision remains unchanged, other low income college students who live at home with their parents or siblings could also face food insecurity because of the precedent set. Both parties to this litigation agree that the Appellate Division applied the incorrect regulation when determining the household's SNAP

budget, therefore, Empire Justice renews its request that the Appellate decision be modified to comply with the proper SNAP budgeting standard that excludes both the ineligible college student and their income from consideration in the SNAP budget, and ensure that low income college students who are ineligible for SNAP have the benefit of using their own income to meet their critical food needs.

## V. Conclusion

For the foregoing reasons, Empire Justice Center respectfully asks that: the decision of the Second Department Appellate Division be upheld in part as to the allocation of the child support income between the children, and reversed in part as to the treatment of the income of the ineligible college students; and, the case be remanded to the trial court to revise its holding on Ms. Leggio's underlying fair hearing decision in a manner consistent with the decision of this Court.

Respectfully submitted,



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