Affirming the Right to Shelter:

The *Callahan* Decision Blocking New York City's Plan to Eject Homeless Individuals from Shelters to the Streets

Following is the complete text of the February 2000 decision in Callahan v. Carey *(the original right-to-shelter litigation brought by Coalition for the Homeless in 1979) which blocked the Giuliani Administration's attempt to implement State regulations that would terminate or deny shelter for many homeless individuals. In October 2002 the City filed an appeal of this decision, and Coalition for the Homeless is currently challenging the City's appeal.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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ROBERT CALLAHAN, et al.,

Plaintiffs, Index No. 42582/79

-against-

HUGH L. CAREY, as Governor of the State of New York, et al

Defendants.
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LOUISE F. ELDREDGE, et al.,

Plaintiffs, Index No. 41494/82

-against-

EDWARD I. KOCH, as Mayor of the City Of New York, et al.,

Defendants.
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In August, 1981, after long and arduous negotiations, the City and State defendants in this action entered into a Consent Decree with the plaintiffs, a group of adult homeless men, in which it was agreed that

> [t]he City defendants shall provide shelter and board to each homeless man who applies for it provided that

(a) the man meets the need standard to qualify for the home relief program established in New York State; or
(b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter.

In 1983, this assurance was extended to homeless adult women. See, Eldredge v Koch, 98 AD2d 675 (1st Dept 1983). The Consent Decree was hammered out at a time when the magnitude of the rising tide of homelessness to come, and which would grow exponentially in the ensuing years, could hardly be conceived. Nevertheless, it has served for nearly two decades as a staunch protector of the right of homeless, and often helpless, men and women in this City to have access to the bare minimum of decent shelter and board that one would hope to provide to all people in a humane and caring society.

This court is now asked to determine whether 18 NYCRR § 352.35, a regulation promulgated by the New York State Department of Social Services ("DSS") in 1995, and found to be constitutionally valid upon its face by two courts, including the Appellate Division, First Department, is, nonetheless, unenforceable as applied to those persons specifically described, and specifically sheltered, under the broad wing of the Consent Decree.

Plaintiffs move here for an order declaring 18 NYCRR § 352.35 null and void, on the ground that it is inconsistent with the Consent Decree.[1]

The City of New York cross-moves for an order modifying the Consent Decree, to incorporate within it the provisions of 18 NYCRR § 352.35 (hereinafter, the "Regulation").

The issue before this court is whether the implementation of the Regulation, as planned by the New York City Department of Homeless Services ("DHS"), will violate the Consent Decree with respect to the homeless adult men and women to whom the Decree currently applies. According to the defendants, the Regulation "does not alter the basic entitlement to shelter established by the [Consent Decree] and its provisions do not establish unreasonable barriers to the receipt of assistance by eligible homeless persons." Affidavit of Martin Osterreich in Support of Defendants' Cross Motion, ¶ 9. However, it is the plaintiffs' position that the implementation of the Regulation will "gut" the essential feature of the Consent Decree, and "again put homeless New Yorkers at risk of the very danger that the Decree was crafted to prevent: serious injury or death on the streets of New York City." Plaintiffs' Memorandum of Law, dated December 13,

[1] Plaintiffs also argued that 18 NYCRR § 352.35 was issued in violation of the State Administrative Procedure Act ("SAPA") § 202 (6) (motion sequence no. 006). However, Justice Friedman, in her decision in McCain v Giuliani, Index No. 41024/83 Sup Ct, NY County [1996], affd 252 AD2d 461 [1st Dept 1998]), determined that the Regulation was properly promulgated" in accordance with SAPA procedures."

1999, at 3-4. By the agreement of the defendants in open court, the Regulation will not be implemented unless and until a decision is rendered in defendants' favor on these motions by this court.

The Regulation is entitled "Eligibility for Temporary Assistance for Homeless Persons," and expressly

> governs the provision of temporary housing assistance to persons who are homeless. It sets forth the requirements with which an individual or family who applies for temporary housing must comply in order to be eligible for temporary housing assistance.

18 NYCRR § 352.35 (a).

The scope of the Regulation has been amply set forth in the decision of Justice Helen Freedman dated December 30, 1996, in McCain v Giuliani, Index No. 41023/83, in which she found the Regulation to be constitutionally valid upon its face, when applied to the homeless families who are the plaintiffs in McCain. In brief, the Regulation requires that anyone seeking "temporary housing assistance" must comply with public assistance eligibility requirements, including concomitant workfare obligations. The Regulation provides that anyone seeking temporary shelter (referred to as "temporary housing assistance") from the City, be it only for night, must cooperate in and complete a complexity of assessments with the DHS (or other applicable local social services district) (18 NYCRR § 352.35 [c] [1], all aimed at developing an "independent living plan" (18 NYCRR § 352. 35 [c] [2]), and, ultimately, placing the individual or family in permanent housing, before the person or family will be permitted to remain in the shelter system. These assessments include an evaluation of, *inter alia*, "the availability of housing, the need for temporary housing assistance, employment and educational needs, the need for preventative or protective services, the ability to live independently, and the need for treatment of physical and mental health problems, including substance abuse." 18 NYCRR § 352.35 (b) (1).

The Regulation flatly declares that "[t]emporary housing assistance is a public assistance benefit provided temporarily for an eligible homeless individual or family to meet an immediate need for shelter" (18 NYCRR § 352.35 [b] [4]), and so, the Regulation requires, essentially, that any individual or family seeking temporary shelter comply with all the administrative requirements which apply if the individual or family were applying for full public assistance. Thus, an individual seeking a night's shelter must comply with all applicable public assistance and care requirements, including the requirements for participating in job training programs (18) NYCRR § 352.35 [e] [1], for participation in rehabilitation services (18) NYCRR § 352.35 [e] [2], for participation in child support enforcement programs (18 NYCRR § 352.35 [e] [3]), for applying for

social security income benefits (18) NYCRR § 352.35 [e] [4], and more.

Individuals and families seeking temporary shelter must also "actively seek housing other than the temporary housing" (18) NYCRR § 352.35 [c] [4]), and "must refrain from engaging in acts which endanger the health and safety of oneself or others or which substantially and repeatedly interfere with the orderly operation" of the temporary housing facility. Id.

The failure of the individual or family to conform to standards of behavior, to cooperate with completing the various assessments, with completing an independent living plan, or any "unreasonable" refusal to accept permanent housing, if offered, may mean that the individual or family who appears at a shelter for a night's lodging will be compelled to leave that facility, as a penalty, for periods ranging up to 30 days. See, e.g., (18) NYCRR § 352.35 [c] (3) and (4). However, under section 352.35 [c], access to a shelter "will not be denied or discontinued for failure of the individual or the family to comply with the requirements of this subdivision when such failure is due to the physical or mental impairment of the individual or family member." People to whom temporary shelter has been denied as a result of a perceived failure to comply with the requirements as contained in 18 NYCRR § 352.35, subsections (1) through (4), and in (18) NYCRR § 352.55 (g) (applicable when other housing is available), are entitled to a fair hearing.

This motion is not the first challenge to this Regulation. In McCain v Giuliani, Index No. 41023/83, in a motion before Hon. Justice Helen E. Freedman (Sup Ct, NY County 1996), the plaintiff families charged, *inter alia*, that the Regulation violated earlier court rulings, which required the City to provide shelter to homeless families with children. See, e.g.; Mc Cain v Dinkins, 192 AD2d 217 (1st Dept 1993), affd as mod in part, McCain V Dinkins, 84 NY2d 216 (1994); McCain v Koch, 117 AD2d 198 (1st Dept 1986), revd in part, 70 NY2d 109 (1987). Further, they claimed that the Regulation, when applied to them, carries the draconian threat that families who do not, or cannot comply with the Regulation's requirements will be ushered back into the streets, to face the possibility that their children would be taken from them, and be placed in foster care.[2] Regardless, and based to a great degree on the assurances given the court by defendants at the time that the Regulation would "only be invoked when individuals make no attempt to comply with directives, and that aid will continue as long as an individual asks for a fair hearing," and that such individuals would be informed both of their

[2] 18 NYCRR § 352.35 (d) states that "[p]rior to denying or discontinuing temporary housing assistance pursuant to subdivision (c) of this section, the social services district must evaluate the individual's or the family's needs for protective services for adults, preventative services for children and protective services for children and, if necessary, make an appropriate referral."

right to a fair hearing, and that their aid would continue pending the hearing, the lower court in McCain found that the Regulation was valid on its face, and that DSS had acted within its authority in its promulgation. McCain v Dinkins, Index No. 41023/83 (Sup Ct. NY County 1996), supra at 17-18. Upon a grant of reargument, the court adhered to the earlier decision. McCain v Giuliani, 41023/83, decision dated May 27, 1997.

In decision dated July 30, 1998, the Appellate Division, First Department, affirmed both lower court decisions, finding that "the promulgation of NYCRR 352.35, conditioning an applicant's entitlement to temporary housing benefits upon the applicant's satisfaction of the … requirements, was a proper exercise of state DSS's rulemaking authority pursuant to Social Services Law §§ 20 (3) (d) and 34 (3) (f)," and that the Regulation was, indeed, facially valid. McCain v Giuliani, 252 AD2d 461, 461-462 (1st Dept 1998). The court reiterated, however, that it was only determining the Regulation's facial validity, because it "does not on its face permit the arbitrary, outright denial of temporary shelter." Id. at 462.

The essential difference between the situation which prevailed in McCain, and that in the present action, is that the situation of the parties herein is governed, and has long been governed by the Consent Decree, a written agreement, while no such document presently attends to the needs of the homeless families in McCain.[3]

According to Robert M. Hayes, plaintiffs' long-time counsel, who also participated in the drafting of the Consent Decree, "[t]he fundamental design of the Callahan decree was to establish a bedrock protection with the intention to preserve human life." Affidavit of Robert M. Hayes dated January 3, 2000, ¶ 9. Plaintiffs insist that the complex web of bureaucracy which, allegedly, defendants are attempting to weave into the Consent Decree by means of 18 NYCRR § 352.35 as a condition for shelter eligibility, is patently and flagrantly inconsistent with the simple language of the Decree which promises succor from the elements to any man or woman who meets either the standard of neediness, or who finds him or herself seeking shelter because of "physical, mental or social dysfunction." Plaintiffs further argue that even the "needs standard" which prevailed at the time that the Consent Decree was executed was simpler than that which prevails in today's bureaucracy and only required, at the time, the supplicant for shelter prove that he or she was poor. Consequently, it is plaintiffs' position that 18 NYCRR

[3] But see, McCain v Koch (117) AD2d 198 [1st Dept- 1986]), where the First Department, Appellate Division stated, in the context of a motion for a preliminary injunction, that the protections offered by the Consent Decree should apply to homeless families on equal protection grounds, without specifically determining that the Consent Decree should itself, and in its entirety, applied to the families. The Appellate Division, First Department, in McCain v Giuliani, 252 AD2d 461 (1st Dept 1998), did not address the Consent Decree at all.

§ 352.35, despite its "facial" validity, cannot serve to alter rights long established under the Consent Decree.

Defendants' position is set forth succinctly by the State in its Reply Memorandum of Law, where it states that

> [t]he provisions that plaintiffs dismiss as mere "bureaucracy" are intended to foster shelter residents' self sufficiency and diminish reliance upon emergency shelter, as well as protect them from violence and dangerous behavior within shelters. Nothing in the Consent Decree precludes the State defendant from exercising his legal authority to enforce laws and implement regulations promoting these salutary goals.

Id., at 2. The City's position is equally confident that "the regulation is consistent with the Decree and is a reasonable, lawful limitation on single adults' entitlement to shelter." Affidavit of Martin Osterreich, supra, ¶ 3. Consequently, defendants challenge the contention that the Consent Decree, as it now stands, confers an absolute and unconditional right to shelter. Instead, defendants argue that the Consent Decree has always provided for the imposition of sanctions for breaches of "reasonable" requirements governing behavior, such as anti-social acts, or the possession of drugs or alcohol. Based on this history, defendants maintain that "the Consent Decree should be read in a way that allows imposition of reasonable conditions on the right to shelter…"(City Defendants' Reply Memorandum of Law, at 11), so as to include sanctions for, inter alia, a failure to cooperate with the various delineated assessments, and contend that this policy is but an extension of the same policy which, according to defendants, has long been in place.

Defendants further maintain that, to the extent that the Regulation appears to alter the rights conferred therein, the Consent Decree, in paragraph 18, provides, by its terms, for just such regulatory change as has been wrought by 18 NYCRR 352.35. In this argument, defendants contend that paragraph 18 of the Consent Decree preserved to the Commissioner of the Department of Social Services an unfettered right to formulate new regulations such as the one at hand. Thus, defendants claim that the issuance of the Regulation did not violate the Consent Decree; it was, rather, permissible as an action contemplated by the Consent Decree itself.

Alternatively, defendants argue that, if the court should find that the Consent Decree does not already incorporate the Regulation, the Consent Decree should be modified to incorporate it, based on the holding in Rufo v Inmates of Suffolk County Jail (502 US 367 [1992]). The United States Supreme Court in Rufo Determined that "[a] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Id. at 384. The "significant" change may

be either one of fact or of law. Modification under Rufo may also be warranted "when changed factual conditions make compliance with the decree substantially more onerous," when the decree "proves to be unworkable because of unforeseen obstacles," or "when enforcement of the decree without modification would be detrimental to public interest [citations omitted]." Id. Accordingly, defendants would have this court find that changing circumstances since the execution of the Consent Decree, and the change in the law represented by the Regulation, require the Consent Decree's modification to incorporate the Regulation.

This court has been greatly impressed by the quality of the arguments as presented to it by all of the parties on this very difficult issue. It is evident that all of the participants in these motions share a deep concern for and commitment to alleviating the plight of the individuals whose interests are at stake. There can be no mistaking the defendants' sincere concern for the welfare of the homeless, and their genuine determination to alleviate their unfortunate situation, as evidenced by the scope of the system which they wish to implement by means of the regulation at issue. Equally sincere are the plaintiffs' concerns that the Regulation will harm, rather than help, the very people intended to benefit most from the Consent Decree.

It is this court's finding that the Regulation, as presently formulated, and in its proposed implementation, will violate the terms of the Consent Decree, in that it will place restrictions on the right to shelter guaranteed under the specific and unambiguous language of the Consent Decree, beyond the minimal and reasonable limitations which have developed over time to correct for, and protect shelter inhabitants from, dangerous or anti-social behavior. The history of the evolution of the Consent Decree makes patent that it was expressly and carefully worded to ensure that the members of this City's homeless population who are the most difficult to reach, and the most resistant to sincere offers of help, would still find themselves in a safe and warm bed when the need arose, and, barring behavior which, in the context of the shelter environment, would be considered unacceptable, would not lose that security if their need was established, or their physical, mental or social dysfunction made cooperation with all but the basic civilities impossible.

At oral argument of the present motions on January 3, 2000, the City correctly stated that "the issue here is really one of interpretation of the consent decree," that is, that the issue is one of contract interpretation. A court's interpretation of writings is circumscribed by law. The court is to interpret writings so as to reveal and enforce the parties' intentions, as conveyed in the unambiguous language of the document. See, W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157 (1990). This rule applies equally to writings such as the present Consent Decree. See, United States v

Armour & Co., 402 US 673, 681 (1971) ("[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms).[4] Courts are to give full expression to all of the language employed in the writing, in the context in which it appears. See, Kass v Kass, 91 NY2d 554 (1998). Doing so in the present context reveals the fundamental weakness in defendants' claim that the implementation of the Regulation will impact upon the single adult shelter population in a manner which was within the contemplation of the parties when the Consent Decree was executed.

While the defendants have taken pains to explain how they would identify, and exempt from the sanctions contained in the regulation, those persons suffering mental or physical infirmities, it is telling that defendants avoid any real discussion of the possible meaning of the term "social dysfunction," or why it was included among the categories of impairments which will entitle a homeless adult to basic shelter under the Consent Decree. In fact, defendants admit that the Regulation does not include "social dysfunction" within the description of impairments which will exempt from compliance with the regulatory scheme, but insist that the plaintiffs engage in "metaphysical hairsplitting' (State's Reply Memorandum of Law, at 4) when they complain that the Regulation violates the Consent Decree by failing to allude to the impairment of "social dysfunction."

Defendants have implied to this court that they do not even know what "social dysfunction" means, but that a definition is, after nearly two decades, "still evolving." Affidavit of Robert A. Dawes, dated December 22, 1999, ¶ 14. However, defendants do acknowledge, on several occasions, the existence of "the small but sizable portion of the shelter population who, for personal rather than physical or mental reasons, are uncooperative with reasonable conditions for receipt of shelter." Affidavit of Richard Salyer (President of Volunteers of America, Greater New York, Inc.), dated December 22, 1999, ¶ 4; see also, Unsworn Affidavit of George McDonald (President of the Doe Fund), ¶ 7 (supporting the implementation of 18 NYCRR § 352.35 as a tool for dealing with "the small but highly visible portion of the shelter population who, for personal rather than physical or mental reasons, are resistant to entering shelter-based programs"). Defendants, throughout their arguments, have expressed confidence that they can, and will, distinguish between individuals who "are capable of meeting the State regulatory requirements, including not using drugs, refraining from violence, preparing an independent living plan, looking for permanent housing, participating in work requirements, etc…."

[4] The Supreme Court has noted that a consent decree "no doubt embodies an agreement of the parties and thus in some respects is contractual in nature," but that, as a "judicial decree," it is also subject to the rules generally applicable to judgments. Rufo v Inmates of Suffolk County Jail, 502 US 367, 378 (1992).

(Affidavit of Robert A. Dawes, Dated December 22, 1999, ¶ 15). This includes, presumably, those requirements for attending scheduled appointments in various locations around the City, and those individuals who "choose not to, or "are unwilling to" comply. Id.

Defendants make it clear by these statements that they believe in the existence of a small contingent of homeless individuals who simply will not comply with shelter rules, while evading the question of whether there may also be a class of individuals who simply cannot comply, despite the absence of a clear-cut diagnosis of mental or physical infirmity. However, it seems but common sense to recognize that at least a part of this "small but highly visible ... population" of recalcitrant individuals is made up of the very population of people who the drafters of the Consent Decree sought to protect by deliberately, and with much consideration, including a type of dysfunction, which is distinct from mental or physical impairment, and which renders a person "socially dysfunctional," i.e., impaired, in his or her ability to act correctly, or in his or her best interests, in society. The issue with such individuals is not, according to plaintiffs' experts, so much a matter of unwillingness to cooperate, as inability to do so. Thus, defendants' assurances that their ever-increasing sophistication in being able to detect and diagnose mental and physical impairments[5] will satisfy the mandate of the Consent Decree, while making no acknowledgment of the possibility of social impairment, which might make someone unable, as opposed to un*willing* to cooperate with bureaucratic niceties, ignores the very language of the Consent Decree, ignores the drafters' recognition that such a class of individuals exists, and renders the Regulation void as to the single adult homeless population protected under the Consent Decree, despite the facial validity of the Regulation as applied to other populations.

There is no conflict between the above conclusion and the holding in McCain v Giuliani (252 AD2d 461, supra), since, in that case, the Appellate Division, First Department, was not dealing with an agreement in which the term "socially dysfunctional" was specifically, and with forethought, included as a specific category of individuals entitled to shelter. That the Court therein did not recognize any constitutional protection available to such individuals does not negate their inclusion in the Consent Decree, or dilute the Consent Decree's ability to offer them shelter.

It is further found that plaintiffs' challenge to the promulgation of the Regulation does not "violate a primary term of the Decree…"

[5] This court has accepted a great deal of testimony, in the form of affidavits, concerning defendants' ability to detect mental and physical impairment in the immediate shelter setting, before determining that a particular adult should be removed from the safety of the shelter. With all due regard to defendants' manifest good intentions, this court remains particularly dubious as to the feasibility of this part of the planned implementation of 18 NYCRR § 352.35.

(i.e., paragraph 18), and "impermissibly deprive the State Commissioner of his statutory and regulatory authority to administer this form of public assistance,"[6] as the State would have this court find. State's Reply Memorandum of Law, at 1. There is no question but that the State is authorized to promulgate regulations concerning public assistance. See, Social Services Law § 131-a (1); Crawford v Perales, 205 AD2d 307 (1st Dept 1994). It is also true that deference is to be given to the interpretation of regulations by the parties responsible for promulgation. See, Barie v Lavine, 40 NY2d 565 (1976). However, the court is here dealing with the construction of a species of contract, not an administrative regulation, and so, must consider the intent behind the language which the parties chose to employ in the Consent Decree. See, W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, supra.

Paragraph 18 of the Consent Decree reads as follows:

> Nothing in the judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce and carry out her duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

If, by means of this language, the Commissioner of the Department of Social Services were free to issue regulations, which vitiated any part of the Consent Decree, as, would, to some degree, 18 NYCRR § 352.35, then the entire Consent Decree would be rendered a fiction, an agreement which would last only as long as defendants wished it to last, and no longer. Therefore, the meaning of the paragraph is in question, and is the proper subject for exposition by parol evidence. See, Stage Club Corporation v West Realty Co., 212 AD2d 458 (1st Dept 1995) (parol evidence rule does not preclude evidence to clarify an ambiguity in a writing).

No credible rebuttal has been offered to the affidavit of Barbara Blum, former Commissioner of the Department of Social Services, in which, based upon her own involvement in the negotiation of the Consent Decree, she states that

> [I]n agreeing to this Decree term [i.e., "social dysfunction"] as the State defendant's Commissioner of the Department of Social Services it was my intent to ensure that vulnerable New Yorkers would be provided with a roof over their heads instead

[6] It is unnecessary, under the circumstance, to join the heated debate between the parties as to whether acceptance in a shelter is a form of public assistance at this time, since, regardless of whether the homeless individuals herein are accepting public assistance in accepting temporary shelter, the Consent Decree bars the type of sanctions which the defendants would take against them with regard to shelter applicability.

> of being relegated to live in the public spaces of New York City. All parties to the Decree recognized the troubled nature of the plaintiff class and the need to avoid bureaucratic barriers to obtaining and remaining in safety-net shelter. Thus, the Decree merely requires class members to meet the "need standard" for public assistance instead of tying shelter eligibility to public assistance eligibility. Likewise, the Decree requires the provision of shelter not just to persons with physical or mental disabilities but also to persons who are homeless by reason of "social dysfunction." Again, all parties understood that such accommodations were necessary for plaintiff homeless person because of the nature of their limitations and chronic conditions.

Affidavit of Barbara Blum dated December 11, 1999, ¶ 7.

Ms. Blum pointedly notes in her affidavit that she had every intention of preserving her right as Commissioner to carry out her duties under the Social Services Law, including the implementation of regulations and applicable law, but that the inclusion of paragraph 18 "was solely intended to ensure that the Decree establish a floor and not a ceiling with respect to providing assistance to homeless New Yorkers." Id., ¶ 8. In short, paragraph 18 was intended to protect the beneficiaries of the Consent Decree from the implementation of regulations which would undercut the benefits conferred therein, while preserving to the Commissioner of Social Services the right and ability to call forth even greater protections, if necessary.

There is no serious disagreement with Ms. Blum's recollection of the negotiation process, or with her interpretation of the provision. The statements of Ms. Blum are not here being invoked "against" the State, as suggested (State's Reply Memorandum of Law, at 13); they are merely being utilized as a tool to analyze the intent of the parties as to the meaning of language in the Consent Decree. Further, this court does not believe that, in entering into paragraph 18, as it is explained by Ms. Blum, she, in any way, "disavowed" her legal responsibilities, or hampered the ability of her successors to fulfill theirs. Id. at 14. It is evident that the Consent Decree was intended to be viable as long as the need for it remains, and that any interpretation of its terms which suggests that the Decree is as mutable as defendants suggest, defies reason. Consequently, implementation of the Regulation is not permissible under paragraph 18 of the Consent Decree, and such implementation would violate the terms of the Consent Decree, by creating circumstances wherein persons who previously could count on shelter under the terms of the Consent Decree might be sanctioned, and turned away from necessary shelter.

Nor can it be claimed that any "significant" change in law or fact requires that the Consent Decree be modified to encompass the Regulation. See, Rufo v Inmates of Suffolk County Jail, 502 US 367, supra.[7] Modification of a consent decree is not warranted simply "when it is no longer convenient" to live with the terms of the Consent Decree. Id. at 383. This court does not believe that the Regulation itself, or any regulation issued by the defendants, could be considered to be the type of statutory or factual change, which would warrant modification of a Consent Decree. As previously stated, the Consent Decree would be but an illusion if its mandates could be changed by the wish of one of the signatories. Some change in law or factual circumstances other than a regulation issued by one of the signatories to the Consent Decree must surely be required before a modification is warranted.

Defendants have suggested that the change in social climate, and the demonstrably better system which has developed since 1981 to aid and shelter the homeless, constitutes a significant change in circumstances aside from the Regulation, so as to warrant modifying the Consent Decree. However, as admirable as the new system is in comparison to the old, "socially dysfunctional" people continue to exist, and to inhabit the streets of New York in fair weather and foul, and no change in circumstances, social or otherwise, warrants that these individuals should no longer receive succor under the terms of the Consent Decree, or should be subject to termination of their right to shelter if they cannot function within the complex system which defendants have fashioned to alleviate the problem of homelessness.

Even if a modification appeared to be justified under the circumstances herein, such a modification would have to "suitably tailored" to the change in circumstances. Rufo v Inmates of Suffolk County Jail, 502 US 367, supra; see also, Gilmore v Housing Authority of Baltimore City, 170 F3d 428 4th Cir 1999). Within the very simple parameters which describe the parties to whom shelter is assured under the Consent Decree, it is difficult to see how the addition of sanctions which would bar the door to the very people promised shelter under the Consent Decree could ever be "suitably tailored" to the circumstances. Therefore, the court fails to find any basis for a modification of the Consent Decree, based on any "significant" change in circumstances.

As a result of the foregoing, it is this court's finding that plaintiffs are entitled to a declaration in their favor, as a matter of law, because the Consent Decree does not incorporate, nor allow

[7] It should be noted that the Court in Rufo, in formulating a standard for modification of a Consent Decree is applying Federal Rule of Civil Procedure 60 (b), which provides the conditions for obtaining relief from a judgment or order. Thus, the Court in Rufo is treating the Consent Decree as a final order.

for the Regulation, and no significant changes in law or fact justify a modification of the Consent Decree to encompass the Regulation. In consequence, the Regulation cannot be applied to the single, adult homeless persons who are the beneficiaries of the Consent Decree.

This determination has not been an easy one to make. The affidavits from various people who are deeply, and even passionately, involved in the fight to better the lives of homeless person (such as, for example, that of George McDonald, President of the Doe Fund), who believe the Regulation to be beneficial and necessary, particularly because they believe that it will compel some people to "appropriately modify their behavior to allow them to not only enter or remain in the shelter system, but to end their dependency on it" (id., ¶ 8), are very compelling. Defendants have taken great pains to delineate the "extraordinary safeguards" which they intend to put into place to ensure that the system will not fail, and that no person will find him or herself in danger of cold or violence on the street because of a bureaucratic error.[8]

Equally compelling has been the testimony of the many affiants on plaintiffs' behalf, such as that of Kim Hopper, Ph.D., an expert on mental health issues, who was a primary expert witness for the plaintiffs in 1981. Dr. Hopper, for instance, reminds this court that the plaintiffs' class was, and still is, made up of many "troubled" individuals who have "fallen through the cracks of the welfare system, the mental health system, employment and housing market," who have a great need for a "seamless entry into safety-net shelter," so as to avoid being turned out into the streets of the City. Affidavit of Kim Hopper, Ph.D., dated December 12, 1999, ¶2. Other witnesses, such as Philip W. Brickner, M.D., have here testified as to the many serious and chronic medical conditions, such as venous disorders, diabetes, and heart problems, which are endemic to the homeless, and often hard to detect and treat, due to the inability to ensure treatment and care over a sufficient period of time. These experts have testified, most convincingly, that such persons are far more susceptible to hypothermia, and other cold-related injury, even when the ambient air temperature is above the freezing point. Plaintiffs have eloquently expressed their fears that subjecting these high-risk, and difficult to reach people to the potentially life-threatening sanction of expulsion from shelters, because of the difficulty in diagnosing their problems or obtaining their cooperation in the long-term programs and innumerable bureaucratic requirements encompassed in the Regulation, will result

[8] For instance, the City has assured the court that no one is ever turned away from, or put out of, a shelter, if the outside temperature is 32 degrees or below, and that people who have been turned away before such cold arrives will be searched for, located, and returned to the safety of the shelter, or, may avail themselves of a "drop in center," where they may sit on a chair throughout the night. The difficulties of this well-intentioned plan are manifest. In addition, it may be noted that society provides even a convicted felon with the amenity of a bed.

in an explosion of homeless individuals, banished or barred from shelters, risking their health, and perhaps, their lives, on the often bitterly cold, and palpably dangerous streets of a sadly indifferent City. Plaintiffs insist that defendants' failure to even recognize the very existence of a population of "socially dysfunctional" individuals will ensure that many such people, who presently enjoy the surety of a safe bed and sufficient board under the broad reach of the Consent Decree, will no longer be protected thereunder, upon implementation of the Regulation. This court shares that concern.

Defendants express great confidence that their regulatory bureaucracy can be so stream-lined and made so failsafe, as to ensure that virtually no deserving person will be harmed. However, bureaucratic error is as much a part of bureaucracy, as human error is a part of life. If the Consent Decree were to be found to encompass the multitude of bureaucratic requirements which are contained in the Regulation, the majority of which are much more complex than the simple rules of correct social behavior to which defendants so often refer, the simple bureaucratic error which might send an individual out into the street, because he or she was unable to understand or to cooperate with these requirements, might be the error which results in that individual's death by exposure, death by violence, or death by sheer neglect. The risk is simply too great to take.

If defendants sincerely want to create a system in which our homeless citizens can rejoin, and contribute to society, as is evident, they should do so by means which do not endanger those very persons. The court is confident that such a goal can be accomplished. This was, in fact, the goal of the Consent Decree, and still is. Accordingly, plaintiffs' motion is granted, and the regulation, 18 NYCRR § 352.35, is declared null and void as it pertains to the population of single adult homeless persons who are the subject of the Consent Decree.

Dated: February 18, 2000