SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROBERT CALLAHAN, et al., Plaintiffs, -against- HUGH L. CAREY, as Governor of the State of New York, et al., Defendants.	)	Index No.: 42582/79 IAS Part 10 Honorable Judith J. Gische
LOUISE F. ELDREDGE, et al., Plaintiffs, -against- EDWARD I. KOCH, as Mayor of the City of New York, et al., Defendants.	)	Index No.: 41494/82 IAS Part 10 Honorable Judith J. Gische

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER ENFORCING THE CONSENT DECREE

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Procedure 12-400 of the New York City Department of Homeless Services ("DHS") attempts a radical change in DHS's administrative rules governing who is provided with court-ordered shelter.[1] The new policy will subject thousands of the most vulnerable New Yorkers to the risk of death or grievous injury from exposure to the elements on the street. DHS developed the new policy in secret for nearly a year, before announcing, late on November 3, 2011, that the policy would become effective just five business days later, on November 14, without any public debate on the measure. The people of New York City ("City") adopted the City Administrative Procedure Act ("CAPA"), N.Y. City Charter § 1041 *et seq.*, precisely to prevent such clandestine policymaking.

The proposed policy violates the plain and heretofore universally acknowledged requirement of the Consent Decree in this litigation that the City must provide shelter from the elements to each woman and man who meets the need standard for public assistance or is in need of shelter by reason of physical, mental or social dysfunction. Consent Decree, ¶ 1. In the instant motion, Plaintiffs have asked this Court to enforce the Consent Decree and enjoin implementation of Procedure 12-400 for that reason, and in addition because the City's sudden shift in homelessness policy violates the letter and spirit of CAPA. The New York City Council ("City Council") has filed its own action against the City challenging Procedure 12-400 on CAPA grounds. This memorandum addresses only the CAPA issues (raised in Plaintiffs' motion and the City Council's separate action), which the Court has determined to resolve before deciding whether the Procedure contravenes the Consent Decree. Hr'g Tr. 3–4, Dec. 9, 2011 ("12/9/2011 Hr'g")[2] Pending the return date of this motion, the City has agreed to forebear from

[1] A copy of Procedure 12-400 was included as Exhibit A attached to the Affirmation of Steven Banks (filed Nov. 10, 2011), submitted with Plaintiffs' Order to Show Cause.

[2] Pursuant to Paragraph 11 of the Consent Decree, the City is under order to produce documents in connection with this enforcement motion. Hr'g Tr. 20–21, Nov. 21, 2011. That document production is

implementing Procedure 12-400. *Id*. at 7–8.

With respect to Procedure 12-400, the City followed none of the procedures that CAPA mandates for issuing a rule. N.Y. City Memorandum of Law. 2, Dec. 29, 2011 ("City Br."). Those procedures were not required in this case, the City maintains, because the new policy is not a "rule" within the meaning of CAPA.

First, the City argues that Procedure 12-400 does not qualify as a rule because it leaves the decision whether a homeless woman or man receives shelter to the discretion of shelter workers. *Id*. at 9–16. The brief that the Council is submitting today in its action explains cogently why the City is wrong on this point. Council of the City of New York Memorandum of Law, Jan. 10, 2012 ("City Council Br."). Plaintiffs adopt and incorporate the City Council's arguments by reference.

Second, the City contends that Procedure 12-400 is not subject to CAPA because the Procedure implements rules and guidance issued by the former New York State Department of Social Services, chiefly Administrative Directive 94 ADM-20. According to the City, Procedure 12-400 thus "in itself has no legal effect but is merely explanatory," § 1041(5)(b)(ii), and is by definition not a "rule" under CAPA. City Br. 17–19. To the contrary, the new policy has significant legal effect, in that it (1) purports to eliminate the entitlement to shelter of many vulnerable New Yorkers who have a court-ordered right to shelter pursuant to the Consent Decree and (2) for those who are still able to enter the shelter system, changes what they must do to receive life-sustaining shelter from the elements.

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still outstanding and the Plaintiffs have reserved their objection to proceeding on the CAPA issue without such production. 12/9/2011 Hr'g. 6–7.

I. A policy with legal effect is a rule, even if it implements State law.

Under CAPA, some statements of policy are "merely explanatory," § 1041(5)(b)(ii); they simply inform New Yorkers of pre-existing rights and obligations. On the other hand, a policy statement that has independent "legal effect," *id*., must be promulgated using proper rulemaking procedures. Courts have uniformly recognized the difference. *See, e.g., Cubas v. Martinez*, 8 N.Y.3d 611, 621 (2007); *Elcor Health Servs. Inc. v. Novello*, 100 N.Y.2d 273, 279 (2003); *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578, 585–86 (3d Dep't 2009); *Childs v. Bane*, 194 A.D.2d 221, 228 (3d Dep't 1993).

In *Cubas*, on which the City relies, the Court of Appeals stressed that rulemaking was not required for the policy under challenge in that action—requiring an applicant without a social security number to submit certain documentary evidence to obtain a driver license—because pre-existing State law had already obligated such applicants to prove the facts to which the documentary evidence was germane. 8 N.Y.3d at 621. The new practice only specified a particular form of proof for establishing those facts. *Id*. The new practice had no "legal effect" because it explained how to fulfill an existing requirement, rather than "impos[ing] a new obligation." *Id*. By contrast, until Procedure 12-400, women and men seeking shelter in New York City have not been required to prove—at all, much less by clear and convincing evidence—that they have no conceivable alternatives. *See infra*, at 5–6.

Childs, also discussed in the City's brief, illustrates the same distinction. By operation of a new State statute, any applicant for utility support payments whose income exceeded the need threshold was required to execute an agreement to repay the assistance. 194 A.D.2d at 224 (citing Law 1992, ch. 41, § 128). The Department of Social Services issued a directive to the same effect and further explained that defaulting on the required repayment agreement would

make a person ineligible for future utility assistance. *Id*. The City argues that the *Childs* directive "went beyond the scope of ... the statute." City Br. 18. But the Third Department specifically observed that the new statute implicitly contained the new rule about default, without which "the repayment agreement[s]" would be "meaningless." 194 A.D.2d at 226.[3] *Childs* thus confirms that whether a policy statement is a rule depends, just as CAPA says, on whether the policy statement has "legal effect" of its own.

The fact that a policy statement "implement[s]" a pre-existing directive, City Br. 17, does not exempt it from rulemaking. On the contrary, the very definition of "rule" under CAPA is a statement or communication that "*implements* or applies law or policy." § 1041(5)(i) (emphasis added). Were the City correct that Procedure 12-400 escapes CAPA because it "repeats and incorporates some of the requirements" of State directives, City Br. 17, there would be little scope left for rulemaking. Every policy an agency makes is an implementation of pre-existing law, because agencies operate subject to legislative direction and exercise only delegated authority. *Abiele Contracting, Inc. v. N.Y. City Sch. Constr. Auth.*, 91 N.Y.2d 1, 10 (1997). Furthermore, even when a rule "implement[s] particular mandates or standards set forth in ... state ... laws … with only minor, if any, exercise of agency discretion," the rule is exempted from only one step of rulemaking—review by the Law Department—not from *all* of them. §1043(d)(4)(iv). CAPA hardly needed to include this express exemption if, as the City suggests, "incorporat[ing] some of the requirements" of State law takes a policy outside the rulemaking ambit entirely.

[3] The *Childs* directive did go "beyond the scope of" the governing statute in several respects. But the Third Department invalidated those aspects of the directive as substantively unlawful, 194 A.D.2d at 227–28, and therefore had no need to consider whether those features constituted "rules" for administrative procedure purposes.

II. Procedure 12-400 has legal effect.

A policy that creates or destroys rights or obligations triggers the rulemaking requirements of CAPA. Therefore, the questions before the Court are: What rights and obligations did women and men who receive shelter under the Decree have before the City issued Procedure 12-400? What are their rights according to the new policy? If those rights will change, Procedure 12-400 is clearly a statement with "legal effect" that cannot be promulgated without rulemaking procedures.

Procedure 12-400 would, indeed, alter the entitlement of women and men in New York City to receive shelter.

First, until now DHS has accepted, and provided shelter from the elements to, all women and men who seek such shelter at DHS's intake facilities. Under Procedure 12-400, DHS will turn women and men away, denying them shelter from the elements, on the basis of newly created background investigation and documentation requirements.

The City contends that Procedure 12-400 merely deals with procedures for a determination for which State rules already define the "contours." City Br. 15. But Procedure 12-400 imposes exacting *new* requirements, not previously in force, on women and men attempting to enter the shelter system. Labeling those requirements "procedures" does not save them. § 1041(5)(ii) ("rule" includes statement that "prescribes the procedural requirements of an agency"); *1700 York Assocs. v. Kaskel*, 701 N.Y.S.2d 233, 241 (N.Y. Civ. Ct. 1999) ("An agency may not circumvent CAPA's rulemaking requirements by giving a different label to what is in purpose or effect a rule or amendment to a rule.").

New York State Restaurant Ass'n v. New York City Department of Health and Mental Hygiene is instructive in this regard. 2004 WL 2423561 (N.Y. Sup. Ct. N.Y. County, Oct. 27,

2004). The plaintiff there challenged procedural guidelines adopted by the City for restaurant inspections. Existing City and State law prescribed hygiene rules for restaurants and penalties for violations, and the City therefore argued that the guidelines were "merely explanatory." The court held the guidelines to be rules subject to CAPA, because they effectively "prescribe[d] standards which, if violated, may result in a sanction." *Id*., at *4.[4]

Similarly here, "all applicants ... are required to cooperate with DHS's eligibility process," Procedure 12-400, at 3, a procedure never before encountered by women and men seeking shelter in New York City. Notwithstanding the issuance of 94 ADM-20 (in its current form) 15 years ago, DHS had not previously required women and men seeking shelter to establish that they have neither conceivably viable alternative housing nor the financial resources to obtain any other form of shelter. *See* Affirmation of Steven Banks, ¶¶ 3–4 (filed Jan. 10, 2012) ("2d Banks Aff."); *cf.* Procedure 12-400, at 1. DHS has not required documentation of an entrant's housing or medical history in order to receive shelter from the elements. 2d Banks Aff. ¶ 3; *cf.* Procedure 12-400, at 3, 7. DHS has not required cooperation with any sort of pre-entry background investigation because it has conducted no such background investigations of women and men seeking shelter. 2d Banks Aff. ¶ 3; *cf.* Procedure 12-400, at 3. Procedure 12-400 erects all these new requirements; and if a person "fails to cooperate," DHS "must deny [shelter]." Procedure 12-400, at 3–4.[5]

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[4] Before adoption of the new procedures, restaurant inspectors classified violations as "general" or "critical" (more serious); if an inspection resulted in four critical violations or five general violations the restaurant was subject to closure. Under the new procedures, inspectors assigned point values to specific violations, depending on the severity of the violation at issue, and a restaurant that received 28 points or more was subject to closure. *N.Y. State Restaurant Ass'n*, 2004 WL 2423561, at *1, *3.

[5] The City denies that any woman or man will be barred from shelter "for failure to supply information," City Br. 16, but Procedure 12-400 declares that rejection is the mandatory consequence of an alleged failure to cooperate. The policy must be judged on the basis of its "plain language," not the City's contrary contentions. *See Maher v. N.Y. State Div. of Hous. & Cmty. Renewal*, 601 N.Y.S.2d 667, 669–70 (Sup. Ct. Westchester County 1993). The City claims that those with physical or mental

Second, the City admits that, under the new requirements, at least 10 percent and possibly as many as 60 percent of the women and men who arrive at DHS's intake centers—women and men to whom, in the past, the City would have had no reason to deny shelter—will be rejected. City Council Hr'g Gen. Welfare Comm., 60–61 (Nov. 9, 2011) (testimony of Homeless Servs. Comm'r Seth Diamond).[6] The City expects, as a result, to save $4 million every year. *Id*. at 60. Those women and men who are relegated to the streets because they are unable to obtain shelter will take no comfort from the City's argument that Procedure 12-400 had "no legal effect" on them.

Third, the State regulation and directives on which the City relies do not, in fact, mandate the policy that Procedure 12-400 will put in place. These directives are fifteen years old. If they required the City to conduct extensive background investigations at intake and maintain strict controls on who enters shelter, the City would surely have done so long before now. In arguing now that Procedure 12-400 has no legal effect independent of the State rules, the City in effect suggests that DHS has been violating State requirements for a decade and a half.

The better view is that State rules permit, but do not require, the City to implement something like Procedure 12-400—subject to the City's compliance with the Consent Decree. Indeed, the City has previously taken exactly that position in this litigation. As the City points out, City Br. 4, Plaintiffs previously challenged the shelter termination provisions of 18 N.Y.C.R.R. § 352.35 as inconsistent with the Decree. Plaintiffs also argued, *inter alia*, that the

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impairments may be excused from cooperating with the investigation, Goldenberg Affirmation, ¶ 15, Dec. 29, 2011—if they can meet the heavy burden of proving that they have such an impairment and that the impairment caused their alleged non-cooperation, Procedure 12-400, at 3–4. However, a policy does not cease to be a rule because it has exceptions. *See Application of 439 East 88 Owners Corp. v. Tax Comm'n of the City of N.Y.*, 2002 WL 32799697, *8–*9 (N.Y. Sup. Ct. N.Y. County Dec. 3, 2002), *aff'd*, 307 A.D.2d 203 (1st Dep't 2003) (policy requiring information from only certain taxpayers was a rule).

[6] The relevant portion of this transcript is attached as Exhibit I to the Affirmation of Emergency of Jeffrey P. Metzler (filed Dec. 7, 2011), submitted with the City Council's petition.

Decree does not permit the City to impose onerous "bureaucratic obstacles" on women and men trying to enter the shelter system. In response, the City pointed out that the shelter rules, as the City proposed to apply them at that point, did *not* erect such obstacles:

> "[S]hould the City have so chosen, ***which it has not***, it unquestionably ***could have*** … require[ed] a careful investigation of whether the applicant was, indeed, homeless. It ***could***, for example, have required the applicant to cooperate in a thorough investigation of housing alternatives and required extensive information and documentation in that regard." City Defs.' Reply Memorandum of Law, *Callahan v. Carey*, No. 42582/79, p. 9 (N.Y. Sup. Ct. N.Y. County, filed Dec. 23, 1999) (Ex. H to 2d Banks Aff.) (emphasis added).

See also City Defs.' Memo. of Law, *Callahan v. Carey*, No. 42582/79, p. 2 (N.Y. Sup. Ct. N.Y. County, filed Nov. 12, 1999) (Ex. I to 2d Banks Aff.) ("City 1999 Br.") (under challenged regulation, "[i]ndividuals ... must also comply with ... requirements as a condition *for the* ***continued receipt*** *of shelter*" (emphasis added)).

The City repeated this position before the Appellate Division, First Department, claiming that the State regulations do not involve determinations of eligibility to enter shelter. The rules only "requir[e] that those shelter ***residents*** who are able to do so take reasonable steps to ***end*** their dependence on emergency shelter." Br. of Municipal Appellants, *Callahan v. Carey*, Index No. 42582/79, p. 27 (1st Dep't, filed Oct. 18, 2002) (Ex. J to 2d Banks Aff.) (emphasis added). By its own argument, the City distinguished the State rules from what the Consent Decree requires. "[T]he very purpose of the decree," the City agreed with Plaintiffs, "was to obligate the defendants to provide shelter to men who needed it, ***without immediate analysis of why they needed it***." *Id*., at 33 (emphasis added).

The First Department relied on the City's distinction. Agreeing that the Consent Decree "relieved [women and men seeking shelter] from the burden of establishing public assistance eligibility to gain ***entry*** to temporary shelter," the Court held that the Consent Decree did not create a right to "***remain*** in shelters in perpetuity." *Callahan v. Carey*, 307 A.D.2d 150, 153–54

(1st Dep't 2003) (emphasis added). The City could therefore "requir[e] certain conduct, including cooperation," from residents ***in*** shelters." *Id*. at 153–54 (emphasis added).

The City was correct in its past briefing: To the extent the State rules are consistent with the Consent Decree, that is because the rules do not require the City to conduct "eligibility" screening at intake, as prescribed by Procedure 12-400. The Court should rely on the City's previously expressed views.[7]

Fourth, because Procedure 12-400 is inconsistent with the Consent Decree, implementing it would require a modification of the Court's judgment, as the Plaintiffs have pointed out in the instant motion. Altering the rights of homeless women and men under the Decree to receive life-sustaining shelter from the elements is itself a "legal effect."

Even if State rules required the City to seek this change—as of course they do not—that fact would not obviate CAPA's mandate of rulemaking procedures. As *Home Care Ass'n of New York State, Inc. v. Dowling*, 218 A.D.2d 126, 127 (3d Dep't 1996), cited in the City Council's opening brief, City Council Opening Br. 10, illustrates, an agency must use rulemaking procedure even if it is doing exactly what existing law obligates it to do.[8]

III. Procedure 12-400 imposes specific criteria different from those in the State rules.

Finally, the City devotes much effort to cherry-picking provisions in 94 ADM-20 that it says are similar to provisions in Procedure 12-400. City Br. 18–19. But "repeat[ing] and incorporat[ing]" some pieces of 94 ADM-20, City Br. 17, cannot exempt the entire Procedure 12-400 from CAPA's rulemaking provisions. *See* N.Y. City Charter § 1041(5) (defining "rule"

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[7] The City's views have not really changed: Procedure 12-400 itself refers to the State directives as only "guidance," not requirements. Procedure 12-400, at 8.

[8] In *Home Care Ass'n*, the agency was obeying a federal court's order, pursuant to federal law. The City, trying to distinguish *Home Care Ass'n*, observes that in that case the agency was only promulgating a procedural requirement. As explained above, *see supra*, at 5, that distinction makes no difference.

as "*the whole or part of* any statement or communication of general applicability . . . .") (emphasis added). The City's policy differs in significant details that require rulemaking.

For example:

- As noted in the Plaintiffs' moving papers, Pltf.'s Memorandum of Law. 10 (Nov. 10, 2011)—and not disputed by the City—individuals with physical or mental impairments are ultimately subject to the same new eligibility criterion, under Procedure 12-400, as others. Procedure 12-400 only exempts such individuals from cooperating with the investigation into their alternative housing options—and then only if they can prove that they are impaired and that their impairments prevent cooperation. Procedure 12-400, at 9. In contrast, as the City previously acknowledged, "by their terms the regulations concerning shelter-based conduct do not apply when the individual suffers from a physical or mental impairment." City 1999 Br. 29.

Procedure 12-400 thus represents a change from the City's prior implementation of State rules. A policy statement that "changes ... procedure[s]" in "significant ways" is a rule, not a "merely explanatory" document. *Maher v. N.Y. State Div. of Housing & Community Renewal*, 601 N.Y.S.2d 667, 669 (Sup. Ct. Westchester County 1993) (holding policy statement to be a rule, although policy statement claimed to "clarify and conform" policy to regulation, because "[t]he plain language of the Policy Statement" indicated differences from the regulation); *see also SLS Residential, Inc. v. N.Y. State Office of Mental Health*, 67 A.D.3d 813, 816 (2d Dep't 2009) (holding policy statement to be a rule because it "essentially amends the ... existing regulations").

- Procedure 12-400 declares that a woman or man seeking shelter who has $2,000 in assets "must utilize his or her resources to reduce or eliminate his/her need for emergency shelter," without exception. Procedure 12-400, at 6. No State directive or regulation specifies a

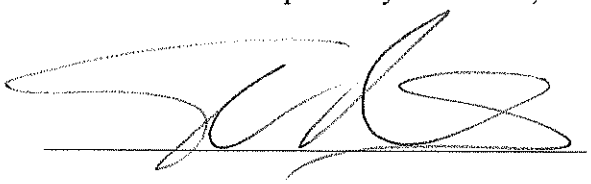
level of assets that triggers a duty to use those assets for securing temporary housing, and certainly none specifies the figure of $2,000. Even under the City's cramped reading of CAPA, a "rigid, numerical policy" like the $2,000 limit in Procedure 12-400 is a rule. *See* City Br. 9 (quoting *Matter of Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994)). Having generated this criterion on its own, independent of any direction from State rules, the City cannot claim the rigid $2,000 bar is "merely explanatory" of State law.

Conclusion

For the foregoing reasons, and those given in the City Council's Memorandum of Law in Further Support of the Petition, submitted contemporaneously, Plaintiffs respectfully ask the Court to enjoin the City from implementing Procedure 12-400 without first fulfilling the rulemaking requirements of CAPA, and to grant such other and further relief as the Court determines is just and proper.

Dated: January 10, 2012

Respectfully submitted,



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