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 SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER ENFORCING THE CONSENT DECREE

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Plaintiffs, homeless adult men and women, respectfully ask this Court to enforce the final judgment the Court entered on August 26, 1981, by consent of the parties ("Consent Decree"), in order to prevent the denial of life-sustaining shelter to class members just before Thanksgiving and the onset of winter. The Consent Decree sets forth two simple alternative criteria: **A women or a man is entitled to shelter if he or she either is in need of shelter by reason of physical, mental, or social dysfunction, or meets the need standard for public assistance.** The City of New York's Department of Homeless Services ("DHS") has just announced a new policy—to be effective November 14, 2011, with no opportunity for public comment or debate—replacing the agreed-upon criteria in the Consent Decree that has been in place for three decades. Henceforward, a class member will be turned away from the City's shelter system unless she can prove ***by clear and convincing evidence*** that she can obtain shelter from the elements by no other means. The new policy will keep out of the shelter system many class member homeless men and women who are entitled to shelter pursuant to the Consent Decree. Such a change in the basic criteria in the Decree requires a modification of the Consent Decree, and the City has made no such modification motion. In addition, even if the new policy were compliant with the Consent Decree, such a significant change in thirty years of shelter policy cannot be made without the benefit of a proper public rulemaking procedure.

BACKGROUND

For thirty years, the provision of shelter to homeless adult men and women in New York City has been governed by the Court's August 26, 1981 Consent Decree. *See Callahan v. Carey*, Final Judgment by Consent, Index No. 42582/79 (N.Y. Sup. Ct. N.Y. County Aug. 26, 1981)

("Consent Decree") (Ex. B attached to the November 10, 2011 Affirmation of Steven Banks).[1] The Consent Decree represented a negotiated settlement of contentious litigation over the City's and State's constitutional obligations to provide aid to men and women in New York City in need of shelter. *See* Consent Decree, at 1–2. The City promised to "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 [public assistance] program in New York State; or (b) the man by reason [of] physical, mental or social dysfunction is in need of temporary shelter." *Id.* ¶ 1.[2] "The consent decree acknowledges Plaintiffs' right to temporary shelter and relieves them of the perceived burden of establishing … eligibility to gain entry to temporary shelter." *Callahan v. Carey*, 307 A.D.2d 150, 154 (1st Dep't 2003).

At 5 PM on November 3, 2011, the City informed Plaintiffs' counsel of a radical change in how class members enter the adult men's and women's shelter system. *See* Affirmation of Steven Banks ¶ 3 ("Banks Aff."); Letter from Michele Ovesey to Legal Aid Society (Nov. 3, 2011) (Ex. C to Banks Aff.); N.Y. City Dep't of Homeless Servs., Procedure No. 12–400, *Single Adults Eligibility Procedure* (Ex. A to Banks Aff.) ("Procedure"). This new Procedure "sets forth the standards by which … Intake facilities will determine whether individuals who apply for [shelter] are eligible." Procedure No. 12–400, at 1. The Procedure is to be implemented on November 14, 2011, just five business days after the City first gave Plaintiffs notice.

[1] On that date, this Court entered a Consent Decree regarding the City's provision of shelter to homeless men in *Callahan v. Carey*. The terms of that Decree have since been extended to women, see *Eldredge v. Koch*, 98 A.D.2d 675 (1st Dep't 1983), and the *Eldredge* and *Callahan* cases were consolidated by order of this Court in January 2010.

[2] The Court has retained an active role monitoring and enforcing the Consent Decree. *See, e.g.*, *Callahan v. Carey*, 12 N.Y.3d 496 (2009) (under Consent Decree ¶ 11, Plaintiffs entitled to information about individuals ejected from the shelter system). Just two winters ago, this Court granted a class-wide enforcement application. *See* Tr. of Hrg. in *Callahan v. Carey*, Index No. 42582/79, 35 (N.Y. Sup. Ct. N.Y. County Dec. 21, 2009) (granting Plaintiffs temporary relief against shelter denials and systemic "overnighting" practices developed to mitigate a severe lack of lawful shelter). Further details regarding prior litigation in these matters are set forth in the Memorandum of Law filed in support of that enforcement request. *See* Memo. of Law in Support of Plaintiffs' Motion, *Callahan v. Carey*, Index No. 42582/79 (N.Y. Sup. Ct. N.Y. County Dec. 8, 2009).

Hardly any public deliberation is possible in the brief period, which includes two weekends and two holidays, between the announcement of the policy and its effective date. The City Council, outraged by the City's attempt to elude public scrutiny, took the unusual step of scheduling an emergency Council hearing on November 9, 2011. *See* Nov. 10, 2011 Affidavit of Patrick Markee ¶ 3 ("Markee Aff."). At that hearing, Seth Diamond, Commissioner of DHS, admitted that the City had sought no input on the policy from outside DHS. *Id.* ¶ 3.

The Procedure calls for two factual determinations. First, a class member must prove "by clear, convincing and credible evidence" that he "ha[s] actively sought and [is] unable to access any other temporary or permanent housing." Procedure No. 12–400, at 3. City employees will gather documents, interview "third parties who may be sources of housing for the applicant," and conduct field investigations. *Id.*, at 2. The inquiry will touch at least every place where the applicant resided in the year before seeking shelter and, in addition, any other potential location identified by the investigation. Second, a class member must also document his finances to show he or she lacks "the means to secure other housing." *Id.*, at 6. During the course of the lengthy shelter entry process, a class member will be diverted away to "explor[e] options other than shelter." *Id.*, at 7.

A class member who fails to provide the demanded documents and information is liable to be deemed uncooperative and therefore denied shelter. *Id.*, at 3–4, 9. A class member may be excused from participating if "[a] licensed social worker finds that the applicant has a mental or physical impairment that prevents the applicant from cooperating with the investigation." *Id.*, at 9. However, the assessment will continue even without the involvement of such a class member. *Ibid.* The City will then reject even a mentally impaired class member who is found to have "a viable housing option." *Ibid.* Moreover, the City does not intend to evaluate class members

rigorously for physical or mental impairments. Unless a class member "claims to have a[n] ... impairment," an impairment determination is triggered only if an "eligibility specialist suspects that an applicant has such an impairment." *Ibid.*

The City's implementation of the Procedure will have severe consequences for individuals in need of shelter. A study published in 1989 revealed that nearly 25 percent of homeless men had a definite, probable, or possible history of psychosis. *See* Affidavit of Dr. Ezra Susser ¶ 19 ("Susser Aff."). A history of alcohol or other drug abuse was evident in 58 percent. *Ibid.* Current research suggests continuing high prevalence of mental disorders among homeless people today. *Id.* ¶ 20; *see also* Markee Aff. ¶ 5 (recounting testimony of Deputy Commissioner Nashak that 30 percent of shelter residents have significant mental health problems and 60 percent have substance abuse problems). Class members cannot be expected to navigate a complicated series of investigations and provide clear and convincing proof of their plight. *Id.* ¶¶ 6–14. Many of them will be discouraged by the process and will retreat to the streets or other unstable living situations. *Id.* ¶ 14. Those who try to persevere will ordinarily not carry with them the copious documentation of housing history that the new Procedure demands. *Ibid.* And while they wait for their eligibility decisions, the City will refuse to provide even temporary relief. Procedure No. 12–400, at 7. Homeless New Yorkers denied shelter will face the risk of injury or worse on the City's streets. *See* Dec. 9, 1999 Affidavit of Dr. James O'Connell ¶ 5 ("O'Connell Aff.") (attached as Ex. D to Banks Aff.).

The Procedure purports to have a mechanism for assisting mentally impaired individuals who cannot complete the onerous new application process, *see* Procedure No. 12–400, at 9, but that mechanism is highly deficient. Many impaired individuals have never been properly diagnosed, and even those who have been are often unable to provide information about their

diagnoses. Susser Aff. ¶¶ 8-11. They will thus be unable to claim their exemption from participating in the City's eligibility investigation. The Procedure proposes to rely on eligibility specialists to "suspect[]" applicants' mental impairments and on social workers to assess them. Procedure No. 12–400, at 9. But expecting shelter employees to diagnose mental impairments is hopelessly unrealistic. Evaluating an individual's mental condition is a complex and difficult matter that requires significant observation time in the best of circumstances. Susser Aff. ¶ 10. In a shelter—let alone a shelter intake office—under the time pressure of mass-scale eligibility determinations, conducting reasonably accurate diagnoses will be essentially impossible. *Id.*, at ¶¶ 8–11.

An example illustrates the futility of the City's plans to screen mentally impaired applicants. Since 2003, in compliance with 18 N.Y.C.R.R. § 352.35, the City's Department of Homeless Services ("DHS") has evaluated existing shelter residents to see which of them might be able to transition to other housing. The regulation requires DHS to prepare Individualized Living Plans for shelter residents, and it obligates class member shelter residents to cooperate with the evaluation process and carry out their individual Plans. Like the Procedure at issue here, § 352.35 excludes mentally impaired individuals from the assessment procedure if they can prove that they are unable to comply because of their impairments. Between 2004 and 2006, according to the record before the Court of Appeals in this case in 2009, DHS ejected 24 shelter residents for failure to comply with the § 352.35 process. Appellants' Opening Brief, *Callahan v. Carey*, No. 2009-0098, at 7 (N.Y. Ct. App. Dec. 5, 2008). In all but two of those cases, Legal Aid staff found that the City had failed to take into account evidence of mental or cognitive impairment, which led to erroneous determinations. *Id.*, at 7, 9–11.

The role of the § 352.35 mental impairment determination is comparable to that contemplated in the Procedure. The § 352.35 assessment, though, takes place over months and involves observing and interacting with *existing* shelter residents. The Procedure will be applied to hundreds of applicants every night, and the City expects the new procedures could lead them to reject between 10 and 60 percent of those applicants. *See* Azi Paybarah, *City homeless commissioner defends policy change*, Capital New York (Nov. 4, 2011) (quoting Seth Diamond, Commissioner of the Department of Homeless Services) (Ex. F to Banks Aff.); *see also* Markee Aff. ¶ 9 (recounting Commissioner Diamond's testimony to City Council that City estimated 10 percent of applicants will be denied shelter). Thus, the volume of decisions is much greater, and the time available for them much shorter. And under the Procedure, a class member's case will not even be considered by a licensed social worker unless an eligibility screener "suspects" the applicant has a mental impairment. Procedure No. 12–400, at 9. The rate of inaccuracy in assessing homeless individuals' mental health can only be worse than occurred in § 352.35 determinations.

Finally, and at bottom, the Procedure makes no reference to the eligibility criteria the parties actually agreed upon in the *Callahan* Consent Decree. Class members who meet the need standard for public assistance are entitled to enter shelter, Consent Decree ¶ 1, but the City will now reject them from the shelter system unless they satisfy both the Procedure's new "viable housing" and "financial resources" criteria, Procedure No. 12–400, at 4-7. Class members who are in need of shelter by reason of mental, physical, or social dysfunction should also be able to enter shelter, Consent Decree ¶ 1, but the Procedure walks back from that promise. Mental or physical dysfunction will now be merely a *potential* excuse for a class member's failure to document his or her inability to find housing. Procedure No. 12–400, at 9. Such a person will

still be subject to the new protocol and the new criteria. *Ibid.* Class members with social dysfunctions will not receive even the limited exemption provided to those with mental or physical impairments, because the Procedure does not acknowledge that such class members exist.

ARGUMENT

The temporary relief Plaintiffs request, preventing the City from implementing the Procedure pending the Court's review of the Procedure, is appropriate. Plaintiffs face irreparable injury if the City proceeds with its new policy; Plaintiffs' challenge to the Procedure is likely to succeed on the merits; and the balance of equities favors the preservation of the *status quo*. *See Albini v. Solork Assocs*, 326 N.Y.S.2d 150 (2d Dep't 1971) (reciting standards governing grant of provisional relief). The harm Plaintiffs face from the Procedure is clearly irreparable: Every night, the City contemplates that the Procedure will deny shelter to those who need it. This Court has in the past recognized how harmful are the nights that class members spend without shelter, and the Court has weighed the equities in favor of avoiding that harm. *See* Tr. of Hr'g in *Callahan v. Carey*, Index No. 42385/76, 34–35 (Dec. 21, 2009).

I. The Procedure violates the Consent Decree and cannot be implemented absent a modification of the Decree – which the City has not requested.

"A consent decree is in the nature of a contract," *Callahan v. Carey*, 12 N.Y.3d 496, 502 (N.Y. 2009), and it "is legally enforceable according to its terms," *19th St. Assocs. v. State*, 79 N.Y.2d 434, 442 (N.Y. 1992). "The clear language of the decree" in *Callahan* "acknowledges Plaintiffs' right to temporary shelter," and it "obligates the defendants to provide temporary shelter to homeless individuals." *Callahan v. Carey*, 307 A.D.2d, at 153, 155. The City's new Procedure is inconsistent with the Decree in at least four ways.

First, the Consent Decree promises shelter to all homeless individuals who "meet[] the need standard to qualify for the [public assistance] program established in New York State." Consent Decree ¶ 1. Nothing in the Decree conditions a class member's initial eligibility on criteria like those in the Procedure. "Homeless[ness]" conventionally means simply "lack[ing] a … regular, and adequate nighttime residence." 42 U.S.C. § 11302(a)(1) (defining "homeless individual" for purposes of establishing service agencies' eligibility for federal funds). Yet Commissioner Diamond testified on November 9, 2011, that if, for example, a family member evicts a needy individual from their shared home, changes the locks, and repeatedly refuses reentry, DHS will refuse to provide shelter. Markee Aff. ¶ 8. Under the Procedure, the formerly shared home, now inaccessible, will be treated as a viable housing option that disqualifies the person from obtaining shelter services. As another example, the City will also refuse shelter if a class member's need for housing is persistent, rather than "immediate." Procedure No. 12–400, at 2. Furthermore, before providing a class member with a bed, the City will judge whether she tried hard enough to find housing outside the shelter system. *Id.*, at 4. A class member will now be deemed ineligible if she has any hypothetical alternative housing, *ibid.*, even if it is only a couch in a crowded living room, Markee Aff. ¶ 8 (recounting testimony of Commissioner Diamond). In short, homelessness no longer qualifies a class member for shelter, under the City's new criteria.[3]

Second, the language of the Consent Decree is mandatory. *See* Consent Decree ¶ 1 (City "shall provide shelter and board to each homeless man who applies"). But the City seeks to avoid its obligation by requiring, before it provides shelter, clear and convincing evidence of a class member's eligibility. The City will deny shelter to homeless men and women who in fact

[3] The City makes no effort to base its new eligibility criteria on State welfare rules. *Cf.* Consent Decree ¶ 1 (citing "the need standard to qualify for the home relief program established in New York State").

are eligible, but who are unable to prove their circumstances to the City's high standard. Suppose, for example, that a class member lived in someone else's home, and that person will no longer permit the applicant to stay there. That refusal, remarkably, will not satisfy the City that the home is truly unavailable as a housing option. *See* Procedure No. 12–400, at 4 ("A primary tenant's claim … is not … sufficient to establish that the housing is no longer available ...."). As another example, a class member who lost her own home will be "presumed to not be in immediate need of assistance" and will therefore be denied shelter. *Id.*, at 2. Many class member may be turned away regardless of their actual need for housing, simply because they were "unable to produce required documentation" to satisfy the clear-and-convincing-evidence test. *Id.*, at 3.

Paragraph 1 established a right to shelter for those in need, and it "relieve[d] them of the perceived burden of establishing … eligibility to gain entry to temporary shelter." *Callahan v. Carey*, 307 A.D.2d, at 154. The threshold for gaining access to shelter was made low for good reasons. Being homeless is dangerous, especially in the cold winter months. A wrongful denial of shelter risks the life and limb of the person denied. *See generally* O'Connell Aff. (describing risks of hypothermia and frostbite). By contrast, even if the City were mistakenly to provide temporary shelter to a women or a man who has no real need, that decision can be reversed after careful consideration. Where the risks from an erroneous decision are so unbalanced, the standard of proof should protect against the worst outcomes. *See Addington v. Texas*, 441 U.S. 418, 423 (1979) ("The function of a standard of proof[] [is] … to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."). The Procedure perversely pushes the risk of error onto homeless men and women, precisely the people whom the Consent Decree was meant to protect.

Third, the Consent Decree guarantees shelter to those who need it because of "physical, mental or social dysfunction." Consent Decree ¶ 1. Yet the Procedure acknowledges only that a mental or physical dysfunction might preclude an applicant from participating in the City's assessment of her alternative housing options. The City will proceed with the assessment nonetheless. A shelter employee may conclude, now without class member input, that a class member has other housing options. The Procedure then calls for the homeless individual to be rejected, largely without regard to whether the hypothesized options are truly available in light of the applicant's mental or physical impairment. Procedure No. 12–400, at 9–10.

Moreover, as discussed above, *see supra*, at 4, the City plans no real assessment of mental impairment. Those mentally impaired individuals whom the *ad hoc* suspicions of shelter workers the City do not identify will simply fall through the cracks. They will be required to go through the full, intensive clear-and-convincing-evidence procedure. They will be expected to provide documentary and other proof of their searches for housing. As difficult as these demands are for an ordinary class member, they will be nearly impossible for many men and women with mental impairments. *See* Susser Aff. ¶ 15. A mentally impaired class member's only way out is to understand that she must claim herself to be impaired—a procedural nous that most impaired individuals are unlikely to possess, *see id.* ¶ 8.

Fourth, the Eligibility procedure makes no provision for class members with social dysfunctions. Indeed, the document does not recognize the existence of social dysfunction. Deputy Commissioner Nashak acknowledged to the City Council that he does not even know what social dysfunction is. Markee Aff. ¶ 6. Social dysfunction is not the same as mental impairment, *see* Susser Aff. ¶¶ 16–17, and the Consent Decree explicitly extends its protection to this additional category of needy individuals.

In short, in the Procedure the City has designed a system that is certain to deny shelter to large numbers of men and women who need help and are entitled to it under the Decree. The cost to these vulnerable individuals will be high. *See generally* O'Connell Aff. Absent a modification of the Decree—which the City has not sought—this new procedure cannot be implemented. Relief should therefore be granted, enjoining the Procedure's implementation to preserve the *status quo*.

II. The Procedure was issued in violation of the City Administrative Procedure Act.

The Procedure appeared suddenly, and it was announced to be effective a mere 11 days (including two weekends and two holidays) after the City notified Plaintiffs via a 5 PM e-mail. Policymaking in this fashion is unlawful, and the City has offered no explanation for why the shelter system's standards needed to be changed so urgently, without any public input.

"For [a] City[] agency's pronouncement to be a rule with the force and effect of law, it must be adopted in accordance with the rulemaking requirements under [the City Administrative Procedure Act,] CAPA." *Ousmane v. City of New York*, 801 N.Y.S.2d 238 (N.Y. Sup. Ct. 2005); *see also 1700 New York Assocs. v. Kaskel*, 701 N.Y.S.2d 233, 240 (N.Y. Civ. Ct. 1999) (same). Certainly, the Procedure is a rule.[4] It "implements or applies law or policy," and it "prescribes the procedural requirements of" DHS. N.Y. City Charter § 1041(5) (defining "rule"). The Procedure is meant to have legal force, in that it "dictates a specific result in particular circumstances." *439 E. 88 Owners Corp. v. Tax Comm'n of the City of N.Y.*, 763 N.Y.S.2d 12, 13 (1st Dep't 2003). The Procedure "sets forth the requirements with which persons seeking shelter must comply in order to receive [temporary housing assistance]," Procedure No. 12–400,

[4] That the City chose not to style the Procedure as a rule is immaterial. "The definition [of 'rule'] is functional and requires compliance with rulemaking whenever pronouncements, intended to have the effects set forth, are made, whether they are called rules, regulations, orders or anything else." Report of the New York City Charter Revision Commission: December 1986-November 1988 at 85–86 (Apr. 1989). "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." *1700 New York Assocs.*, 701 N.Y.S.2d, at 241.

at 1, and conversely the criteria that will render a person ineligible for shelter. *E.g. id.*, at 4 ("If an applicant has tenancy rights at any housing option, that residence will be deemed the viable housing option and the applicant will be found ineligible[.]"); *id.*, at 3 ("All applicants must demonstrate by clear, convincing and credible evidence that they have actively sought and are unable to access any other temporary or permanent housing."); *id.*, at 4 ("Residential treatment ... shall be considered an available housing option[.]"). These criteria dictate "specific result[s]," 763 N.Y.S.2d, at 13, because they are "standards for the granting of ... benefits," § 1041(5)(a)(vii).

The Procedure also describes "standards which, if violated, may result in a sanction." § 1041(5)(a)(i). It imposes "applicant obligations," with denial of shelter the consequence of a failure to comply. *E.g.* Procedure No. 12–400, at 3 ("All applicants must demonstrate by clear, convincing and credible evidence that they have actively sought and are unable to access any other temporary or permanent housing ...."); *id.*, at 5 ("[T]he burden is on the applicant to establish that a viable housing option is not available."). Policies requiring applicants to provide certain information as a prerequisite to beneficial treatment are commonly held to be "rules" within the meaning of CAPA. *E.g. 439 E. 88 Owners Corp.*, 763 N.Y.S.2d, at 13 (treating as a "rule" a Tax Commission policy of refusing to review assessments unless a property owner discloses certain requested information).

The City complied with none of CAPA's procedural requirements. For example, a proposed rule must be published in the City Record, § 1043(b)(1), and the City must allow the public at least 30 days' "opportunity to comment on the proposed rule," § 1043(e). Instead, the City notified Plaintiffs of the Procedure by e-mail 11 days before its effective date; that letter invited no comment but instead indicated that the City will implement the newly announced

policy. Because the City chose to skip the procedures mandated by CAPA, the Procedure was developed without benefit of the views of the Council, interested organizations, and the general public, input that could substantially have improved the result. *See* Markee Aff. ¶ 7 (in drafting the Procedure, Commissioner Diamond admitted, DHS consulted nobody outside the agency). Had the City provided a proper chance to comment, it would have discovered the flaws described in this memorandum.

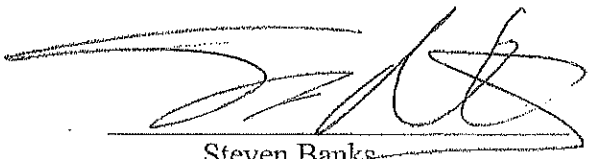
The ultimate check under CAPA is the requirement of publication: An agency must, after receiving public comment, articulate "a statement of basis and purpose" for the final rule, also "published in the City Record." § 1043(f). No such publication of the Procedure has appeared; and without proper publication no rule, including the Procedure, can take effect, *ibid.*

Conclusion

For the foregoing reasons, Plaintiffs are entitled to an order from this Court preserving the *status quo* and enjoining the City from implementation of the Procedure absent a modification of the Decree.

Dated: November 10, 2011

Respectfully submitted,



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