(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, New York County, New York.
Yvonne McCAIN, et al., Plaintiffs,
v.
Michael R. BLOOMBERG, etc., et al., Defendants.
In the Matter of the Application of Maria Lamboy and Oscar Serrano, et al., Petitioners,
For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,
Verna Eggleston, etc., et al., Respondents.
Karen Slade, et al., Plaintiffs,
Michael R. Bloomberg, etc., et al., Defendants.
Katherine Cosentino, et al., Plaintiffs,
Brian J. Wing, et al., Defendants.
In the Matter of the Application of Maria Lamboy and Oscar Serrano, et al., Petitioners,
For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,
v.
Eggleston, etc., et al., Respondents.
Karen Slade, et al., Plaintiffs,
v.
R. Bloomberg, etc., et al., Defendants.
Katherine Cosentino, et al., Plaintiffs,
v.
Brian J. Wing, et al., Defendants.
No. 41023/83.

Aug. 16, 2005.

Steven Banks, Attorney-in-Chief, The Legal Aid Society, Of Counsel: Jane Sujen Bock, Esq. and Joshua Goldfein, Esq., Cravath Swaine & Moore, by Elizabeth L. Grayer, Esq. and Richard W. Clary, Esq., New York, Attorneys for Plaintiffs.
Office of the Corporation Counsel, The City of New York, Law Department, by Len Koerner, Esq., Thomas C. Crane, Esq., and Alan Krams, Esq., New York, Attorneys for City Defendants.
New York State Law Department, by William H. Bristow, Esq., New York, Attorneys for State Defendants.

HELEN E. FREEDMAN, J.
***1** In this class action on behalf of the right of homeless families with children to emergency shelter, Defendants Bloomberg, Eggleston, Gibbs (collectively "City defendants") move for an order declaring that the orders of this court entered on June 30, 1999 and January 31, 2001 do not prevent the City defendants from implementing the provisions of a State Administrative Directive, hereinafter 05-ADM-07, issued by the State Office of Temporary and Disability Assistance on April 6, 2005. In the alternative, the City defendants seek an order vacating the Court's orders entered on June 30, 1999 and January 31, 2001 pursuant to CPLR 6314 to the extent that those orders are in conflict with the provisions of 05-ADM-07, and granting such other relief as the Court deems just and proper. Plaintiffs/petitioners cross-move for an Order directing the City defendants to correct the serious problems in the eligibility process by complying with this Court's prior rulings and orders to "make sure" that families with children have other housing that is actually available to them before they can be denied shelter, and granting such other relief as the Court deems just and proper. State defendant submits papers supporting the application of City defendants.

The Administrative Directive, 05-ADM-07, that City defendants seek to implement concerns re-applicant families, those families with children who have been denied temporary emergency shelter on the ground that they have other shelter resources. Until now, defendants have allowed class members, homeless families with children, who apply for temporary shelter but who are rejected because they have been found ineligible, to re-apply as often as they choose. While their applications are pending and the City Department of Homeless Services ("DHS") is investigating whether other shelter resources are available, families have been housed in either overnight placement facilities or in conditional placement facilities. Overnight facilities provide beds until the application process is over and conditional placements are afforded while eligibility investigations are being made. First time applicants are processed in a new intake facility known as the PATH facility (discussed below), and re-applicants are processed at the old Emergency Assistance Unit ("EAU").

The new ADM, issued by the State Office of Temporary and Disability Assistance (OTDA) on April 6, 2005 at the behest of the City defendants, ends automatic shelter placement of re-applicants during the investigation process if the re-application is made within ninety days of rejection. Pursuant to the new ADM, the City would not have to shelter re-

applicant families, determined within the prior ninety days to have been ineligible, during the period of investigation, unless they demonstrated that they (or their host) had been evicted or they had been victims of domestic violence or child abuse or unless an otherwise demonstrated immediate need exists.

***2** The new ADM reads as follows:

A family whose prior application for emergency shelter was denied may re-apply for THA [temporary housing assistance] at a DHS [Department of Homeless Services] family intake facility at any time. Families who re-apply within 90 days of a determination denying their previous application for THA and who do not make a showing of a material change in their housing situation from their prior application will have their prior application reviewed to ensure that the proper result was reached in the prior determination. Re-applicant families who re-apply for shelter more than 90 days after a determination denying their application for THA will receive a full investigation of their re-application and will be provided shelter during the investigation. Re-applicant families who re-apply within 90 days of a determination denying their previous application for THA and who make a showing of a material change in their housing situation from their initial application will receive a full investigation of their claim, and will be provided shelter during the investigation in the following circumstances:

-the re-applicant asserts new facts establishing that the re-applicant is a victim of domestic violence and the alleged perpetrator of the violence lives in the same residence the re-applicant did immediately prior to submitting the re-application, or is aware of the re-applicant's current address and presents a clear and ongoing threat to the re-applicant, or

-the re-applicant provides evidence that the re-applicant or the primary tenant has been evicted from the residence where the re-applicant lived immediately prior to submitting the re-application; or

-the re-applicant asserts new facts establishing that the re-applicants child(ren) is/are a victim of child abuse and the alleged perpetrator of the abuse lives in the same residence the re-applicant did immediately prior to submitting the re-application, or has access to the re-applicant's household.

In such circumstances an immediate need is demonstrated and a pre-investigation grant of assistance shall be made pending an eligibility determination.

Additionally, DHS team leaders and supervising attorneys may authorize a pre-investigation grant of assistance in other circumstances ... In all circumstances, the district shall consider the threat to health and safety of the reapplicant family, the sufficiency of available information ... and the possibility that material change(s) may have taken place since the time of the previous application.... Districts are reminded that all applications for temporary housing assistance must be acted on promptly and consistent with State regulations and existing directives, including provision of a written notice of denial or acceptance setting forth the reapplicant's right to challenge such denial.

The City contends that implementation of this new Directive is necessary to streamline the intake process into the family shelter system, which it asserts, has become clogged and unwieldy because of the constant need to address and provide overnight accommodations for re-applicants, most of whom are never found eligible for temporary shelter. Plaintiffs object to implementation of this new policy on several grounds, which will be discussed below. Plaintiffs claim that it directly conflicts with § 21-313 of the New York City Administrative Code, which requires placement of families in overnight accommodations if they apply for emergency shelter before 10 p.m. They also claim it conflicts with this Court's orders implementing § 21-313 that were issued on June 30,1999 and January 31, 2001. Plaintiffs note that the June 30, 1999 Order was entered on consent of all parties. That June 30, 1999 Order provides:
***3** ... it is hereby

ORDERED that:

1. On consent, the January 12, 1999 Order is amended to reflect recently enacted revisions to the New York City administrative Code and City defendants are directed to comply with New York city administrative Code §§ 21-313 and 21-314, which replaced §§ 21-140 and 21-141.

2. Based on the City defendants' representations that they will be in compliance with ....., on consent, the City defendants are directed to comply with § 21-313 by July 12, 1999.

General Contentions

Defendants aver that their new practices and procedures will minimize if not eliminate erroneous initial determinations and that the safeguards for families suffering violence, abuse or evictions or other demonstrated immediate need will provide assurances of fairness. They assert that continuous re-applications by families, most of whom are never found eligible, diverts considerable resources from needy eligible families. Defendants also contend that the existing new procedures have reduced the percentage of applicants who have been found ineligible on first application to 14% and that, at most, 4% of the total number of applicants are found eligible on subsequent applications. Of those who are initially ineligible but are later found eligible, defendants contend the change is attributable to changes in circumstance and not necessarily to error in the initial determination. Although they do not concede that the new ADM conflicts with prior Orders or § 21-313 of the New York City Administrative Code, defendants assert that the ADM, which implements State policy, preempts local law and mandates modification of any prior court orders that are found to be inconsistent.

Plaintiffs, in addition to contending that the ADM violates local law and prior court orders, dispute defendants' percentages, contending that almost fifty per cent of those found ineligible on the first investigation are deemed eligible after subsequent applications. Plaintiffs aver that one out of every seven eligible families is initially found ineligible or deemed to have withdrawn its application. They present the court with a number of recent cases in which it appears erroneous determinations were made and applicants were forced to re-apply, in at least one case numerous times, until a correct determination was made and shelter provided. In those circumstances, investigators erred in ascertaining availability of other shelter resources or other miscalculations were made. These were cases in which it is alleged no changes in circumstances between the time of the initial application and the ultimate finding of eligibility and need occurred. Plaintiffs opine that families like these, under the proposed protocols or “one strike plan”, will be forced into the streets, as happens in other cities.

Plaintiffs also invoke 86 ADM-7 which requires that “the local district must be sure that the resource is actually available” before determining that an applicant can make use of community resources such as relatives or friends. That ADM also provides that written notice of the agency's decision must be given, and it must state reasons why the request for immediate assistance had been denied and inform the applicant of his/her right to a fair hearing and expedited processing of said fair haring.

***4** Plaintiffs also invoke another Administrative Directive, 94 ADM-20. In an Order dated, September 1996, this Court stated, “pursuant to 94 ADM-20 ..., the City defendants in conducting eligibility determinations for emergency housing assistance for families with children ‘must make every reasonable effort to verify the applicant's eligibility for assistance (see 86 ADM-7) ...’ and provide assistance to those eligible.”The Administrative Directive 94 ADM-20 is discussed later.

History

A brief review of recent history in the Homeless Families with Children litigation, with which this court has been involved since 1985, is in order. In 1994, this Court, hoping to remove issues involving emergency shelter for homeless families with children from the courtroom, appointed Kenneth Feinberg, Esq. as Special Master to resolve disputes between the parties. That appointment was made with the consent of the parties that included class counsel for plaintiffs and the prior mayoral administration. Together with his assistant, Barbara Cutler, Esq., Feinberg resolved most issues, and where they could not, the Court sought the guidance of the Special Masters in fashioning orders.

On January 17, 2003, the parties including Plaintiffs, the City of New York, The New York City Department of Homeless Services, Michael Bloomberg in his capacity as Mayor of the City of New York and Linda Gibbs in her capacity as Commissioner of the Department of Homeless Services, but not the State of New York, agreed to the appointment of a Special Master Panel (SMP)

consisting of John Feerick, Esq., Daniel Kronenfeld, and Gail Nayowith. The SMP was also charged with making of reports and recommendation and with providing the Court with periodic reports of its work, including any recommendations to modify an existing order. The agreement was to expire in two years January 17, 2005.

Pursuant to the parties' stipulation, the SMP assumed the responsibility of evaluating the functioning of the shelter system for homeless families and making recommendations for improvement in such areas as the processing of applications for shelter services; the operation of the Emergency Assistance Unit; the placement of families into shelter facilities, including the use of overnight accommodations pending shelter placement; and client responsibility. The stipulation also included subjects like homeless prevention, adequacy of shelter placements, health and safety, and relocation to permanent housing. The parties agreed to withdraw all pending motions before the Court involving family homelessness (all existing orders to remain in effect) and to avert the need for applications to the Court by a procedure described as follows: “Plaintiffs may seek the intervention of the Court and the Special Master Panel only under extreme circumstances involving a major problem.... The Panel will determine if a major problem exists and if the City is responding to it in an appropriate manner, which may be recommended by the Panel.... Any Party aggrieved by a determination of the Panel.... may obtain Court relief only upon alleging and establishing the Panel's determination was arbitrary and capricious.”

***5** During the two year period, no applications were made to the Court. It is the Court's understanding that three matters were referred to the SMP for adjudication, but none were appealed to the Court. The SMP, with the able assistance of Dora Galacatos and Maria Toro, worked tirelessly to fulfill its function. Two interim comprehensive Reports were submitted to the Court, one dated November 2003 and one submitted in June 2004. A final Report was submitted in April 2005. The SMP, after exhaustive research and investigation as well as substantial input from the parties, made many recommendations for improving the intake system as well as other aspects of the family shelter system.

Many, but not all, of the SMP recommendations were adopted by the Department of Homeless Services under the able leadership of the Commissioner and her assistants. Although the system for providing shelter for homeless families with children is not perfect, it is substantially improved. Currently, there are no families spending overnight in offices either the EAU or the new intake facility at the former Powers overnight Shelter PATH (Prevention Assistance and Temporary Housing Intake Center). The PATH facility is reportedly clean and better suited to assessing family needs. All first time applicants are interviewed and placed at the PATH facility while re-applicants go to the EAU. The City's plans call for razing of the EAU and building a state of the art facility in its place. To that end, the Polshek partnership has been hired as architects, and $30 million has been authorized and committed.

The goal of the two year period, denominated the “transition” period, was “to end the current cycle of litigation” and reach the point “where the problem of family homelessness can be dealt with by government and larger society without the intervention of the judiciary.”(January 17, 2003 Stipulation and Order). The SMP worked mightily to reach a final resolution, but some issues remain. In its Final Report and the accompanying letter, the SMP indicated that one Panel member believed the litigation should end as soon as possible, one member believed it should end but at least not for six months, and one member believed it should end but not in less than a year.

There have been calls by the City and the press for the court to end the litigation. However, a court cannot by fiat or on its own declare a litigation ended because parties have an absolute right to seek redress in court. The only way to end a litigation is by a decision and judgment after trial or by settlement. At this time, the parties do not seek a trial, nor have they succeeded in achieving a final settlement.

Although no final resolution has been achieved, plaintiffs have not come into court since the SMP was established. However, Defendants now seek the court's intervention to allow them to implement the ADM as set forth above.

Legal Contentions

Plaintiffs' Legal Contentions

***6** Plaintiffs assert that 05 ADM-07 is inconsistent with § 21-313 of the New York City Administrative Code and this Court's previous orders, all of which require homeless families with children to be provided with shelter while their applications are being processed and their eligibility is under investigation.

Plaintiffs contend that this Court's previous Orders specifically dealt with the issues here and that defendants are estopped from relitigating issues clearly decided by previous orders. See *Jheanson v. Middlegrove Estates, Inc.*, 222 A.D.2d 782, 634 N.Y.S.2d 818 (3d Dept.1995); *Mahotal v. City of Hudson*, 179 A.D.2d 845, 579 N.Y.S.2d 818 (3d Dept.1992). Plaintiffs argue that state or municipal defendants may not evade valid court orders by changing policies or amending codes. *McCain v. Giuliani*, 236 A.D.2d 256, 653 N.Y.S.2d 256 (1st Dept.1997); *New York City Coalition to End Lead Poisoning v. Giuliani*, 248 A.D.2d 120, 669 N.Y.S.2d 552 (1st Dept.1998). Plaintiffs also contend that to constitute a binding rule of law, an administrative directive must be promulgated in accordance with public notice-and-comment procedures set forth in the State Administrative Procedures Act ("SAPA"); that was not done so in the case of 05-ADM-07, and according to plaintiffs, the ADM has no legal effect and cannot pre-empt Local Law 21-313, particularly because the State has not preempted the field of homeless services. Finally, plaintiffs argue that the ADM at issue violates Article XVII of the New York State Constitution, which imposes an affirmative duty to provide for the needy and has been interpreted to include provision of shelter for the homeless. *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dept.1986)., *rev'd in part on other gds.*, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 (1987).

Defendants' Legal Contentions

Defendants contend that the ADM does not conflict with prior orders enforcing Admin. Code § 21-313, but to the extent that it may be, those orders should be modified based on changed circumstances. Defendants assert that § 21-313 concerned EAU stays and not conditional placements after the application process was completed. They argue that the issue before the court at the time it ordered compliance with § 21-313 was whether families placed in over night facilities could be required to return to the EAU on successive days between overnight placements. This had caused multiple overnight placements. In its July 12, 1999 and January 31, 2001 Orders, the Court mandated compliance with Local Law § 21-313. The Court in the January 31, 2001 order said that the Local Law prohibited such placements, and did not specifically address the issue of whether all applicants must receive conditional placements, but as defendants concede, could be read to mandate conditional placements for every applicant including reapplicants. However, according to defendants, legislative history discussed EAU sleepovers during the initial processing of applications, rather than conditional placements during the investigative process. The Court also interpreted § 21-313 to prohibit multiple overnight placements repeat returns to the EAU-while processing of applications occurred-and mandated conditional placements. Refusal to provide Conditional placements during the investigative process was not at issue when Administrative Law § 21-313 was enacted.

***7** Defendants note that the prior orders were preliminary and that as long as the Court retained jurisdiction over the case, such orders could be modified. See *Liss v. Tras Auto Sys.*, 68 N.Y.2d 15, 505 N.Y.S.2d 831, 496 N.E.2d 851 (1986). This is particularly so when there is a change in statutory or case law. See *Roundabout Theatre Co. V. Tishman Realty & Constr. Co.*, 302 A.D.2d 272, 756 N.Y.S.2d 12 (1st Dept .2003).

Defendants argue that the State Department, OTDA, has the power to issue ADM's and that this court has in the past used Administrative Directives as a basis for its orders in the homeless families litigation. (See *Lamboy v. Gross*, 129 Misc.2d 564, 493 N.Y.S.2d 709,*aff'd.* 126 A.D.2d 265, 513 N.Y.S.2d 393 (1st Dept.1987). They assert that provisions of the Social Services Law serve as the basis for issuing ADM's and a Local Law that is inconsistent with an ADM would be contrary to the provisions of the Social Services Law. Social Serv. Law § 132(1) establishes the process for investigation of need for immediate public assistance. The Office of Temporary and Disability Assistance (OTDA) is authorized to "establish rules, regulations and policies" to administer public assistance. New York Soc. Serv. Law § 20(3)(d). Implementing regulations are established under 18 N.Y.C.R.R. § 351.8(c)(3). Local

social services districts are “a part of and the local arm of the single State administrative agency.” *Thomasel v. Perales*, 78 N.Y.2d 561, 578 N.Y.S.2d 110, 585 N.E.2d 359 (1991); *Matter of Beaudoin v. Toia*, 45 N.Y.2d 343, 408 N.Y.S.2d 417, 380 N.E.2d 246 (1979).

Defendants also argue that the ADM preempts Local Law. Invoking the preemption doctrine, defendants state that where there is a conflict between state and local law, i.e., where the State has occupied the field or evinces an intent to occupy the field, local prohibitions are invalid. See *Jancyn Mfg. Corp. V. County of Suffolk*, 71 N.Y.2d 91, 524 N.Y.S.2d 8, 518 N.E.2d 903 (1987) (holding that State law did not preempt a county ordinance prohibiting sale of sewage system cleaning additives where there was no express conflict with State Environmental Control Law); *Council of the City of New York v. Bloomberg*, 16 A.D.3d 212, 791 N.Y.S.2d 107 (1st Dept.2005). (Local Law prohibiting city from dealing with vendors who provided spouse benefits but not benefits to domestic partners is invalid as conflicting with State law and ERISA).

Defendants emphasize that their proposed plan is totally consistent with the SMP recommendations, noting that in its June 2004 Report on the Emergency Assistance Unit and Shelter Eligibility Determination (“June Report”), the SMP specifically stated that “re-applications prolong periods of family instability and typically involve multiple overnight placements over many weeks, both of which result in: compromised child well being,..... and generate considerable costs to the city in overnight placements and multiple eligibility determination processing resources.”

Finally, defendants also assert that their plan adequately provides for anyone including re-applicants who have an immediate need. The Commissioner claims to have established a multi-tiered process for determining eligibility, with several layers of review by trained workers and DHS lawyers. The new investigative process pursuant to which eligibility is determined also involves interim conferences with social service workers and DHS lawyers whereby assistance to applicants who are having difficulty establishing need will be afforded, and, where a family is determined to be ineligible a Resource Program staffed by at least sixteen social workers, all with MSW's, will be available to ease the family's transition back to the community without provision of emergency shelter. While the Social Workers are not empowered to reverse decisions, they will have input into ultimate decision making.

Expert Contentions

***8** Plaintiffs and defendants each submit affidavits from experts in the field of public policy to buttress their arguments concerning potential error rates if the new ADM is implemented.

Plaintiffs submit the affidavit of David B.Monk, Jr., Vice President of NERA Economic Consulting, who, analyzes the City's own data and concludes that over 44 percent of the families who re-apply for shelter within 90 days of not being found eligible at the City's new PATH intake office on their initial application, are subsequently found eligible and that the number who repeatedly apply that are never found eligible is small. For every four eligible families who are initially denied shelter at PATH, there is only one ineligible who repeatedly applies, according to Monk's analysis. Plaintiffs note that Monk has provided his services to plaintiffs pro bono.

Defendants submit the affidavit of John H. Mollenkopf, Distinguished Professor of Political Science and Sociology at the Graduate Center of CUNY and Director of its Center for Urban Research. Mr. Mollenkopf's analyzes data provided by DHS and concludes that Mr. Monk's interpretation of the data does not reflect the accuracy of the current DHS eligibility process because it assumes that every applicant who becomes eligible upon re-application was eligible initially, that every first time applicant who is rejected immediately re-applies, when in fact a number of families allow considerable time to elapse before filing follow up applications, that the comparison base is to those deemed ineligible rather than to the total number of applicants for shelter, and that the number of re-applicants who are never found eligible exceeds the number found eligible. While Monk concludes that there is a 44% or higher rate of error, Mollenkopf concludes that the error rate is at most 4% and more likely closer to 2 percent. Mollenkopf has provided his services to the City at his customary $250 per hour rate.

State's Contentions

The State's papers support the City's position. The State defendant limits its concerns to a potential conflict between the Local Law and 05-ADM-07. The State posits that the ADM is supreme. According to the State, Social Services Law § 17 ("SSL" § 17) empowers the State Commissioner to "determine the policies and principles upon which public assistance, services and care shall be provided within the state both by the state itself and by local [social services districts]." Local social services districts are responsible for processing applications for public assistance, issuing eligibility determinations on such applications and for issuing and providing benefits pursuant to State SSL §§ 61,62,65 and 69. Since 1983, the State has instructed local social service districts to assist eligible homeless persons with shelter and services including provision of temporary housing. 18N.Y.C.R.R. § 352.35 and ADM's. In 1994, an ADM (94 ADM-20) issued on December 29, 1994 and amended on December 27, 1996 made it clear that an applicant for temporary shelter must demonstrate immediate need for temporary housing and show that she has made reasonable efforts to secure such housing before provision of shelter would be mandated. SSL Regulation § 133 and 18 N.Y.C.R.R. § 351.8(c)(4) states: that where eligibility has not been established but an immediate need is determined to exist, an emergency grant of assistance shall be made. The State has previously found that grants for emergency temporary assistance can be limited when individuals make repeated applications 03 INF-34 and failed to complete the application process. The purpose of 05 ADM-07, according to the State (Russell Sykes affidavit), was to address the problem of multiple overnight placements of families determined to be ineligible that were "imposing considerable costs to the City in application processing and shelter placement", while compromising "child well being and disrupting family life."This, the State has determined, is consistent with the recommendations of the SMP.

***9** The State avers that the ADM is quite specific in requiring careful eligibility assessments and provision of shelter even to re-applicants, where immediate need is demonstrated. The State affirms that Local social services districts are obligated to comply with State SSLs, regulations and policies with respect to the provision of public assistance benefits. SSL §§ 17(a) and (b); 20(2)(b) and (d); 34(3)(d),(e) and (f); 355(1) and (3). These are the same provisions that this Court invoked in *Lamboy v. Gross*, 12 9 Misc.2d 564, 493 N.Y.S.2d 709 (Sup.Ct. N.Y. Cty.1985) in requiring compliance with 83 ADM-47. The State also contends that the Court of Appeals has established that the preemption doctrine represents a fundamental limitation on home rule powers, and that while localities have been invested with substantial powers in matters of local concern, "the preemption doctrine embodies the untrammeled primacy of the Legislature to act ... with respect to matters of State concern," *Albany Builders v. Guilderland*, 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 (1989) (invalidating a local law imposing a Transportation Impact Fee in conjunction with building permits to fund highway capital improvements.) The State concludes that any Local Law that requires provision of shelter to those not in immediate need would conflict with state policy.

Conclusion

City defendants, when asked during oral argument, indicated that they did not object to granting plaintiffs' cross-motion that the City be directed to make sure that safe alternate housing was actually available before finding any family applying for emergency temporary shelter ineligible. This is consistent with this Court's prior Order of January 12, 1999. The specific provisions relating to ascertaining whether there is actually a safe alternative contained in that Order as well as previous Orders should not be disturbed, since none of the provisions conflicts with 05 ADM-07.

At the same time, defendants have established that on its face, the ADM does not conflict with Local Law § 21-313 or with aspects of prior Orders that relied upon the constitutional mandates as set forth in *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dept.1987). Nor is it directly conflict with Appellate decisions, this Court's decisions, or the statutory framework upon which any of these decisions is based. Administrative Code Local Law § 21-313 was enacted specifically to deal with the overnight stays in the EAU and the multiple overnight placements with families returning after each night to the EAU while their applications were being processed. At this time, there are no overnights in the EAU or PATH facility, and it appears that families applying for temporary emergency shelter

are placed in conditional facilities an average of six hours after initial intake. Moreover, preliminary court orders may be modified by the issuing court where circumstances change."....[R]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider it prior interlocutory orders during the pendency of the action." *Liss v. Trans Auto systems*, 68 N.Y.2d 15, 505 N.Y.S.2d 831, 496 N.E.2d 851 (1986).CPLR § 6314 provides that a party enjoined by a preliminary injunction may move to modify it at any time. *Morris v. 702 East Fifth Street HDFC*, 8 A.D.3d 27, 778 N.Y.S.2d 20 (1st Dept.2004).

***10** Article XVII of the New York State Constitution requires the state to care for the needy, and the specific provisions of the new ADM require that any re-applicant who demonstrates that he or she has been evicted from previous housing, is the victim of domestic violence, or whose children have been subjected to abuse by a co-resident of previous housing, or any re-applicant who otherwise shows immediate need be granted a conditional placement. That is consistent with ADM 94 ADM-20, modified by 96 ADM-20, which also specifically requires a showing of need before temporary shelter must be provided.

Clearly, the improved eligibility process has substantially reduced the number of families found ineligible initially. The proposed plan allows for conditional housing of families who have been found ineligible but who fall into one of three specific categories, and provides for other families who may not fit into one of the categories but who demonstrate "immediate need." The ADM sets out a number of factors to be considered in determining what constitutes "immediate need." Nevertheless, there is appropriate concern that some homeless families with children who have no alternative may be found ineligible and relegated to unsafe environments or places. The newly formed Resource facilities designed to ease transition back to the community should, however, prevent this from occurring in all but a very small number of cases.

Plaintiffs' expert's analysis, as well as that of defendants' expert, demonstrates that errors have been made in determining eligibility in the past; plaintiffs have put forward a number of recent instances in which serious errors were made and families who had been victims of violence or abuse or who clearly had no safe alternative shelter available were found ineligible. Nevertheless, the procedures set forth in the proposed regulation, if applied correctly, would not consign such families to the streets inasmuch as emergency shelter is still to be provided to re-applicants who can show immediate need.

Plaintiffs have requested hearings and a deposition of defendants' expert before this motion is decided on the ground that mixed questions of law and fact are involved in this petition. However, hearings would only demonstrate, as plaintiffs' papers have so compellingly done, that defendants have made serious errors in denying eligibility status to homeless families with children in the past. A deposition of defendants' expert might at most disclose either errors in his calculations or challenge the premises upon which he made those calculations. Plaintiffs' papers already do the latter. At this time, neither hearings nor a deposition would assist the court in deciding this motion.

As in the past, this Court is reluctant to enjoin a regulation or Administrative Directive issued by the State pursuant to Social Services Law §§ 17 and 20(3)(d), which empower the State Commissioner to "determine the policies and principles upon which public assistance, services and care shall be provided within the state both by the state itself and by local government units" that does not violate a the constitutional or a statute. See *McCain v. Giuliani*, 252 A.D.2d 461, 676 N.Y.S.2d 151 (1st Dept.1998). The Appellate Division, consistent with the decision in *McCain v. Giuliani*, 252 A.D.2d 461, 676 N.Y.S.2d 151, upheld implementation of shelter eviction protocols in *Callahan v. Carey*, 307 A.D.2d 150, 762 N.Y.S.2d 349 (1st Dept.2002). While plaintiffs' argument that, unlike the above situations wherein there was no track record, here there is clear evidence that serious mistakes are made is cogent, it is not sufficient to enjoin an Administrative Directive that appears to contain clear safeguards. Moreover, defendants are providing additional safeguards by establishing a Resource facility and assisting ineligible plaintiffs in seeking Fair Hearing reviews.

***11** The Court is keenly aware of defendants' earnest desire to have the Court remove itself from matters involving homeless families with children and still

hopes to accomplish that laudable goal. Despite limited resources, this administration has done commendable work in addressing the needs of this most vulnerable population. Indeed, both Plaintiffs (the Legal Aid Society, now assisted by Cravath Swaine and Moore) and defendants (the City of New York, Mayor, Commissioner and Corporation Counsel) have worked tirelessly to serve the needs of this client population.

The City should be allowed to continue its work. However, provision for a report back once the new program is instituted is in order, and parties are directed to make proposals in their orders for such.

Based on the above, it is hereby

ORDERED that City Defendants' motion is granted and it is further

ADJUDGED and DECLARED that prior orders do not prevent implementation of provisions of Administrative Directive 05-ADM-07, and it is further

ORDERED that Plaintiffs' cross-motion is granted to the extent defendants are directed to make sure alternate housing is available before denying emergency shelter to homeless families with children,

and the parties are further DIRECTED to

Settle Orders consistent with these directives on notice on or before September 1, 2005.

N.Y.Sup.,2005.
McCain v. Bloomberg
9 Misc.3d 1107(A), 806 N.Y.S.2d 446, 2005 WL 2217001 (N.Y.Sup.), 2005 N.Y. Slip Op. 51435(U)

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