COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. No. SJC-12507

THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT,
Defendant-Appellant,

v.

ROSANNA GARCIA & OTHERS,
Plaintiffs-Appellees.

ON APPEAL FROM A PRELIMINARY INJUNCTION ENTERED BY THE SUFFOLK COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANT-DEFENDANT DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

MAURA HEALEY
Attorney General
Samuel Furgang, BBO # 559062
Bryan F. Bertram, BBO # 667102
Kimberly Parr, BBO # 679806
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2107

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other

Introduction

Since 1983, Massachusetts has provided temporary, emergency shelter to financially-distressed homeless families and pregnant women.[1] While certain cities have comparable shelter programs, Massachusetts is unique among the states in creating one.

The program (EA shelter program) has grown since its start because homelessness proves a persistent problem. The program presently shelters 3,500 families, most of whom are likely to stay in shelter for nearly a year or more. Since 2008, it has sheltered more than 33,000 families for at least a night.[2] This reflects increased demand for the service after the Great Recession of 2009, which outpaced the state's ability to open new homeless shelters. As in past instances of such emergency demand, the Department of Housing and Community Development (DHCD), the program's administrator, used motels as overflow capacity. Motels are justly criticized as poor shelter, but in times of overflow their use has sometimes been a necessity.

This case arises on the heels of many years' work to expand the state's homeless shelter system to end

---

[1] 1983 Stat. c. 450.

[2] The Growing Challenge of Family Homelessness, Homeless Assistance for Families in Massachusetts: Trends in Use FY2008-FY2016, The Boston Foundation, p. 7 (Feb. 2017).

this undesirable, recession-induced use of motels as homeless shelters. DHCD has increased shelter units by 82% (1,664 new units) since late 2013. In doing so, DHCD has nearly reached its goal: it has opened enough shelters to mostly eliminate using motels.

The Superior Court's mandatory injunction, however, jeopardizes this progress. Citing the Americans with Disabilities Act (ADA) and related disability laws, the court ordered DHCD to use motels for more than emergency overflow, specifically as a separate placement choice for persons with disabilities. That injunction undermines DHCD's administration of the program, which uses homeless shelters (and not inferior motels) for all families, unless there are no system vacancies, absent rare exceptions. It also threatens significant disruption to the program, with forced change not easily undone.

For the reasons that follow, this Court should vacate the preliminary injunction.

Question Presented

The question presented is: Did the Superior Court err when it enjoined DHCD to immediately transfer, to motels, all families previously approved for disability-related transfers upon a system vacancy (i.e. when "administratively feasible"), even if that means identifying and entering into agreements for

additional motels that DHCD would not otherwise use; likely force reductions in non-motel, homeless shelter units; and compromise service quality.

Subsumed within are the questions:

1. Whether the Superior Court erred when it defined the scope of the EA shelter program's service as more than the "temporary shelter" specified by statute. See G.L. c. 23B, § 30(A)(e).

2. Whether the Superior Court erred when it held that DHCD's long-standing motel-use policy unlawfully discriminates, where DHCD uses motels as overflow capacity, to ensure that all families get shelter, including persons with disabilities.

3. Whether the Superior Court erred when it entered a generalized injunction that failed to conduct individualized, case-by-case analyses, as disability law requires, for every accommodation request.

4. Whether the Superior Court's injunction is contrary to the ADA because it will: (i) fundamentally alter the program by requiring the provision of services beyond the statutory entitlement, or (ii) cause undue hardship to the EA program.

5. Whether the Superior Court failed to appropriately consider the public interest where its ordered relief, based on an abbreviated preliminary injunction record, will reverse many years' effort to

expand the state's homeless shelter system in the manner best suited to address the needs of homeless families.

Statement of the Case

Nature of the Case

This is an appeal, under G.L. c. 231, § 118, ¶ 2, from a preliminary injunction entered by the Suffolk County Superior Court (Wilkins, J.) ("Superior Court"). Addendum ("Add.") 24-60.

Procedural History

Plaintiffs filed this lawsuit on December 9, 2016, and their operative First Amended Complaint ("Amended Complaint") on December 27, 2016. Record Appendix ("RA") 1 (Dkt. ## 1, 9). Plaintiffs moved, on July 14, 2017, for an "emergency" class-wide preliminary injunction. RA 2 (Dkt # 27). On September 11, 2017, the Superior Court entered the class-wide preliminary injunction now on appeal. RA 3 (Dkt. # 44). The next day, the Superior Court amended that order to correct errors identified by Plaintiffs. Id. (Dkt. # 47).

DHCD moved for reconsideration and dissolution of the preliminary injunction on October 10, 2017. RA 4 (Dkt. # 53). That same day, DHCD filed its notice of appeal, under G.L. c. 231, § 118, ¶ 2, from the preliminary injunction. Id. (Dkt. # 60). The

Superior Court denied DHCD's motion for reconsideration on October 31, 2017, RA 4, and, on November 27, 2017, DHCD filed a second notice of appeal from that denial, RA 5 (Dkt. # 71).

On November 27, 2017, DHCD filed a motion in the Appeals Court, under Mass. R. A. P. 6(a), to stay the Superior Court's injunction. (2017-J-0535). The Appeals Court (Trainor, J.) allowed that motion on December 14, 2017. Id. The stay remains in effect.

Statutory and Regulatory Scheme

Under G.L. c. 23B, § 30, DHCD must "administer a program of emergency housing assistance to needy families with children and pregnant woman with no other children . . .." Among the program's services is "temporary shelter as necessary to alleviate homelessness when such family has no feasible alternative housing available . . .." Id. § 30(A)(e).

DHCD has promulgated program regulations to implement the statute. See 760 C.M.R. § 67. To be eligible, a family's income must be no more than 115% of the federal poverty line and the family must be homeless, without feasible alternative housing, due to enumerated reasons such as domestic violence, natural disaster, or previously sheltering in a location not fit for human habitation. 2017 Stat. c. 47, § 2, item 7004-0101; 760 C.M.R. § 67.06(1).

DHCD places these eligible families in an "appropriate family shelter, substance abuse shelter or other Department-approved accommodation[ ]" that is within 20 miles of the family's home community. 760 C.M.R. § 67.06(3). When shelter within 20 miles of a family's home community is not available, the regulations allow for DHCD to use an "interim placement." Id. § 67.06(3)(e). Based on its past, negative experiences with motels, see page 9-12, below, DHCD restricts its use of motels to only when its contracted family-shelter system has no vacancies. RA 252-56, 339, 341.

The Legislature appropriates funds for the program through two budgetary line-items, 7004-0100 and 7004-0101. The latter funds shelter services, with the former funding DHCD's program staff and administration. See 2017 Stat. c. 47, § 2, items 7004-0100, 7004-0101. Line-item 7004-0101 has historically contained many directive provisos. See St. 2017, c. 47, § 2, item 7004-0101. Several are relevant to this appeal.

- Proviso 17 (Placement Proviso) – "an eligible household that is approved for shelter placement shall be placed in a shelter as close as possible to the household's home community unless a household requests otherwise;"

- Proviso 18 (Transfer Proviso) – "if the closest available placement is not within 20 miles of the household's home community, the household shall be transferred to an appropriate shelter within

20 miles of its home community at the earliest possible date, unless the household requests otherwise;"

- Proviso 35 (Motel Proviso) - "funds shall be expended for expenses incurred as a result of families being housed in hotels due to the unavailability of contracted shelter beds."

Each of these provisos has for many years appeared in line-item 7004-0101. None is of recent creation.

Factual Overview

1. DHCD's administration of the statewide homeless shelter system

DHCD contracts with service providers to support a geographically distributed system of family shelters, across the state, whose aggregate capacity is enough to meet projected need. RA 254, 258-60, 401-03. Service providers are typically non-profit entities that agree to supply or themselves contract for family shelter units for a specified capacity and in specified regions. Id.

DHCD annually enters into contracts with these service providers, which DHCD previously procured for this purpose. Id. For the current fiscal year, the Legislature appropriated $155,878,948 to line-item 7004-0101. Id. DHCD projects (consistent with prior years' experience) that the line-item 7004-0101 appropriation will not be enough for full-year system needs (which has been true for many years running). RA 259-60. Thus, for the current fiscal year, DHCD's

initial contracts are for 9 months, with an additional 1.5-month reserve. Id. DHCD will extend those contractual terms only if the Legislature approves a sufficient supplemental appropriation, which is not guaranteed. Id. If the Legislature does not appropriate supplemental funds, then DHCD's contracts for family shelters - presently sheltering 3,500 families - will expire before the fiscal year's end. Id.[3]

As of October 2017, DHCD - through its service providers - supported 3,694 units of family shelter space dispersed across the state, but focused in areas of significant demand (e.g., Boston). RA 388, 402. DHCD maintained this system through 45 providers encompassing 150 different shelter programs. RA 377.

Family shelters take three forms: congregate, scattered-site, and co-shelter. Congregate shelters serve multiple families, providing those families with their own private sleeping rooms and shared common facilities, typically including bathrooms, kitchens, and living areas. RA 254-55, 339-42, 345-47, 368-70. Congregate shelters have around-the-clock professional staff to support families. Id. At minimum, they also have cooking facilities sufficient for families with

[3] A supplemental budget request seeks an additional $19.3 million appropriation for the program. See https://malegislature.gov/Bills/190/H4231.

children and space for families to congregate outside of living quarters. Id. They are secure from unauthorized public access. Id.

Scattered-site shelters are apartments leased by DHCD service providers. Id. Co-shelters are a derivation of scattered-site shelters - leased apartments, but with two families, each with separate sleeping space. Id. Families sheltered in either a scattered-site or co-shelter unit have access to off-site service providers and units are typically clustered to enhance service providers' ability to help families. Id. These shelters also have shared cooking and bath facilities, and communal areas. Id.

2. DHCD's use of motels for overflow capacity when the system is full

To ensure that all eligible families get at least some shelter, DHCD will use motels when there is no suitable, vacant family-shelter unit. Compared to family shelters, motels' shortcomings are many and meaningful. RA 164-250, 254-55, 339-42, 350-62.[4]

- Motels almost always lack necessary facilities for families. Id. For example, few motels have full kitchens with stoves, adequate food storage,

[4] DHCD is not the only government entity to recognize these shortcomings. E.g., Welfare Hotels, Uses, Costs, and Alternatives. Briefing Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, GAO/HRD-89-26BR, pp. 25-29 (Jan. 1989).

and preparation areas necessary for families to prepare meals for children. Id.

- Motel rooms are cramped accommodations, without enough common space for family members to congregate or find privacy. Id. What common space a motel may have is often inadequate for families' needs, because the needs of other motel guests may be at odds with the need of a child to play, or the space itself may be unfit for such a purpose, such as children playing in unsafe areas (e.g., parking lots). Id.

- DHCD has had many difficulties ensuring that motels follow program rules and regulations, such as sanitary requirements. Id. Its inspectors found many deficiencies that, even after inspection, often went unaddressed because motels are usually less inclined than service providers to correct problems and DHCD has less power to force corrections. Id.

- Motels are not in the business of sheltering families and therefore lack staff trained to properly interact with and aid homeless families. Id. This has caused recurring conflicts between staff and sheltered families. Id.

- Motels are not service providers and do not provide important services to homeless families, such as identifying community resources (e.g., grocery stores) or helping families develop plans for and connect with other aids to finding new housing. Id.

- Motels are open to the public. Id. Families therefore have less security and privacy and may be exposed to crime or other undesirable activity. Id. For example, DHCD staff, in the past, observed drug paraphernalia, such as needles, in parking lots where sheltered children played. Id.

Even during this case, DHCD has encountered substantial issues with one of the two remaining

motels it used at the time the case commenced. Officials from Malden and Melrose, where that motel is (jointly) located, ordered DHCD to stop using it due to fire code, sanitation, and building code violations, among other reasons. RA 341-42, 350-58.

For these reasons, DHCD limits its use of motels. DHCD uses them only as a safety-valve, when no other appropriately sized, accessible family shelter space is available – meaning when DHCD lacks anywhere else within its system that can accommodate an eligible family that urgently needs temporary shelter. RA 252-56, 339, 341.[5] *DHCD's use of motels is thus tied to* the system's capacity. See id. No family is "eligible" or "ineligible" for a motel based on individual eligibility criteria. See id.

DHCD must sometimes turn to motels for a practical reason. Congregate shelters are difficult to site and often take considerable time to bring online and adding scattered-site and co-shelters reduces affordable housing available to families in the first place. RA 254, 346.

When DHCD uses motels for this purpose, DHCD must follow state procurement and finance law. RA 257-58. Once procured, motels do not enter into annual

[5] DHCD may deviate from this policy in "rare circumstances," such as where a family is entirely unable to physically access any vacant shelter units. RA 109, 341, 960.

contracts to provide a specific number of units. RA 247, 254-55, 401-05. Instead, DHCD enters into a master services agreement with a procured motel, specifying a price (or price range) at which the motel will provide to DHCD a room if it chooses (and one is vacant). Id. Motels must also agree to follow EA shelter program rules and regulations. RA 340.

At the time this case began, DHCD had agreements with two motels. RA 347. DHCD now uses only one, having discontinued use of the other due to serious health and safety concerns. RA 350-58. DHCD does not project that it will need more motel rooms during the rest of this fiscal year.

3. DHCD's expansion of the homeless shelter system, to end motel use

DHCD's need to use motels has varied. When DHCD first assumed responsibility for this program in 2009,[6] DHCD needed to make widespread use of them. In 2009 and following years, the Great Recession caused homelessness and the resulting demand for shelter to far outpace space in the existing family shelter system. RA 252-53, 379-89. Demand peaked between fiscal year 2013 and 2014, when DHCD sheltered over 6,000 families. Id. DHCD's heaviest motel use was in fiscal year 2014, when DHCD sheltered a roughly equal

[6] The Department of Transitional Assistance previously administered the program.

number of homeless families in motels as in family shelters. Id. DHCD was criticized for doing so, despite the confluence of precipitating, uncontrollable events.[7]

Since September 2013, DHCD has invested many years' effort in ending this widespread motel use. Since then, DHCD has increased its contracted, family-shelter capacity by 1,664 units, an increase of 82%. RA 253. This expansion was regionally diverse, with 489 new units in Boston, 463 north of Boston, 430 in western Massachusetts, 224 in central Massachusetts, and 193 south of Boston. Id.[8]

---

[7] See, e.g., Akilah Johnson, "Sheltered in motels, but feeling squeezed," Boston Globe (Aug. 17, 2016); "Making homeless families' lives more stable," Boston Globe, Editorial (May 21, 2016); Stephanie Barry, "Nearly $56 million in payments to homeless motels in Western Massachusetts detailed in state records," MassLive.com (June 3, 2014) (available at http://www.masslive.com/news/index.ssf/2014/06/nearly_56_million_in_payments.html); Rick Cohen, "Homeless Families Crowding Motels in Massachusetts," Nonprofit Quarterly (Feb. 4, 2014) (available at https://nonprofitquarterly.org/2014/02/04/homeless-families-crowding-motels-in-massachusetts/); Calvin Hennick, "Marlborough mayor's request that motel provide meals for homeless families goes unanswered," Boston Globe (Jan. 2014); Joan Vennochi, "Motels no answer for homeless," Boston Globe (Nov. 4, 2013); Kathleen Burge, "For homeless families, motel is a life in limbo: Off a Route 128 exit, they wait and hope for something more," Boston Globe (Mar. 25, 2012).

[8] DHCD coupled this expansion with expansion of efforts at diverting homeless families from needing to enter the program at all, such as through short-term rental assistance or other subsidies (under a program called

This expansion has translated into a steady reduction in DHCD's motel use. Id.[9] When this lawsuit began, DHCD had reduced its motel population to approximately 40 families in the previously mentioned two motels.

4. DHCD's practices and procedures for accommodating disabilities

At the time they seek entry into shelter, DHCD asks all families about any disabilities (including through questions in intake forms). RA 289-309, 395-98. DHCD provides a request for accommodation form along with a form with disability law rights, to persons with disabilities. Id. Families are also asked to provide information related to their other individualized placement needs. Id.

DHCD's central ADA coordinator keeps a spreadsheet of all pending and completed ADA accommodation requests. Id. Many requests are immediately addressed while others may require a family to wait for a system vacancy because it depends on a shelter placement's location. Id. Because

---

HomeBASE). RA 253, 256, 379, 386. Since 2011, diversionary efforts have allowed over 5,000 families to remain in their communities of choice, rather than requiring EA shelter. Id.

[9] DHCD's quarterly reports to the General Court include its motel use. Those reports are available at https://www.mass.gov/service-details/emergency-housing-assistance-resource-information.

families' needs are often complex, this may require prioritizing certain placement attributes over others.

DHCD regularly recognizes disability-related requests for reasonable accommodations and approves a variety of accommodations, including transfers when administratively feasible, as well as for many other, non-transfer related requests. Id. Once approved, DHCD will move the family into another family shelter unit that meets the need, once such a unit becomes vacant. Id. This way, DHCD's placement team takes these approved disability requests into consideration when assigning families to vacancies. See id.

Class-wide Preliminary Injunction

This lawsuit follows DHCD's successful expansion of the family-shelter system. Plaintiffs allege that DHCD has failed to put this new shelter space in areas of need[10] and therefore failed to comply with the ADA and other applicable state and federal disability law.[11] Among other remedies, Plaintiffs seek a declaration that DHCD must use motel rooms beyond

---

[10] RA 6-16 (First Am. Compl. ¶ 9; also ¶¶ 5-8, 16, 18, 22-24, 30-36, 40-54).

[11] RA 18-19 (First Am. Compl. Counts 3, 4). Plaintiffs' First Amended Complaint also advances other counts relating to interpretation of line-item 7004-0101 provisos, but the Superior Court did not enter preliminary injunctive relief with respect to them. See RA 17-19 (First Am. Compl. Counts 1, 2, 5). Those claims are therefore not a part of this appeal.

those needed for overflow capacity, as an additional placement resource whenever a person with a disability requests an accommodation, and Plaintiffs request injunctive relief to implement that declaration. Id. (First Am. Compl. Prayers for Relief # 4; also ¶¶ 5-9, 16, 18, 22-24, 30-36, 40-54). Plaintiffs pursue this case as a class action, and the Superior Court has certified it as one. RA 3, 16-17.

Plaintiffs sought a class-wide "preliminary" injunction to revise DHCD's allocation of shelter resources. Plaintiffs asserted that the line-item 704-0101 provisos require using motels to place families in proximity to their home communities, and using motels for disability-related transfers would be a reasonable modification to DHCD's existing policies, practices, or procedures. See RA 40-50.

DHCD contested a class-wide preliminary injunction, both through its initial opposition to the motion and in a later motion for reconsideration and dissolution after the injunction entered. RA 1-5. DHCD submitted affidavits from the program's Assistant Undersecretary, and DHCD's Associate Director of Housing Stabilization, ADA coordinator, manager of shelter placements, and Chief Financial Officer, and Director of Quality Assurance, Technology & Training, and Research & Evaluation for Housing Stabilization. RA 251-60, 289-309, 337-406. Those affidavits

presented decades of collective experience about the program. Id.

Among many subjects, DHCD's affidavits explained the impacts that would flow from renewed, widespread motel use. See id. Because the program's service is subject to appropriation, and the current fiscal year appropriation is in projected shortfall, DHCD has no excess funds to divert to motels, while simultaneously meeting contractual obligations to service providers who provide family shelters. RA 257-60, 399-406. Any significant motel use will necessarily detract from the family-shelter portfolio, in addition to the other recognized, negative impacts from sheltering families in motels. Id.; RA 253-55, 342-45, 367-73.

DHCD also explained to the Superior Court how it administers the system, with all eligible families getting shelter somewhere in the system, and all families - including persons with disabilities - having access to the same unit vacancies. RA. 390-98. Persons with disabilities are not segregated from any shelter placements. Id. In fact, DHCD centrally tracks disability-related requests, so that it can make sure they are considered when vacancies arise in the system. Id.

The Superior Court issued a memorandum and order dated September 7, 2017[12] entering a preliminary injunction against DHCD. The relevant portions read:

> (1) "DHCD shall treat motels and hotels as available placements when implementing approved ADA accommodation requests in the EA program"; and
>
> (2) "If a hotel or motel placement will meet an approved ADA accommodation request for an EA-recipient household, and DHCD cannot provide that accommodation in any other way, then DHCD must place the household in a hotel or motel on at least an interim basis until it provides the accommodation through an approved contracted shelter, or otherwise."

Add. 49. This order necessarily requires DHCD to enter into master services agreements with motels in enough locations and with enough vacant rooms to immediately transfer families previously approved for an eventual transfer for a disability-related reason who are presently waiting for a family shelter vacancy that would accommodate their request for accommodation. See id.

As of the date of the filing of DHCD's opposition to the preliminary injunction, this potentially included 187 families seeking transfers to differing locations in the state - a small number compared to

[12] The Superior Court later entered it on the docket on September 11. On September 12, the Court entered on the docket the operative, amended memorandum and order that changed certain factual findings, but did not alter the relief granted.

DHCD's entire EA shelter program caseload (approximately 5%), but large enough to have real impact. RA 397. DHCD calculates that this may cost more than $ 5 million dollars for the balance of this fiscal year, and more than $ 8 million in future fiscal years. RA 403-05.

The Superior Court premised its reasoning on two related conclusions (both of which, DHCD submits, are incorrect). First, the Superior Court believed that any family approved for shelter but not immediately transferred remains in an "ADA non-compliant" and "unlawful" placement. Add. 29, 35-39. Second, based upon the first conclusion, the Superior Court decided that the line-item 7004-0101's Motel Proviso requires DHCD to transfer all these families to motels as necessary because their "ADA non-compliant" and "unlawful" placements fall within the meaning of "unavailability" in the proviso. Add. 24-60. Because the Superior Court found in the Motel Proviso a state law mandate to transfer these families, it concluded that doing so must be required for all of them. Id. The Superior Court also rejected that doing so would create an undue hardship or fundamentally alter the program, again because the court reasoned that the Proviso itself required this action. Id.

Summary of the Argument

Title II of the ADA prohibits "public entities," such as DHCD, from discriminating against "qualified persons with disabilities" when providing public services. 42 U.S.C. § 12132. The ADA and other related laws ensure that persons with disabilities receive evenhanded treatment. Tennessee v. Lane, 541 U.S. 509, 525 (2004). This includes reasonable modifications to policy, practice, and procedure to ensure equality of access. 42 U.S.C. § 12131(2).[13] But the ADA does not require a public entity to "employ any and all means to make" services perfectly accessible. Tennessee, 541 U.S. at 531-32. Nor does it set standards of care or alter public entities' discretion to limit the services they provide. Alexander v. Choate, 469 U.S. 287, 302-03 (1985). Applying these principles, Plaintiffs are unlikely to succeed on the merits of their claims, and the court below therefore erred in granting preliminary relief.

I. The Superior Court erred at the outset when defining the scope of the EA shelter program service.

---

[13] DHCD refers to the "ADA" as shorthand to include also requirements under Section 50 of the Rehabilitation Act of 1973, whose nearly identical requirements are typically considered in tandem by courts, see Cercpac v. Health & Hosps. Corp., 147 F.3d 165, 167 (2d Cir. 1998), as well as related state laws, which DHCD does not understand to impose additional requirements in this case (Plaintiffs have identified no such differences themselves).

Through the program, DHCD administers a statutory entitlement to "temporary shelter as necessary to alleviate homelessness." G.L. c. 23B, § 30. The Superior Court, however, derived from provisos to line-item 7004-0101 an additional legislative command – absent from its text – to use motels, contrary to DHCD's long-standing policy. This was a critical misstep because, without properly defining service scope, it is impossible to apply the ADA's requirements, which center on evenhanded administration of the state-defined service and reasonable modifications to the service's policies, practices, and procedures. Pages 24-32.

II. A. "[T]he ADA does not itself mandate the provision of services, it . . . *prohibit[s]* discrimination against the disabled within the services that are provided." Buchanan v. Maine, 469 F.3d 158, 174 (1st Cir. 2006) (emphasis in original). The Superior Court's preliminary injunction founders on the shoals of this important distinction. DHCD administers the EA shelter program on equal terms for all. All eligible families, including persons with disabilities, receive temporary shelter. To make sure of this, DHCD uses motels for overflow. This policy, based on DHCD's judgment about how best to deliver the service, is not discriminatory. Plaintiffs' claims to the contrary are nothing more than challenges to the

service's substantive adequacy, not challenges based upon a discriminatory policy or practice, in administering it. Pages 33-37.

B. DHCD's many years' effort to use more family-shelter units and end motel use has not adversely impacted persons with disabilities. All system-wide data presented to the Superior Court shows that this shift has not materially shifted families farther from their home communities. Nor does that data or any other evidence show that this shift has adversely changed persons with disabilities' access to the program. Pages 37-39.

C. The ADA's lodestar is "reasonable" accommodations, based on "fact-specific, case-by-case" determinations. Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995). Here, however, the Superior Court has ordered the same accommodation for all families previously approved for a disability-related transfer. Even if DHCD must use motels in some cases, it does not follow that doing so immediately for all these families is reasonable. At minimum, the ADA required case-by-case reassessments and not a one-size-fits-all order. Pages 39-43.

D. The ADA does not require public entities to make changes that will "fundamentally alter" a program. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603 (1999). The Superior Court's

preliminary injunction, however, will require DHCD to alter the service's scope beyond state law entitlements. This was an error of law. The ADA also does not require public entities to make changes that will impose an "undue hardship." Here, the injunction does just that by creating significant cost and negative impacts for the system. Pages 43-49.

III. The public interest does not support a preliminary injunction. It is improvident to compel such system-wide change, not easily reversed and with such potential for negative impacts, where the order is premised upon an erroneous construction of state law and an abbreviated preliminary injunction record. Pages 49-50.

Argument

In an interlocutory appeal of a preliminary injunction under G.L. c. 231, § 118, ¶ 2, this Court applies the same factors considered by the Superior Court. Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 851 (2004), citing Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980). They are: a likelihood of success on the merits and a substantial risk of irreparable harm. Packaging Indus. Group, 380 Mass. at 617. Because this injunction is directed to government action, the Court must also consider the public interest. Tri-Nel

Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). "On review, the motion judge's 'conclusions of law are subject to broad review and will be reversed if incorrect.'" Fordyce v. Hanover, 457 Mass. 248, 256 (2010), quoting Packaging Indus. Group, 380 Mass. at 616. Further, here, where the record consists of documents and not testimony, the Court "may draw [its] own conclusions from the record." Packaging Indus. Group, 380 Mass. at 616.

I. The scope of the EA shelter program is to provide temporary shelter through a statewide shelter system to homeless families.

The ADA does not require states to provide a particular level of services nor set a standard for the services they choose to provide. Alexander, 469 U.S. at 303; Buchanan, 469 F.3d at 174.[14] Rather, states have discretion to define the scope of their services and to limit them. Id. The state is equally free to structure its services and their delivery as it believes proper. Williams v. Secretary of Human Servs., 414 Mass. 551, 561 (1993) ("[T]he ADA does not require the [agency] to change the structure of its services or funding . . ..").

[14] Accord Schiavo v. Schiavo, 403 F.3d 1289, 1300 (11th Cir. 2005); Radaszewski v. Maram, 383 F.3d 599, 608 (7th Cir. 2004); Townsend v. Qasim, 328 F.3d 511, 518 (9th Cir. 2003); Cercpac, 147 F.3d at 168.

It follows that, "[b]efore a court can determine whether a public entity has violated the ADA, it must first define the scope of the 'benefit' or 'service' at issue." Van Velzor v. City of Burleson, 43 F. Supp. 3d 746, 753 (N.D. Tex. 2014). That means identifying state law "facial legal entitlements," Henrietta D. v. Bloomberg, 331 F.3d 261, 277 (2d Cir. 2003), that make up the "package" of services provided by the state, Alexander, 469 U.S. at 302-03. In doing so, courts must avoid expanding the service's scope beyond those entitlements themselves, in pursuit of amorphous objectives beyond a service's set scope. Alexander, 469 U.S. at 302-03.[15] Here, the Superior Court's error in entering a preliminary injunction stemmed largely from its failure properly to identify the services that DHCD, as a matter of state law, is to provide.

A. The EA shelter program entitles eligible homeless families to temporary shelter.

To define the EA shelter program's scope, analysis begins with the program's statutory text. Ajemian v. Yahoo!, Inc., 478 Mass. 169, 181 (2017). Under G.L. c. 23B, § 30, DHCD is to "administer a program of emergency housing assistance to needy

[15] See also Jones v. City of Monroe, MI, 341 F.3d 474, 477-78 (6th Cir. 2003); Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999).

families with children and pregnant wom[e]n with no other children." Among the program's services, is providing "temporary shelter as necessary to alleviate homelessness when such family has no feasible alternative housing . . .." Id. § 30(A)(e).

The program's facial legal entitlement is directly stated in this text: "temporary shelter." This is a discrete entitlement. "Homeless" means "having no home or permanent place of residence," and "homeless shelters" provide temporary residence to such individuals.[16] These are not ambiguous terms. They apply to the lack of overnight accommodation in a home, and a corresponding entitlement to overnight accommodation.[17] By mandating this temporary shelter, the statue does not obligate DHCD to address other obstacles leading to or created by homelessness, other than providing this shelter to eligible families who have lost it. Dartt v. Browning-Ferris Indus., Inc.,

---

[16] Merriam Webster Dictionary, available at https://www.merriam-webster.com/dictionary/homeless; see Commonwealth v. Samuel S., 476 Mass. 497, 501 (2017) (courts look to "dictionary definitions as a guide to a term's plain or ordinary meaning.")

[17] Even were this ambiguous, this definitional intent is written in the Legislature's Report of the Special Commission relative to ending homelessness in the Commonwealth, p. ix (Dec. 28, 2007): "Homeless: All families or individuals who both lack a fixed, regular and adequate nighttime residence and who reside in emergency or transitional shelter programs . . .."

427 Mass. 1, 9 (1998) (provisions are not read into statutes that are not written into them).

DHCD's regulations elucidate further these service limits. They generally require DHCD to place families in family shelters within 20 miles of their home communities. 760 C.M.R. § 67.06(3). But if no system vacancy meets that criterion, DHCD may put the family in an interim placement - such as a shelter beyond 20 miles - and then transfer those families "as soon as possible." 760 C.M.R. § 67.06(3); also 2017 Stat. c. 47, § 2, item 7004-0101 (Transfer Proviso).

Both the Transfer Proviso and these regulations tell DHCD how it must manage vacancies. The directive Transfer Proviso says that DHCD must only effect transfers "at the earliest possible date." See 2017 Stat. c. 47, § 2, item 7004-0101. Similarly, under the regulations, some families get priority in transfer requests over others. See 760 C.M.R. § 67.06(3). And they reinforce that the program is intended to shelter families in family shelters. See 760 C.M.R. § 67.06. The regulations do not, however, expand the statutory entitlement to placement in temporary shelter in a way that requires DHCD to find new placement units - outside of DHCD's existing, contracted portfolio of family shelters - based on individual family requests. See id. If there are no vacancies in a family shelter within 20 miles of a

home community, the regulations authorize placements farther away, with a transfer priority. See id. In other words, this is not an entitlement to shelter in any specific, extra-system location. See id.

Concomitantly, the Motel Proviso and the regulations do not command DHCD to use motels as placements. Motels are authorized as an "interim placement" but the regulations do not require their use. See 760 C.M.R. § 67.06(3). The Motel Proviso doesn't go any further because it directs DHCD to pay any expenses it incurs when it uses motels due to "unavailability," but it at no point requires actual motel use. See 2017 Stat. c. 47, § 2, item 7004-0101. At most, the Motel Proviso is a narrow authorization to use motels in a specific circumstance, but it nowhere affirmatively directs DHCD to use them. See id.[18]

DHCD's motel practice is consistent with the statute and regulations. DHCD provides the promised temporary shelter to all eligible families. To ensure this is always the case, DHCD will use motels as an emergency, overflow resource. DHCD need do nothing more. Instead, having met the statutory legal

[18] The statutes and regulations are not ambiguous. Even were they, DHCD's interpretation is entitled to deference. See Peterborough Oil Co., LLC v. Department of Envtl. Prot., 474 Mass. 443, 449 (2016).

entitlements, DHCD has "discretion . . . to determine priorities for allocation of resources among services." Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 615 (1997), quoting Williams, 414 Mass. at 567.

B. The Superior Court erred when construing the scope of the EA shelter program service.

The Superior Court expanded the facial legal entitlement of the program beyond temporary shelter to, in essence, provide temporary shelter in very specific locations, with DHCD obligated to continually add motels to do so. That was error. The Superior Court should have applied the analysis above to reject this expansive program construction. The court made three mistakes to reach its flawed conclusion.

First, the court began with a flawed premise. The Superior Court labeled the current placements of all families waiting for a disability-related transfer as "ADA non-compliant" and "unlawful." Add. 33, 34-35. The Superior Court cited to no provisions of the ADA to support these labels. This is because the ADA does not mandate specific services; it only prohibits states from discriminating when providing the services that they do offer. E.g., Buchanan, 469 F.3d at 170-71. So, the starting point to figure out program scope cannot be labeling the placements at issue as

per se "unlawful" under the ADA, because the ADA doesn't contain such standards.

Second, the Superior Court used its incorrect premise as an interpretive guide to the Motel Proviso. Add. 31-40. The court reasoned that the Legislature did not intend to put families in "unlawful" placements, so they must be "unavailable" and subject to the Motel. Id. At the outset, because the premise was wrong, so too was the conclusion.

Beyond that, the Superior Court did not properly interpret the Proviso's text. The court says that the "Motel Proviso expressly requires that DHCD make every effort to provide accommodations with[in] [sic] [a] 20 mile radius." Add. 34. But, the Motel Proviso does not "expressly" include the text the Superior Court wrote - it doesn't say "every effort" and it makes no reference to "a 20 mile radius." See 2017 Stat. c. 47, § 2, item 7004-0101. Instead, it refers only to using motels "due to the unavailability of contracted shelter beds." Indeed, even the Transfer Proviso, while it refers to a 20-mile radius, doesn't use the words "make every effort"; it refers more concretely to "the earliest possible date," implicitly acknowledging the practical limitations on availability. See id. The Superior Court thus ranged beyond the text of the Motel Proviso.

Third, the Superior Court erred by concluding that the "service" at issue is for shelter in a particular location (including through motels) because location is a "material part" of the program. Add. 54-55. Location is important to "assigning a location within the existing system" – the very words used by the court. Id. But assigning a location within the system is different from finding and using motels outside that "existing system." That distinction is critical.[19] Observing the importance of location to intra-system assignment of vacancies is no support for forced expansion of the system, using motels.

In sum, the Superior Court erred when defining the state's "service" at issue for ADA purposes. As follows, with a proper definition of the relevant service in hand, the Superior Court should have concluded that Plaintiffs are not likely to succeed on the merits of their ADA claims.

---

[19] The Superior Court also wrote that "location is obviously important for a family seeking shelter, just as it is for most people." Id. The question, however, is the specific services the Legislature chose to provide – a question answered not by what families may value but by what the Legislature intended to provide, as reflected in statutory text.

II. DHCD's motel-use practice does not discriminate against persons with disabilities.

Title II of the ADA applies to this case.[20] To prevail on a Title II claim, a plaintiff must show: "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." Buchanan, 469 F.3d at 170-71, quoting Parker v. Universidad de Puerto Rico, 225 F.3d 1, 5 (1st Cir. 2000). Among other actions, public entitles must make "reasonable modifications" to policy, practice, or procedure to provide meaningful access to services. Toledo v. Sánchez, 454 F.3d 24, 39-40 (1st Cir. 2006).

Plaintiffs are not likely to succeed on the merits of their Title II claim. DHCD's practice of using motels as emergency overflow only is a neutral, non-discriminatory mechanism for adding system capacity in times of great need. It reflects the agency's best judgment about where to shelter homeless families. And, it ensures that all families receive the service required by the Legislature. While Plaintiffs may wish for more, or desire shelter that

[20] Title II applies to public entities, such as DHCD.

better addresses obstacles other than a lack of any shelter at all, those are not discrimination claims.

A. DHCD's motel-use practice does not discriminate in the provisions of the EA shelter program service.

No matter how presented, "a claim survives only if it truly alleges a 'discriminatory denial of services,'" rather than a complaint about "the 'adequacy' of the services provided." Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1207 (D. Ore. 2012) (citing Buchanan, 469 F.3d at 174-75); also Rodriguez, 197 F.3d at 618 ("[W]hat appellees are challenging is not illegal discrimination against the disabled, but the substance of the services provided.") (internal quotation omitted).

Plaintiffs' claim is one for adequacy, not discrimination. DHCD uses motels only to avoid catastrophe: having no placements available that can shelter an eligible, homeless family. DHCD administers this policy to ensure that all families receive shelter, not to exclude them. For the most part, families are sheltered in the (contracted) family shelter system, with all families - including persons with disabilities - having equal opportunity and access to all system vacancies. DHCD brings motels online only as necessary for overflow. DHCD does not and never has used motels as new,

individualized, extra-system placements, sought out specifically and in specific locations.

That is not discriminatory. DHCD excludes no family from the service it is required to provide: "temporary shelter." DHCD's decisions to add or remove motels from its portfolio are based on system-wide need. Moreover, all eligible families receive access to the service equally because all families get shelter and all families have equal opportunity to transfer to system vacancies when they arise. This policy does not give rise to an ADA claim. See Buchanan, 469 F.3d at 170-71.

Characterizing the claim as one for "meaningful access" and "reasonable accommodations," as Plaintiffs do, changes nothing. Homelessness is both caused by, and itself causes, many problems beyond just a lack of shelter - i.e. no place to stay overnight. But, just because a temporary shelter placement is not alone adequate to overcome those other obstacles does not mean that DHCD has excluded families from shelter itself. For example, in Cercpac v. Health and Hosp. Corp., the Second Circuit held that the closure of a hospital with certain services did not deny persons with disability meaningful access to those service at other facilities. 147 F.3d at 168. This was so, even

where they would have to travel resulting in access to medical care less adequate to their needs.[21]

Holding otherwise would expand the scope of this program beyond just its prescribed service to a more amorphous entitlement to cure a broader set of ills associated with homelessness. The ADA not require that services address policy goals outside of the state's defined service scope. See Alexander, 469 U.S. at 303 (holding that "benefits" are "the individual services offered" not an "amorphous objective"). Nor does the ADA compel altering services to meet the "greater [ ] needs" of persons with disabilities. Id. The law only "prohibit[s] discrimination against the disabled within the services that are provided." Buchanan, 469 F.3d at 174.[22]

---

[21] Accord Zaffino v. Metro. Gov't of Nashville & Davidson Cty., Tennessee, 688 F. Appx 356, 358-59 (6th Cir. 2017) (the ADA did not protect an employee from transfer to another workplace farther away from medical providers, because the ADA does not require removal of barriers outside the workplace); Jones, 341 F.3d at 479 (city did not deny access to parking benefit by refusing to alter different parking benefit to the advantage of a person with a disability).

[22] In close corollary to this principle, the ADA does not require public entities to provide services in addition to those it chooses to provide. See also Colbert v. District of Columbia, 110 F. Supp. 3d 251, 256-57 (D.C. Cir. 2015) (rejecting Rehabilitation Act claim for specialized mental health services (claimed as accommodation for individualized needs) as in fact seeking "additional or different substantive

The Superior Court saw otherwise because it interpreted state law (the Motel Proviso) to require DHCD to use motels. But that's wrong, as already explained. Pages 24-32, above. State law doesn't require what the Superior Court commanded and, because it does not, disability law does not authorize "major inroads on the state's longstanding discretion to choose the proper mix of amount, scope, and duration limitations of services . . .." Alexander, 469 U.S. at 307. Particularly not where DHCD's policy is based on its widely-shared judgment that homeless families should be in family shelters, not motels. Cf. Olmstead, 527 U.S. at 602 (deference owed to state's reasonable medical assessments for program eligibility); Buchanan, 469 F.3d at 174 (same); Wynne v. Tufts Univ. School of Med., 932 F.2d 19, 23-26 (1st Cir. 1991) (deference owed to school officials' assessments of program academic requirements).

---

benefits"); Rodriguez, 197 F.3d at 618 (rejecting ADA challenge based on New York's failure to provide safety monitoring devices to persons with disabilities because "[t]he ADA requires only that a particular service provided to some not be denied to disabled people"); Doe v. Pfrommer, 148 F.3d 73, 83-84 (2d Cir. 1998) (rejecting claim that state was required to provide "job coach" services where the applicable program offered such services, but the plaintiff did not qualify for them under program standards applicable equally to persons with and without disabilities).

B. There is no record evidence that DHCD's family-shelter expansion and elimination of motel use has adversely impacted persons with disabilities.

There is also no question in this case that DHCD's expanded use of family shelters, and corresponding reduction in motel use, has not adversely impacted persons with disabilities. In fact, it has benefited all families through better quality of placement options. DHCD believes that placing homeless families in congregate, scattered-site or co-shelter units rather than motels enhances placement quality. Pages 9-12, above (summarizing DHCD's reasons for preferring non-motel placements).[23]

System-wide data bear this out. In evidence presented to the Superior Court, DHCD compared system-wide data from fiscal year 2013 - during DHCD's peak motel use - and fiscal year 2017 - with expanded family-shelter use. Id. As shown in the chart below, families' mean and median distance from their home communities has changed little between these two

[23] Plaintiffs did not argue a disparate impact claim in their preliminary injunction papers. See RA 38-50. The Superior Court, however, began its ADA analysis by saying that DHCD's reduction in motel use "adversely" effected persons with disabilities, and it is unclear whether this was in reference to disparate impact or something else. DHCD thus addresses the Superior Court's holding here.

periods. In fact, it has improved in Boston, DHCD's area of greatest need. Id.

	Fiscal Year 2013	Fiscal Year 2017	Difference
Average distance (statewide)	12.9 miles	14.6 miles	+ 1.7 miles
Median distance (statewide)	7.9 miles	7.1 miles	- 0.8 miles
Average distance (Boston)	12.0 miles	9.3 miles	- 2.7 miles
Median distance (Boston)	7.9 miles	3.4 miles	- 4.5 miles

These data show that DHCD's expansion of the family shelter system has provided more families with better shelter, without adversely moving them significantly farther away from their home communities.[24]

The Superior Court was wrong to suggest otherwise. See Add. 32-33. The court found, based on the "record," that DHCD's "policy of denying motel placements has shifted resources toward contracted

[24] Moreover, these same data on distances show that DHCD has not violated the ADA regulation the Superior Court references, 28 C.F.R. § 39.130(b)(4), which Plaintiffs themselves did not argue when seeking an injunction. Under 28 C.F.R. § 39.130(b)(4), public entities may not select service facility locations that "have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination" or "have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities." The distances data do not bear out any violation of this regulation and instead show that contracted-for units are widely dispersed geographically.

beds that present unique problems for persons with disability," because "[t]he use of hotels or motels to meet the unique treatment needs of persons with disabilities was an important way to equalize the quality of placements, with respect to location, as between disabled and nondisabled recipients." Id. But as the above data show, the record does not bear out these statements. The Superior Court never cited where in the record it found its supporting evidence, see id, and, once DHCD presented its data in a motion for reconsideration, the court did not reiterate this line of reasoning. See Add. 51-60. It therefore serves as no basis to sustain the class-wide preliminary injunction.

C. The ADA requires individualized, case-by-case assessments of reasonableness, not a generalized accommodation applicable to all.

DHCD's motel policy is non-discriminatory for purposes of the ADA, and this Court need go no further to vacate the Superior Court's preliminary injunction overriding it. But, were that not so, the Superior Court's injunction would still be flawed. The court's injunction ignores the ADA's lodestar: even where different access to actual state-provided services is at issue, the ADA requires only "reasonable" modifications to policy and practice, for specific individuals and requests. See 28 C.F.R.

§§ 35.130(b)(7), 41.53. This requires "fact-specific, case-by-case inquir[ies]." Staron, 51 F.3d at 356; PGA Tour v. Martin, 523 U.S. 661, 682-83 (2000) ("individualized" inquiries needed).[25] Where, as here, the Superior Court made no individualized inquiry at all, instead ordering a one-size-fits-all accommodation for many families, it must be wrong.

The Superior Court's preliminary injunction, potentially applies to over 180 families currently sheltered by the program. Page 18, above.[26] In the future, it will encompass more. When ordering its relief, the court had before it only a fraction of the records applicable to each individual family. Yet, the Superior Court ordered a specific (and identical) accommodation for all these families. That was error. See Staron, 51 F.3d at 356.

---

[25] Also Toledo, 454 F.3d at 39-40; Dean v. University of Buffalo School of Medicine and Biomedical Sciences, 804 F.3d 178, 189 (2d Cir. 2015) (recognizing that the ADA demands reasonableness as measured on a case-by-case basis, not perfection); Tuck v. HCA Health Servs. of Tennessee, Inc., 7 F.3d 465, 471 (6th Cir. 1993) ("Issues involving ... reasonable accommodation are primarily factual issues.").

[26] The system is a series of moving pieces. While these are all families that have requested transfer, it is possible that they may later decline based on any number of reasons (including satisfaction in their current placement or a desire not to move) once DHCD has figured out what motel is available for use.

Even the court acknowledges that it did not conduct these individualized analyses. The court reasoned it didn't need to, writing:

> The operative paragraphs of the Order only apply to recipients with "approved ADA accommodation requests." . . . DHCD itself makes the individualized, fact-specific analyses that lead to approving the accommodation requests. The Order expressly relies upon those DHCD approvals; it certainly has not preempted any individualized analysis of accommodation requests.

Add. 56. But relying on DHCD's prior approvals could only make sense if: (i) the EA shelter program statute requires DHCD to use a motel for all these families; or (ii) DHCD's prior approvals were for motels.

Neither proposition is true. As discussed, far from compelling DHCD to use motels, the statute contemplates funding them only when DHCD has exceeded its system-wide capacity. Pages 24-32, above. And DHCD's prior decisions all approved taking those families disabilities into account for system-vacancy transfers. None was an approval for a motel in particular; families must still wait for a vacancy in the general shelter system (i.e. when transfer is administratively feasible).

The Superior Court's preliminary injunction is therefore fundamentally flawed. Reasonableness inquiries require careful consideration of many factors, including "the effectiveness of the

modification in light of the nature of the disability in question and the cost to the organization that would implement it." Staron, 51 F.3d at 356; Vane Zande v. State of Wis. Dept. of Admin, 44 F.3d 538, 541-43 (7th Cir. 1995) (same). Public entities may also consider the effects of a modification on others, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400-01 (2002), and whether such action, individually or writ large, would inflict undue hardship or fundamentally alter the program, pages 43-49, below.

Here, the factual *considerations* are particularly weighty given the number of families involved and complexity of the EA shelter program. Any decision to use a motel room in lieu of a shelter placement in the existing system means the system will bear a per diem expense it otherwise would not have had, placing even more pressure on a system that already spends more than $150 million per year. As explained later, there is no way to do this without shouldering added costs or diverting funds from and reducing family-shelter units. Even then, shelter quality in motels will be inferior to family shelters.[27]

[27] For example, many families wish to transfer to Boston. But, in exploring compliance with the Superior Court's injunction, DHCD discovered that none of its previously-procured motel providers in Boston *wish to provide rooms now.* RA 347.

All told, the modifications ordered wholesale by the court are not reasonable. This case does not require the agency simply to make a reasonable adjustment to accommodate a person, like granting a zoning variance to allow for installing a ramp.[28] At stake here instead is a system-wide policy running to a core belief about how best to shelter homeless families, and many years of resource allocation decisions to implement it. Pages 9-14, above.

Absent rare circumstances, DHCD does not believe that reasonableness weighs in favor of such a "motel" accommodation. In any event, what is clear is that the ADA does not demand this same accommodation for all these families, without any consideration of other factors. The Superior Court's generalized, one-size-fits-all accommodation cannot stand. See Staron, 51 F.3d at 356 ("fact-specific, case-by-case inquiries" required; PGA Tour, 523 U.S. at 682-83 ("individualized" inquiries needed).

D. The ADA does not require public entities to absorb undue hardships or fundamentally alter their programs.

The Superior Court's decision also disregards basic limits on the ADA's requirements of public

---

[28] This example is drawn from the Department of Justice's Title II Technical Assistance Manual, II-3.6100, available at https://www.ada.gov/taman2.html#II-3.6100.

entities. Under the "reasonable accommodation" standard, public entities need not make modifications that would impose "undue financial and administrative burdens." Boston Hous. Auth. v. Bridgewaters, 452 Mass. 833, 851 n.26 (2009), quoting Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979). Nor must they make "[disability] modifications that would fundamentally alter the nature" of service. Olmstead, 527 U.S. at 603-06. The Superior Court's injunction is infirm because it will do both.

1. The Superior Court's generalized preliminary injunction will cause undue hardship.

Public entities do not need to shoulder undue hardships to make modifications to programs; they need only take actions that are reasonable. Boston Hous. Auth., 452 Mass. at 851 n.26; Southeastern Community College, 442 U.S. at 412. Accordingly, modifications that would impose "undue financial and administrative burdens" are not required. Boston Hous. Auth., 452 Mass. at 851 n.26. DHCD presented extensive evidence below of the financial and administrative burdens that must result from the preliminary injunction.

First, DHCD's Chief Financial Officer and program staff estimate that using motels as ordered by the Superior Court may cost more than $ 5 million dollars for the balance of this fiscal year, and more than $ 8

million in future fiscal years, just for the motel rooms. Page 19, above. If even a portion of these families take a motel placement, it would create a significant impact on a program that already lacks enough appropriation for full-year operations.

Second, in addition to paying for these new motel rooms themselves, DHCD will need to shoulder other, related expenses. RA 251-56, 337-76, 399-405. For example, DHCD previously needed to hire inspectors to ensure motels followed sanitation requirements. Also, DHCD will need to support families sheltered in motels, which means contracting for service-provider staff to visit motels. These are administration costs beyond just the per diem rates of motel rooms. See id. And, even after these efforts, motels will still be poorer in quality than family shelters. Id.

Third, DHCD will have to administer what will surely be many motels in varying locations. See RA 395-98. The more motels, in more locations, the greater the complexity and costs, expense, and difficulty of managing the system will be.

Fourth, all these costs will impose a hardship that outstrips even their fiscal impact. DHCD has no "extra" money in its appropriation and, under state finance law, it can spend no more than appropriated. Accordingly, increased costs for motels must be offset elsewhere. Page 17, above. And, where the lion's

share of the program's appropriation pays for family shelters, that is where the reductions will come. In short, more motels mean less family shelter units, which reverses many years' effort to do the opposite. Id.[29] Congregate family shelters are not easy to site and, once shut, not easily reopened. Id. Scattered-site and co-shelter family shelters, while easier to open, are still not always readily available, particularly in areas of high housing demand. Id. The Superior Court's preliminary injunction thus threatens detrimental change not easily undone.

This all reduces to changes that will negatively impact the very families that DHCD shelters, including persons with disabilities. In particular, closing family shelters will reduce service quality at the ones that still are open. DHCD's service providers support many family shelters each, and often multiple regional programs. Id. They therefore enjoy scale economies - particularly in staffing - that enhances service levels and qualities. Id. Reducing family shelters will disrupt those scale economies and lead to staffing reductions yielding effects greater than simply losing shelter units. Id. These harms will

[29] The only other alternative would be to reduce contract lengths with family-shelter service-providers (already less than the full fiscal year), injecting more uncertainty into a system that already requires a supplemental appropriation to ensure shelter for all families through the end of the fiscal year.

affect both persons with disabilities and other families in the program, whose needs are also directly relevant to the analysis. See U.S. Airways, 535 U.S. 391, 400-01 (recognizing that effects on others must be considered when evaluating accommodation).

The Superior Court did not carefully weigh these added considerations, nor DHCD's evidence supporting them. It instead repeatedly viewed the issue as solely one of DHCD wishing to avoid an added expense, writing: "The Departments affidavits do not deny a no impact fiscal scenario and at least demonstrate that at least [sic] of motel costs can be offset by eliminating underutilized contracted units." Add. 36-37. DHCD is trying not to save money, but instead avoid diverting money from family shelters to motels. The Superior Court did not carefully examine these consequences of increased costs.

2. The ADA does not require fundamentally altering the EA shelter program.

Fundamental alterations affect a service's essential, rather than peripheral, aspects. See PGA Tour, 523 U.S. at 682-83. Here, as a matter of law, the Superior Court's order fundamentally alters the system by changing a key aspect of its administration; the injunction expands the entitlement beyond its statutory contours and thus fundamentally changes the program's delivery model. Instead of placement within

the statewide shelter system, persons with disabilities would get shelter in a specific location, with DHCD required to individually identify and obtain motel rooms for those persons.

Because "the ADA does not require the [agency] to change the structure of its services or funding," Williams, 414 Mass. at 561, and because Congress did not intend disability law to make "major inroads on the state's longstanding discretion to choose the proper mix of amount, scope, and duration limitations of services," Alexander, 469 U.S. at 307, the Superior Court's order cannot be upheld. It is a change to an essential aspect of how the program ensures shelter for all families, and one that concerns DHCD's experience and judgment about where best to shelter families. This is a central aspect to how this program operates and one that, to shift away from motel use by necessity, required many years' planning and effort.

It is thus surely an essential aspect of a program that provides shelter to thousands of families, all of whom have differing and complex needs, and often must be given shelter on short notice (even within hours of a request). Moreover, as just explained, it is a change to an essential aspect of the program that will come with significant administrative and fiscal cost, underscoring that it

is not peripheral. In short, the preliminary injunction is just the type of "essential" rather than "peripheral" change that the ADA does not require. See PGA Tour, 523 U.S. at 682-83.

III. Sweeping, system-wide, and difficult-to-reverse change should not be ordered through a preliminary injunction.

Finally, the Superior Court's preliminary injunction also did not properly weigh the public interest. See Tri-Nel Mgmt., Inc., 433 Mass. at 219. In evaluating the public interest, this Court "must find that 'the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.'" King v. Shank, Appeals Ct. Nos 17-P-809, 17-P-1096, slip op. at 4 (Mar. 2, 2018), quoting Commonwealth v. Massachusetts CRINC, 392 Mass. 79, 89 (1984).

The preliminary injunction here forces change to a long-standing government practice and to resource-allocation decisions implemented after many years' effort. DHCD will be put to hard choices: to close hard-won family-shelter units or to reduce in length existing contracts for them. The Superior Court should not have ordered this change on an abbreviated preliminary injunction record. Such change is improvident and does not favor the public interest because it is not easily undone even if DHCD prevails.

See Doe v. Superintendent of Schools of Weston, 461 Mass. 159, 164 (2011) ("A preliminary injunction ordinarily is issued to preserve the status quo"); Matter of McKnight, 406 Mass. 787,792 & n.4 (1990) ("preliminary" injunction should not grant final relief). In short, the Superior Court failed to heed the SJC's caution in Packaging Indus. Group, 380 Mass. at 609, that a judge should seek to minimize the "harm that final relief cannot redress, by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party." (internal quotation omitted).

Conclusion

For the reasons above, this Court should vacate the class-wide preliminary injunction.

MAURA HEALEY, ATTORNEY GENERAL

Samuel Furgang, BBO # 559062
Bryan F. Bertram, BBO # 667102
Kimberly Parr, BBO # 679806
Office of the Attorney General
Government Bureau
(617) 963-2107

Mass. R. A. P. 16(k) Certification

I, Bryan F. Bertram, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

Bryan F. Bertram
Assistant Attorney General
BBO No. 667102

Addendum

2017 Stat. c. 47, § 2, item 7004-0100

For the operations of the homeless shelter and services unit, including the compensation of caseworkers and support personnel; provided, that not less than $46,790 shall be expended for the WATCH CDC's housing clinic; and provided further, that not less than $38,000 shall be expended for a full-time dual-diagnosis clinician at the Community Day Center of Waltham to treat homeless individuals with both mental health and substance abuse issues ...$5,090,311

2017 Stat. c. 47, § 2, item 7004-0101 (Excerpted)

For certain expenses of the emergency housing assistance program under section 30 of chapter 23B of the General Laws; provided, that eligibility shall be limited to families with incomes at or below 115 per cent of the 2016 or later issued higher federal poverty level; provided further, that any family whose income exceeds 115 per cent of the federal poverty level while the family is receiving assistance funded by this item shall not become ineligible for assistance due to exceeding the income limit for a period of 6 months from the date that the income level was exceeded; provided further, that families who are eligible for assistance through a temporary emergency family shelter shall include: (i) families who are at risk of domestic abuse in their current housing situation or who are homeless because they fled domestic violence and have not had access to safe, permanent housing since leaving the housing situation that they fled; (ii) families who, through no fault of their own, are homeless due to fire, flood or natural disaster; (iii) families who, through no fault of their own, have been subject to eviction from their most recent housing due to: (a) foreclosure; (b) condemnation; (c) conduct by a guest or former household member who is not part of the household

seeking emergency shelter and over whose conduct the remaining household members had no control; or (d) nonpayment of rent caused by a documented medical condition or diagnosed disability or caused by a documented loss of income within the last 12 months directly as a result of a change in household composition or a loss of income source through no fault of the family; and (iv) families who are in a housing situation where they are not the primary leaseholder or who are in a housing situation not meant for human habitation and where there is a substantial health and safety risk to the family that is likely to result in significant harm should the family remain in such housing situation;

* * *

provided further, that an eligible household that is approved for shelter placement shall be placed in a shelter as close as possible to the household's home community unless a household requests otherwise; provided further, that if the closest available placement is not within 20 miles of the household's home community, the household shall be transferred to an appropriate shelter within 20 miles of its home community at the earliest possible date, unless the household requests otherwise;

* * *

provided further, that this item shall be subject to appropriation, and in the event of a deficiency, nothing in this item shall give rise to or shall be construed as giving rise to any enforceable right or entitlement to services in excess of the amounts appropriated in this item;

* * *

provided further, that no funds shall be expended for costs associated with the homeless management information system; provided further, that no funds from this item shall be expended for personnel or administrative costs; provided further, that the department shall endeavor to convert scattered site units to congregate units and, as allowed by demand, reduce the overall number of shelter beds through the reduction of scattered site units;

* * *

provided further, that funds shall be expended for expenses incurred as a result of families being housed in hotels due to the unavailability of contracted shelter beds;

42 U.S.C. § 12131

As used in this subchapter:

(1) Public entity

The term "public entity" means--

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

G.L. c. 23B, § 30

Subject to appropriation, the department shall administer a program of emergency housing assistance to needy families with children and pregnant woman with no other children. The department shall administer the program throughout the commonwealth at locations that are geographically convenient to families who are homeless or at-risk of homelessness and shall administer the program in a fair, just and equitable manner. The commonwealth shall accept funds from the appropriate federal authorities for said program.

(A) The department shall promulgate rules and regulations to establish the levels of benefits available under the program and to ensure simplicity of administration in the best interest of needy recipients. Such benefits shall include, but not be limited to, the following:--

(a) for the prevention of the loss of housing, the actual liability up to three times the monthly rental or mortgage liability;

(b) for the prevention of utility shutoffs or for the resumption of utility services, up to three months of the actual service liabilities;

(c) for the provision of home heating assistance, up to three months of the actual fuel liabilities.

(d) The department shall promulgate regulations which would authorize the department to make payments for a fourth month of rent, utility or fuel arrearages if the director certifies in writing that the family would otherwise become homeless, or be without utilities or fuel.

(e) for the prevention of homelessness, temporary shelter as necessary to alleviate homelessness when *such family has no* feasible alternative housing available, storage of furniture for up to thirty days; moving expenses; advance rent payments of one month's rent; and security deposit not to exceed one month's rent.

The department shall establish procedures, consistent with federal law, to require applicants for the program to also submit an application for federal energy assistance where appropriate. No benefits for a particular emergency shall be provided to an applicant family under the emergency assistance program when benefits are available within seven days of application under the federal assistance program to meet *such particular emergency*.

(B) The department shall promulgate rules and regulations to establish the requirements and

standards for eligibility. Subject to appropriation, such regulations shall provide that a needy family shall be eligible for assistance under the emergency assistance program if its income is within the income limits for the program of aid to families with dependent children established pursuant to chapter one hundred and eighteen.

Emergency housing assistance shall be denied to a family who, at any time within 1 year immediately prior to the filing of an application for emergency assistance, has depleted, assigned or transferred real or personal property that would have rendered such family ineligible for assistance if the depletion, transfer or assignment was not reasonable at the time or was not for good cause reasons. For purposes of the preceding sentence, good cause reasons shall include, but not be limited to, that the funds were expended for necessary or reasonable costs of living such as rent, utilities, food, health related needs, education related expenses or transportation.

The department shall take all reasonable actions to minimize abuse and errors. Such activities shall include:--

(a) the collection and analysis of data regarding utilization patterns;

(b) the recording and tracking of use of this program by individual recipients, including, but

not limited to, the utilization of a year to year cross check of recipients to determine if a person or persons has received similar benefits in the previous year or years;

(c) the utilization by the department of mechanisms, such as payment of all or part of a regular assistance grant directly to vendors, to prevent the misuse of this program, provided, however, that such mechanisms are authorized under federal or state law;

(d) the utilization of wage reporting and bank matching systems, provided, however, that the provision of assistance shall not be delayed by such utilization;

(e) the verification of all elements of eligibility. Such verification requirements, including home visits by workers assigned to recipients, shall be reasonable and in accordance with federal law and regulations, where applicable. The department shall determine which verification requirements can be reasonably met by third party affidavits and shall provide notification to recipients and applicants of the circumstances when third party affidavits may be used. The department shall establish reasonable procedures for the verification of continuing eligibility, including monthly reporting and retrospective budgeting where appropriate.

(C) Subject to federal approval of any necessary waivers, the department shall use the warrant management system established pursuant to section twenty-three A of chapter two hundred and seventy-six; and, in accordance with section 11 of chapter 14 and the rules and regulations of the fraudulent claims commission, the department shall forward the name of any applicant or beneficiary of emergency housing assistance who, according to said warrant management system, has an outstanding default or arrest warrant issued against him; and the department shall comply with existing state and federal law applicable to time standards for review and determination of eligibility, and all notice and hearing requirements afforded to applicants and beneficiaries under its emergency housing assistance programs; and

The department shall not issue a check or grant any non-shelter benefits of any kind to or on behalf of an applicant for or recipient of emergency housing assistance benefits against whom an outstanding default or arrest warrant has issued by any court of the commonwealth. Evidence of the outstanding default or arrest warrant appearing in said warrant management system shall be sufficient grounds for such action by the department.

If a hearing is requested to challenge the termination of benefits due to an outstanding default

or arrest warrant, the law enforcement agency responsible for the warrant shall be notified of the time, place, date of hearing and the subject of the warrant. An affidavit from the law enforcement agency responsible for the warrant or from the colonel of the state police may be introduced as prima facie evidence of the existence of a warrant without the need for members of that law enforcement agency to attend any hearings held under this section.

(D) Any person or institution which knowingly makes a false representation or, contrary to a legal duty to do so, knowingly fails to disclose any material fact affecting eligibility or level of benefits to the department or its agents, for the purpose of causing any person, including the person making such representations, to be eligible for emergency housing assistance, shall be punished by a fine of not less than two hundred nor more than five hundred dollars or by imprisonment for not more than one year.

Nothing in this section shall be construed as preventing the institution of criminal proceedings for the violation of any other law of the commonwealth.

(E) Any vendor under the emergency housing assistance program administered by the department shall submit to the department, within six months of the last day of the month in which such service was

rendered, a bill for the same. For the purposes of this chapter a vendor shall be any person or institution providing services in connection with any assistance program administered by the department. All vouchers submitted by a vendor shall be signed under the penalties of perjury.

(F) There shall be within the office of the chief counsel a division of hearings for the purpose of holding the hearings referred to herein and rendering decisions. Said division shall be under the supervision of a hearings manager appointed by the director and shall be independent of all other divisions and personnel of the department.

Any person aggrieved by the failure of the department to render adequate aid or assistance under the emergency housing assistance program administered by the department or to approve or reject an application for aid or assistance thereunder within forty-five days after receiving such application, or aggrieved by the withdrawal of such aid or assistance, or by coercive or otherwise improper conduct on the part of the emergency housing assistance program staff, shall have a right to a hearing, after due notice, upon appeal to the director.

A hearing held pursuant to this section shall be conducted by a hearing officer designated by the hearings manager and shall be conducted as an

adjudicatory proceeding under chapter 30A. The department shall offer the person appealing the option to hold the hearing: (a) such that the hearing officer, person appealing and department representatives shall be in 1 location for the hearing and such location shall be convenient to the person appealing; (b) telephonically; or (c) through other available means such as videoconferencing. The person appealing shall have the right to choose among these options. No employee shall review, interfere with, change or attempt to influence any hearing decision by a hearing officer. The hearings manager shall be responsible for the fair and efficient operation of the division in conformity with state and federal laws and regulations and may review and discuss with the hearing officers such decisions solely in order to carry out this responsibility. The hearing manager shall be responsible for the training of hearing officers, scheduling of hearings and the compilation of decisions. The hearings manager may grant a request by the person appealing for a remand of the decision to the hearings officer who made the initial decision or another hearings officer for reconsideration of an initial decision. The final decision of the hearing officer shall be the decision of the department.

A hearing officer shall render and issue his decision within ninety days after the date of the

filing of the aggrieved person's appeal, except that when an aggrieved person appeals the rejection of his application for aid or assistance, or the failure to act on said application, or the failure of the department to render assistance to meet an emergency or hardship situation, the hearing officer shall render and issue the decision within forty-five days after the date of filing of said appeal. The decision of the department shall be subject to review in accordance with the provisions of chapter thirty A.

When a timely request for a hearing is made because of a termination or reduction of assistance that has been provided on the basis of a final determination of eligibility, involving an issue of fact, or of judgment relating to an individual case, between the agency and the appellant, assistance shall be continued during the period of the appeal. If the decision is adverse to the appellant, assistance shall be terminated immediately. If assistance has been terminated prior to a timely request for a hearing, assistance shall be reinstated.

The department shall ensure that a hotel or motel under contract to provide emergency housing assistance to individuals receiving benefits under this section shall provide access to all common and recreational areas otherwise accessible to hotel or motel guests

under the same terms and conditions as those generally available to hotel or motel guests.

28 C.F.R. § 35.130(b)(4), (7)

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

. . .

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

. . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

28 C.F.R § 35.164

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

28 C.F.R. § 41.53

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(3) Temporary Emergency Shelter Placements. An EA-eligible household homeless due to the lack of feasible alternative housing in accordance with 760 CMR 67.06(1)(b) shall be approved for temporary emergency shelter. Any temporary emergency shelter placement must be approved by the Associate Director or his or her designee. Such approval for placement may be withdrawn or temporary emergency shelter benefits terminated if feasible alternative housing subsequently becomes available. A temporary emergency shelter placement shall also be subject to the following provisions:

(a) The Department shall make reasonable efforts to locate temporary emergency shelter that will accommodate the physical composition of the entire household, i.e. the size of the household and the age and gender of the household members.

(b) An EA household requiring temporary emergency shelter shall be placed in an appropriate family shelter, substance abuse shelter or other Department-approved accommodations.

1. An EA household shall be placed in a family shelter when such shelter is available. A room or rooms shall not be considered available if the Department has reserved space for intake cases.

Temporary emergency shelter in another approved temporary emergency shelter specified by the Department may be authorized as an interim measure after the Department determines that there is no family shelter with space available.

2. An EA household having a member with a substance abuse problem shall be referred to the Department of Public Health for placement in a substance abuse shelter when such shelter is available. Temporary emergency shelter in another approved temporary emergency shelter specified by the Department may be authorized as an interim measure if the Department of Public Health determines that there is no substance abuse shelter with space available or appropriate for the household needs.

3. If an EA household contains more than one adult (individual 21 years of age or older), or contains no children younger than 21 years of age during the period of aid pending appeal pursuant to 760 CMR 67.09(2)(a)2.b., the Department may make alternative sheltering arrangements for such adult(s) with the approval of the Associate Director or his or her designee.

(c) The Department-approved family shelter shall be located within 20 miles of the EA household's home community unless the EA household requests otherwise;

(d) The Department shall make every effort to ensure that a child receiving temporary emergency shelter shall continue attending school in the community in which he or she lived prior to receiving EA unless the EA household requests otherwise.

(e) The EA household will be placed in an interim placement, such as shelter beyond 20 miles or a hotel/motel, only if appropriate Department-approved family shelter space is not available. During this interim placement, the EA household must attend the family shelter interview(s) at family shelter(s) specified by the Department. The household shall be advised at the time of placement that:

1. it will be transferred from a shelter beyond 20 miles into an appropriate Department approved family shelter within 20 miles of its community at the earliest possible date unless the EA household requests otherwise; or

2. it will be transferred from another interim shelter into an appropriate Department approved family shelter at the earliest possible date.

9/12V

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-3768

Notice sent 9-12-17
G.B L.S
R.A-B
D.S M
L.M
M.A.G
B.F.B
S.M.F
D.H.C.D
A.W
M.L.R.I
L.K
J.C.SM
S.M.HR
CRB

ROSANNA GARCIA, et al.,
Plaintiff,
vs.

MASSACHUSETTS DEPARTMENT OF HOUSING
AND COMMUNITY DEVELOPMENT,
Defendant.

AMENDED MEMORANDUM AND ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR CLASS-WIDE PRELIMINARY INJUNCTIVE RELIEF

A class of recipients for Emergency Assistance has brought this a class action for injunctive relief and damages against the defendant Massachusetts Department of Housing and Community Development ("DHCD"). On July 14, 2017, the Plaintiff Class filed an Emergency Motion for Class-Wide Preliminary Injunctive Relief. ("Motion"). The Court heard argument on the Motion on July 25, 2017 and has received supplemental submissions since that time. It issued a Memorandum and Order on Plaintiffs' Emergency Motion for Class-Wide Preliminary Injunctive Relief ("September 7 Order"). This amended order makes some typographical corrections and corrects certain errors noted in "Plaintiffs' Suggestions for Corrections to Court's September 7, 2017 Memorandum and Order on Plaintiffs' Emergency Motion for Class-Wide Preliminary Injunctive Relief," filed on September 11, 2017 ("Plaintiffs' September 11 Filing").[1]

PROCEDURAL HISTORY

The named plaintiffs, Rosanna Garcia, Naikis Cepeda, Ana Monterola and Maria Luisa Amparo, Ana Monterola, Shanica Charles and Dawn Didion ("Named Plaintiffs") are applicants for Emergency Assistance (EA) in Massachusetts who filed a complaint on December 9, 2016,

[1] The Court appreciates the Plaintiffs' September 11 Filing, in the interest of accuracy, although it does not change any of the Court's conclusions or legal reasoning.

alleging that they and a class of EA applicants have faced unlawful denials and/or delays in the processing of their EA applications. Through the Spring of 2017, a number of plaintiffs or intervenors sought and obtained preliminary injunctive relief regarding their own individual shelter placements. On June 19, 2017, the Named Plaintiffs filed "Plaintiffs' Motion for Class Certification" ("Motion"), which the defendants opposed.

The Court certified the following class (subject to further refinement of the final definition) in a Memorandum and Order dated July 27, 2017:

> All families who, from December 9, 2016 to the date of Final Judgment applied for or were residing in the EA shelter system (or had been granted a Temporary Emergency Shelter Interruption (TESI)) and met the Eligibility Requirements but did not Immediately receive a placement that both (1) was within 20 miles of the household's home community unless the household requests otherwise and (2) allowed a requested accommodation, if any, for a Qualified Person With A Disability Or A Handicap. For Counts 3 and 4, the court also certifies a subclass of families who include a Qualified Person With A Disability Or A Handicap.
>
> For purposes of class definition:
>
> "Eligibility Requirements" are the requirements for placement under applicable law, including St. 2016, c. 133, Section 2, item 7004-0101, (and 2017 H. 1, section 2, item 7004-0101), G.L. c. 23B, § 30 and implementing regulations found at 760 Code Mass Regs. 67.00 et seq.
>
> "Immediately," for class definition purposes only, means "on the day of application."
>
> "a Qualified Person With A Disability Or A Handicap" shall have the same meaning as in Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq.; the Rehabilitation Act, 29 U.S.C. §§701 et seq.; and the Fair Housing Act, 42 U.S.C. § 3604(f), 3608(e)(5), 12705 and 1437.

With the Motion still under advisement, on August 25, the plaintiff class filed Plaintiffs' Emergency Motion for Preliminary Injunction on behalf of Certain Individual Class Members ("Individual Motion"). On August 31, 2017, the Court entered an initial memorandum to address the matters that appeared clearest and most pressing, granting preliminary injunctive relief to six class members and reserving other questions (including the more complex preliminary injunction claims of certain individual class members) for later proceedings. The

Court has considered the factual submissions on the Individual Motion in deciding the present Motion, as those submissions shed light on DHCD's policies and the impacts upon EA recipients.

BACKGROUND

At this early stage, the court makes the following preliminary findings of fact, reflecting those facts that Plaintiffs are likely to prove.

The Emergency Assistance Shelter program exists by statute, as funded and further defined in a line item in the annual budget. G.L. c. 23B, s. 30 ("Subject to appropriation, the department shall administer a program of emergency housing assistance to needy families with children and pregnant [women] with no other children"). The pertinent line item contains the following language, in relevant part:

> For certain expenses of the emergency housing assistance program under section 30 of chapter 23B of the General Laws; provided, that eligibility shall be limited to families with incomes at or below 115 per cent of the 2015 or later-issued higher federal poverty level; . . .provided further, that an eligible household that is approved for shelter placement shall be placed in a shelter as close as possible to the household's home community unless a household requests otherwise ["Placement Proviso"]; provided further that, if the closest available placement is not within 20 miles of the household's home community, the household **shall be transferred to an appropriate shelter within 20 miles of its home community at the earliest possible date** unless the household requests otherwise ["Transfer Proviso"]; . . . provided further , that the department **shall make every effort** to ensure that children receiving services from this item shall continue attending school in the community in which they lived before receiving services funded from this item ["Education Proviso"]; provided further, that the department shall use its best efforts to ensure that a family placed by the emergency housing assistance program shall be provided with access to refrigeration and basic cooking facilities ["Cooking Proviso"]; . . . provided further, that **funds shall be expended for expenses incurred as a result of families being housed in motels due to the unavailability of contracted shelter beds** ["Motel Proviso"] . . ..

St. 2016, c. 133, section 2, item 7004-0101 (the "line item") (emphasis added); as supplemented by St. 2017, c. 5, section 2, St. 2017, c. 47, § 2, item 7004-0101. The line item specifically excludes expenditure of funds from this particular line item for "the homeless management

information system" and "for personnel or administrative costs." As represented at the hearing on August 31, 2017, the Legislature has historically funded EA for the first 9 months of each fiscal year, as extended by supplemental appropriation for the final 3 months. In fact, DHCD has entered into nine-month contracts with its providers. Maddox Aff. , par. 14. It also has the capacity to enter into one-month, one-week and even three-day contracts. Id. at 15.

DHCD's policy effectively provides only for scattered site and congregate shelter placements. It will not willingly place a household in a motel, despite the provision in the line item for "expenses incurred as a result of families being housed in motels due to the unavailability of contracted shelter beds." It describes its policy as follows:

> DHCD as a matter of policy no longer assigns new intake families to motel or motel scattered site placements, with rare exception[s]. DHCD views congregate shelters as a superior form of placement because they have superior staffing, support services, and common facilities (e.g. kitchens and other facilities for food preparation) to support homeless families as compared to motels or motels. DHCD similarly views scattered site apartment shelters s a superior form of placement for many of the same reasons.

Duffy Aff. § 16. The affidavit does not describe the "rare exception" to this policy.

Since 2011, DHCD has enabled more than 5,000 families to avoid entering shelter and, instead, to remain in their community of choice through its HomeBASE Program, which allows families to receive financial assistance for rehousing. It has also added more than 1,600 additional shelter units, adding to the pre-expansion EA shelter portfolio of 801 congregate shelter beds and 1,217 scattered site units. By the end of June 2017, that portfolio grew to 1,529 congregate shelter beds and 2,153 scattered site units.

Through fiscal year 2016 (and well into the next fiscal year), the number of families in motels remained relatively stable (500 on June 1, 2016; 484 on June 16, 2016; 485 on June 17, 2016). According to attachments to Plaintiffs' September 11 Filing, placements into motels virtually ceased in the second quarter of FY 2017. Over the past year, motel placement has

dropped precipitously, until there were 42 EA families in motels as of July 18, 2017. That was the day after the Governor signed the 2018 Appropriations Bill, with a disputed exercise of the line item veto power to delete, among other things, the Motel Proviso. Providers are obtained under state procurement laws every 10 years, with the next round of procurement set for 2019.

The Court reaffirms its previous observations that:

> Through discovery, the plaintiffs have shown as a preliminary matter that the Department has no system to transfer families to a placement within 20 miles of their home communities "at the earliest possible date unless the household requests otherwise." The Department has stated that it does not generally keep track of how many families are placed beyond 20 miles and does not "capture any information about what schools participant children are enrolled in." The plaintiffs allege that the Department does not accommodate disabilities, as evidenced by plaintiff Didion's circumstances (above) and those of plaintiff Charles, whose family's severe asthma has made numerous placements unworkable and, in one of her family member's case, severe depression requiring treatment in Boston, more than 20 miles away from at least some of the placements.

Memorandum and Order on Individual Named Plaintiffs' Motion for Class Certification (July 27, 2017) at 3. The proceedings on the Motion have also shown, at least preliminarily, that there is no list of recipients identified by DHCD as eligible for and awaiting transfer. These facts raise serious concern about whether, in pursuing an initiative to eliminate hotel placements and the legislative directive to pursue congregate shelter sites, DHCD has paid any substantial attention to the Education Provision and Transfer Proviso. DHCD's two affiants (Maddox and Mullarkey) do not cite any efforts or initiatives to comply with those provisos.

ISSUES PRESENTED IN THIS CASE

Among the issues in the underlying lawsuit are:

- Does DHCD systematically violate the Transfer Proviso by failing to transfer households to an appropriate shelter within 20 miles of its home community "at the earliest possible date," as required by the line item?
- Does DHCD systematically fail to comply with the Education Proviso's mandate that it "**shall make every effort** to ensure that children receiving services from this item shall continue attending school in the community in which they lived before receiving services funded from this item" (emphasis added)?

- Has DHCD systematically contracted for placements located more than 20 miles from the need, i.e. "the household's home community" of the applicant population it knows exists in Greater Boston?
- Does DHCD fail to comply with the Americans With Disabilities Act by denying actual, reasonable accommodation to households whose requests for ADA accommodation DHCD has approved?
- May DHCD adopt a policy categorically refusing to assign families to motel or motel placements despite the Motel Proviso's directive that "funds shall be expended" for "families being housed in motels due to the unavailability of contracted shelter beds"?
- Was the Governor's attempt to strike this language from the line item in the 2018 budget a valid exercise of his line item veto power?
- Does an "unavailability of contracted shelter beds" occur within the meaning of the line item when DHCD determines that (a) no appropriate shelter is available within 20 miles of the household's home community or (b) no shelter is available that would ensure that children receiving EA shelter will continue attending school in the community in which they lived before receiving services?
- Is an ADA-noncompliant shelter "available" for purposes of determining whether DHCD may expend line item funds for a motel?
- Whether, in the totality or in any aspect(s) of the EA program, DHCD is complying with the statutory mandate to administer that program "in a fair, just and equitable manner." G.L. c. 23B, § 30.

DISCUSSION

To obtain preliminary relief, the plaintiff must prove a likelihood of success on the merits of the case and a balance of harm in their favor when considered in light of their likelihood of success. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). "One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent." Shaw v. Harding, 306 Mass. 441, 449-50 (1940). A party seeking to enjoin governmental action must also ordinarily show that "the relief sought will [not] adversely affect the public." Tri-Nel Mgt. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Commonwealth v. Mass CRINC, 392 Mass. 79, 89 (1984).

I.

The Moving Plaintiffs have shown that they are likely to succeed on the merits in some respects, but not yet in others. The key task is to define the extent of DHCD's discretion and the presence of non-discretionary legal obligation.

The Supreme Judicial Court has provided guidance in earlier litigation involving a different aspect of the EA program. Wilson v. Dept. of Transitional Assistance, 441 Mass. 846 (2004) (vacating preliminary injunction against reduction of EA benefits). See also Massachusetts Coalition for the Homeless v. Secretary of Health & Human Services, 422 Mass. 214 (1996) (affirming judgment that the agency met its statutory duty to combat homelessness, but reversing summary judgment for the defendant on a claim that the agency applied housing search regulations in a coercive manner that was not "fair, just and equitable"); Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610 (1997) (vacating preliminary injunction because the agency's regulation, on its face made a rational and fair attempt to allocate limited resources so as to maximize EA benefits for families who had not previously received government housing assistance). As evident from the description of each case, much may depend upon whether the Court is evaluating a facial challenge to an agency policy, or the application of that policy in practice. See esp. Massachusetts Coalition for the, 422 Mass. at 226-227. The record in this case to date focuses more upon DHCD's policies themselves, than upon application of those policies.

The most recent case is the most instructive, as it focuses upon interpretation of a line item and the agency's specific policies. In Wilson, 441 Mass. at 851-852, the plaintiff argued that the Department of Transitional Assistance ("DTA") was required to maintain a specific level of benefit payment because proviso 2 of the relevant line item stated that "the payment standard shall equal the payment standard in effect under the general relief program in fiscal year 1991."

The same line item, however, also contained a proviso 9, which granted the DTA commissioner to amend "all benefits including the payment standard." The Court held that the word "shall" was ordinarily mandatory, but in the context of proviso 2 was merely directory,[2] because the Legislature had anticipated and addressed "what the department may do in the event that the demand for EA assistance will exhaust its appropriation if the initial level of benefits and scope of eligibility remain in place." Id. at 853 ("Seemingly contradictory provisions of a statute must be harmonized so that the enactment as a whole can effectuate the presumed intent of the Legislature"). The Court also presumed in that case that the line item appropriated funds for the entire fiscal year. "In this case, the commissioner had discretion to adjust either the program's eligibility categories or payment standard, or both, in order to stay within the appropriated funding until the fiscal year's end, as long as he gave the Legislature the requisite advance notice under proviso 15 of the proposed adjustments (and thereby an opportunity to appropriate additional funds to avert the need for such adjustment)." Id. at 854-855.

A.

Federal law imposes certain obligations that DHCD has no discretion to evade. See the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"). Under 28 C.F.R. 35.130(b)(7),[3] a public entity operating a public program must make reasonable modifications to

[2] See e.g. Globe Newspaper Company v. Superior Court, 379 Mass. 846, 862 (1980) ("Although "[t]he word 'shall' as used in statutes . . . is not of inflexible signification and not infrequently is construed as permissive or directory in order to effectuate a legislative purpose," Swift v. Registrars of Voters of Quincy, 281 Mass. 271 , 276 (1932); see Myers v. Commonwealth, 363 Mass. 843 , 846 (1973), "[t]he word 'shall' . . . is commonly a word of imperative obligation . . . ," Johnson v. District Attorney for the N. Dist., 342 Mass. 212, 215 (1961)").

[3] 28 C.F.R. 35.130(b)(7)(i) provides: "(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Moreover, 28 C.F.R. § 35.130(b)(1) provides:

> (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability -
>
> * * *

policy to accommodate the needs of qualified persons with disabilities, where necessary to avoid discrimination, so long as doing so does not fundamentally alter the program. See generally Crowell v. Massachusetts Parole Board, 477 Mass. 106, 110-112 (2017) (The Parole Board's "deference is not without limits. . . . [B]oth the ADA and the parole statute, G. L. c. 127, § 130, require the board to take some measures to accommodate prisoners with disabilities."), citing, among other authorities, 28 C.F.R. § 35.130(b)(7). See also Mass. Const., Art. 114; G.L. c. 93, § 103. The ADA does not adopt a narrow definition of discrimination but rather "a more comprehensive view of the concept of discrimination." Olmstead v. L.C., 527 U.S. 581, 598 (1999).

The record shows that DHCD's policy of denying motel placements has shifted resources toward contracted beds that present unique problems for persons with disability who need to visit their treatment providers. To that extent, the resulting array of services is less suited to (i.e. less beneficial for) persons with disabilities than non-disabled persons. See 28 C.F.R. § 35.130(b)(1)(ii), (iii) (agency may not afford qualified individuals with a disability "the opportunity to . . . benefit from the aid, benefit, or service that is not equal to that afforded others" or "to gain the same benefit . . . as that provided to others"). In some cases, this has resulted in an effective denial of housing, as evidenced by the occasions on which the disabilities have necessitated well-justified requests for Temporary Emergency Shelter Interruption ("TESI") – meaning that the recipients are effectively denied housing because they cannot use the shelter that DHCD offers them. See 28 C.F.R. § 35.130(b)(1)(i) (agency may not "[d]eny a

---

(ii) Afford a qualified individual with a disability an opportunity to participate in **or benefit from** the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is **not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others**; (emphasis added).

qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service"). The ADA specifically prohibits locating facilities in this manner, which has the effect of denying benefits to qualified individuals with disabilities. 28 C.F.R. § 35.350(b)(4).[4]

The use of hotels or motels to meet the unique treatment needs of persons with disabilities was an important way to equalize the quality of placements, with respect to location, as between disabled and non-disabled recipients. Placements of EA recipients with disabilities far from home has resulted in failure to obtain care and treatment, manifestations of treatable and avoidable symptoms (such as mental health episodes) that interfere with activities such as travel to school, hardship (such as climbing stairs against medical advice) and consumption of the household's limited resources to travel for treatment. EA recipients without disabilities do not experience those or similar impediments. Therefore, it appears preliminarily that EA shelter benefits are (1) effectively denied to some disabled recipients receive placements that they cannot reasonably be expected to use because of their handicaps and (2) effectively reduced to others who receive placements that place hardships upon them and impair their ability to gain the benefit of shelter in ways not experienced by non-disabled persons. The plaintiffs are very likely to show that the ADA and associated regulations, including 28 C.F.R. 35.130(b)(1), (4), (7), require motel placements where necessary to accommodate a class member's disability. This is true as a matter of law, fact and procedure.

[4] That provision reads: "(4) A public entity may not, in determining the site or location of a facility, make selections --

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.."

Law. The DCHD is aware of, and has approved, requests for ADA accommodation for many class members, without actually providing the accommodation for many months – sometimes more than six months. The plaintiffs are likely to show that their medical or psychological conditions, with attendant limitations, qualify as a "disabilities" within the meaning of c. 151B and the ADA.[5] "To make a reasonable accommodation request, no 'magic words are required." Boston Housing Authority v. Bridgewaters, 452 Mass. 833, 848-849 (2009). In any event, it appears largely undisputed that ADA requests have been made and disabilities recognized by DHCD.

DCHD argues primarily that granting the requested relief would impose an "undue hardship" upon it or require it to "fundamentally alter" the nature of the EA program. DHCD Opp. at 18-19, citing Bridgewaters, 452 Mass. at 851, quoting Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979). See also Williams v. Secretary of Human Services, 414 Mass. 551, 561 (1993) ("the ADA does not require the [agency] to change the structure of its services or funding to conform to other programs that the plaintiffs claim are more efficient.").

The moving plaintiffs are very likely to show that granting the relief would not fundamentally alter the nature of the EA program. The law actually mandates what the plaintiffs request in at least three ways. First, the Motel Proviso expressly requires that DHCD make every effort to provide accommodations with that 20 mile radius, and doing so is therefore already part of the nature of the EA program. See also 760 Code Mass. Regs. Section 67.06(3)(b)(2), (e) (referring to "an interim placement such as shelter beyond 20 miles or a hotel/motel . . ."). Second, the same is true as to motel accommodations, where contracted shelter beds are

[5] Even if the evidence left DHCD with good faith questions as to whether some of the moving plaintiffs are disabled for ADA purposes, they are likely to show that the defendants never conducted a good faith and flexible interactive process to explore any unresolved issues. See Russell v. Cooley Dickenson Hosp., Inc., 437 Mass. 443, 457 (2002); Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 441 Mass. 632, 648-649 (2004). Such an interactive process is required by G.L. c. 151B, § 4.

unavailable. The line item explicitly directs DHCD to spend monies for motels in the event of "the unavailability of contracted shelter beds." DHCD's policy choice regarding motels is not part of – and actually contradicts -- the fundamental nature of the EA program authorized and directed by the Legislature in the line item. Third, the plaintiffs are likely to prove that an ADA-noncompliant shelter is not "available" for purposes of the Motel Proviso. The Legislature meant to prohibit use of funds for motels unless other placements were "unavailable," but it is highly unlikely that it meant to force DHCD to use contracted shelter beds that fail to provide an ADA-mandated accommodation.[6] Even if that was the statutory intent, the plaintiffs are likely to prove that the federal requirements of the ADA supersede it, because payment for a motel bed – authorized in some circumstances -- does not fundamentally alter the EA program when motel placement would eliminate an ADA violation. It follows that, where DHCD has approved a moving plaintiff's ADA request, the ADA likely does require DHCD to provide services to the moving plaintiffs, which it can do within the existing structure of the line item, even if it had to use a motel (which the court does not require). In short, DHCD does not have to change the statutorily mandated program at all in order to provide ADA-compliant accommodations in motels within 20 miles of the household's original residence; the EA program is what the Legislature decreed, not what DHCD would like it to be.

Fact. The defendants have a very low chance of showing factually that continued use of motels would fundamentally alter the EA program. Use of motels has been, and still is, part of the EA

[6] The Court does not agree that "the plain text of the motels proviso mandates DHCD's policy." Opp at 6. The defendant concedes that no statute defines "unavailability" for this purpose and that the dictionary definition of "unavailable" is "not possible to get or use." Id. The ordinary meaning of the phrase, in the context of a statute, would include not only physically unavailability but also placements that are legally unavailable (or legally "not possible to get or use"). The Court would not likely infer that the Legislature intended to inflict ADA violations on EA recipients as the mandated alternative to a motel placement. The fact that "contracted shelter beds" refers to congregate and scattered-side beds (and that DCF does not contract for "beds" at motels) (Opp. at 6) is beside the point. Nothing in the Motels Proviso mentions "beds" at a motel; on the contrary, the authorization is broad: "funds shall be expended for expenses incurred as a result of families being housed in hotels. . .."

program as a matter of fact. Even into FY 2018, there were 42 families in motels, and the latest hearings in this case suggest that at least some motel usage continues. In very recent history, EA had up to 500 families in motels, even as it greatly expanded contracted shelter beds.

Despite this history, DHCD has presented virtually no facts or empirical data to show any burden at all upon it, apart from a policy preference for fully occupied contracted beds that it has placed above accommodating disabilities.[7] It asserts generally that paying for motels will exhaust the appropriation more quickly, but offers no cost comparisons or other demonstration that any expenditures for motels required for ADA compliance will not be offset by eliminating ADA-noncompliant placements. Its expansion up to 1,529 congregate shelter beds and 2,153 scattered site units through the end of FY 2017 (June, 2017) occurred at the same time, and in the same fiscal year, when it maintained 480 to 500 families in motels. That suggests that motel placements are compatible with contracted bed placements. Without proof that motel placements are in fact more expensive, the Court will not simply assume that providing ADA-compliant shelter in motels (and reducing non-compliant contracted beds accordingly) is anything worse than a zero sum fiscal proposition. While motels require additional costs for security, management and other services not included in the motel's daily rate, DCF's (and the Legislature's[8]) "preferred shelter option," congregate shelters, "is also the hardest to site and is the most expensive sheltering model because of the expensive staffing and services provided." Mullarkey Aff., par. 15. The Departments affidavits do not deny a no-impact fiscal scenario and at least demonstrate that at least of motel costs can be offset by eliminating underutilized

[7] Stressing the minimal role that the ADA allows for keeping state institutions populated, the United States Supreme Court has suggested how a state agency might make such a showing in the context of a large social services program: "If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan 606*606 for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met." Olmstead v. L.C., 527 U.S. 581, 605-606 (1999).

[8] The Line Item states: "the department shall endeavor to convert scattered site units to congregate units and, as allowed by demand, reduce the overall number of shelter beds through the reduction of scattered site units."

contracted units. For all that appears, given FY 17 experience, motels are as fiscally manageable as (at least) congregate shelters, within the appropriation. For purposes of preliminary relief, any concern about exceeding the appropriation (based upon DCF's 9-month projection for its own preferred approach) is unsubstantiated as a matter of fact.

DCF's most forceful factual presentation concerns the benefits of congregate shelters and scattered site units. As a generality, those benefits probably apply to the majority of EA recipients. The ADA, however, requires treating each household individually for purposes of accommodating any disability. What may work well for most cannot limit DCF's obligations under the ADA to use its statutory authorization and fiscal resources to continue providing hotels where need to provide ADA accommodation. Indeed, if a public entity operating a public program, can simply redefine its "program" to eliminate existing features needed to accommodate recipients' disabilities, then it has the power by fiat to render 28 C.F.R. 35.130(b)(7) completely ineffectual.

Procedure. Moreover, DHCD's policy not to use motels – resulting in a 90% drop in motel usage from the end of FY 2016 to the beginning of FY 2018 – was not filed with the Legislature, as required by the line item:

> provided further, that notwithstanding any general or special law to the contrary, 90 days before promulgating or amending any regulations, administrative practice or policy that would alter eligibility for or the level of benefits under this program, other than that which would benefit the clients, the department shall file with the house and senate committees on ways and means, the clerks of the house of representatives and senate and the joint committee on children, families and persons with disabilities a written report setting forth justification for such changes including, but not limited to, any determination by the secretary of housing and economic development that available appropriations will be insufficient to meet projected expenses and the projected savings from any proposed changes.

St. 2017, c. 47, line item 7004-0101; St. 2016, c. 133, line item 7004-0101. Requirements of this type are no mere formality. They affirmatively limit the agency's discretion to change

policies until the Legislature has had the chance to weigh in. Wilson, 441 Mass. at 854-855 ("In this case, **the commissioner had discretion** to adjust either the program's eligibility categories or payment standard, or both, in order to stay within the appropriated funding until the fiscal year's end, **as long as he gave the Legislature the requisite advance notice** under proviso 15 of the proposed adjustments (and thereby an opportunity to appropriate additional funds to avert the need for such adjustment)." (Emphasis added)).

Given the precipitous drop in use of motels from FY 2016 to FY 2018, the plaintiffs are likely to show that DHCD made a major change in policy without making the required filing with the legislative officials and committees mentioned in the line item. This new policy therefore does not alter the basic nature of the EA program, which includes placements in shelters.

Conclusion. As the foregoing analysis demonstrates, this case differs from Wilson in at least two critical respects: Wilson did not involve any overriding, non-discretionary duty such as that imposed by the ADA; and nothing in the EA line item corresponds to proviso 9 in Wilson, which authorized the Commissioner to modify the standard of need. As a general matter, it is true that DHCD retains substantial discretion to decide how best to comply with its ADA and Line Item obligations. It does not have to use a motel to provide an ADA-compliant placement, including a contracted shelter bed, if available. DHCD also has substantial discretion to determine that no such contracted bed is available. The only thing it cannot do is restructure the EA program in a way that prevents a timely accommodation for a disability, particularly where the line item commands it to use the very approach it refuses to implement.

DHCD's unilateral policy against using funds for motel placement is the only thing preventing a lawful ADA placement for EA recipients who would be appropriately placed in a

motel. A preliminary injunction against this policy, which plaintiffs have shown is very likely illegal, properly operates on a class-wide basis, does not require individualized judicial determinations and does not shift[] resource allocation decisions from DHCD to this Court, as the defendants argue. Opp. at 18. On the contrary, such an order returns control over the program to the Legislature, which has expressly directed DHCD to expend funds for motels if other placements are not available. It cannot be "fair, just and equitable" (G.L. c. 23B, § 30) for DHCD to disregard its authority **and obligation** ("funds **shall be expended** for expenses incurred as a result of families being housed in motels due to the unavailability of contracted shelter beds"(emphasis added)) to provide a motel placement, if necessary to comply with the ADA or mandates of the line item itself. The Court therefore preliminarily enjoins DHCD from following its anti-motel policy when implementing ADA accommodations.

"Only when . . . there is but one way in which [an agency's legal] obligation may properly be fulfilled, is a judge warranted in telling a public agency precisely how it must fulfill its legal obligation." Massachusetts Coalition for the Homeless v. Secretary of Health & Human Services, 422 Mass. 214, 223 (1996), quoting Matter of McKnight, 406 Mass. 787, 792 (1990). Accordingly, the Court's order affords DHCD flexibility in choosing how to comply with the ADA. Only if DHCD cannot find an alternative to motel placement that will accommodate an approved ADA request, must it use a motel.

B.

DHCD also "shall make every effort to ensure that children receiving services from this item shall continue attending school in the community in which they lived before receiving services funded from this item." *See Line Item, Education Proviso.* The Legislature undoubtedly realized that a large number of EA recipient children are at risk of missing critical

schooling and education due to economic challenges, homelessness and EA placements far from home. The Legislative's mandate for the educational continuity of homeless children is in the finest tradition of meeting its constitutional duty to "cherish" education. Mass. Const. Part II, c. V, § 2 (duty "to cherish the . . . public schools and grammar schools in the towns"). See generally McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545 (1993).

The issue again arises whether this proviso is mandatory or directory. Unlike part A, above, there is no federal mandate requiring DHCD to ensure continuity of education. The questions is entirely one of Massachusetts law. The word "shall" suggests that it the Education Proviso is mandatory, particularly where there is no analogue to Wilson's proviso 9, specifically authorizing the executive branch to modify an earlier clause. See Wilson, 441 Mass. at 853.[9] So does the context – the exigencies of educating homeless children. And, the standard of "every effort" is a workable standard for a court to apply.

On the other hand, G.L. c. 23B, s. 30 makes the EA program "[s]ubject to appropriation." See also Line Item ("in the event of a deficiency, nothing in this item shall give rise to or shall be construed as giving rise to any enforceable right or entitlement to services in excess of the amounts appropriated in this item . . .."). DCHD therefore must spend within the limits of the amounts appropriated and has discretion to adjust resources and temper its obligations to stay within the appropriation. In this case, DHCD has determined that "purpose of [the] appropriation . . . either permit[s] or require[s] use of the entire appropriation in a shorter period of time" than the full year. Wilson, 441 Mass. at 854. It has already done so by paying for shelter contracts at the beginning of the fiscal year and by limiting its commitments to 9 month contracts that will exhaust the appropriation. If and to the extent that complying with the

[9] The Court reads Wilson (at id.) to suggest that "shall" is ordinarily mandatory, even in a line item for a public benefits program, unless other language and contexts demonstrate otherwise.

Education Proviso threatened to exhaust the appropriation even more quickly, DHCD would have discretion to avoid taking such action, on the rationale of Wilson.

It is not easy on the current record to evaluate whether DHCD has made "every effort" contemplated by the Education Proviso within the existing appropriation. DHCD's decision to take motels off the table, viewed in isolation, might constitute a failure to "make every effort" to have some children educated in their home community. The plaintiffs have identified individual children who could be educated in their home community if housed in a motel, but the Education Proviso addresses "children," in the plural, and may therefore be intended as a collective goal, not to be assessed on a child-by-child basis.

The record presently is not sufficient to decide, on a class-wide basis, whether DHCD violates the Education Proviso systematically. For this purpose, contracted beds are not legally unavailable (as in the case of an ADA-noncompliant bed). The Motel Proviso's "unavailability" provision therefore might not permit use of motels if a contracted bed is open. To decide whether the Education Proviso overcomes the "unavailability" requirement of the Motel Proviso may require harmonizing apparently conflicting legislative goals and language, which would call for deference to the agency's approach as in Wilson. It may be that, be allocating resources in the fashion it has chosen, DHCD has made every effort to allow education of the most EA-eligible children in their home communities.

Of course, providing motel placements is not the only way to "make every effort" to ensure education in a child's community. For instance, as the plaintiffs point out, DHCD can pursue use of non-EA funds, programs and resources to house children in the same community as their school. The record does not clarify what, if any, influence the Education Proviso has had on DHCD's programmatic decisions. At some level, the Legislature requires DHCD at least to

consider ways to ensure education in the child's home community. DHCD cannot simply refuse to weigh this factor in allocating resources. See L. L. v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014) ("[A]n abuse of discretion" exists where the decisionmaker "made 'a clear error of judgment in weighing' the factors relevant to the decision, (citation omitted), such that the decision falls outside the range of reasonable alternatives."). Massachusetts Coalition for the Homeless, 422 Mass. at 226-227 (as-applied scrutiny under the "fair, just and equitable" test). The present record does not show whether and to what extent DHCD has incorporated the Education Proviso into its decisions or whether it has committed an abuse of discretion and an error of law to act as though that provision was meaningless. Id.

To be sure, as noted in the Background section above, the preliminary record is far from encouraging. Without a list of children's schools, of families placed more than 20 miles from home, and even a list of expected transfers, it is hard to see how DHCD could have done anything at all to comply with the Education Proviso. In addition, DHCD's affidavits opposing the Motion evidence a near-exclusive focus upon the motel question. It is not clear whether this reflects actual programmatic myopia, or simply a misunderstanding of all that is at issue in this litigation. Clarity on DHCD's total efforts may be forthcoming in the relatively near future. Given the troubling showing to date, the Court expects DHCD's upcoming discovery responses to be completely forthcoming about any efforts it has made to comply with the line item's provisos and the "just, fair and equitable" standard in G.L. c. 23B, §30. The Court plans to revisit this issue soon, with a more complete record that establishes clearly what, if any efforts DHCD is making to comply with the relevant provisos. This will allow an "as applied" inquiry, instead of the present context which, despite much information about EA recipients' experiences,

is still effectively a facial challenge as far as DHCD's overall practices go. See above at 6 and cases cited.

At present, however, preliminary relief to enforce both the Education Proviso and the Transfer Proviso (discussed below part C) would be problematic. Serious practical problems make such relief more suited to resolution through a final judgment (or at least consideration of a more complete record) than a preliminary injunction which may or may not turn out to be warranted at the end of the case. Since contracted shelters are probably not "unavailable," and specific directives for new placements might well displace other EA recipients, the most practical relief would be a court order that DHCD submit a plan to comply with the provisos. That would not afford any actual immediate relief and, if done prematurely, could lead to programmatic changes and reallocation of resources that might have to be undone depending on the final outcome of this case. In addition to the legal and factual reasons set forth above, the Court also withholds preliminary relief under parts B and C as a matter of discretion. The implication of this discretionary ruling is that this case should proceed to final resolution on the merits as soon as possible, to implement legislative intent, afford EA recipients the benefits to which they are entitled, and provide DHCD with a clear legal guidepost for allocation of its resources.

C.

Finally, DHCD may be violating the Transfer Proviso's mandate that "the household shall be transferred to an appropriate shelter within 20 miles of its home community at the earliest possible date." Phrased in the singular ("the household"), this clause may well require DHCD to provide a program that complies with respect to each individual, not just one that best

accommodates the entire recipient population. Moreover, the standard, "earliest possible date," is a judicially enforceable standard, suggesting a mandatory, not directory intent.

For preliminary injunction purposes at least, there are two problems with the plaintiff's reliance on the Transfer Proviso. First, this obligation specifically refers to "appropriate shelter[s]," which requires exercise of judgment about what is appropriate. It is probably reasonable for DHCD to view motels as inappropriate for this purpose considered in isolation – and also to read "shelter" to refer to contracted shelter beds, not including motels. Second and more fundamentally, what is "possible" depends upon various limiting factors, including the size of the line item's appropriation, the availability of shelter locations, the progress toward building or creating congregate units and the like.[10] Full exploration of DHCD's efforts to comply with this mandate will require the parties and the Court to devote much additional time, discovery and analysis. Given the long delay between many placements and transfers the plaintiffs may well have a likelihood of success on this claim, but the Court is not in a position to grant relief on this claim at this time, for the reasons discussed in Part B, above.

Nothing in Parts B and C of the above discussion suggests that DHCD's implementation of the Education Proviso and Transfer Proviso is beyond as-applied scrutiny in the context of DHCD's overall implementation of the line item. To be sure, "[i]t is within the discretion of an agency to determine priorities for allocation of resources among services where the enabling statute does not itself clearly establish particular priorities." Dowell, 424 Mass. at 615.[11] In this case, however, the line item expressly identifies a number of "particular priorities." As noted

[10] The Court does not take a broader view of the word "possible" in the context of a line item, because almost anything is possible with enough money.

[11] The DHCD brief (Opp. at 14 n.13) reads Dowell, 424 Mass. at 616, too broadly when it suggests that "judicial intrusion which directs the department to allocate limited EA resources in designated ways would be improper." See also Opp. at 15, citing Wilson, 441 Mass. at 854. That principle does not address the relief sought here: an order requiring DHCD to obey legislative directives to allocate EA resources pursuant to the Education Proviso, Transfer Proviso and Motel Proviso.

above, DHCD cannot simply ignore them. Moreover, an arbitrary disregard of legislative priorities could, on a developed record, amount to failure to meet the "just, fair and equitable" standard in G.L. c. 23B, § 30 [formerly found in G.L. c. 18, § 2(B)(d)]. See Dowell, 424 Mass. at 616-617. "A court may conclude that an agency [policy] which, as written, may not be arbitrary or irrational has been applied in a manner that produces a result antithetical to purposes of the enabling statute." Mass. Coalition, 422 Mass. at 227, citing Civetti v. Commissioner of Pub. Welfare, 392 Mass. 474, 485-489 (1984) (rejecting department's interpretation of a regulation it had enacted, finding regulation could not be read, as department asserted, to exclude voluntarily placed children from the status of dependent children for AFDC purposes). Preliminary and final relief thus depend upon future proof of failure by DHCD to pay meaningful heed to the Education Proviso or the Transfer Proviso.

D.

Finally, the defendants advance a number of procedural arguments, none of which affects the plaintiffs' likelihood of success.

While the Governor attempted to use his line item veto power to eliminate the language relating to expenditures for motel placements, the Plaintiffs have persuasively argued (without response from the defendants) that the attempt is a nullity. See Opinion of the Justices to the House of Representatives, 411 Mass. 1201, 1212 (1991) (veto of proviso that "would remove legislatively imposed restrictions on the appropriation and would alter the legislative purpose" would be "ineffective"); Opinion of the Justices, 384 Mass. 828, 837-38 (1981) ("[T]he Governor was free to reduce or disapprove each [line] item, but not to disapprove the restrictions alone."); Opinion of the Justices, 294 Mass. 616, 621 (1936) (the Governor's constitutional line item veto power "does not extend to the removal of restrictions imposed upon the use of the

items appropriated. . . . The result is that the disapproval of that condition was a nullity."). Compare Barnes v. Secretary of the Commonwealth, 411 Mass. 822, 826 (1992) ("The Governor did not attempt to remove any restrictions or conditions on the appropriation by changing or deleting words or phrases"). Under these authorities, the Plaintiffs are very likely to succeed on this point, for purposes of the Motion. Moreover, the Governor did not veto all line item references to "motels." See Line Item (". . . if a family with a child under the age of 3 is placed in a hotel or motel, the department shall ensure that the hotel or motel provides a crib . . .."). Expenditures for motels therefore still remain part of the EA program and, as such, would not fundamentally alter the program at all. Finally, the Court's conclusion that providing motel placements would not fundamentally alter the EA program as a matter of fact does not turn entirely on the line item language, as discussed above.

DHCD claims that some or all of the class have failed to exhaust their administrative remedies. While subsequent briefing and argument has shown some factual errors in DHCD's claim, the more basic response is that this Court may enter preliminary injunctive relief to avoid irreparable harm pending exhaustion of administrative remedies. See Honig v. Doe, 484 U.S. 305, 326-37 (1988); Grace B. v. Lexington School Committee, 762 F.Supp. 416, 419 (D. Mass. 1991).

The complaint employs an appropriate vehicle to challenge DHCD's actions. "General Laws c. 231A, Section 2, is an appropriate route by which to challenge an administrative agency's noncompliance with its statutory mandate. Villages Dev. Co. v. Secretary of the Executive Office of Envtl. Affairs, 410 Mass. 100, 105-106 (1991)," Williams v. Secretary of Human Services, 414 Mass. 551, 567 n. 10 (1993). DHCD's argument that the line item does not create a private right of action (Opp. at 4-5) misses the point and fails to cite controlling

precedent. For one thing, there is, and can be, no serious argument that the plaintiff class lacks a private right of action under the ADA. See 42 U.S.C. § 12133. Moreover, at least in cases challenging agency practices where the criteria for declaratory relief are met,[12] "[a] plaintiff may seek the equitable remedy of declaratory relief, . . . **even if the relevant statute does not provide a private right of action.**" Service Employees International Union, Local 509 v. Department of Mental Health, 469 Mass. 323, 335-336 (2014) (emphasis added) and cases cited. DHCD does not argue that anything in the line item affirmatively intended to foreclose declaratory relief against the Commonwealth in the absence of a private right of action, even though the cases it cites turn on such a fact pattern. Compare New Bedford Educators Association v. Chairman of the Massachusetts Board of Elementary and Secondary Education, 92 Mass. App. Ct. 99, 111 (2017), citing Boston Med. Center Corp. v. Secretary of the Executive Office of Health & Human Servs., 463 Mass. 447, 471 (2012); Frawley v. Police Commr. of Cambridge, 473 Mass. 716 , 724 (2016). DHCD's private right of action argument, as framed to date, is not likely to succeed.

II.

In light of the very strong likelihood of success identified in part A above, the balance of harms weighs heavily in favor of class members who have approved ADA accommodation requests that can be satisfied by placement in a motel. They all have long-standing ADA-approved needs for accommodation, which can be met with existing program elements, whether

[12] In Villages, 410 Mass. at 106, the Supreme Judicial Court articulated four requirements for maintaining a declaratory judgment action, all of which are met here:

> To secure declaratory relief in a case involving administrative action, a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) available administrative remedies have been exhausted.

that be in a contracted shelter bed of motel. Every day they go without accommodation is time irreparably lost and harm needlessly inflicted upon people whose disabilities need relief. Some, perhaps many, of these class members have additional irreparable harm within the scope of concern of the Education Proviso, because they have children starting school in the very near future and who need to keep pace with their peers. Those children can never recover the time lost at the beginning of school.

The relief granted by this decision will not cause irreparable harm to DHCD or the public interest. Each household receiving relief will get nothing more than the ADA-approved accommodation that DHCD has already approved. Because the motel option is available, DHCD is not harmed programmatically by having to deny contracted shelter placements to anyone else. Further mitigating any harm to DHCD, the Court does not order DHCD to place the Moving Plaintiffs in a motel, although the agency may choose to comply with this order by doing so.[13] Particularly given the limitation of preliminary injunctive relief to persons with approved ADA accommodation requests, DHCD has not provided data, figures or hard facts to document its generalized allegations of fiscal harm that threatens its ability to continue the EA program as intended by the Legislature.

With respect to those EA recipients not receiving relief at this time, DHCD would suffer some degree of harm, because there is no apparent way to accommodate those plaintiffs, at least

[13] As the Supreme Judicial Court stated in Williams, 414 Mass. at 570:

> Where the Legislature has not imposed specific restrictions on the reasonable methods by which an agency may carry out its mandate in the plain language of the agency's enabling statute, it is not appropriate for the courts to order the agency to follow specific methods for meeting the agency's mandate. See, e.g., Matter of McKnight, 406 Mass. 787, 792 (1990) ("[w]here the means of fulfilling [a legal] obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfil its obligation . . . . Only when . . . there is but one way in which that obligation may properly be fulfilled, is a judge warranted in telling a public agency precisely how it must fulfil its legal obligations"); Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985) ("where the means of carrying out [a] statutory duty is within the discretion of the public official, courts normally will not direct how the public official should exercise that statutory duty"); Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365 (1982).

without denying shelter to some other family. So far, despite ADA approvals for many of them, DHCD has been unable to find an available and appropriate placement that actually would meet ADA needs and/or the statutory 20-mile threshold. Of course, for those EA recipients without ADA-approvals or children about to start school (or both), their irreparable harm is somewhat less than that of the ADA recipients.

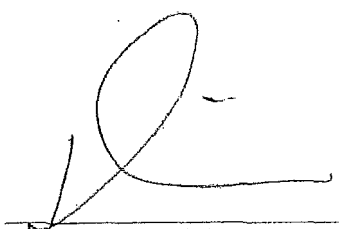
Because the Court's order does not require DHCD to alter its program, does require it to comply with the line item and the ADA, and does not conflict with any demonstrated decision regarding another applicant, the relief is consistent with the public interest.

ORDER

For the foregoing reasons, the Court enters a preliminary injunction that:

1. Notwithstanding its policy on motels, DHCD shall treat motels and hotels as available placements when implementing approved ADA accommodation requests in the EA program.
2. If a hotel or motel placement will meet an approved ADA accommodation request for an EA-recipient household, and DHCD cannot provide that accommodation in any other way, then DHCD must place the household in a hotel or motel on at least an interim basis until it provides the accommodation through an approved contracted shelter, or otherwise.

3. The Motion is otherwise denied without prejudice to renewal upon a record that more comprehensively shows what DHCD has done to implement the Education Proviso, Transfer Proviso, and mandate to administer the EA program "in a fair, just and equitable manner." G.L. c. 23B, § 30.



Date: September 12, 2017

Douglas H. Wilkins
Associate Justice of the Superior Court

In hand 10/30/17 GBLS

10130

68

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-3768

ROSANNA GARCIA, et al.,
Plaintiff,
vs.

MASSACHUSETTS DEPARTMENT OF HOUSING
AND COMMUNITY DEVELOPMENT,
Defendant.

ORDER ON DEFENDANT'S EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S AMENDED MEMORANDUM AND ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

This is a class action for injunctive relief and damages against the defendant Massachusetts Department of Housing and Community Development ("DHCD"). On September 12, 2017, the Court issued its "Amended Memorandum and Order on Plaintiffs' Emergency Motion for Class-Wide Preliminary Injunctive Relief" ("Order").[1] The Order granted the following preliminary relief:

1. Notwithstanding its policy on motels, DHCD shall treat motels and hotels as available placements when implementing approved ADA accommodation requests in the EA program.

2. If a hotel or motel placement will meet an approved ADA accommodation request for an EA-recipient household, and DHCD cannot provide that accommodation in any other way, then DHCD must place the household in a hotel or motel on at least an interim basis until it provides the accommodation through an approved contracted shelter, or otherwise.

3. The Motion is otherwise denied without prejudice to renewal upon a record that more comprehensively shows what DHCD has done to implement the Education Proviso, Transfer Proviso, and mandate to administer the EA program "in a fair, just and equitable manner." G.L. c. 23B, § 30.

Notice sent 10.30.17 LM DSM RAB GBLS MVLA MMB SRJ RSGVP LK MLRJ KBP BFB AW SMF SMH (MD)

[1] The Court issued its original order on September 7, 2017.

DHCD filed its notice of appeal pursuant to G.L. c. 231, §118, ¶2 on October 10, 2017. Simultaneously, it filed "Defendant's Emergency Motion for Reconsideration of the Court's Amended Memorandum and Order on Plaintiffs' Emergency Motion for Class-Wide Preliminary Injunctive Relief" ("Motion").[2] It also filed Defendant's Emergency Motion to Stay Further Implementation of the Court's Amended Memorandum and Order on Plaintiffs' Motion for Class-Wide Injunctive Relief ("Stay Motion"). After hearing argument on October 26, 2017, the Court DENIES the Motion and the Stay Motion.

The Court incorporates its preliminary factual findings, set forth in the Order.

DISCUSSION

The Court has jurisdiction to decide the Motion notwithstanding the Notice of Appeal, because the appeal has not been entered in the Appeals Court. See M.B. Claff, Inc. v. Massachusetts Bay Transportation Authority, 441 Mass. 596, 599 n. 4 (2004). Moreover, the Order imposes a continuing injunction, which the Court has the power to modify prospectively in any event.

DHCD's Motion makes the following arguments:

1. DHCD's contracted shelter locations provide meaningful, statewide access to persons with disabilities in compliance with the Americans with Disabilities Act.
2. The Court should issue amended findings that motels are inappropriate shelter for anything more than temporary overflow capacity.
3. The relevant "service" in the EA program is emergency shelter in contracted facilities; motels are available only as temporary, overflow capacity.

[2] Over the past few months, both sides have characterized their motions as "Emergency Motions." In the Court's view, neither motion qualified as an emergency motion within Superior Court Rule 9A, because there was no reason to believe that compliance with the service and filing requirements of Rule 9A would delay the Court's consideration and decision, particularly given the need for briefing relatively complex issues in opposition to each motion. The timing of briefing and argument on both motions bears out that conclusion. Such complex motions, unlike, for instance, motions addressing pressing, individual circumstances, generally should not be filed on an emergency basis, because there is no realistic prospect that the Court could address them responsibly without allowing sufficient time for response. Compliance with Rule 9A will certainly not undermine the Court's understanding that there are pressing concerns on both sides, which arise on a daily basis.

4. The ADA requires individualized analysis and does not support the class-wide relief.
5. Ordering DHCD to use motels as interim ADA placements would fundamentally alter the EA shelter program.
6. Ordering DHCD to use motels as interim ADA placements will cause undue hardship.

At the outset, the Court sees no legally significant difference between "interim ADA placements" and "temporary overflow capacity." Both concepts recognize that a longer term placement, not in a hotel, is the goal. DHCD's refusal to consider temporary hotel placements to accommodate ADA-recognized disabilities – but to accept them when demand "overflows" contracted capacity – says nothing about the fundamental nature of the EA program. As noted in the Order, the legislatively-prescribed program accepts use of hotels given the "unavailability of contracted shelter beds." St. 2016, c. 133, section 2, item 7004-0101 (the "Line Item"), as supplemented by St. 2017, c. 5, section 2. St. 2017, c. 47, § 2, item 7004-0101. DHCD's verbal distinction is far too tenuous to justify denying accommodations for disabilities that DHCD itself has recognized. The Line Item directs the EA program to provide those accommodations through hotels if no other alternative is available. The Court adheres to the Order's analysis and conclusions that hotels are part of the EA program, use of hotels to accommodate ADA disabilities does not fundamentally alter the EA program, and "unavailability" includes not only excess numerical demand, but also unlawful placements that fail to make required accommodations for disability.

The crux of the dispute leading to the Order centered on DHCD's arguments 3 and 5, which are closely related. As fully discussed in the Order, the use of hotels and motels is part of the EA program as a matter of law under the Line Item (given "unavailability of contracted shelter beds"). It is also part of the EA program as a matter of fact, given past and present practice. It may be debatable whether DHCD's decision to stop new hotel placements was a new

policy that triggered the requirement to notify the Legislature under the Line Item, unless the change benefits recipients.[3] But even if the Order overstated the plaintiffs' likelihood of success on this procedural issue, their strong likelihoods of success on the legal points and factual grounds, by themselves, amply support the Order.

The Court rejects DHCD's other arguments for the reasons stated in the Order. DHCD's first argument is essentially that it complies with the ADA by providing contracted shelter beds that do not accommodate a disability identified by DHCD itself. The Order rejected that argument for reasons that the Court reaffirms here. It is true, as plaintiffs argue, that location is a material part of the EA shelter program, as specifically and repeatedly recognized in the Line Item. For these purposes, "location" is not intended to refer to redistribution of contracted beds (although that could be a rational response), but rather assigning a location within the existing system of contracted beds and hotel placements identified through the procurement process. Treating location as a significant feature of housing is simple common sense; location is obviously important for a family seeking shelter, just as it is for most people. A roof over one's head is therefore not the only aspect of "service" that the EA program provides, contrary to DHCD's apparent contention that location is irrelevant for ADA proposes. A person with a disability who needs medical care rendered inaccessible by the shelter's location suffers negative effects from the shelter's location in a way not experienced by a recipient who does not need that care. Moreover, failing to provide an accommodation results in unequal access in a number of

[3] DHCD describes its policy as follows:

> DHCD as a matter of policy no longer assigns new intake families to motel or motel scattered site placements, with rare exception[s]. DHCD views congregate shelters as a superior form of placement because they have superior staffing, support services, and common facilities (e.g. kitchens and other facilities for food preparation) to support homeless families as compared to motels or motels. DHCD similarly views scattered site apartment shelters s a superior form of placement for many of the same reasons.

Duffy Aff. § 16.

ways. Among other things, it operates to (1) deprive persons with disabilities of necessary medical care located too far away, (2) force them to endure unique hardships or pain for lack of adjustments (e.g. having to climb stairs instead of living on the first floor or with access to an elevator), (3) require them to spend their limited time and very scarce resources to travel to medical appointments, subjecting them to stresses and symptom-producing effects of the travel itself and eliminating opportunities for employment, education or other productive use of time or (4) lead some eligible individuals to refuse shelter rather than undergo these hardships. Recipients without disabilities suffer none of the first three impacts and therefore receive greater benefit from EA shelter. Non-disabled recipients receive shelter in the fourth situation, while those with disabilities receive none. All four situations amount to discrimination prohibited by the ADA. If DHCD can provide accommodation without using hotels (particularly through engaging in the required interactive process), the Order fully allows it to do so. The Court, in fact, encourages DHCD to do so. Nothing in the Motion, however, justifies denial of a motel placement, where there is no other way to accommodate a disability. Significantly, contrary to the concerns alleged in DHCD Mem. at 13-14, it should be obvious that nothing in the Order requires DHCD to change the EA program from a shelter program to one that also, itself, provides the necessary transportation, medical treatment or other services.

The Court does not "amend its factual findings to conclude that motels are inappropriate shelter for anything more than temporary overflow capacity." (Argument 2).[4] Much of DHCD's

[4] The Court notes that, for purposes of other, differently worded, provisos in the Line Item, DHCD's policy arguments may well affect the legal analysis:

> For preliminary injunction purposes at least, there are two problems with the plaintiff's reliance on the Transfer Proviso. First, this obligation specifically refers to "appropriate shelter[s]," which requires exercise of judgment about what is appropriate. It is probably reasonable for DHCD to view motels as inappropriate for this purpose considered in isolation – and also to read "shelter" to refer to contracted shelter beds, not including motels.

Order at 20.

argument on this point (DHCD Mem. at 5-7) effectively asks the Court to agree with its policy objections to the Line Item's Motel Proviso as, which, written is not restricted to "temporary overflow capacity." Moreover, as noted above, shelter that is appropriate for temporary overflow capacity can also be appropriate for interim accommodation of a disability. DHCD's rationale for finding one approach "appropriate" and the other "inappropriate" is thin and utterly unconvincing. To the extent that the Court is called upon to make a finding on this point, given the serious harms suffered by members of the plaintiff class, it finds that motels are not always inappropriate shelter for interim ADA accommodation; in many cases motels are more appropriate than the assigned contracted shelter for persons with disabilities who would otherwise suffer adverse impacts like those discussed above, p. 5. DHCD has minimal likelihood of success on this argument.

Not does DHCD have an appreciable likelihood of success on its argument that the class-wide Order contravenes the need for individualized and "highly fact-specific analyses" under the ADA. (Argument 4). The operative paragraphs of the Order only apply to recipients with "approved ADA accommodation requests." Order at 26. DHCD itself makes the individualized, fact-specific analyses that lead to approving the accommodation requests. The Order expressly relies upon those DHCD approvals; it certainly has not preempted any individualized analysis of accommodation requests.

Finally, the Court does not accept DHCD's sixth argument – that the Order will cause it undue hardship. To the extent that this argument challenges the inclusion of motels as available shelter for ADA accommodations, the Court rejects it for the same reasons as arguments 3 and 5, above. It is not "undue" (and perhaps not even "hardship") for DHCD to include the very same type of shelter that the Legislature included in the Line Item.

To the extent that Argument 6 addresses the balance of harms, the Court also remains unconvinced. For one thing, DHCD's statistics (Exhibit 1 at the October 26 Hearing) show that the EA program was housing 45 families in motels on September 8, 2017 (just after the initial September 7 Order) and 44 families in Motels on October 24, 2017. In a month and one half, the utilization of motels is unchanged. Yet, DHCD says (Memo at 9) that, since entry of the Order, "DHCD has repeatedly placed families in motels," to respond to threats of contempt by the plaintiffs. This statement appears to exclude the possibility that DHCD is making no sincere effort to comply with the Order. It follows that compliance with the Order is not having any significant effect upon DHCD's use of resources. The same statistics further increase the plaintiffs' likelihood of success in proving that providing ADA accommodation in a hotel as a last resort is "reasonable" in the sense that it does not consume significantly more resources.

Those real data reinforce the conclusions that the Court has drawn from reviewing DHCD's voluminous, but very general, discussion of its resource allocation decisions. Any conclusions from DHCD's submissions is speculative – all the more so because DHCD would seem to have the ability to provide more concrete support for its argument that the Order will result in serious adverse financial consequences for the EA program. Nothing in DHCD's material provides a concrete analysis of the number of recipients actually affected by the Order as opposed to those who have unsatisfied accommodation requests. The Court will not assume that all 187 unsatisfied requests will require using a hotel. Among other things, this number includes those for whom a hotel "could arguably satisfy the request," but there is no reason to equate "arguably" with "likely," let alone anything even more concrete The number also does not appear to exclude families who would not accept (or desire) a motel placement. It does include those "who request transfer to a non-congregate setting" and therefore may not want a

hotel. DHCD's calculations, based upon the 187 number, are speculative if intended to show the real cost of compliance. So far, the only concrete number of total hotel placements – ADA accommodation and other -- is 44-45 families, which DHCF is currently accommodating within its budget plan.

Moreover, nothing in DHCD's analysis takes account of the potential cost savings achieved by removing some recipients from contracted beds and placing them in a hotel. DHCD's affidavits discuss the possibility of savings from existing providers, but neither quantifies any savings nor explains why achieving those savings would be burdensome or impossible. In that regard, the Court notes the evidence cited in the Order that congregate housing is itself quite expensive. DHCD's argument that the Order will cause significant financial problems is speculative. The Court does not credit the affidavits' predictions of such problems, both because (1) the actual data from the first 46 days of active use of hotels to accommodate ADA rights pursuant the Order belie any such concern and (2) the predictions lack concrete factual support, as opposed to generalities that fail to take account of factors limiting any effect.

Of course, DHCD may be able to provide accommodation through contracted shelter beds or by finding other providers to accommodate the disabilities though other means (such as transportation or identifying other resources near the contracted shelter placement), and hotels may not be appropriate placements for all unmet accommodation requests. In that regard, the Court clarifies what it believes all understood – no recipients are required to accept a hotel placement if they do not want one, or if the hotel will not in fact accommodate their needs.

Nothing in DHCD's Motion addresses the significant harm suffered on a daily basis by EA recipients whose approved ADA requests go unmet. That harm still weighs heavily in favor of the Order.

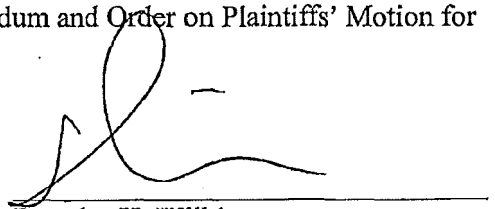
In short, the Court remains convinced that the plaintiffs' likelihood of success, viewed in light of the balance of harms in their favor, warrants the relief provided in the Order. In reaching this conclusion, the Court rejects, as speculative and unsupported, DHCD's supposition that widespread negative net effects will occur. It also rejects the claim that the Order is defective for failure to use the word "reasonable," as the concept of reasonableness is already incorporated into the Order's description of circumstances calling for relief. For instance, it turns upon DHCD's own determination of the accommodation needed for each family – a determination that itself is a finding of reasonableness.[5] The Order does not, of course, require DHCD to accomplish the impossible – although it does preclude DHCD from imposing its own views that it may deny an approved and desired disability accommodation because it does not use hotels for that purpose. The Order does not require DHCD to "again heavily utilize motels in one region at the expense of other regions and the families sheltered in those regions." Bartosch Aff. ¶24. If redistribution occurs, it will simply reflect the geographic distribution of the clientele's needs for disability accommodation. Additionally, if hotel or motel providers decide not to participate, despite qualification in the procurement process and DHCD's efforts to enlist them, that may just mean that DHCD needs to explore other accommodation options. Nothing in the Order suggests that DHCD may ignore procurement laws, which seems to be a concern. See DHCD Memo at

[5] DHCD's claim (Mem. at 9) that "DHCD's prior approvals all expressly limited the 'approved' accommodation to transfer to a contracted shelter unit, when available" simply reiterates its factually and legally incorrect position that hotels are not part of the EA program. The Court has rejected, and continues to reject that position at the preliminary injunction stage, as the plaintiffs have a strong likelihood of success in showing that the position is unlawful. Incorporating that position as boilerplate in ADA accommodation approvals does not enable DHCD to redefine the Line Item's description of the EA program through the back door.

11. Nor does the Order ignore the difficult choices that DHCD must often make between families with competing needs when insufficient resources are available. Nothing in the difficulties or complexities of the EA program appears, on this record, to preclude treating hotels as part of the EA program and providing ADA accommodations in hotels when no other options exist. Finally, of course, nothing in the Order requires DHCD to place families in hotels that would not accommodate the approved disability request. If a family agrees with DHCD that a motel would provide an inferior shelter, it need not move into one.

ORDER

For the foregoing reasons, the Defendant's Emergency Motion for Reconsideration of the Court's Amended Memorandum and Order on Plaintiffs' Motion for Class-Wide Injunctive Relief is **DENIED**. For the same reasons, Defendant's Emergency Motion to Stay Further Implementation of the Court's Amended Memorandum and Order on Plaintiffs' Motion for Class-Wide Injunctive Relief is **DENIED**.[6]



Date: October 30, 2017

Douglas H. Wilkins
Associate Justice of the Superior Court

[6] To the extent that DHCD asks the Court to amend its finding that "the Legislautre has historically funded for the first 9 months of each fiscal year", the Court removes the work "historically" and substitutes the word "recently."