COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12507

ROSANNA GARCIA & others,
Plaintiffs-Appellees,

v.

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

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

BRIEF OF APPELLEES

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Introduction

After hearing months of evidence and argument about the plight of homeless families with disabilities in the Emergency Assistance ("EA") shelter program, the Superior Court entered a targeted order directing the Department of Housing and Community Development ("DHCD") to stop categorically refusing to use motels to meet recognized disability-related needs which are otherwise not being accommodated. The preliminary injunction should be affirmed.

The Legislature established the EA program to provide temporary shelter to indigent families with children experiencing homelessness. Understanding the many challenges facing these families, the Legislature has included in the Line Item funding the program several explicit mandates to keep families close to their home communities. The Line Item also requires that hotels be used when other forms of shelter are not available.[1] And, in the very first section of the annual state budget, the Legislature directs state agencies, including DHCD, to use appropriated funds to

[1] When this case began the Line Item was found at St. 2016, c. 133, § 2, item 7004-0101; it is now at St. 2017, c. 47, § 2, item 7004-0101. All relevant provisions remain the same. The words "hotel" and "motel" are used in the Line Item interchangeably. Hereafter the use of either word refers to both.

facilitate access for persons with disabilities. Despite these legislative mandates, DHCD now refuses to place additional families in motels, even if use of a motel is the only way to keep a family close to home or meet disability-related needs.

Some families in the EA system include a qualified individual with a disability within the meaning of Title II of the Americans with Disabilities Act (ADA). Many such individuals, including children, have physical, mental health or behavioral disabilities that make living in a congregate setting – DHCD's preferred form of shelter – particularly difficult. Many also have urgent needs to be close to their specialty and primary care providers because of their disabilities.

In spite of attempts to expand its capacity, DHCD does not have enough non-motel, non-congregate shelter space in areas of high demand to allow prompt placements or transfers of families for whom the agency itself has recognized that a disability accommodation with regard to location or type of shelter is warranted. Yet, DHCD now refuses to use a motel even if that is the best or indeed only way to satisfy an approved reasonable accommodation request. As a result, the agency has left families languishing in inappropriate placements for many months *after* it

has approved their disability-based requests for transfers to another location or type of shelter.

The Superior Court properly entered a limited preliminary injunction, in essence directing DHCD to stop taking motels off the table as an EA shelter option for – and only for – families with DHCD-approved disability accommodation requests, for whom a motel would be an appropriate accommodation, and whose needs DHCD is not otherwise accommodating.

Question Presented

Did the Superior Court (Wilkins, J.) properly issue a narrowly tailored preliminary injunction directing DHCD to (1) consider hotels as available placements when implementing approved ADA requests and (2) place individual ADA recipients in a hotel where such placement would meet the individual's recognized needs that DHCD is not otherwise accommodating, particularly given that (a) both Title II of the ADA and state law require DHCD to make reasonable modifications and otherwise ensure that people with disabilities have meaningful access to the EA program; (b) the Legislature in establishing the scope of the EA program authorizes and directs DHCD to use motels and to place families in shelter close to their home communities; (c) families with approved accommodation requests are having their disability needs go unmet

because of DHCD's refusal to use hotels; and (d) such families are suffering irreparable harm as a result of DHCD's failure to place them in a shelter that accommodates their disabilities?[2]

Statement of the Case

Plaintiffs filed the original complaint on December 9 and an amended complaint on December 27, 2016, on behalf of several named plaintiffs and others similarly situated, all low-income caretakers of children or pregnant women who are experiencing homelessness and rely on the Commonwealth's EA Program to have a safe place for their children to stay.

A. The Superior Court Record

Beginning in the spring of 2017, Plaintiffs filed a series of motions for preliminary injunction on behalf of individual class members who were in particularly untenable situations due to a family member's disability. One class member, the mother of a toddler with spina bifida who needed specialty medical care at Children's Hospital in Boston, was placed more than thirty miles away in Lowell. The child suffered

[2] Another question in this case is whether the Single Justice of the Appeals Court erred in staying the Superior Court's Order. Because this Court has now granted Direct Appellate Review and expedited oral argument, Plaintiffs rely on their arguments on the merits in support of their claim that the stay should promptly be lifted.

through long, painful rides multiple times a week to get to her providers and was at high risk of pressure sores. In spite of the urgent disability-related needs, DHCD said it could not transfer the family due to lack of contracted shelter space. After the filing of a motion for preliminary injunction, the Superior Court (Tochka, J.) ordered that the family be transferred to the Boston area. RA 2, Dkt. # 16; see also "Disabled Homeless Girl Is at Center of Fight Over Housing," Boston Globe (May 15, 2017); "Disabled Homeless Girl's Family Reach Deal With State on Shelter," Boston Globe (May 17, 2017).

Similarly, Marcia Prodoscimo and her children were initially placed in a third-floor walk-up shelter in Worcester, more than 36 miles from their home community. Despite a transfer order from the agency's Division of Hearings, as of just days before surgery on her son's knee for an ACL rupture, DHCD still had not transferred the family to a shelter that was accessible for the son post-surgery. In response to a motion for preliminary injunction, Dkt. #24; RA 2, DHCD said it would not transfer the family because of a lack of shelter space. The agency also confirmed:

> DHCD as a matter of policy no longer assigns new intake families to hotel or motel scattered site placements, with rare exception.

RA 109 (quoting Affidavit of Barbara J. Duffy, ¶ 16) ("no hotels" policy). These "rare exceptions" do not include accommodating a person with a disability. Id. On July 10, 2017, the Superior Court issued a preliminary injunction requiring that the family be transferred to a placement without stairs within 20 miles of their home community. Dkt. # 25; RA 2, 105-14. The Court did not order the agency to utilize a motel, but noted DHCD "may choose to comply with this order by doing so." RA 113.

Following this series of motions on behalf of individual families, Plaintiffs filed an Emergency Motion for Class-Wide Preliminary Injunction on July 14, 2017, requesting that the Superior Court direct DHCD to use motels as EA placements to the extent the agency could not otherwise meet its obligations under the Line Item and the ADA. RA 3, 38-116. The Superior Court held a hearing on this motion on July 25, 2017. RA 660-775.

On August 25, 2017, while the class-wide motion was still under consideration, Plaintiffs filed an Emergency Motion for Preliminary Injunction on behalf of another eighteen individual families in urgent need of shelter transfers to accommodate disabilities and allow children to get to their schools. RA 470-622. The Superior Court granted preliminary injunctive

relief on behalf of eight of the families,[3] emphasizing the intersection of disability needs and DHCD's statutory duty under the Line Item to make "every effort" to ensure children can attend school in their home communities. RA 959-72; Add. 93-95. The Superior Court granted relief to those with recognized disabilities who could accept a motel as a placement. In its decision, the Superior Court stated:

> DHCD undoubtedly has discretion as to many aspects of the EA program, but it is an abuse of discretion, arbitrary and capricious, and an error of law to rule out all motel placements automatically for all recipients – particularly ADA-eligible

[3] Families afforded relief included the following as well as the families discussed infra at pp. 14-15 (initials used here and below to protect privacy):

- I.F., a mother of three from Boston who was placed in Haverhill, more than 30 miles away from Boston, necessitating a grueling daily commute by public transit that took hours each way so that the children could attend school and I.F. could get to her job. DHCD had approved the family's request for a transfer back to Boston as an ADA accommodation for a child's disability in February 2017, but by August 31, 2017 the family still had not received a transfer. RA 570.
- R.F. is a mother employed in the Boston area with children enrolled in Boston schools. Initially, DHCD did not have *any* shelter space to accommodate the family's size and, because of its "no hotels" policy, had to ask a third party to pay for a hotel. RA 98-99. Then, the family was placed by DHCD in Lawrence. The arduous daily commute by public transit sapped the family's financial resources and caused R.F. to "suffer[] debilitating spinal migraines." RA 475, 536-42; Add. 94.

> recipients – as though the line item proviso [saying funds 'shall be' used for motels] were meaningless.

RA 968.

B. The Preliminary Injunction

Drawing on its experience with multiple families needing relief due to DHCD's failure to accommodate their disabilities, the Superior Court issued its initial Memorandum and Order on Plaintiffs' Emergency Motion for Class-Wide Preliminary Injunctive Relief on September 7, 2017 and modified the Memorandum but not the Order on September 21, 2017 (hereinafter "Order"). The Order was entered only after months of DHCD failing persuasively to articulate how it implements the Line Item provisos and accommodates persons with disabilities. RA 660-958; see also, e.g., Addenda ("Add.") 5 (evidence raises "serious concerns" that in pursuing elimination of hotels DHCD has not paid any substantial attention to the placement provisos) and 10 (failure to accommodate disabilities).[4] In the Order, the Superior Court explicitly stated that it had "considered the factual submissions on the Individual Motion in deciding" the class-wide motion,

[4] The study that DHCD cites, The Growing Challenge of Family Homelessness, Homeless Assistance for Families in Massachusetts: Trends in Use FY2008-FY2016, The Boston Foundation (Feb. 2017), available at https://www.tbf.org/~/media/TBFOrg/Files/Reports/Homlessness%20Report_Feb2017R.pdf, confirms how little attention DHCD has paid to the placement provisos. Id. at 17-18, 42.

"as those submissions shed light on DHCD's policies and the impacts upon EA recipients." Add. 3.

The Superior Court found that DHCD "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." Add. 11. The court ruled that the use of 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" and placements far from a family's home community "resulted in failure to obtain care and treatment, manifestation 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." Add. 10. Based on these findings, the Superior Court concluded that:

> [I]t appears preliminarily that EA shelter benefits are (1) effectively denied to some disabled recipients [who] 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.

Id.

The Superior Court rejected DHCD's argument that issuing the requested injunction would fundamentally alter the EA program. The Court reasoned that a placement from which a family is entitled to a transfer to meet disability-related needs is not "available" within the meaning of the hotel expenditure proviso. Add. 12.

DHCD filed motions for reconsideration and a stay on October 10, 2017. RA 310-406. Plaintiffs opposed the motions, RA 407-62, and the Superior Court heard argument on October 26, 2017. The Superior Court denied the motions on October 30, 2017 in a thorough opinion. Add. 29-38.

In that opinion, the Superior Court made additional findings of fact and held that DHCD's stated policy of using hotels as "temporary overflow capacity," while refusing to use them as "interim ADA placements," was a distinction "far too tenuous to justify denying accommodations for disabilities that DHCD itself has recognized." Add. 31. "DHCD's rationale for finding one approach 'appropriate' and the other 'inappropriate' is thin and utterly unconvincing." Add. 34. On the propriety of using motels as shelter, the Superior Court stated:

> 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.

Id. (emphasis in original). The Superior Court carefully considered DHCD's allegations of harm and found them unsupported by the actual evidence. Add. 35-37.

C. Appellate Proceedings

On November 27, 2017, DHCD moved for a stay of the Preliminary Injunction in the Appeals Court under Mass. RAP. 16(a). On December 14, 2017, without a hearing, a Single Justice of the Appeals Court granted the Stay. RA 2; Dkt. # 73. On March 28, 2018, this Court granted the parties' Joint Petition for Direct Appellate review.

Statement of the Facts

A. The EA Program

The EA program provides shelter to homeless children and their adult caretakers and pregnant women. There are approximately 3,500 families in the EA shelter system. RA 366, 416. Families who meet strict eligibility criteria, including having absolutely no other safe place to stay, are entitled to be placed in shelter "as close as possible to the household's home community" and to be transferred "at

the earliest possible date" to within 20 miles of their home communities. Line Item, Add. 48. DHCD also "shall make every effort to ensure that children . . . shall continue attending school in the community in which they lived" prior to entering shelter. Id. However, DHCD regularly places families far from their home communities, particularly families who come from areas of high demand, including Greater Boston. See, e.g., RA 381. In addition to other challenges, families placed far away from their communities are at enhanced risk of being terminated and barred from shelter for 12 months under DHCD regulations.[5]

For many years, Massachusetts has utilized four different kinds of EA shelter placements: a) congregate shelters, in which each family generally has its own bedroom but shares living space, including bathrooms and cooking space if provided; b) scattered site shelters, which are generally apartments in which a single family is placed; c) co-shelters, which generally are apartments shared by two or more families; and d) hotel rooms or suites. RA 252-55. Decisions as to where individual families will be placed within the shelter system are made by DHCD

[5] See, e.g., 760 CMR 67.02(10); 760 CMR 67.06(6)(a)4 (termination for refusing placement); 760 CMR 67.06(6)(a)3; 760 CMR 67.06(6)(a)5 (noncompliance and termination for missing curfew or being absent); 760 CMR 67.06(1)(d)(12-month bar to returning to shelter).

Central Office personnel.

B. Families with Disabilities in the EA System

Some EA families include one or more individuals with disabilities. Form and location of shelter have a large impact on whether these families can meaningfully access the EA program.

For example, a congregate shelter is often medically inappropriate for persons with disabilities, including a person with a weakened immune system, RA 398, a child with Autism Spectrum Disorder, RA 397-398, or a person with mental health conditions that are exacerbated by the crowded and chaotic nature of congregate shelter living. See, e.g., RA 447-448, 474. Families with specialized dietary needs, such as severe food allergies, RA 68, or a strict diabetic diet, RA 489, require regular access to non-shared cooking facilities to prepare their own meals. And families with complex medical conditions that necessitate frequent access to highly specialized providers often need a shelter placement very near those providers, as do families in ongoing treatment for severe mental health issues. See, e.g., RA 43, 52, 398, 461-462, 476, 479-80.

DHCD maintains a centralized system for processing requests for reasonable accommodations. A request for reasonable accommodation is made to DHCD's ADA Coordinator, Erin Bartlett. As of October 4, 2017,

there were 187 families in the EA system who had requested transfers due to disability-related needs, whose ADA requests for reasonable accommodation had been approved, but whose ADA-based transfer requests DHCD had not yet fulfilled. RA 397.

The record before the Superior Court included numerous examples of families whose approved requests for transfer were not fulfilled for months, leaving them in shelter placements that did not meet their disability-related needs. See RA 41-42, 51-53, 472-480. In many instances, the inappropriate shelter placements resulted in significant deterioration in children's and parents' health during these long waits. For example:

- M.F. is the grandmother and guardian of two girls, ages eight and six. Both children suffer from mental health disabilities, for which they receive treatment at their Boston school; the younger girl also receives neurological care at Boston Children's Hospital. Despite being on notice of the family's need for a Boston-area non-congregate shelter, DHCD placed the family in a congregate shelter in Framingham, subjecting the children to a lengthy daily commute to their school. Ms. F. could not continue treatment with her long-established Boston providers for her own severe mental health conditions, including post-traumatic stress disorder, major depressive disorder, and generalized anxiety disorder. DHCD approved the family's request for a transfer to a Boston-area non-congregate placement on February 7, 2017, stating that the transfer would be effected "when administratively feasible." DHCD did not transfer the family until receiving an order from the Superior Court on August 31, 2017,

despite repeated communications from Ms. F.'s counsel and additional medical documentation regarding the health impact of the prolonged stay in the medically inappropriate placement.

- N.S. is the mother of two children. Ms. S. and her ten-year-old daughter have survived multiple traumas, including severe domestic violence; they receive mental health care in Boston for post-traumatic stress disorder and related mental health concerns. Ms. S.'s two-year-old son receives specialized treatment for severe anemia at Boston Children's Hospital. Multiple providers attested to the family's urgent need for a Boston-area non-congregate placement in order to access not only their medical providers but also family supports on which they rely heavily for emotional stabilization. The family was placed in Fitchburg – more than forty miles from Boston – on July 28, 2017. The mental health of Ms. S.'s daughter declined precipitously, culminating in a mental health crisis for which the family needed to seek emergency treatment. Because of DHCD's failure to accommodate the family's urgent needs, in a situation described by one of the daughter's clinicians as "a safety risk for this child," the family requested a Temporary Emergency Shelter Interruption (TESI) on August 17, 2017, during which they stayed with Ms. S.'s mother and sister in a small one-bedroom apartment in Roxbury, sleeping on the floor and jeopardizing the tenancy. Despite the hardships associated with the TESI, Ms. S. felt it was the only option for safeguarding her children's health and safety. DHCD did not provide a placement to accommodate the family's severe medical needs until receiving an order from the Superior Court on August 31, 2017.

RA 552-69, 600-16, 959-72. See also, e.g., families discussed supra note 3.

C. Motels in the EA System

Motel placements have been a significant component of the EA shelter system for many years. RA

251-52. The number of families placed in motels has increased and decreased with demand and the availability of other shelter space, from 842 EA families at the time DHCD took over the EA program in 2009 to 2,175 families in December 2013. RA 252. Although DHCD increased non-hotel shelter capacity by 1,664 beds between September 2013 and June 2017, 88% of the expansion occurred prior to the end of June 2016, see RA 253, at which point 485 hotel rooms were still needed to shelter all eligible families. Add. 4. New placements in motels virtually ceased beginning in October 2016, Add. 4, but between 40 and 50 families remained in hotels at the time of the Order. Add. 35.

Hotels provide flexible, expandable capacity in a system that cannot predict day-to-day capacity needs with certainty. DHCD pays for hotel rooms based on nights of actual usage, as compared to contracted shelter spaces, for which DHCD must pay regardless of whether the unit is in use by a family on any given night. RA 254, 401.

In spite of statutory language clearly making hotels an allowable component of the EA system, in or around the fall of 2016, DHCD, without advance notice to the Legislature, stopped placing additional families in hotels. RA 109 (quoting Duffy Aff. ¶ 16). DHCD asserts generally that hotel placements are categorically worse for homeless families than other

forms of placements, citing, e.g., conditions issues in certain motels. But sadly, contracted shelters also have serious conditions issues, including but not limited to rodent and cockroach infestations, lack of security, mold, and nonfunctioning toilets. See, e.g., RA 54-58, 90-94, 429 (¶¶ 2-3), 448, 457-59. For some families, hotel placements are significant improvements on the conditions they endured in inappropriate placements that did not accommodate a family member's disabilities.[6]

[6] For example, affiant R.F. described the Colonial Traveler Inn in Saugus as clean and the staff as "nice[]" and "helpful," compared to her subsequent EA placement in Lawrence, where her son's asthma was significantly aggravated by the presence of severe rodent infestation. RA 457-60. Affiant I.F. described her depression and anxiety, as well as the exacerbation of her daughter's chronic knee pain, during the almost ten months that she and her three children endured daily commutes from their Haverhill shelter placement to their Boston schools and her job in Newton. Almost two months after receiving a transfer to the Home Suites Inn in Waltham, she states that "[t]he hotel is much better for my family than the shelter was . . . . In the shelter, I used to cry every night because of what my kids were going through. They are much happier in the hotel, and so am I." RA 451-52. Affiant M.F. described extreme stress associated with living in the congregate shelter, including staff's requiring her to cancel medical appointments; she stated that she and her granddaughters, all of whom suffer from severe mental health disabilities, "all feel more relaxed" since the transfer to the hotel and states that "the move here is the best thing that could have happened to me." RA 448. An affidavit by an attorney for an intervenor described the experience of her client M.J., a Boston family placed in EA shelter in Springfield whose fifth-grade son experienced a mental health crisis and

Summary of Argument

The Line Item funding the EA program both authorizes and mandates the use of motel rooms when contracted shelter spaces are not available. Section 1 of the annual state budget also mandates that all agencies expend appropriated funds in ways that accommodate the needs of persons with disabilities. The Line Item further requires that, before DHCD makes any changes to policies or administrative practices, except those that clearly benefit the families, it provide the Legislature with 90 days' advance notice so that the Legislature has the option to intervene. Yet, without any advance notice, DHCD now refuses to place families in motel rooms, even when motel rooms are the only way to satisfy an approved reasonable accommodation request. That refusal both contradicts the Line Item and violates multiple provisions of the ADA and concomitant provisions of state law. (pp. 21-44).

The Superior Court's Order was narrowly tailored to address impacts on qualified persons with disabilities. The Order requires DHCD to continue to

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ran away from the shelter when faced with the prospect of transferring from his familiar school to a new school in Springfield; the attorney stated that the family's transfer to a Boston-area hotel on September 25, 2017 "has allowed the son to access his providers and continue attending his school." RA 462.

use motels as an option for EA shelter placements to the extent – and only to the extent – that (1) DHCD itself has approved a family's individualized request for reasonable accommodation in the form of a different type or location of shelter to address disability-related needs of a parent or child; (2) DHCD cannot provide the approved accommodation in a different form of shelter; and (3) the individual family's disability-related needs can be accommodated in a hotel. DHCD's argument that the Order does not allow for individualized consideration is without merit. (pp. 28-31).

DHCD's refusal even to consider motel placements for disabled individuals is a prototypical refusal reasonably to accommodate a disability. (pp. 31-36). And requiring the agency to modify this practice to meet the needs of persons with disabilities is reasonable and does not fundamentally alter the EA program. (pp. 36-39). Indeed, because of the rigidity of DHCD's refusal to consider a motel placement for individuals with disabilities, Plaintiffs have a likelihood of success that the practice also violates several other provisions of the ADA. (pp. 39-44).

Preliminary relief was and remains appropriate because Plaintiffs have a strong likelihood of showing that DHCD's practice discriminates against disabled individuals in violation of the ADA, the balance of

harms is decidedly in Plaintiffs' favor, and the injunction is in the public interest. (pp. 44-53).

Argument

The grant of a preliminary injunction will be overturned on appeal only where there is an abuse of discretion. See Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 615 (1980). Findings of law are reviewed *de novo*. Id. The Court may draw its own factual findings where the record contains only documentary evidence, but the issuing judge's factual findings must be afforded deference. Id.

A preliminary injunction is appropriate where, "after an abbreviated presentation of the facts and law," the moving party shows that "it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." Id. at 111. The court evaluates a "combination [of] the moving party's claim of injury and chance of success on the merits" against the harm to the non-moving party. Id. Where the requested relief would enjoin government action, the court also weighs whether granting the motion would adversely affect the public interest. Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT DHCD'S "NO HOTELS" POLICY IS CAUSING VIOLATIONS OF THE ADA.

The Legislature has, and has exercised, the power to define the scope of the EA program. Once the Legislature has defined the program, a public entity must not erect systemic barriers that deny promised services to persons with disabilities. Indeed, the public entity must go farther and "make reasonable modifications in policies, practices or procedures" to ensure individuals with disabilities are granted "meaningful access to the benefit" unless the modification would "fundamentally alter the nature of" the benefit provided. Van Velzor v. City of Burleson, 43 F.Supp.3d 746, 752(N.D. Tex. 2014)(quoting 28 C.F.R. § 35.130(b)(7) and Alexander v. Choate, 469 U.S. 287, 301 (1985))(internal quotations omitted). The erection of undue barriers can also violate other provisions of the ADA requiring that a public program not deny disabled individuals the opportunity to participate in and benefit from the program or substantially impair the purpose of it for them.

Here, the Legislature has expressly mandated that DHCD, when making placement decisions, consider location, disability, and, in certain circumstances, the use of motels. The Superior Court's Order, which merely requires that DHCD apply these statutorily mandated considerations and stop applying its "no

hotels" policy when a hotel is needed to accommodate recognized disabilities, does not change the scope of the EA Program or preclude individualized consideration – indeed, it enables such consideration. To the extent the Superior Court's limited Order requires that DHCD alter the administration of the EA Program, the Order requires only reasonable modifications that do not fundamentally alter the program or result in an undue burden.

A. The Scope of the EA Program as Established by the Legislature Includes Consideration of Location, Disability, and Motels, and The Superior Court's Order Mandated Nothing More.

The Superior Court properly found that the "scope of services" encompassed by the EA program includes the consideration of location and disability in placement decisions. Under the ADA, courts grant deference to States in determining the "proper mix of amount, scope, and durational limitations of services" they provide. Alexander v. Choate, 469 U.S. at 307. Where, as here, the Legislature has established the fundamental parameters of a state-funded program, it is for DHCD to administer and not second-guess the policy choices the Legislature has made. See Opinion of the Justices, 384 Mass. 828, 837-38 (1981) (finding that the purported veto of budget provisos directing that funds be spent on a particular purpose was invalid as an unlawful invasion into the Legislature's

Amendment Article 63 powers). It is "for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit" and, "[o]nce a bill has been duly enacted . . . the Governor . . . is not free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law." Id.

The legislative intent is evidenced here throughout the relevant statutes, which all make clear that the Legislature has defined the "proper mix" of services in the EA program to include consideration of location and the use of motels.[7]

First, G.L. c. 23B, § 30 does not restrict EA only to "temporary shelter" wherever it may be. For one thing, the introductory paragraph to that section says that 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

[7] Because the Legislature created the EA program to encompass location and use of motels, cases cited by DHCD, including Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Ore. 2012), in fact support plaintiffs' argument. "`States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.'" Id. at 1207 (quoting Olmstead v. L.C., 527 U.S. 581, 603 n.14 (1999)).

program in a fair, just and equitable manner." (emphases added). And, in 2015, the statute was amended to make explicit mention of the use of hotels. Add. 43. Hence, the enabling statute does not restrict the program in the way DHCD contends.

Second, the Line Item – with numerous provisos directing DHCD to pay attention to location issues and directing it to use motels when appropriate[8] – makes location considerations a fundamental part of the EA program and fully authorizes the use of hotels. Wilson v. Comm'r of Transitional Assistance, 441 Mass. 846, 851 (2004) ("We apply established rules of statutory

[8] The Line Item repeatedly references the use of motels and indeed provides that "funds shall be expended for expenses incurred as a result of families being housed in hotels due to the unavailability of contracted beds." Add. 51(emphasis added). This "hotel expenditure" proviso, first included in the Line Item in FY 13, was enacted by the Legislature in the FY 18 state budget over the Governor's purported veto. This veto override occurred after the Governor had first proposed to change this language to say only that funds "may be expended" for hotel expenses and the Legislature rejected that proposal and changed the language back to "shall be expended." RA 117-141. Thus, in this case, there can be no doubt that the term "shall" in this proviso is mandatory and not merely directory. See Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 862 (1980)("legislative history is relevant to a determination whether a statute is mandatory or directory, and '[t]he deliberate refusal of the General Court to adopt a word which plainly would have conferred discretionary power . . . [may], in place of one whose natural purport would compel them . . . [shall], is significant of a settled intention to use the imperative word.' Rea v. Aldermen of Everett, 217 Mass. 427, 431 (1914)").

construction to the provisos of a line item in a legislative appropriation").[9]

Third, Section 1 of the budget provides: "All sums appropriated under this act, including supplemental and deficiency budgets, shall be expended in a manner reflecting and encouraging a policy of nondiscrimination and equal opportunity for ... persons with a disability." St. 2017, c. 47, § 1. Hence, the Legislature has ordered DHCD to use funds flexibly to accommodate the needs of persons with disabilities, consistent with Article 114 of the state constitution.[10]

Finally, DHCD's "no hotel" policy cannot be "fundamental" because it was adopted in violation of the advance notice proviso of the Line Item. Reflecting its strong concern for families in the EA program, the Legislature included in the Line Item a requirement that, before DHCD may implement any change in policy or administrative practice that affects

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[9] Moreover, the Line Item and DHCD's own regulations, 760 CMR 67.05, require DHCD to provide "housing search assistance," not just shelter.

[10] "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth," demonstrating at the highest level of state law a finding that it is in the public interest to safeguard the rights of individuals with disabilities. Mass. Const., Amendment Art. 114.

eligibility for or the level of benefits available in the EA program and does not purely benefit the clients, the agency must give 90 days' advance notice to the Legislature. The notice requirement applies even if the change is otherwise within the agency's discretion. Such notice provisions are intended to give the Legislature time to take action to forestall the proposed policy change if the Legislature disagrees. RA citing and quoting Wilson, 441 Mass. at 856 (discussing advance notice in EAEDC item).[11]

[11] The advance notice language in the EA item was expressly broadened in FY 2012 when, within months of its creation, demand for the new HomeBASE Rental Assistance program grossly exceeded supply and the program had to be shut down, leaving more families in need of EA shelter. In response, DHCD proposed to create a waiting list for EA shelter, contending it did not have to give the Legislature advance notice of this plan because the language at the time referred only to amending agency "regulations" rather than to sub-regulatory policy actions. The Legislature swiftly responded, expanding the advance notice provision to cover "any regulations or policy." St. 2011, c. 171, § 6 (emphasis added). The Administration then took the position that it could still change administrative practices without notice and that it was barred from adopting policies that would be more favorable to families, prompting the Legislature to amend the proviso further to its current form, which applies to "any regulations, administrative practice or policy . . . other than that which would benefit the clients." St. 2012, c. 36, § 32. Beginning in FY 2017, the Legislature extended the required advance notice from 60 days to 90 days. St. 2016, c. 133, § 2, item 7004-0101; St. 2017, c. 41, § 2, item 7004-0101, further reflecting the Legislature's concern with protecting these vital benefits for homeless children and their families. RA 124.

Because no such advance notice was given before DHCD adopted its "no hotels" policy, RA 469, the policy is not legal, let alone fundamental to the program. Add. 14-15.

In spite of these clear statutory mandates, DHCD argues that all it must do is provide "temporary shelter" anywhere in the state with no regard for location, the needs of persons with disabilities, or the type of shelter. But DHCD's "scope-of-the-service" and fundamental alteration arguments, like its "no hotels" policy, fail to show sufficient respect for the Legislature's power to set the parameters of the EA program. Indeed, DHCD's position violates basic principles of statutory interpretation. See, e.g., Smith v. Comm'r of Transitional Assistance, 431 Mass. 638, 649 (2000) (agency interpretation that is contrary to the plain language and purpose of the statute must be rejected); Mass. Hosp. Ass'n, Inc. v. Dept. of Med. Security, 412 Mass. 340, 346 (1992) (same).

The Legislature has authorized consideration of location, disability, and motels when making program placements. The Superior Court's order mandating consideration of these same factors is consistent with the scope of the EA program, and DHCD's arguments that the Order expanded the scope of or fundamentally

altered the EA program are without merit.[12]

B. The Order Enables and Depends on the Individualized Consideration Required by the ADA.

DHCD's other primary argument is that the Order does not allow for individualized determinations as required by the ADA. Br. 39-43. But it is DHCD's "no hotel" policy, not the Order, that defies the ADA's individualized consideration requirements. The Order

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[12] In Williams v. Executive Office of Human Services, 414 Mass. 551, 567, 570 (1993), Alexander v. Choate, and Colbert v. Dist. of Columbia, 110 F. Supp. 3d 251 (D.C. Cir. 2015), on which DHCD heavily relies, there was no argument that the state legislatures had authorized a program broader in scope than the administering agency was willing to provide. Indeed, in Williams, 414 Mass. at 567, the Court said that "[i]t is within the discretion of the agency to determine priorities for allocation of resources among services where the enabling statute does not itself clearly establish particular priorities." (emphasis added). Plaintiffs here do not seek – and the Superior Court did not order – an expansion of or alteration in the scope of the EA program as authorized by the Legislature. Rather, the Order merely requires DHCD to use the tools it has at hand to afford meaningful access to the services the Legislature mandated. Williams also predated the decision in Olmstead v. L.C., supra, in which the Supreme Court rejected many of the arguments accepted in Williams, and indeed was criticized by the court on whose precedent it relied. Helen L. v. DiDario, 46 F.3d 325, 333 (3rd Cir. 1995). DCHD also wrongly relies on Zaffino v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 688 F. Appx 356, 359 (6th Cir. 2017). Zaffino did not involve access to a public benefit but rather an employer's duty to accommodate disabilities in the work place – an inquiry that turns on a handicapped individual's ability "to perform the essential functions of a job she's otherwise qualified for." Id.

simply removes a systemic barrier to individualized consideration that DHCD itself erected. Class-wide relief to remedy systemic ADA violations is appropriate. Courts regularly enjoin systemic refusals to engage in an individualized analysis. See, e.g., Guckenberger v. Boston Univ., 974 F. Supp. 106, 154 (D. Mass. 1997) (enjoining portion of university's reasonable accommodation policy that was systemically interfering with granting appropriate accommodations); Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003) (injunctive relief appropriate with regard to procedures causing systemic violations of the ADA).[13]

Where, as here, a public entity's policies or procedures operate to close off the individualized consideration of reasonable accommodation requests mandated by the ADA, or erect other unwarranted barriers for persons with disabilities, class-wide preliminary injunctive relief is appropriate.[14]

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[13] See also Henderson v. Thomas, 913 F. Supp. 2d 1267 (M.D. Ala. 2012) (injunction mandating individualized analysis); Feldman v. Oakland Univ. Bd. of Trustees, 678 F. Supp. 2d 576, 583 (E.D. Mich. 2009)(enjoining blanket restriction of on-campus housing to degree-enrolled students); Tugg v. Towey, 864 F. Supp. 1201, 1207 (S.D. Fla. 1994) (enjoining blanket refusal to provide therapists fluent in sign language).

[14] See, e.g., Rodde v. Bonta, 357 F.3d 988, 997 (9th Cir. 2004) (shutdown of only hospital capable of providing services to disabled was discrimination); Civic Assoc'n of Deaf of New York City, Inc. v. Giuliani, 970 F. Supp. 352 (S.D.N.Y. 1997)(extending injunction under ADA for class of deaf and hearing-

The preliminary injunction issued here was narrowly tailored to the scope of the EA program and applies only to families whose ADA requests for a new placement are approved by DHCD on an individualized basis,[15] only to those whose disability-related needs DHCD is not otherwise accommodating, and only to those whose individualized needs can be accommodated in a hotel. No particular result is mandated for any particular individual, and the Order preserves DHCD's discretion to engage in a reasoned, individualized, and case-by-case assessment. The Order requires only

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impaired plaintiffs to require city officials to implement components of city program previously exempt from scope of injunction); V.L. v. Wagner, 669 F. Supp. 2d 1106 (N.D. Cal. 2009)(holding that class of recipients of in-home care was entitled to preliminary injunction because new state program effectively reduced or terminated recipients from eligibility for program benefits in violation of ADA); Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994)(enjoining closure of recreational facilities for disabled individuals).

[15] Each approval of an ADA request for a shelter placement of a different type or location recognizes, based on individualized consideration, that the current placement is not fully accommodating the family's disability-related needs. It is in this sense that the lower court appropriately referred to these placements as not compliant with the ADA or "unlawful." Hence, DHCD's argument that these approvals are irrelevant because they do not specify that a hotel specifically would be an appropriate placement, DHCD Br. 41, misses the point. Indeed, the Court's Order addresses that issue by requiring that only those families whose approved accommodations can be met in a hotel, and only those families whose needs are not otherwise being met, are covered by the Order.

that DHCD stop systemically refusing to use motels to meet the disability-related needs of participant families.

C. Even if the Superior Court's Order Could Be Read to Require Modification of the EA Program, It is a Reasonable Modification Necessary to Address the Urgent Needs of Persons with Disabilities.

To the extent the Superior Court's Order modified the EA Program at all, it was reasonable. "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 . . ." 28 C.F.R. § 35.130(b)(7)(i). Such modifications must be made to ensure individuals with disabilities are granted "meaningful access to the benefit" provided. Van Velzor, 43 F.Supp.3d at 752 (N.D. Tex. 2014) (quoting Alexander v. Choate, 469 U.S. at 301) (internal quotations omitted).

1. Use of Hotels is a Reasonable Modification to Ensure That Individuals With Disabilities Have Meaningful Access to the EA Program.

The modification to DHCD's preferred method of administering the EA program required by the Superior Court's Order is reasonable and appropriate to comply

with both the ADA and the state budget.[16] The Order requires that DHCD modify its current, recently adopted practice so as to (1) treat motels as available placements for DHCD-approved ADA accommodation requests, and (2) use a motel placement as an interim alternative where, but only where, a motel would meet the needs of a disabled individual and no other suitable placement is available.

Although this modification is limited and its application depends on individualized factors, see Part B above, it can drastically improve the ability of disabled individuals meaningfully to access the shelter system. Consideration of motels as potential

[16] DHCD contends that the phrase "unavailability of contracted shelter beds" in the hotel expenditure proviso and the regulation at 760 CMR 67.06(3) means that a hotel need be used only when there is not a single contracted shelter unit of the correct size anywhere in the state. For one thing, there will be evidence in the proceedings below that this is not how DHCD has historically interpreted these provisions. But, in any event, "unavailability" in context must be interpreted to refer to the unavailability of contracted shelter beds that satisfy the placement requirements of the Line Item. No other interpretation harmonizes the placement and hotel expenditure provisos of the Line Item. See, e.g. EMC Corp. v. Comm'r of Revenue, 433 Mass. 568, 574 (2001). And even if "unavailability" means, as DHCD would have it, that a hotel generally should be used only if there is no contracted shelter bed in the whole state into which the family can physically fit, certainly the applicable provisions of the ADA as well as Section 1 of the state budget require DHCD to make reasonable modifications to this general policy to accommodate the needs of qualified persons with disabilities.

placements for families with approved accommodation requests flexibly expands the pool of available shelter, resulting in placements that do not trigger disability-related symptoms (as congregate shelters often do) and that are near family, communities, and necessary medical care, all of which often serve vital functions for disabled individuals. [17] An added advantage is that DHCD does not have to pay for motel rooms that are not being used, unlike contracted shelters.

As the Superior Court found, DHCD's categorical refusal to use a form of shelter authorized by the Legislature has resulted in "failure to obtain care and treatment, manifestations of treatable and avoidable symptoms (such as mental health episodes)

[17] Many cases cited by DHCD are simply inapposite. Buchanan v. Maine, 469 F.3d 158, 174 (1st Cir. 2006) rejected a plaintiff's attempt to shoehorn a medical malpractice action into the ADA. In contrast, plaintiffs' request here for the provision of services at a location that accommodates the effect of their disability is soundly within the ADA. Rodriguez v. City of New York, 197 F.3d 611, 617 (2d Cir. 1999), cert. denied, 531 U.S. 864 (2000), held that it was not a reasonable modification of New York City's personal-care offering, which included support with tasks like hygiene, dressing, feeding, and health, to require that New York also provide security service not authorized by the program. Cercpac v. Health & Hosps. Corp., 147 F.3d 165, 168 (2d Cir. 1998), recognized that if disabled children were being denied a needed "basic service" or being refused "specialized services that might be required as a reasonable accommodation of the child's disability," the state action may well violate the ADA.

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." Add. 10.

For some families with disabilities, the effect has been so debilitating that they are forced to choose between shelter on the one hand and basic disability-related necessities on the other hand. See, e.g., N.S., supra at 15, with regard to whom the Superior Court said her situation "speaks volumes." Indeed, as the Superior Court explained, as a result of DHCD's refusal to use hotels, the "array of services is less suited to (i.e. less beneficial for) persons with disabilities than non-disabled persons." In some cases, the consequences are so extreme as to have "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." Add. 9 (emphasis added).

Such harmful results are exactly what the ADA is designed to prevent. See 42 U.S.C. §§ 12101(a)(5), (7)-(8), quoted infra 51; see also Alexander v. Choate, 469 U.S. at 301 ("meaningful access" requires consideration of practical ability to access service);

Shedlock v. Dep't Of Correction, 442 Mass. 844, 854–55 (2004) ("At some level, the difficulties experienced in attempting to access programs and services become so great – so laborious, so painful – that a plaintiff's access has functionally been denied, even if the plaintiff could, at least in theory, get to and from the program or services").[18]

Consistent with this mandate, courts have consistently recognized that requests to alleviate the harmful aspects of policies that prevent disabled individuals from successfully accessing public programs are appropriate accommodations.

> The injunction at its core orders [the agency] to perform its statutory mandate, and imposes some procedural mechanisms designed to effectuate this goal. The plaintiffs' prima facie burden in arguing that the relief they obtained represents a reasonable accommodation is "not a heavy one." We have explained that "[i]t is enough for the plaintiff to suggest the existence

[18] DHCD's contention that its policy is immunized because it is facially "neutral" (Br. 32-34) ignores that neither disparate treatment nor disparate impact is required to establish that a general policy must be reasonably modified. See Henrietta D., 331 F.3d at 291 ("[A] plaintiff advancing a reasonable accommodation claim under the ADA or Rehabilitation Act need not also show that the challenged program or practice has a disparate impact on persons with disabilities"); McGary v. City of Portland, 386 F.3d 1259, 1266 (9th Cir. 2004) (holding that a plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim); Van Velzor, 43 F. Supp. 3d at 755 (citing and quoting Olmstead v. L.C., 527 U.S. 581, 598 (1999).

> of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits," and that "[o]nce the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant."

Henrietta D., 331 F.3d at 280 (quoting Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995). See also Bezi v. Camacho, 2015 WL 4380280, at *7-8 (C.D. Cal. July 9, 2015) ("The Court also finds that relocation to another city closer to plaintiff's school may have been reasonably necessary to accommodate her handicap").[19] The Superior Court's order is fully in line with such precedent.

2. The Superior Court Order Does Not Cause a Fundamental Alteration of the EA Program.

Because both location and the use of motels fall within the scope of EA services as defined by the

[19] See also Giebeler v. M & B Assocs., 343 F.3d 1143, 1155 (9th Cir. 2003) (recognizing that "access to physical therapy, nursing care, and other medical needs" may be critical for housing for disabled individuals); Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996) (prohibiting enforcement of statutory dog quarantine in Hawaii when quarantine "effectively denies . . . meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others"); Fialka-Feldman v. Oakland Univ. Bd. of Trustees, 678 F. Supp. 2d 576, 583 (E.D. Mich. 2009), appeal dismissed as moot, 639 F.3d 711 (6th Cir. 2011) (rejecting blanket restriction of on-campus housing to degree-enrolled students); Rodde v. Bonta, 357 F.3d at 997 (shutdown of only hospital capable of providing services to disabled was discrimination).

Legislature, the Superior Court's Order does not force a fundamental alteration of the program. Merely requiring that a state fulfill its obligations under state law is not a fundamental alteration. Kathleen S. v. Dep't of Pub. Welfare, 10 F. Supp. 2d 460, 471 (E.D. Pa. 1998) (citing Helen L. v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995)).[20]

Even if the scope of the EA shelter program were, as DHCD argues, limited to providing "temporary shelter" without regard to location, disability, or type, the Order would still not require a "fundamental alteration" of the EA Program. The Superior Court merely ordered DHCD to continue to use hotels, which have been used as a form of EA shelter for many years. That DHCD long has utilized hotel placements and, indeed, that families still remain in EA-funded hotel rooms, demonstrates that using such a placement as an accommodation for a disabled individual is not a fundamental alteration of the EA Program.

3. The Order Imposes No "Undue Hardship" on DHCD.

Contrary to DHCD's argument, Br. 44-47, there is no cognizable hardship to DHCD, let alone any "undue

[20] DHCD bears the burden of establishing that an accommodation would result in a fundamental alteration, and it has not met that burden here. Reaves v. Dep't of Corr., 195 F. Supp. 3d 383, 419 (D. Mass. 2016).

hardship" that renders the limited use of hotels "unreasonable."[21] First, "simply because a requested accommodation would alter a substantive rule or regulation does not render it unreasonable or unduly burdensome." Kulin v. Deschutes Cty., 872 F. Supp. 2d 1093, 1100 (D. Or. 2012). Here, the Order requires modification of DHCD's placement policy, which is a "procedural mechanism." Henrietta D., 331 F.3d at 280.

Further, as is well-established, expenditure of public funds to fulfill statutory mandates is not cognizable harm. Healey v. Comm'r of Pub. Welfare, 414 Mass. 18, 27 (2002) (expenditure of funds to meet statutory obligations is not an irreparable harm to the agency or contrary to the public interest); see also Stone v. City & Cty. of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) (expenditure of funds to comply with law not harm).

In addition, a reasonable modification does not impose an undue burden if its costs are proportionate to the benefits it will produce. Borkowski, 63 F.3d at 138. Here, DHCD's cost estimates are not reliable, see Part II B below, and DHCD admits that it is free to reduce expenditures on shelter placements that are distant from places of greatest demand or otherwise

[21] For these same reasons and more, DHCD's arguments that the injunction causes it irreparable harm are unsupported. See Part II below.

under-used in order to pay for any incremental costs of using motels to accommodate disability-related needs – it just does not want to do so, in spite of what the Line Item says. Further, DHCD has never contested Plaintiffs' evidence that it can ask its contracted shelter providers to rent motel rooms as needed and then not even have to take the basic step of entering into a "master service agreement" directly with a hotel. RA 430.[22] Moreover, as the Superior Court found, any need to increase or rearrange expenditures as a result of the Order is only speculative. Add. 35. DHCD has not proven undue hardship.

D. Plaintiffs Have a Strong Likelihood of Success that DHCD's "No Hotel" Policy Violates Other Provisions of the Title II ADA Regulations.

The ADA Title II regulations prohibit public entities from implementing their programs in ways that exclude or diminish the value of the benefits for persons with disabilities. See, e.g., 28 C.F.R. §§ 35.130(b)(1), (3), (4), (7) and (8). Even though DHCD focuses its arguments almost exclusively on the "reasonable modification" provision, DHCD's "no hotels" policy likely violates other of these

[22] Of course entering into such an agreement is not an "undue burden"; it is merely an administrative task. And, notably, DHCD conceded that several motels within a reasonable range of Greater Boston whose services DHCD previously stopped using are willing to participate in the EA program again. RA 349.

provisions.

As the Superior Court found, "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." Add. 10. DHCD does not and cannot rebut the conclusion that Plaintiffs have a likelihood of success that the Order is consistent with the mandates of 28 C.F.R. § 35.130(b)(1) and (4).

With respect to the provision of an aid, benefit or service to a qualified individual, under (b)(1), a public entity may not:

> (i) "[d]eny … the opportunity to participate in or benefit from" the program;
> (ii) "[a]fford … an opportunity to participate in or benefit from" the program that is not equal to that afforded others, or
> iii) provide a 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.

28 C.F.R. §§ 35.130(b)(1)(i)– (iii)(emphasis added).

A blanket policy – like DHCD's "no hotels" policy – which impairs the ability of disabled individuals to benefit from the program violates all three provisions. See Tugg v. Towey, 864 F. Supp. at 1211 (refusal to provide therapists that are fluent in sign language violates all three parts of (b)(1)); Allah v.

Goord, 405 F. Supp. 2d 265, 280 (S.D.N.Y. 2005) (one not wholly precluded from using a service but "at risk of incurring serious injuries" whenever "he attempts to take advantage of" it, "surely [] is being denied the benefits of this service"); Alvey v. Gualtieri, 2016 WL 6582897, at *10 (M.D. Fla. Nov. 7, 2016) (emergency housing service must provide disabled individual a "reasonable accommodation that would be as effective in affording . . . a safe sleeping arrangement as provided to other residents").

Title II also prevents public entities from making site selection decisions that have the "effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(4)(ii). DHCD's "no hotels" policy is a site selection decision that is impairing the objective of the program for many families with disabilities.[23]

Where an agency's systemic policies impair access to quality services for persons with disabilities, they are discriminatory under these provisions. See Poole v. Hous. Auth. for the Town of Vinton, 202 F. Supp. 3d 617, 626 (W.D. La. 2016) (lease provision

[23] DHCD is simply wrong (Br.38 n.4) that plaintiffs did not rely on the siting regulation in the proceedings below. RA 15-16, 482, 815-16.

that did not permit caretakers to reside in public housing substantially impaired objectives of housing program); Indep. Living Res. Ctr., Inc. v. City of Wichita, Kansas, 2002 WL 539037, at *4 (D. Kan. Mar. 15, 2002) (refusal to enforce statutory requirements of disabled parking program substantially impaired purpose of program and could be enjoined); see also Van Velzor, 43 F.Supp.3d at 752 ("In other words, a public entity cannot actively undercut the ability of a public program to benefit those with disabilities").

As the record shows and the Superior Court recognized, DHCD's "no hotels" policy has a particularly harmful effect on persons with disabilities.[24] The insufficiency of placements with necessary features such as stair-free access, non-congregate form, or proximity to medical providers and other supports in families' home communities denies disabled individuals the ability to participate in the EA program in a meaningful way and does not afford them ability to participate in the program on an equal basis or in an equally effective manner.[25] As the court

[24] The strong evidence of harm to actual class members in this case is another basis of distinction with Williams, 414 Mass. at 558 (plaintiffs did not show that any individual's placement was not appropriate). See also note 12 supra.

[25] For instance, R.F. could not effectively engage in housing search services because of how much time she and her children were spending commuting long distances to work and school and her resulting

below properly found, Plaintiffs have a likelihood of success under (b)(1) and (4) of the ADA regulations.

DHCD's reliance on a single in-house study purporting to show that at one point in time in 2017 there were no more families placed more than 20 miles from their home communities than there were at another point in time in 2013 is irrelevant to the issue of whether its policy violates ADA rights. This single-point-in-time analysis does not even address the distances for individuals with disabilities, despite the fact that, as the Superior Court recognized, "[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 non-disabled recipients." Add. 10. And DHCD's data do not even speak to what percentages of families at the two single points in time were in types of shelter placements that were inconsistent with their approved ADA accommodations.

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migraines. RA 457-60. See McGarry v. Dir., Dep't of Revenue, 7 F. Supp. 2d 1022 (W.D. Mo. 1998) (offering only disabled license plates, and not windshield placards, did not afford equally effective services because disabled individuals who do not own a car cannot use the program and car rental was made more difficult); Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994) (closure of recreational facilities was a failure to "provide equal opportunity for persons with disabilities to receive comparable benefits").

II. THE SUPERIOR COURT PROPERLY AND CAREFULLY ANALYZED AND WEIGHED THE COMPETING HARMS, AS WELL AS THE PUBLIC INTEREST.

A court considering a motion for preliminary injunction must consider the risk of irreparable harm, defined as "harm that would not be addressed by final relief." GTE Products Corp. v. Stewart, 414 Mass. 721, 724 (1993). The court weighs each party's risk of irreparable harm "in light of [its] chance of success on the merits"; "the goal is to minimize the risk of irreparable harm." Packaging Indus. Group, 380 Mass. at 617 n.12. Where the requested relief would enjoin government action, the court also weighs whether granting the motion would adversely affect the public interest. Tri-Nel Mgmt., 433 Mass. at 219. Here, the Superior Court correctly held that Plaintiffs had satisfied each of these prerequisites.

A. The Record Clearly Shows Irreparable Harm to Plaintiffs with Disabilities as a Result of DHCD's "No Hotels" Policy.

The record is replete with examples of families who are suffering because DHCD does not have enough contracted shelter spaces to fulfill their approved ADA accommodation requests with regard to type and/or location of shelter. The harm suffered by such families has daily impacts and cannot await a final ruling on the merits of this case.

The members of the Plaintiff class impacted by the preliminary injunction, and by the stay thereof,

are parents and children experiencing not only the anguish of homelessness but also the daily suffering of disabilities that have been recognized but not yet accommodated. Affiants have described the extreme physical, emotional, and financial hardships suffered by themselves and their children as they struggled to maintain access to their medical providers, schools, jobs, and community supports throughout months of placement in medically inappropriate shelters. EA participant N.S., terrified for the safety of her ten-year-old daughter after a mental health crisis requiring emergency medical treatment, opted to leave the EA shelter system temporarily to sleep on the floor of her sister's small one-bedroom apartment – a situation that she judged to be safer and more adequate to her children's health needs than the distant shelter placement that made it nearly impossible for the family to access their medical providers and community supports on which they rely.

DHCD asserts that its policy of not placing families in hotels "has benefited all families through better quality of placement options." Br. 37. This simply is not true. Families who received transfers to hotels based on orders from the Superior Court, after enduring months in shelter placements that did not accommodate their disabilities, attest repeatedly that the hotel placements were better for their families.

RA 447-56. Their affidavits demonstrate the harm visited upon similarly situated families every day that they are forced to wait in ADA-noncompliant placements - or even to take Temporary Emergency Shelter Interruptions (TESIs), including into overcrowded and precarious double-up situations, due solely to DHCD's failure or refusal to provide them with shelter placements that meets their urgent disability-related needs.

B. The Balance of Harms Greatly Favors the Plaintiffs.

In cases where destitute and/or disabled litigants seek preliminary injunctive relief against government action or inaction and have a likelihood of success, courts often hold that the risk of irreparable harm to the plaintiffs exceeds harm to the agency.[26] This is particularly true where the harms

[26] See, e.g., Smith, 431 Mass. at 652 (upholding injunction reinstating subsistence-level benefits to extremely low-income families with children and noting that "time presses sharply on a family with children struggling against destitution"); Sak v. City of Aurelia, Iowa, 832 F.Supp. 2d 1026, 1045-46 (N.D. Iowa 2011) (granting preliminary injunction to disabled plaintiff whose part-pit bull service dog was barred from plaintiff's city of residence by anti-pit bull ordinance, holding that "the balance of the weak or illusory injury to public health and safety, if the Ordinance is suspended or modified as to [plaintiff], against the very real threat of irreparable injury to [plaintiff], if [the dog] continues to be excluded from the City and, consequently, cannot provide necessary services to [plaintiff], is unequivocally in

claimed by the government are speculative or vague, contrasted with concrete immediate harms shown by plaintiffs. See, e.g., M.R. v. Dreyfus, 697 F.3d 706, 737 (9th Cir. 2012) (overturning denial of preliminary injunction in which plaintiffs had sought to enjoin state agency from implementing new regulation reducing in-home personal services care for disabled Medicaid beneficiaries; rejecting "diffuse and nonspecific hardships asserted by the state" when weighed against concrete harms to plaintiffs). In contrast to the very real and immediate harms facing class members, the harms raised by DHCD "rest [ ] in speculation." Com. v. Suffolk County, 383 Mass. 286, 289 (1981). Add. 35.

Even if DHCD's projected maximum cost of complying with the Order for FY 2018 were correct – and, as described below, there is no credible evidence on which to base such a finding – that would not constitute irreparable harm. For one thing, as discussed above, supra at 38, expenditure of funds to meet statutory obligations is not cognizable harm. For another, DHCD claimed that compliance with the Order for FY 2018 would cost $6,563,700. RA 403 (Second Maddox Aff. at ¶ 16). Yet, DHCD acknowledged that $24,430,192 of the FY 2018 appropriation for the

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favor of preliminary injunctive relief"); Camacho v. Texas Workforce Comm'n, 326 F. Supp. 2d 724, 802 (W.D. Tex. 2004)(harm to plaintiffs from cutoff of Medicaid benefits outweighed state's desire for savings).

EA program remained uncommitted at that time. RA 402 (Second Maddox Aff. at ¶ 13). DHCD thus had adequate funding to comply with the Order even assuming its estimates were reliable.

Moreover, DHCD's calculation of the cost of compliance with the Order was based on numerous flawed assumptions. First, DHCD presented an estimate of 187 families "that would potentially require transfer" to a motel under the Order, and assumes this figure will remain constant for the balance of FY 2018 and all of FY 2019. RA 403 (Second Maddox Aff. at ¶ 18). DHCD's record evidence failed to indicate how many families in this group could appropriately be accommodated in a hotel; and as shown in the record, many families cannot be. RA 961.[27]

Second, and perhaps most importantly, DHCD assumed that the estimated expenditures would not be offset by savings in other areas. RA 403 (Second Maddox Aff. at ¶ 16) (projected expenditure on motels for FY 2018 and FY 2019 "would represent an

[27] DHCD also assumes with no supporting evidence that this inflated estimate of the number of families who might be eligible for a transfer under the Order would remain at this level for the balance of FY 2018 (270 days) and all of FY 2019 (365 days). RA 404 (Second Maddox Aff. at ¶ 21). There is absolutely no basis for this assumption. If, as it argues, DHCD has plenty of non-hotel units available, then any hotel stays will be of short duration.

incremental, increased expense that DHCD has not currently projected or budgeted for in its financial planning"). DHCD, however, acknowledges that it can take steps to offset the cost of any motel placements. Id. See also RA 368 (Affidavit of Jane Banks, ¶ 19) ("I further understand from DHCD staff, that DHCD could alternatively seek to renegotiate or terminate existing contracts with service providers, to reduce contracted shelter beds in other parts of the state to compensate for increased motel expenditures"). While these steps may not be DHCD's preference, they can be taken in order to speed the accommodation of homeless parents and children who are currently in shelter placements that do not accommodate their disabilities. DHCD makes nebulous claims that any such reallocation of funds may "disrupt scale economies" that "enhance[] service levels and qualities" at larger EA providers, but offers no concrete examples of services that will be curtailed if the preliminary injunction stands. DHCD Br. 46.[28]

In addition, the Superior Court correctly found no evidence in the record that hotel placements are more expensive than other forms of EA placement. In

[28] DHCD, perhaps understandably, seems concerned about the impact of the Order on its contracted providers. But G.L. c. 23B, §30(A) requires DHCD to administer the program "in the best interest of needy recipients" – not the EA providers.

fact, the evidence shows that they are not, RA 623, and DHCD admits that congregate shelters are the most expensive form of shelter placement. RA 254.[29]

Finally, DHCD's claim that the Order will significantly impact its administration of the EA Program simply does not match reality. In the six weeks between the entry of the Order and the Superior Court's denial of DHCD's Motion for Reconsideration, the number of families in hotels remained nearly constant at below 50. Add. 35-36. Hence, no harm to DHCD comes close to outweighing the harm to Plaintiffs that the Order alleviates.[30]

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[29] DHCD's financial impact claim also fails to account for related expenditures throughout the state budget necessitated by distant or otherwise inappropriate placements, including costs shouldered by the Commonwealth to support transportation services for homeless families both to school and to important medical services, e.g. St. 2017, c. 47, § 2, item 7035-0008 (appropriating $8,099,500 in FY 2018 to transport homeless students to their schools of origin); item 4513-1020 (transportation to early intervention); 4000-0102 (transportation for human services clients); and 103 CMR 407 (MassHealth transportation), and MassHealth costs associated with increased need for emergency medical services due to medical crises precipitated by shelter placements that do not accommodate disability-related needs, such as the mental health crisis experienced by the 10-year-old daughter of N.S. RA 49, 609.

[30] To the extent that DHCD is worried about criticism for the targeted use of hotels required by the Order, Br. 13, early signs are reassuring. See "A Reasonable Exception for the Homeless," Boston Globe (September 17, 2017) available at https://www.bostonglobe.com/opinion/editorials/2017/09/17/reasonable-exception-for-homeless/mqr4rVL5zSkaXG5J8XOunI/story.html.

C. The Preliminary Injunction Serves the Public Interest.

The preliminary injunction is in the public interest. The United States Congress, in enacting the ADA, expressly found that

> individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing . . . practices . . .; the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation . . . for such individuals; and the continuing existence of unfair and unnecessary discrimination . . . denies people with disabilities the opportunity to . . . pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses . . . .

42 U.S.C. §§ 12101(a)(5),(7)-(8). Thus, Congress has determined that the elimination of discrimination against individuals with disabilities, including a mandate for reasonable accommodations and modifications, is in the national public interest.

Similarly, the Commonwealth has enshrined in our Constitution a guarantee against discrimination on the basis of disabilities. See Amendment Article 114 and note 10 supra. The Legislature annually reaffirms this commitment by instructing agencies to spend appropriated funds with the needs of persons with disabilities in mind. St. 2017, c. 47, § 1. And the Legislature has mandated that DHCD "administer the

[EA] program in a fair, just and equitable manner." G.L. c. 23B, § 30. Requiring homeless children and parents to spend months in shelter placements that do not accommodate their disabilities, when those disabilities could be accommodated on at least an interim basis by a transfer to a hotel placement, certainly does not satisfy the Legislature's requirement of "fair, just and equitable" administration of the EA shelter system.

Furthermore, the evidence shows that relief afforded by the preliminary injunction imposes no hardship on other families in the EA system, and DHCD provided no evidence that it does.

Lastly, the Order does not grant final relief. DHCD Br. 49-50. This case is about much more than the reasonable and limited use of hotels to meet the needs of families with disabilities. Plaintiffs seek declaratory and injunctive relief that DHCD wrongly denies EA to eligible needy families in part because it does not have enough shelter placements, systematically fails to honor the placement provisos in the Line Item, and fails in fundamental ways to administer the EA program consistently with the law. The Order does not grant final relief on any of Plaintiffs' claims.

Conclusion

For the foregoing reasons, the Superior Court's Order should be affirmed and the stay of the Order should be lifted.

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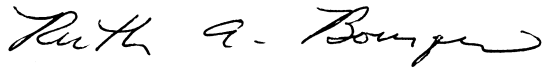
Mass. R. A. P. 16(k) Certification

I, Ruth A. Bourquin, hereby certify that the foregoing brief complies with the rules of court that apply to the filing of appellate briefs, including Rules 16 and 20, subject to the motion for leave to file a brief slightly in excess of the generally applicable 50-page limit.



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Addenda to Appellees' Brief

[1]This Further Order was omitted from the RA; the Initial Order is at RA 959.