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 SUPERIOR COURT FOR SUFFOLK COUNTY

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

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Introduction

The Superior Court has ordered that DHCD "must" place families in motels if DHCD cannot immediately satisfy the families' approved disability-related accommodation requests. Plaintiffs attempt to minimize the broad scope of this directive by claiming that it merely requires that DHCD "consider" motels as an available placement. Br. 3, 29. However, the lower court's decision, and its prior orders requiring motel placement in individual cases, belie plaintiffs' effort to minimize the impact of this agency-wide order.

The injunction incorrectly presumes in every case both that the current shelter placement is unreasonable, and that a motel is a reasonable accommodation. This broad-brush command ignores the inherent unsuitability of motels as shelter, and the resulting need for a case-by-case inquiry. Thus, there is no attempt to discern either the particular nature of the disabilities of each DHCD client affected, the impact of confinement in a motel on the client's family members, the multiple factors involved in prioritizing a transfer, or the repercussions of re-

prioritizing (downward) transfers of other families in the EA shelter system.

Given the department's bad experience with motels, and the language in 2017 Stat. c. 47, § 2, item 7004-0101, the department properly construed the line item as limiting the use of motels, with rare exceptions, to situations where contracted shelter space is not available. Plaintiffs' ADA arguments ignore this fundamental limitation regarding motels that the Legislature has placed on EA programs. And, more broadly, plaintiffs fail to acknowledge that the line item should be interpreted to fulfill its requirement to provide appropriate shelter, not just to those represented by the plaintiffs, but to every eligible family, within the constraints of the appropriation. See Peterborough Oil Co., LLC v. Dep't of Envtl. Prot., 474 Mass. 443, 449 (2016).

After a concerted effort by DHCD to improve the quality and availability of family shelter by reducing reliance on motels, implementing the preliminary injunction would be a major step backwards. And even if DHCD were to find sufficient motel space to comply with the order, the need to comply with the terms of the appropriation would require a counterproductive

reduction in contracted family shelter units, and thereby in total system capacity. For these and additional reasons set out below, the preliminary injunction rests upon fundamental errors of law and is contrary to the public interest, and should be vacated by this Court.

Argument

I. DHCD properly limited the use of motels, because they are not appropriate shelter for homeless families.

In requiring the department to fulfill accommodation requests by placing families in motels, the Superior Court failed to determine in each individual case whether a motel was a reasonable accommodation for that family, taking into account all the specific circumstances. This omission is contrary to the ADA's requirement of individualized assessment of reasonable accommodations. Staron v. McDonalds Corp., 51 F.3d 353, 356 (2d. Cir. 1995) ("fact-specific, case-by-case inquiries" required). The court also ignored the evidence of how this relief will adversely affect the public interest. Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004) (when a party seeks "to enjoin governmental action, the [Court] must also consider whether the grant of an

injunction would adversely affect the public interest"). The focus in plaintiffs' brief on the evidence of several families' disability-related difficulties due to their shelter locations omits the countervailing benefits of the move away from motels - factual material that is essential to understanding the governing statute and the department's policy choices in carrying out the Legislature's directives, and was erroneously ignored by the Superior Court in granting the preliminary injunction. See Comm. v. Mass. CRINC, 392 Mass. 79, 89 (1984)(court must find that "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public").

Motels are not suitable shelter for homeless families, including those with one or more persons with disabilities. DHCD's practice to avoid using motels whenever possible is the culmination of many years' effort to improve the EA shelter system by minimizing this unsatisfactory alternative.

Several years ago, when the Commonwealth's motel use was at its height, families suffered greatly when in them. Anecdotes of that suffering are many and moving. For example, one mother described sheltering

in a motel by saying: "I know it's better than being on the streets. I know that . . . [b]ut, it's still unsafe for children. There are gang fights. People are selling drugs. I feel uncomfortable here and I don't want to raise my children in these hallways."[1] Another mother was sheltered in a motel for eight months "in a cramped second-floor room with her husband and two children, a disabled 1-year-old daughter and a 2-month-old son," with playpens wedged at the side of the bed, and with "[her] infant lying listlessly on his parents' bed for many hours throughout the day because there [was] essentially nowhere for his mother to take him except for occasional walks in a stroller around the parking lot alongside Route 5 and the exit ramp from Interstate 91."[2] According to another mother, who spent several months in a motel with her 5-year-old daughter, no one at the motel helped her, but after she was transferred to a shelter, she got "lots of help, including guidance on how to become self-

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[1] Stephanie Barry, "Homeless families still in hotels," The Republican (Springfield, MA) (Nov. 27, 2011).

[2] Id.

sufficient."[3] Yet another family fleeing domestic violence was sheltered in a motel, only to find themselves "[f]or the next seven months . . . crammed into that one room - along with 60 to 80 homeless families [in other rooms] who lived with little more than two beds, a microwave, and a dresser . . .."[4]

That said, this case should not be about dueling anecdotes. It, instead, should be about whether the ADA or state law positively precludes DHCD from largely eliminating motels and all their ills in configuring a statewide system to best serve the thousands of families confronting homelessness on any given night in Massachusetts - including families with persons with disabilities. To that end, the Superior Court erred when it held that plaintiffs are likely to prevail on those questions and that the public interest favors a preliminary injunction while these questions are litigated - and, in so holding, ignored the evidence supporting DHCD's determination to use family shelters over motels. See Student No. 9, supra.

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[3] Nancy Gonter, "Study of homeless faults motel option," The Republican (Springfield, MA) (May 21, 2010).

[4] Tom Relihan, "She Can Do It!", The Recorder (Greenfield, MA) (Oct. 8, 2016).

Family shelters provide fixed, always-available resources to DHCD and its clients that include proper space and common facilities (including kitchens and food storage), adequate security, and dedicated service provider staff to support these families in crisis. RA 253-254. Motels, on the other hand, make for poor shelter that caused many serious problems when rapid increases in the number of homeless families necessitated their use. RA 340. Those recurring problems included prostitution and drug use, conflicts between motel staff and families, and deficient recreational space for children, with only a few hundred square feet of motel room as their living space. RA 340-41. DHCD tried to address these issues by paying for security at certain motels, coordinating for a local police presence at one, and hiring dedicated motel inspectors, but those efforts did little. RA 341.

And it is not just DHCD staff's experience that substantiates these problems. Independent research drives these points home as well. For example, researchers from Simmons College conducted a study of women in EA shelter program motels in Western

Massachusetts in 2013 and 2014.[5] Their findings are remarkably similar to DHCD's own experience. Living in EA motels is "profoundly difficult," with women frequently reporting that it was difficult to provide nutritious food to their children; that they constantly felt in "limbo" waiting for shelter placements; that living in motels was lonely and isolating, even more so than in shelters because they didn't want to be identified as homeless and therefore be different than other motel guests; and that they frequently encountered difficulties with motel staff. A study published in 2017, also specific to Massachusetts' EA shelter program, adduced more data similarly showing that families in motels, as compared to other types of shelter, more frequently identified problems "with respect to understanding rules/expectations; knowing who to contact if help is needed; and perceiving that their families' needs were

[5] Kristie A. Thomas & Marvin So, "Lost in Limbo: An Exploratory Study of Homeless Mothers' Experiences and Needs at Emergency Assistance Hotels," Families in Society: The Journal of Contemporary Social Services, vol. 92, no. 2 (2016).

being met."[6] "Not surprisingly, hotel/motel residents reported the lowest satisfaction with services."[7]

Given these long-acknowledged problems associated with motel use,[8] it is unsurprising that in all the cases cited by the plaintiffs, no medical professional recommended motels as a preferable option to the family's current placement. See, e.g. RA 565, 601.

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[6] DeCandia, C.J., So, M., Hayes, L., "Family Experiences of Homelessness in Massachusetts: The Case for Family-Centered Care," Homes for Families, Boston, MA (2017).

[7] Id.

[8] The Court may consider the foregoing factual materials because they go to matters of legislative fact, rather than adjudicative fact. As the First Circuit has explained, "'[a]djudicative facts are simply the facts of the particular case[,] . . . [while l]egislative facts . . . are those which have relevance to legal reasoning and the lawmaking process,'" such as "fact[s] useful in formulating common law policy or interpreting a statute." U.S. v. Bello, 194 F.3d 18, 22-23 (1st Cir. 1999) (quoting Fed. R. Evid. 201, Advisory Comm. note); accord Comm. v. Hilaire, 92 Mass. App. Ct. 784, 789 n.5 (2018). See Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d at 7 (legislative facts are "normally noticed by courts with the assistance of briefs, records and common knowledge"). This Court itself "ha[s] considered scientific studies that were not before a lower court judge to further [its] understanding of the social science underlying a legal ruling." Comm. v. Camblin, 478 Mass. 469, 479 (2017) (therefore "see[ing] no reason to ignore the peer-reviewed articles submitted" on appeal); accord Rafferty v. Merck & Co., Inc., 479 Mass. 141, 152-54 (2018) (citing facts in social-science research articles when formulating common-law negligence rule).

The data also shows that eliminating motels has not made shelters less geographically accessible (in fact, in Boston, it reduced the distance from communities of origin). RA 380-382. It is therefore no solution to move persons with disabilities into motels to try to better accommodate the disabilities on a transitory interim basis, because doing so exposes their families to all of motels' manifest problems of space, conditions, security, and isolation.

What's more, the data show that any form of "interim" transfer from contracted shelter to a motel is likely to lengthen a family's overall length-of-stay in shelter. DHCD's analysis of lengths of stay generally during FY15 and FY16 showed that families staying in contracted shelter exited the system, on average, in 246 days, while families placed in motels exited, on average, in 321 days. RA 382-383. The comparison is even starker when comparing the 321 days with average stays in congregate shelters (195 days) and co-shelters (158 days). Id.

Notwithstanding all this record evidence supporting DHCD's policy choice, guided by the governing statutory language, to use motels only as a last resort where no other option is available, the

Superior Court failed to take into account all the problems caused by motels and instead ordered motel use in a broad array of circumstances: any time DHCD provisionally approves an accommodation when "administratively feasible," even when that provisional approval does not itself include or even contemplate transfer to a motel. See RA 998. As discussed further in Section III, nothing in the ADA authorizes such sweeping action to undo the State's experience - and research-supported decisions - about the proper way to shelter homeless families, including those with persons with disabilities.

II. Implementation of the Superior Court's order will fundamentally alter the EA shelter program and cause undue hardship.

Implementation of the court's preliminary injunction will substantially increase the financial burdens of the EA program and fundamentally alter its program by forcing DHCD to use motels rather than maximizing use of superior, contracted-for family shelter. See DHCD Brief 47-49.

As set forth in DHCD's principal brief (Br. 44-45), the annualized cost of motels as ordered by the Superior Court may exceed $8 million. RA 403-405. But just as in previous years, DHCD's original

appropriation for FY18 was inadequate to cover program needs.[9] Because of this shortfall, ordering the use of already insufficient funds for unbudgeted motels becomes a less-than-zero-sum game. Since funds used for motels would be unavailable for contracted family shelter, the diversion of these funds would require a decrease in these preferred shelter units in the short term, and may cause providers to cease participation in future long-term contracts for them. RA 405.

Yet the Superior Court did not consider the cost of its preliminary order to all the families who do not receive the "benefit" of transfer to a motel. This is a necessary predicate to determining whether an accommodation is reasonable. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400-01 (2002) (recognizing the

[9] A supplemental budget that passed in the House and is pending in the Senate may provide much-needed funding. See Bill H.4382. Contrary to the suggestion of the plaintiffs (Br. 47-48), however, the mere fact that DHCD set aside $24,430,192 to extend provider contracts for part of the remaining fiscal year, does not mean that DHCD has a current surplus to spend on motels. The opposite is true, since even the set-aside was not enough to cover basic shelter costs for the rest of the fiscal year. RA 402. See, Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 856 (2004) (agency cannot rely upon expected supplemental monies given in previous years when providing benefits in current year).

effects on others must be considered when evaluating accommodation). Here, the Superior Court focused solely on the beneficiaries of the injunction.[10]

Implementing the order would indeed fundamentally alter the EA system as set by the General Court. See DHCD Br. 47-49. The line item continues to limit the expenditure of EA funds for motels to circumstances where there is "unavailability of contracted shelter beds." 2017 Stat. c. 47, § 2, item 7004-0101. At the same time, the line item explicitly promotes an increase in the use of congregate shelters, not motels: "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." Id. These provisos reflect the Legislature's recognition that congregate housing is the optimal form of family shelter, as evident in the studies and statistics described above. Indeed, the focus on expansion of congregate shelter has been a part of the

[10] Plaintiffs' assertion that the expenditure of funds is not an irreparable harm where it meets a statutory obligation, see Br. 38, confuses a preliminary injunction factor with the specific balancing test required by the ADA as described in U.S. Airways, Inc., supra.

line item since hotel use was at its peak. The absence of any change in the proviso as DHCD reduced the use of hotels is further substantiation of DHCD's interpretation of the line item. See Student No. 9 v. Board of Ed., 440 Mass. 752, 766 (2004) (Legislature's approval of agency policy manifested by annual renewal of budget line item provision).

For this reason, too, Plaintiffs' assertion that DHCD was required to provide notice to the Legislature of its reduction in the use of motels is baseless. See Br. 25-26. Not only would increasing motels lead to a decrease in benefits for homeless families overall, but it would also be contrary to the Legislature's explicit directive to shift resources to "congregate units". As a result, an increase in the use of motels, other than for overflow, would be a fundamental alteration of the program. See PGA Tour v. Martin, 523 U.S. 661, 682-683 (2000).

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

DHCD recognizes and goes to great lengths to accommodate the shelter needs of persons with disabilities. Families are informed of their right to request a reasonable accommodation on the basis of disability, and that information is accompanied by an

offer of translation services. RA 297-300. Forms completed for all families include sections listing "ADA Factors Affecting Placement" and "Factors Affecting Placement Location." RA 304. As a result of this outreach, on average, seven new disability-related accommodation requests are made each day, RA 396, which the ADA Coordinator for the EA program evaluates from the time of initial placement. RA 290. Approved requests are implemented as soon as possible, taking into account the availability of placements and the level of need compared to other participants. Id. All ADA requests are tracked on a spreadsheet recording the family size, number of household members with a disability, diagnoses and/or disability, current placement, and desired placement. Id.

Many of the families who are the subject of the order have in fact had a number of their accommodation requests satisfied - for example, physical accommodations enabling wheelchair access, or grab bars, or placement in a particular type of unit or location. RA 397. Families also receive other accommodations, such as waivers or modifications of DHCD rules, allowance of a service animal, or rescission of a disciplinary decision. Id. None of

these individualized measures are taken into account by the order.

Nor does DHCD discriminate in the siting of its services. In conformance with G.L. c. 23B, § 30, DHCD has located its contracted shelter space in "locations that are geographically convenient to families who are homeless . . . ." Plaintiffs' claim that DHCD provides shelter "with no regard for location, the needs of persons with disabilities, or the type of shelter," Br. 27, is belied by the geographical diversity and unit mix of contracted shelter (RA 253), as well as by its efforts to reasonably accommodate the needs of persons with disabilities within the system.

A persistent flaw in plaintiffs' ADA argument is their failure to acknowledge the scope of the actual service provided by the EA program: emergency shelter for families. See G.L. c. 23B, § 30; Van Velzor *v.* City of Burleson, 43 F. Supp. 3d 746 (N.D. Tex. 2014) ("Before 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."). While there is no doubt that the plaintiffs (as well as other EA program clients) may encounter difficulties in traveling to their preferred medical providers, such

transportation is simply not a service undertaken by the EA program.[11] (Indeed, in the current housing market, many economically vulnerable families who are not homeless are nevertheless forced to relocate far from their home community, employer, and medical provider.) As for the service that is undertaken (emergency shelter), the order actually confirms, by its terms, that all families seeking a transfer are currently receiving EA-funded shelter. They thus are not being deprived of the core program benefit, and DHCD is not required to reconfigure its program to provide a different benefit. See Jones v. City of Monroe, 341 F.3d 474, 480-481 (6th Cir. 2003) (where free parking was provided in specific city-owned lots,

[11] Plaintiffs' erroneous reasoning is exemplified by their reliance upon cases such as Allah v. Goord, 405 F. Supp. 2d 265 (S.D.N.Y. 2005), in which the plaintiff was injured while being unsafely transported in a wheelchair-accessible vehicle from prison to a medical facility. In its ADA analysis, the court focused upon the scope of the service - access to medical care, based upon a contract between the Department of Correctional Services and a hospital. Id. at 270 & 280. Unlike a prison, which necessarily must provide a variety of services to incarcerated persons with disabilities, including medical care and transportation thereto when needed, such services are not part of the scope of DHCD's sole service: providing shelter. Other state entities, for example the MBTA and MassHealth, are responsible for providing services such as transportation and medical care to qualifying persons with disabilities.

city not required by ADA to provide free parking for a person with multiple sclerosis at a different location close to individual's employer). See also 28 C.F.R. § 35.130(b)(1) (focusing upon access to the actual service being offered by the program). Indeed, plaintiffs have failed to cite any case that supports the proposition that the ADA requires a public agency to offer an additional benefit to a client with a disability to facilitate access to a service or benefit that is not provided by the agency's own program.

Moreover, plaintiffs' arguments conflate (1) the overall needs and hardships faced by a person with disabilities with (2) the ADA's requirement that the EA program make its core service - actual shelter - available to all eligible families, including those with persons with disabilities. See, e.g. Br. 44-45. DHCD does provide shelter for all eligible families, starting on the day a person applies. RA 391-392. But, given its budgetary constraints and narrowly-tailored role, DHCD simply cannot provide services beyond the program's scope - however much those services may be needed by a homeless person, with or without disabilities.

Every eligible family that has a person with a disability is thus provided the same access to shelter as other clients. This is not a case, then, where a state is segregating persons with disabilities; to the contrary, DHCD works to keep such persons in congregate and scattered-site housing where they will have the same access to services as persons without disabilities. Cf. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604 (1999). Nor does DHCD place persons with disabilities in housing to which they do not have actual access, such as a person with a wheelchair needing to climb stairs, or the like. And DHCD's commendable system of prioritizing transfers of families with disability-related requests for a more convenient location when such placements become available does not mean that the initial placement is thereby unsuitable or discriminatory under the ADA. In short, and to paraphrase the Supreme Court, "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the [provision of emergency shelter for] a large and diverse population ..." Olmstead, supra; cf. Care and Protection of Isaac, 419 Mass. 602, 610-611 (1995) ("[t]he Legislature, having charged the department

with administering a highly complex social services program within the constraints of a finite annual appropriation, could not have intended that every individual placement decision of the department be subject to de novo judicial review"). DHCD complies with the ADA by providing meaningful shelter for all families every single day they are eligible, and providing transfers as a reasonable accommodation on a space-available basis.

Conclusion

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

Respectfully submitted,
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Mass. R. A. P. 16(k) Certification

I, Samuel Furgang, 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.

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