Defending the Right to Shelter:

Coalition for the Homeless' Brief in *Callahan v. Carey* Responding to the Bloomberg Administration's Appeal of a February 2000 Court Ruling Affirming the Right to Shelter

Following are excerpts from the January 8, 2003, brief submitted by Coalition for the Homeless in Callahan v. Carey *(the original right-to-shelter litigation brought by the Coalition and settled as a consent decree in 1981). The brief responds to the Bloomberg Administration's appeal of a February 2000 ruling by New York State Supreme Court Justice Stanley Sklar which affirmed the right to shelter, and which blocked a Giuliani Administration plan to eject homeless men and women from shelters to the streets for 30 days or more for failure to comply with shelter social service rules. Oral arguments in the State Supreme Court's Appellate Division are scheduled for February 28, 2003.*

New York Supreme Court
Appellate Division, First Department

ROBERT CALLAHAN, CLAYTON W. FOX, THOMAS DAMIAN ROIG, on their own behalves and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-against-

HUGH L. CAREY, as Governor of the State of New York, JAMES A. PREVOST, as New York Commissioner of Mental Health, JOHN R. DeLUCA, as Director of the New York Office of Alcoholism and Substance Abuse, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, EDWARD I. KOCH, as Mayor of the City of New York, STANLEY BREZENOFF, as Commissioner of the New York City Human Resources Administration, JUNE J. CHRISTMAS, as Commissioner of the New York City Department of Mental Health, Mental Retardation and Alcoholism Services, and CALVIN REID, as Director of the Shelter Care Center for Men,

Defendants-Appellants.

BRIEF OF PLAINTIFFS-RESPONDENTS

PRELIMINARY STATEMENT

On their appeal to this Court, the City and State defendants do not dispute that in a 1981 Consent Decree they agreed to:

> provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental, or social dysfunction is in need of temporary shelter.

R. 432-33.[1]

While the State defendants question the "effectiveness" of this Decree requiring the provision of shelter because there are still homeless adult class members in need of shelter two decades later, State Br. at 31, the City's medical expert has attested to the fact that in the years following the Decree "treatment of homeless persons for hypothermia [frostbite] has become a relatively rare event" whereas earlier "it was routine to see homeless patients with severe and fatal hypothermia." R. 797. Indeed, Robert Callahan – the named plaintiff in this litigation – died on the streets of the City after the case was filed, but before the Consent Decree was signed mandating the provision of shelter to troubled New Yorkers like him.[2]

The current Mayor himself has recently affirmed that "none of us want to see people on the street. Society can do better. . .."[3] Nevertheless, the City and State defendants are asking this Court to let them back out of their agreement in the Consent Decree to provide shelter to protect homeless men and women like Robert Callahan from death and injury on the streets of the City.[4] The City and State base their request to change the Decree on the State defendants' issuance of an administrative rule that authorizes the denial of shelter to homeless adult class members who fail to comply with social service plans or public assistance rules, although they either meet the need standard for public assistance – whether or not they are otherwise eligible for benefits – or are homeless by reason of physical, mental, or social dysfunction, the sole eligibility criteria in the Decree. The denial of shelter sought by the defendants is for a period ranging from a 30-day minimum to as long as 180 days. R. 25-27, 942, 1211.

---

[1]Citations to "R. __" and "Suppl. R. __" are to the Record and the Supplemental Record on Appeal. Citations to "City Br. at __" and "State Br. at __" are to the defendants' briefs.

[2]See Robin Herman, "Pact Requires City To Shelter Homeless Men," N.Y. Times, August 27, 1981, at A1.

[3] See Michael Cooper "Bloomberg Says He Does Not Think Homeless Population Has Risen," N.Y. Times, October 14, 2002, at B3.

[4]In Eldredge v. Koch, 98 A.D. 675 (1st Dep't 1983), this Court extended the right to shelter for homeless men set forth in the Callahan Consent Decree to homeless women.

The trial judge below who upheld the Consent Decree has been responsible for enforcing ongoing compliance with the Decree and has had first-hand, direct experience with the extensive record evidence that has been amassed on these motions, as well as in prior enforcement proceedings. The trial court record contains uncontested evidence from the actual negotiators of the Decree for the plaintiffs and the State defendants that the Decree language was drafted to provide refuge for troubled, dysfunctional homeless New Yorkers who would otherwise wander the streets of the City, R. 386-89, 531-33, 1089-91; uncontested evidence of physical injury and even death that results from the denial of shelter, R. 239-45, 262-69, 346-58, 368-84, 1094-97b, 1120-25; and extensive expert evidence supporting a factual finding by the trial court that errors in shelter denial cases are inevitable. R. 1257-58. On this chilling record, the trial court declined to let the defendants renege on their commitment to provide shelter from the elements to homeless adults because the risk of "death by exposure, death by violence, or death by sheer neglect . . . is simply too great to take." R. 1258.

In the face of this overwhelming record evidence, the City defendants have admitted before this Court that they would like to make a "significant change from the circumstances described in the record" and abandon portions of their shelter denial plan before the trial court in order to develop a new plan that is not in the record on this appeal. City Br. at 9-10. The City acknowledges that pursuant to the Court of Appeals ruling in In re Michael B., 80 N.Y.2d 299, 318 (1992), a remand may be proper because "'the record . . . is no longer sufficient' to decide what relief is proper here." City Br. at 10. Expressing confidence that the City could "create a system in which our homeless citizens can rejoin, and contribute to society . . . by means which do not endanger those very persons[,]" the trial court invited the City to submit a new plan rather than pursue this appeal. R. 1258. With the revelation before this Court that the City defendants want to reformulate their plan and essentially create a new record before this Court, a remand is a more appropriate course of action than proceeding without a developed trial court record of what the City now intends to do.

In the judicial record that is before this Court, neither the trial court nor the plaintiffs are questioning the wisdom of any social services plan that the defendants would like to select. R. 147-48, 152, 526, 1255-56. Indeed, in their Complaint, the plaintiffs sought such services for the troubled plaintiff class. Suppl. R. 102-04. But because of the Consent Decree, the defendants are not free to implement the life-threatening sanction of the denial of shelter based upon the failure to comply with such social services plans or public assistance requirements. Unlike this Court's earlier ruling in McCain v. Giuliani, 252 A.D.2d 461 (1st Dep't 1998), leave to appeal dismissed, 93 N.Y.2d 848 (1999), in which the facial validity of the State defendants' administrative rule permitting the denial of shelter to homeless families not in compliance with shelter or public assistance rules was upheld, the class of troubled homeless adults in this litigation is protected by the Consent Decree. Here, the standard of judicial review is not whether the State's administrative rule has a "rational basis" but whether it runs afoul of the Consent Decree that was designed to protect these troubled class members from exposure to the elements on the streets of the City, irrespective of compliance with social services plans or public assistance rules.

Notwithstanding the State's claims, State Br. at 29, that this Court's 1998 McCain decision was a change in law permitting modification of the Consent Decree, the City recognized that the 1998 McCain ruling is not controlling here because of the presence of the Decree. In 1999, the City defendants moved to modify the Decree to permit the denial of shelter to the very same homeless adults to whom the City and State agreed to provide shelter in the Decree. City Br. at 14. The State defendants joined in this motion. State Br. at 9. However, nothing in the extensive record before the trial court establishes any basis for modification of the Consent Decree under the standard set forth by the United States Supreme Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992). Under Rufo, it is the defendants' burden to establish a "significant" change of law or fact, and the trial court found that on this record the defendants failed to meet this heavy burden. R. 1253-55.

The defendants' argument that the enactment of work requirements as part of State and federal "welfare reform" in the 1990s constituted a "change in law" that permits a modification under the Rufo standard ignores the fact that before the 1981 Decree was signed New York State was already a national leader in the development of such "welfare reform" requirements. Indeed, the defendants' repeated citation of Barie v. Lavine, 40 N.Y.2d 565 (1976), in which the Court of Appeals upheld the denial of public assistance to a public assistance recipient who declined an offer of employment, highlights the fact that New York was ahead of its time in enacting in the early 1970s a "welfare reform" program authorizing the withholding of cash assistance for failure to comply with public assistance program rules. Indeed, even with Barie having been decided five years before the Consent Decree was signed, the parties still entered into a Decree that did not condition shelter on compliance with public assistance requirements but on merely meeting the financial "need standard" or being homeless "by reason of physical, mental, or social dysfunction."

Unlike the record before the Barie Court or this Court in the 1998 McCain appeal, the question presented here is not whether a policy of requiring homeless persons to comply with social services requirements, including public assistance "welfare reform" rules, is a "rational" policy, but whether having agreed in the Consent Decree not to condition the provision of shelter on compliance with social services plans or public assistance rules, the defendants can now disavow that agreement. The defendants attempt to side-step the plain language of the Decree, which does not require receipt of public assistance in order to receive shelter, with the new claim that shelter is public assistance. R. 122; State Br. at 4. Uncontested record evidence before the trial court, however, establishes that for years after the Consent Decree the defendants contended that homeless adults were not even eligible for public assistance let alone claiming, as they do now, that shelter itself is public assistance. R. 426-27, 478-79. The uncontested record further establishes that, in enacting the State Welfare Reform Act of 1997, the State Legislature specifically amended the New York State Social Services Law to exclude "care" such as shelter from public assistance requirements. R. 427-28, 500-17.

Although the State defendants continue to press the claim that noncompliance with public assistance rules requires shelter denials of between 30 and 180 days, the State defendants have reportedly approved a City plan that does not deny shelter because of public assistance violations. State Br. at 11, n. 2. "Welfare reform" therefore certainly cannot continue to be the basis for the defendants' claim of a change in law. City Br. at 41, 45.

The State defendants' own promulgation of the administrative rule that authorizes the denial of shelter for 30 days or more also cannot be a "change in law" under Rufo. Nothing in the United States Supreme Court's ruling countenances a defendant's own administrative action as constituting a change in law.

The defendants' claims that the Decree itself authorizes the State defendants to create a "change in law" by administrative rule-making are also unavailing. State Br. at 19-21. The Decree, by its plain language specifying who is to receive shelter, in combination with an uncontested affidavit from Barbara Blum – the State Social Services Commissioner who negotiated and agreed to the Consent Decree – attest to the fact that no provision of the Consent Decree authorizes a successor State Commissioner to gut the essential feature of the Decree, which was to guarantee shelter from the streets to homeless adults regardless of their receipt of public assistance and regardless of their physical, mental, or social dysfunction. R. 386-89.

On this record, any claims of a "change in fact" that permits a modification under Rufo are equally without merit. Before the trial court, the City admitted that even without the State defendants' new administrative rule there are already procedures in place for developing social services case plans for class members. R. 149. Indeed, on the very day of argument before the trial court, under questioning by the trial judge, the City could not cite a single instance of a class member turning down housing or refusing other services to justify modification of the Decree to permit shelter denials. R. 76-77, 79. Similarly, there is absolutely no record evidence that a long-standing, agreed-to administrative procedure permitting the short-term removal from shelter of persons who commit crimes or compromise

fire safety – whose conduct thereby infringes on the right to shelter of other class members – was not sufficient. R. 167. Indeed, the operators of the adult shelters whose staff members are on the front lines saw no need for any change in the status quo because an involuntary transfer from one shelter to another was a sufficient sanction for program rule noncompliance. R. 396-400.

Even as they argue before this Court that they should be able to disavow the Consent Decree because of the growth of the shelter system, State Br. at 30, in the record, the defendants also admit that there were actually 4,000 fewer homeless adults in the shelter system at the time of the trial court motions than there were in 1988. R. 728 (11,000 adults sheltered in 1988); State Br. at 30 (7,000 adults sheltered in 1998); R. 552. The trial court noted the "rising tide of homelessness" prior to and following entry of the Decree, R. 1235, but the State defendants have further conceded that surges in the number of homeless class members in need of shelter were a well-known fact at the time of the Decree and peaked fifteen years ago. R. 728.

The defendants' claims that increased services in shelters should constitute a "change in fact" to warrant a modification under Rufo, State Br. at 30; City Br. at 22, simply ignore the fact that the nature of the class of homeless adults has remained unchanged and these class members are every bit as much in need of shelter from the elements today as Robert Callahan was on the day he died on the streets of this City, before the 1981 Decree was signed.

Unlike various cases cited by the defendants to support a claim that case-by-case administrative reviews are the proper forum to work out "errors" in implementation of the City's plan, City Br. at 38-40, the class of homeless adults is not moving for a preliminary injunction to challenge a State administrative rule or policy. It is the defendants who are seeking to undo a long-standing Consent Decree which settled the question of the plaintiffs' right to shelter. The defendants' own unwillingness before the trial court even to acknowledge their obligation in the Decree to shelter class members who are homeless by reason of "social dysfunction," R. 731, 892, 957-58, 960, 1035, left the trial court with

no choice but to enforce the plain language of the Decree, as the Decree empowers it to do, and to hold the defendants to the agreement that they signed.

On this record, plaintiff homeless men and women who meet the "need standard" for public assistance or who are homeless "by reason of physical, mental, or social dysfunction" respectfully ask this Court to affirm the trial court's ruling upholding the Consent Decree and to remand this case to the trial court for any necessary further proceedings.

QUESTIONS PRESENTED

1. Whether the trial court that has provided ongoing supervision of enforcement proceedings in this litigation properly denied the defendants' motion to modify the Consent Decree to permit the denial of shelter to homeless men and women who meet the public assistance "need standard" or who "by reason of physical, mental, or social dysfunction" are in need of emergency shelter?

2. Whether the trial court properly found that the State defendants' administrative rule contravened the Consent Decree that requires the provision of shelter to homeless men and women who meet the public assistance "need standard" or who "by reason of physical, mental, or social dysfunction" are in need of emergency shelter?

3. On this record, whether the trial court properly exercised its authority under the Consent Decree to enjoin implementation of the City's shelter termination plan that contravened the Consent Decree because it provided for the denial of shelter to homeless men and women who meet the public assistance "need standard" or who "by reason of physical, mental, or social dysfunction" are in need of emergency shelter?

4. Whether the City's admission on this appeal that they have a new shelter plan that "is a significant change from circumstances in the record" requires a remand pursuant to In re Michael B., 80 N.Y.2d 299 (1992)?

STATEMENT OF FACTS

A. The Consent Decree

After nearly two years of litigation, the parties to the Callahan lawsuit reached a final judgement by consent in 1981. Three trial court justices were deeply involved in the litigation prior to entry of the Consent Decree. R. 526.

In December 1979, Justice Andrew Tyler issued a preliminary injunction obligating the defendants to provide shelter. Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10 (Sup. Ct. N.Y. Co. 1979). Justice Tyler's ruling specifically cited the position of the defendant State Social Services Commissioner Barbara Blum that the class is "largely composed of individuals with histories of alcohol abuse, drug abuse, mental disorder or combinations thereof. . . . [which are] chronic [conditions] and seriously preclude independent functioning." Id.; Suppl. R. 135-36. In granting the preliminary injunction requiring the provision of shelter to the class, Justice Tyler also specifically referred to record evidence and concern about loss of limbs and death by exposure on the streets. Callahan, N.Y.L.J., Dec. 11, 1979, at 10.

For the next year, Justice Israel Rubin presided over various proceedings, formal and informal, attempting to secure compliance with the preliminary injunction. In 1981, Justice Richard Wallach presided over a contempt motion, trial, and settlement negotiations.

The Complaint in this litigation had been filed against a backdrop of many homeless adults sleeping in "an array of public spaces in New York – alleys, parks and subway tunnels," sleeping on the floors of a City shelter, and "virtually every homeless person" having been rejected by the City's public assistance system. R. 527-28. The Complaint originally requested a number of remedies in addition to shelter. R. 530. For example, the Complaint, which characterized the "overwhelming majority" of the plaintiff class as suffering from mental and physical incapacities often exacerbated by alcohol and drug addictions, Suppl. R. 97-101, sought necessary services such as substance abuse treatment for members

of the plaintiff class. The Complaint also sought court involvement in the placement of shelters in community settings because of City plans to place shelters in remote locations. R. 530.

After weeks of trial testimony before Justice Wallach and immediately following the Court's comments on the record about the moving testimony of the plaintiffs' witnesses, City lawyers proposed a settlement that would include a commitment to provide shelter to all who requested it, but absolute discretion for the City over the placement of shelters. R. 530-31. The City made this settlement offer in the midst of trial because "there was widespread thought if the City were to test this we would lose."[5]

There was never any doubt that any settlement required "an unequivocal commitment to provide at least minimally decent shelter, without administrative or bureaucratic obstacles," to any class member who requested it. R. 531. The plaintiffs' counsel then drafted the provision of the Consent Decree that is at issue here:

> The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental, or social dysfunction is in need of temporary shelter.

R. 531. After "express discussion" over whether to use the word "or" between the two clauses in this provision and consultations with the City's shelter psychiatrist who rejected requiring a "recognized psychiatric diagnosis," the parties agreed to include this provision as Paragraph One of the Consent Decree. R. 531-32.

The former defendant State Commissioner Barbara Blum attested in 1999 before the trial court that in agreeing to this Paragraph One provision in the Decree,

> as the State defendant's Commissioner of the Department of Social Services it was my intent to ensure that vulnerable New Yorkers would be provided with a roof over their heads instead of being relegated to live in the public spaces of New York City. All parties to the Decree recognized the troubled nature of the plaintiff class and the need to avoid bureaucratic barriers to obtaining and remaining in safety-net shelter. Thus, the Decree merely requires class members to meet the "need standard" for public assistance

[5]See Robin Herman, "Pact Requires City To Shelter Homeless Men," N.Y. Times, August 27, 1981, at A1 (quoting the primary City official who negotiated the Decree); R. 531.

> instead of tying shelter eligibility to public assistance eligibility. Likewise, the Decree requires the provision of shelter not just to persons with physical or mental disabilities but also to persons who are homeless by reason of "social dysfunction." Again, all parties understood that such accommodations were necessary for plaintiff homeless persons because of the nature of their limitations and chronic conditions.

R. 388.

After the relatively quick agreement on Paragraph One of the Decree that is at the heart of this appeal, there were months of negotiations over qualitative standards for shelter. The defendant State Commissioner Barbara Blum and counsel for the State defendants insisted on the authority to "enforce standards providing higher standards of care than those expressed in the Decree," and a provision was included to allow the State Commissioner to do so. R. 532. The State Commissioner attested before the trial court that:

> In the Decree, I specifically reserved my right as the State Commissioner to carry out my duties under the State Social Services Law and implementing regulations and other applicable law. Callahan Consent Decree at ¶18. This provision was solely intended to ensure that the Decree established a floor and not a ceiling with respect to providing assistance to homeless New Yorkers. In early 1981, for example, as State Commissioner I had promulgated a regulation prohibiting the licensing of new shelters with a capacity of more than 200 persons. The City defendants refused to incorporate that regulation into the Decree. By insisting on the provision in ¶18, I wanted to make sure that I maintained my authority as State Commissioner to require the City defendants to do more than what the Decree required.

R. 388-89.

Ultimately, after Justice Wallach had to resolve a dispute between the City and the State regarding the overcrowding at a particular City shelter, the Mayor and Governor approved the Consent Decree. R. 527, 533.

B. The Record Evidence on the Motions Before the Trial Court

1. Proceedings Before the Trial Court

In 1995, a subsequent State Commissioner promulgated an administrative rule to permit the denial of shelter to class member homeless men and women (1) who meet the "need standard" for public assistance but have not complied with a public assistance rule or social service plan or (2) who are

"homeless by reason of physical, mental, or social dysfunction" but who have not complied with a social services plan or public assistance rule. R. 101-09.

Because the State defendants' administrative rule contravened the requirements of the Consent Decree, the plaintiffs moved, pursuant to Paragraph 19 of the Decree, to have the trial court declare the administrative rule null and void under the Decree. R. 12-16; 445 . The parties agreed to adjourn the plaintiffs' application pending consideration of whether the State's administrative rule was facially invalid as applied to homeless families in the McCain litigation in which there is no consent decree. R. 1219; City Br. at 14.

Following this Court's 1998 ruling in McCain, the City defendants moved to modify the Consent Decree based on the State defendants' administrative rule and put forward a plan of implementation. R. 180-81. The trial court directed document production and depositions to allow the plaintiffs to discover key features of the City's plan. In February 2000, the trial court denied the City's motion and granted the plaintiffs' application to find the State defendants' administrative rule and the City defendants' plan of implementation null and void because they contravened the Consent Decree. R. 1235-58.

Twenty-one months after the trial court's ruling, the City defendants requested and obtained an amendment to the introductory language in the trial court's 2000 Order so that they could enter an Amended Order and then take this appeal. R. 8.

2. The City Concedes That Vulnerable Adults Are To Be Denied Shelter

The plaintiffs presented extensive evidence to the trial court. By agreement of the parties, the plaintiffs submitted the sworn deposition testimony of City police, social services and homeless services officials, including the Deputy Commissioner of the Department of Homeless Services. R. 853-1009; 1020-81; Suppl. R. 1-79. The Deputy Commissioner candidly admitted under oath that class members with mental impairments who are placed in special shelter facilities for persons with such mental impairments will not have an automatic exemption from the City's shelter denial plan. R. 981-82. These mentally impaired class members will still be subject to shelter denials for noncompliance with

administrative requirements unless they can show that their impairment caused the public assistance sanction or the violation of a social services plan. R. 919-20, 924-26.

The Deputy Commissioner further admitted that class members who are denied shelter under the City defendants' plan can develop a significant mental impairment during the time when shelter is denied to them. These class members will then be provided with shelter if they seek it, but the Deputy Commissioner conceded that persons who have developed such a mental impairment are more difficult to bring in off the streets. R. 935-36.

Furthermore, the Deputy Commissioner acknowledged that whether or not there was inclement weather, shelter denials will occur. Class members in wheelchairs, class members with diabetes, class members with heart conditions or cellulitis or vascular disease, and class members on medication or who are HIV-positive will all be subject to shelter denials. Regardless of whether someone is homeless by reason of social dysfunction – a term with which the Deputy Commissioner was not even familiar – the shelter denial sanction still applies. R. 889, 954-60.[6]

Under oath, the City's Homeless Services Deputy Commissioner truthfully answered that even when a City outreach team brings a sanctioned class member off the streets to the Bellevue Shelter intake location, the minimum 30-day shelter denial sanction will still leave that class member without shelter. Likewise, even when City police officers take someone who has been sanctioned from the streets to the Bellevue shelter intake location, that person will still be turned away by the Department of Homeless Services until their sanction period is completed. The Deputy Commissioner testified as follows:

Q. That's a minimum sanction of 30 days, correct?

A. Yes.

[6]The Deputy Commissioner of the City's welfare department similarly testified that he was not familiar with the term "social dysfunction." R. 1035. His testimony also revealed inadequate screening procedures for people with physical and mental impairments as well as many other flaws in the City's planned application of public assistance rules to shelter residents. R. 844-48, 1021, 1034, 1039-40, 1058; Suppl. R. 29-30, 32-33, 38-40, 47, 51, 60-62, 75, 78-79.

Q. And that sanction would be in place if you came back during that 30-day period whether or not it was raining out, for example?

A. Yes.

Q. And that sanction would remain in place if you came back during those 30 days even if the outreach teams have brought you to Bellevue?

A. Yes.

Q. And even if the police had brought you to Bellevue, that would still be the case?

A. Yes.

R. 958-59.

3. Uncontested Record Evidence of the Risk of Injury or Death

In addition, the record presents extensive, uncontested medical evidence of the risk of injury and even death resulting from the shelter denial plan that the City's Deputy Commissioner candidly described. Expert medical evidence in the record establishes that class members are at great risk of cold- and heat-related injuries because of risk factors associated with homelessness, including: inadequate clothing; wounds; previous damage to an area of the body or body part; smoking; diabetes; alcohol or drug use; and mental illness.

Before the trial court, the City conceded that when there is a "Winter Alert" triggered by ambient temperatures at or below 32 degrees, the City will not be able to deny class members shelter. R. 814. However, the City's Homeless Services Deputy Commissioner admitted that even when class members are spared a denial of shelter when the absolute temperature is 32 degrees or below, class members who have already been denied shelter or sanctioned before the temperature reaches that point will still be on the streets and will have to be located and brought in from the cold. R. 940-43.

In any case, the risk of heat-related injury illustrates that denial of shelter poses a danger throughout the year. R. 355-56. The risk of cold-related injury also "exists not only during the coldest months of the year." R. 349. The uncontested record shows that injuries are not limited to sub-32 degree weather, but can occur in much higher temperatures if the wind chill, dampness, or individual

risk factors, which are prevalent among homeless people, are present. R. 350. Even in Los Angeles, hypothermia occurs. R. 1096. For example, the "second worst case of non-fatal hypothermia recorded by Massachusetts General Hospital involved a homeless man on October 6, 1993, when the daytime temperatures were in the 50s. This man survived, but now lives in a nursing home at great public expense." R. 350.

Extensive uncontested medical evidence in the record documents that:

> Absolute temperatures are not the key to cold-related injury. Rather, one's ability to tolerate the freezing of tissue or withstand the loss of body temperature without sustaining severe internal damage is closely related to duration of exposure to cold, amount of wind and/or moisture in the air or on the ground and the state of mind of the exposed individual – all factors which, like absolute temperatures, can change dramatically during the course of a day and are difficult to predict. Clinical experience demonstrates that most cold-related injuries and most deaths occur when temperatures range from 40 to 50 degrees during the day and 30 to 40 at night. . . . Studies have been conducted [primarily by the United States Armed Forces] to ascertain how long skin can be exposed to cold before it freezes. . . . When a wind chill factor reduces an absolute temperature of 44 degrees to somewhere in the 20s, for example, skin will freeze in minutes rather than hours. . . . When the ambient temperature is in the 30 to 40 degree range and it is damp, a person with any of the risk factors . . . is likely to sustain severe injury in three to six hours. A person without any of the identified risk factors is likely to sustain injury under the very same conditions in six to eight hours. If the temperature is still in the 30 to 40 degree range but it is not damp and there is no wind chill, a person who has none of the risk factors and is otherwise healthy is nonetheless likely to sustain severe injury within twelve hours.

R. 350-51.

The risk of injury is compounded by the fact that "[a]lthough the visual signs of frostbite are striking – skin initially turns white, then red and often develops blisters which may be clear or bloody – numbness, which is the initial sensation, makes it easy to miss important signals indicating danger." R. 351. Graphic photographic evidence in the record illustrates the injuries that occur under these circumstances. R. 370-84; 1097b. The uncontested record specifically documents that:

> Within different periods ranging from minutes to hours, however, exposed body parts become extremely painful. These areas throb and dilate as blood and anti-inflammatory agents flood the affected area to prevent injury. This excruciating pain should set off warning signals that cold-related injury is occurring. However, persons suffering from long-term disabilities, such as diabetes or neuropathy, or having impaired judgment secondary to mental disabilities or substance abuse will miss these important signals. . . .

> Under these circumstances, the injury to be sustained ranges from mild frostbite to severe frostbite. Until there is a partial thawing of frozen body tissue it is impossible to tell whether frostbite is mild (superficial) or severe (deep). During the first 24 hours after thawing the injuries either heal or progress. When these injuries progress, the 'demarcation of limbs' occurs from 21 to 45 days after exposure. During this time necrosis of the skin causes the skin to turn black and eventually leads to auto-amputation. In other words, limbs fall off. Ninety percent of all frostbite affects hands and feet. Ten percent affects the nose, ears, cheek and penis. These are the body parts that turn black and fall off when auto-amputation occurs.

R. 351-52.

The record also establishes that the City defendants themselves admit that it is not possible "to identify a particular set of environmental conditions or variables, e.g., a combination of temperature, humidity or precipitation, length or kind of exposure, at which it is a risk for every homeless person to be out of doors. Too many factors, including individual factors unrelated to weather, affect the ability of specific persons to withstand climatic conditions." R. 797. The City's Homeless Services Deputy Commissioner further admits that susceptibility to frostbite is not a factor in determining whether to deny shelter under the City's plan. R. 943. The uncontested record also shows that there is an increased prevalence of chronic disorders and medical complications among persons who are homeless because of their living conditions and their difficulty in obtaining medical care. These disorders and conditions will be exacerbated when shelter is denied in accordance with the defendants' plan. Even homeless persons who are relatively healthy or whose illnesses are controlled will be at increased health risk if they are denied shelter and relegated to the streets. The development of drug-resistant disease strains like tuberculosis is a predictable consequence of denying shelter and relegating class members to the streets. R. 241-45.

Undisputed record evidence also documents the difficulty of diagnosing mental impairments which will result in adults with undiagnosed or undiagnosable impairments being denied shelter and expelled from shelter to the streets of the City. R. 264-67. Leaving it up to class members with impairments to establish that their impairment caused the noncompliance with a social services plan or public assistance rule will result in impaired class members being denied shelter. R. 264. Expert

medical evidence documents that this will result in dysfunctional class members out on the streets posing a danger to themselves or others. R. 267, 269.

The City itself concedes that errors are inevitable in making such judgments about whether a class member suffers from dysfunction, R. 1215-18, and that there is a particular danger in failing to address emerging diagnoses like post-traumatic stress disorders which affect class members. R. 774. In fact, the record shows that the same socially dysfunctional behaviors that indicate a need for help and may well be indicia of a mental impairment will result in the denial of shelter from the elements because of conduct which is administratively branded as "non-compliant" or "recalcitrant." R. 1121-22. Even the City's Deputy Commissioner concedes that erratic behavior may be indicative of a deeper problem and that there is not necessarily a difference between erratic behavior and not following program rules. R. 963.

This documented and uncontested risk of injury or death is compounded by record evidence demonstrating that there are inevitable mistakes in the provision of public assistance benefits that will lead to erroneous findings of noncompliance with administrative public assistance rules and a resulting loss of shelter. R. 329-38, 556-72, 709-21, 1098-1109, 1126-32. For example, problems with mail delivery of City notices – even with various post facto attempts to fix errors – are endemic in a population that is characterized by unstable living arrangements. R. 712-20.

4. After Shelter Denials, There Is No Alternative but the Streets

Record evidence from the religious and voluntary agency community painted a painful picture of literally no alternatives to the streets when shelter is denied to class members. R. 304-06, 399, 554-55. Even "drop-in centers"– where class members cannot receive shelter guaranteed under the Decree but can sometimes sit on chairs in a waiting room all night – were full. R. 554-55.[7]

[7]Record evidence further documents the medical harm of venous disorders of the lower extremities, such as chronic stasis ulcers of the lower leg and ankle, resulting from extended sitting or upright sleeping. R. 242.

For all these reasons, the record documents that the consortium of shelter operators who work with class members each day did not believe that the City's shelter denial plan was necessary to operate their programs and were concerned about what will happen to their clients who end up back on the streets of the City. R. 397-400.

The record also documents that at the same time as the Homeless Services Department asked the trial court for permission to deny shelter for a minimum period of 30 days, the Mayor had directed the police to bring homeless adults to shelters from the streets to preserve public safety. R. 451-61, 990-1018.

OPINION BELOW

Based on the record evidence before it, the trial court denied the defendants' application to modify the Consent Decree and agreed with the plaintiffs that the State defendants' administrative rule was inconsistent with, and thus null and void under, the Decree. R. 1258.

The trial court found no significant change in law or fact as required to permit modification of the Consent Decree. R. 1253. In doing so, the trial court concluded that the State defendants' own administrative rule cannot be considered a change in law or fact that would permit a modification. Otherwise, as the trial court stated, "the Consent Decree would be but an illusion if its mandates could be changed by the wish of one of the signatories." R. 1254. The Court also specifically found that there was "[n]o credible rebuttal" to the former defendant State Commissioner Barbara Blum regarding the intent of the parties in entering into the Decree to require the provision of shelter to persons who meet the "need standard" for public assistance or who are homeless "by reason of physical, mental, or social dysfunction." R. 1251-52.

On this record, the Court found that "it seems but common sense to recognize that at least part of [what defendants termed] this 'small but highly visible . . . population' of recalcitrant individuals is made up of the very population of people who the drafters of the Consent Decree sought to protect deliberately, and with much consideration, including a type of dysfunction, which is distinct from

mental or physical impairment, and which renders a person 'socially dysfunctional,' i.e., impaired, in his or her ability to act correctly, or in his or her best interests, in society." R. 1249.

Based on the extensive record evidence, the trial court further found that "as admirable as the new system is in comparison to the old, 'socially dysfunctional' people continue to exist, and to inhabit the streets of New York in fair weather and foul, and no change in the circumstances, social or otherwise, warrants that these individuals should no longer receive succor under the terms of the Consent Decree, or should be subject to termination of their right to shelter if they cannot function within the complex system which defendants have fashioned to alleviate the problem of homelessness." R. 1254.

The Court specifically noted that "Dr. [Kim] Hopper, for instance, reminds this court that the plaintiffs' class was, and still is, made up of many 'troubled' individuals who have 'fallen through the cracks in the welfare system, the mental health system, employment and [the] housing market,' who have great need for a 'seamless entry into safety-net shelter,' so as to avoid being turned out into the streets of the City." R. 1256.

On the record before it, the trial court noted its concern that "subjecting these high risk, and difficult to reach people to the potentially life-threatening sanction of expulsion from shelters, because of the difficulty in diagnosing their problems or obtaining their cooperation in the long-term programs and innumerable bureaucratic requirements encompassed in the Regulation, will result in an explosion of homeless individuals, banished or barred from shelters, risking their health, and perhaps their lives, on the often bitterly cold, and palpably dangerous streets of a sadly indifferent City." R. 1257.

Ultimately, based on this record, the trial court concluded that "[i]f the Consent Decree were to be found to encompass the multitude of bureaucratic requirements which are contained in the Regulation, the majority of which are much more complex than the simple rules of correct social behavior to which defendants so often refer, the simple bureaucratic error which might send an individual out into the street, because he or she was unable to understand or cooperate with these

requirements, might be the error which results in that individual's death by exposure, death by violence, or death by sheer neglect. The risk is simply too great to take." R. 1258.

Dated January 8, 2003
New York, New York