

From Rights of
the Homeless, 1987

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YVONNE MCCAIN et al v. EDWARD I. KOCH

No. 41023/83
November 14, 1986

Coker v. Brown

To Be Argued by: STEVEN BANKS
Time Requested: 30 Minutes

New York County Clerk's Index #41023/83

Court of Appeals
STATE OF NEW YORK

YVONNE MCCAIN, EMILY MOSES, STEVEN MOSES, YVONNE PEREZ, BARBARA DANCY, LILLIE SULLIVAN, BELINDA RANDOLPH, BARBARA DOWNS, JERI EVANS, MARY BROWN, PATRICIA RODAK, WILLIAM SANDERS, CAROLYN SANDERS, VICTORIA SMITH, and CAROLYN KING, on behalf of themselves and their children or other dependent minor relatives in their care and on behalf of all others similarly situated,

Plaintiffs-Appellants,

DONNA KEYES, BARBARA RIVERA, SUZETTE WALKER, RAFAELA CAMPOS, SYLVIA FREE, WANDA PERRY, LINDA TURNER, ROSLYN ELSON, LYDIA ROBLES, ROBERTA HACKETT, LOLA SCOTT, BETHZAIDA SERRANO, SONDRIA KENNEBREW, CAMELLA KENNEBREW, MARIE KENNEBREW, ERIC SULLIVAN, FLORA COLLEY, JEWEL BRYANT, CAMIE SINGLETON, ANITA SHEPARD, JANET MUSILLO, LORETTA LAFRENIER, MARCIA CUNNINGHAM, GENELL SATTERWHITE, MARIA BOURSICQUOT, MILDRED KORNEGAY, ADOPH KORNEGAY, EVRIL PATTERSON, VALERIE FRAZIER, BARBARA STORMS and ELSIE BURGOS,

Plaintiffs-Intervenors-Appellants,

(Caption Continued on Inside Cover)

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Proposed-Plaintiffs-Intervenors-Appellants,

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Plaintiffs-Intervenors,

—against—

EDWARD I. KOCH, as Mayor of the City of New York; THE CITY OF NEW
YORK; JAMES KRAUSKOPF, as Commissioner of The Human Resources
Administration of the City of New York and of the New York City
Department of Social Services; MARTIN BURDICK, as Deputy Director
of Income Maintenance Operations of the New York City Department
of Social Services; ROBERT JORGEN, as Director of Crisis Intervention
Services of the New York City Human Resources Administration;
ANTHONY GLEIDMAN, as Commissioner of the New York City Depart-
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Operations,

Defendants-Respondents,

CESAR PERALES, as Commissioner of the New York State Department of
Social Services,

Defendant.

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PRELIMINARY STATEMENT

The one hundred and thirty families with children before this Court are destitute and homeless. Each of their affidavits details the grim reality of emergency housing in squalid "welfare hotels" and shelters in New York City. Each chronicles the devastating impact of filthy and dangerous emergency housing conditions on homeless children. Now, having endured extraordinary hardship as a result of their government's failure to provide them with adequate emergency housing, these parents and children turn to this Court for relief.

Plaintiffs appeal from so much of an order of the Appellate Division, First Department, entered on May 13, 1986 (CA17-21)¹, as held that Special Term erred as a matter of law by invoking its equitable powers to compel compliance with minimal standards of adequacy in emergency housing for homeless families.² See *McCain v. Koch*, 117 A.D.2d 198, 216-18 (1st Dep't 1986) (CA41-43). The Appellate Division granted plaintiffs' motion for leave to appeal on July 3, 1986 (CA11-13). This Court has jurisdiction pursuant to C.P.L.R. § 5602(b)(1).

¹ References to plaintiffs' single-volume Appendix for the Court of Appeals are denoted "CA ____." The record before the Appellate Division consisted of a lengthy Appendix and Supplemental Appendix, references to which are denoted "A ____" and "SA ____," respectively. Pursuant to Court of Appeals Rule § 500.5(a)(2), one copy of the Appellate Division Appendix and Supplemental Appendix has been filed with the Clerk of the Court. Indexes to the Appellate Division Appendix and Supplemental Appendix are reproduced at CA77-136.

² In the same order, the Appellate Division granted plaintiffs' motion for a preliminary injunction barring the denial of emergency shelter to homeless families. See *McCain v. Koch*, 117 A.D.2d 198, 211 (CA36; CA17-21). On June 24, 1986, the court below denied the City defendants' motion for leave to appeal from this order (CA14-16). This Court subsequently held that no appeal from this order by the City defendants lies to this Court. *McCain v. Koch*, slip op., Motion #775 (Ct. of App. July 3, 1986).

QUESTION PRESENTED

Whether destitute, homeless families with children have the right to emergency shelter that meets basic standards of minimal decency?

The Appellate Division, First Department answered in the negative.

STATEMENT OF FACTS

The plaintiffs are indigent, homeless families with children. The great majority of these families became homeless as a result of circumstances beyond their control. Fully 70 percent of all homeless families "were placed due to fires or vacate orders served because of serious structural problems or deterioration of their buildings" (SA139). Typical among them are William and Carolyn Sanders and their daughters, ages 10 and 13, who, as the Appellate Division found, became homeless when a fire destroyed their home and Mr. Sanders lost his job (A600), *see McCain v. Koch*, 117 A.D.2d at 205 (CA30); Victoria Smith, who awoke to find her apartment "flooded with raw sewage" when the sewer backed up and filled the basement with "[h]uman feces and other wastes" (A557); Sondria Kennebrew, whose building was without heat, gas, and hot water (SA388); and Sylvia Castillo, who lived without heat and hot water until the "water pipes burst and the entire house was flooded" (A1708). Many of the remaining 30 percent—like Belinda Randolph, forced by her landlord's cessation of heat and hot water to crowd nine people into her sister's apartment (A415-16)—could no longer double or triple up in grossly, and often illegally, overcrowded conditions.

With nowhere else to turn, plaintiffs sought emergency shelter from their City government. Many, like the Rodak family, were simply turned away (A535-36; *see also* A541-42, SA33). *See McCain*, 117 A.D.2d at 205 (CA30). When denied

shelter these families slept, as the Appellate Division found, like the Perez family, for nights on a single sheet on a Coney Island beach or in Sunset Park in Brooklyn (A495), *see McCain*, 117 A.D.2d at 206 (CA31); like the Shepards, in subways and the hallways of abandoned buildings (SA605, A543); like Maude Boursiquot and her children, on basement floors (SA697); like the Sanders, in movie theaters (A603); like the Perry family, outside the doorways of strangers (SA295).

The City left other homeless families and their children to sleep overnight on floors, chairs and desktops in all-night welfare offices (A1692). In these "Emergency Assistance Units," homeless families and their children found plastic chairs, a formica countertop, or the linoleum floor their only comfort for the night. Sleep was often impossible amid the glare of fluorescent lights and the din of crying infants and children (A547).

The "Welfare Hotels"

When the City provides emergency housing to families and their children, the shelter usually consists of a single room for an entire family in a filthy and dangerous "welfare hotel" room. The record is replete with evidence of squalid and harmful conditions in these so-called "hotels": infants who slept on floors (SA691-92) or in bureau drawers (SA761); children who ate off of floors for lack of furniture (A1050-51); toilets that were in disrepair (A364, A570, A608, A942, A1577, SA340); inoperable sewage systems and plumbing (A401-402, A448, A943, SA187, SA200, SA296); tin cans and bottles that served as substitutes for working bathroom facilities (A661hhh, SA391); drugs (A965, A1587), prostitution (A889, A1314, SA298), and violent crime (A442, SA185-86, SA712) in hallways, lobbies and bathrooms. As Special Term found, the typical hotel room is "often a cubicle in a crumbling plaster palace . . . infested with vermin, with filthy bedding, children sleeping on the floor for lack of cribs, an entire family sleeping in one bed, exposed electrical wires and rooms soiled by human

waste," *McCain v. Koch*, 127 Misc. 2d 23, 24 (Sup. Ct. N.Y. Co. 1984) (CA51).

As detailed below, the "welfare hotels" used by defendants lack the most basic and fundamental attributes of "shelter": essential furnishings and services such as heat, hot water and bedding; sanitary living conditions; and personal security.

Lack of Heat, Hot Water and Other Basic Services

Lack of heat and hot water are chronic in welfare hotels used by the City to house homeless families.³ Barbara Dancy and her son, Sean, were forced to "sleep fully clothed and jacketed" (A224). Evril Patterson and her children were left "to spend many nights cold and shivering in our room without any blankets." "Most nights my children and I have had to go without baths or take cold baths" (A943). The City sent the Rosa family to a room at the Granada Hotel which "never had adequate heat or hot water" (A1577). As the Appellate Division found (CA31), "[h]eat and hot water were so infrequent" in the Moses' room "that their children were forced to sleep fully clothed on many nights and contracted colds. Indeed, their two-year-old daughter was hospitalized for pneumonia." *McCain*, 117 A.D.2d at 206 (see A404).

Refrigeration and cooking facilities are generally nonexistent (A661hhh, SA586, SA607). So, too, are basic furnishings such as tables and chairs. The Appellate Division found that Valerie Frazier and her two children "eat on the floor [at the Regent Hotel] because there is no table." *McCain*, 117 A.D.2d at 206 (CA31) (see A1051).

The record reveals that bedding in many rooms was so inadequate that young children, and even infants, often slept on floors or fell from beds to the floors. The City placed Genell Satterwhite in a room at the Conca D'Oro Hotel on Staten Island which contained only two beds for her herself,

³ See A224, A404, A570, A942-43, A1314, A1577, A1696, SA272, SA296, SA318, SA332-33, SA339-40.

her husband, and their six children. As the Appellate Division found (CA31-32), the Satterwhites' "two six-month-old infants sleep on the floor because they otherwise crawl out of bed and fall to the floor." *McCain*, 117 A.D.2d at 206-07 (see SA771). Ms. Satterwhite's four-year-old adopted retarded daughter, Victoria, "usually sleeps on the floor with the infants because she has been unable to sleep in the bed with the three boys" (SA771). Fred Nesbitt's one-year-old son "slept in his stroller for [a] whole month" (SA1491). Marcia Cunningham brought her infant child back from the hospital and had to prepare a "bed" by padding "the inside of a bureau drawer for the infant's sleeping place" (SA761). No longer able, after six months, to bed her tiny child in the drawer, she fashioned a "crib" by pressing a bed to the wall and placing the infant between the wall and herself; the child nevertheless still fell to the floor (SA763). Flora Colley had to make a similar crib for her infant child by pressing a cot to a wall (SA706).

As the record makes clear, State administrative hearing decisions and reports from independent inspectors confirm the existence of these dreadful conditions. A State administrative law judge found that the Patterson family "is not provided with adequate heat and hot water" (A960). Another ALJ concluded that "[t]here is no bathtub or shower in the hotel to which [Bernice P.] and her children have access" (A1310). Citizens groups monitoring hotel conditions found that 68 percent of the families in one sample lacked clean mattresses; 50 percent lacked sufficient blankets; 61 percent lacked clean towels (SA2194-95).

Unsanitary Conditions

Special Term's findings that "filth is the watchword of the day" in the City's hotels and that "the vermin outnumber the humans" (CA63) were firmly supported by the record. The Appellate Division found that Yvonne McCain's rooms at the Martinique Hotel were "rodent and bug-infested." *McCain*, 117 A.D.2d at 206 (CA31) (see A569-71). Infestation by rats, mice, roaches, lice, bedbugs, and other vermin injurious to the

health and well-being of children was common.⁴ Walls were riddled with rat holes (A1614). Victoria Martinez "could hear the mice moving around in the room and . . . could feel them crawling across my bed" (A1586). Emily Moses attested that her "children have been so badly bitten by insects at The Granada [Hotel] that their school sent me a letter asking about any diseases they might have" (A404).

The record is replete with evidence of filthy bedding. Families were consistently dispatched by City workers to hotel rooms where there were "bed covers [that] were soiled and stained and never cleaned" (A889). Mattresses were "stained with blood and ripped open" (SA728), "stained and dirty" (A1672), or "filthy and full of holes, with springs sticking out against our bodies" (A1678). Some families were never given clean sheets or towels (A1314, A1577, A1602). At the Regent Hotel, the Frazier family's "beds are filthy and dangerous. The mattresses . . . are dark with dirt and are stained with urine and other things. They smell awful. One of the twin mattresses is in such horrible shape that there is no stuffing in the middle; the sunken ho[le] that results is so big that my nineteen month old son's whole body can fit into it" (A1050). In a mid-town hotel, the sheets and mattresses offered to Donna Keyes "were so filthy that I spent all night in the chair, holding my daughters in my arms (SA185-86).⁵

Disease and illness are the inevitable consequence of these conditions.⁶ A physician diagnosed the filthy environment at

⁴ See A399, A401-02, A448, A570, A608, A661ggg-iii, A943, A1051, A1310, A1577, A1586, A1590, A1614, A1672, A1678, SA184, SA186, SA209, SA272-73, SA313, SA320, SA340, SA344, SA391, SA585-86.

⁵ For other record evidence of the provision of bedding unfit for human use, see A223-24, A401-02, A448, A569-70, A608, A661hhh, A943, A1696, SA198, SA209, SA271, SA297, SA339-40, SA585, SA612.

⁶ Indeed, the New York City Department of Health found that, between 1982 and 1984, the infant mortality rate in New York City's "welfare" hotels surpassed not only the rates of the City's poorest neighborhoods, but even those of some poor, developing nations. *The New York Times*, "Infant Death Rate Is High In Welfare Hotels," June 10, 1986, at B3, col.1.

the Martinique Hotel as the cause of sores "two inches in diameter and swollen with pus" on five-year-old London Free's legs (SA273-74). Doctors informed Donna Keyes, who awoke to find five-year-old Tiffany "bleeding from her ear and the top of her head," that "Tiffany had apparently been bitten by bedbugs on her ear and scalp" (SA184). Observers documented "horrible stories of [parents] having to constantly brush insects off themselves and their children while attempting to fall asleep" (SA1885). "Many of the children and even some adults had inflamed, widespread skin rashes that developed when the family first moved to the Allerton [Hotel] and which have persisted to the present day" (*id.*). One aide to a State Assemblyman "personally noticed skin rashes on many of the children, and particularly on the exposed skin of infants" (SA1892).

Personal Security

The record establishes that welfare hotel rooms are as unsafe as they are unclean. Bare electrical sockets and charged wires were often within reach of children (A571, A1051, A1587, SA296). Many rooms had collapsed ceilings (A1577, SA332) or holes through the floor (A401, A1313). Plaster and paint chips were falling everywhere (A224, A401, A1339, A1586, SA198, SA272, SA296-97), and were often eaten by children (A661hhh, A1586, SA272).

Room doors regularly lacked door locks (A1314, A1587, A1651, A1696, SA185, SA297, SA333). Buildings, too, were "openly accessible to non-residents as there was no front door lock" (A224; see SA297, SA333). Robberies and burglaries were widespread (SA333, SA1019, SA1899). On at least one occasion, a hotel room was ransacked within minutes of a family's arrival, the intruder having "come through the window and gone through all of our possessions" (SA198).

Window guards, locks, and casements were often missing (A889, A943, SA198, SA319, SA1900), frequently on upper floors (A570 (11th floor); A399 (7th floor); SA209 (9th floor)). At one hotel, the manager actually required Victoria Martinez

to "sign a statement that said, among other things, that I understood there were no window guards in the hotel and that it was my responsibility to keep my children away from the windows" (A1590). Citizens groups documented these pervasive breaches of security (SA1899-1900, SA2187-2218). Fully 30 percent of the families interviewed at the Granada Hotel, and more than one quarter of those interviewed at the Martinique and Carter Hotels, lived in rooms without operational door locks (SA2198-99). Nineteen percent of all rooms surveyed in one study lacked window guards (SA2196).

Moreover, the hotels to which the City sends homeless families with children are infested with drugs and violent crime. Donna Keyes explained that she was "afraid to go to sleep because the lock on the door to our room was broken. In the middle of the night my children and I heard the sounds of someone being attacked and beaten directly outside our door and a woman screaming for help in the hallway. . . . My daughters cried for most of the night" (SA185-86).

The record shows rampant prostitution in the hotels (A442, A661000000, A889, A945, A1079, A1314, A1614, SA298, SA344, SA390, SA586, SA700). Sexual solicitation of young children was not uncommon (A1314, SA297-98), and mothers feared that their children would "be sexually abused if left alone even briefly" (A450). Hotel bathrooms and common areas were widely described as "used by heroin addicts to prepare their drugs and shoot up" (A1587). Bathrooms were described by independent observers as bespattered by "blood all over the floor, walls and sinks, syringes lying on the floor" (SA1885-86). Drugs were sold and used in bathrooms, hallways and stairwells (A450, A1614, SA333, SA390, SA585-86) and, indeed, were sold by so-called hotel "guards" (A450, A486). Addicts populated the lobbies and alleys (A889, A1079, SA187).

The danger to children in these environs needs no more comment than the affidavit of young Janet May Patterson, whose family the City placed for six weeks at the Carter Hotel (A965). Janet attested:

1. I am seven years old.
2. I know the difference between right and wrong. I know that telling a lie is wrong. I am telling the truth in this paper.
3. This paper is being read to me. I read a little bit, but not well.
4. The Carter Hotel is a bad place.
5. Last week or so I saw three men on the eighth floor. Each of the men stuck a needle in his arm. Then the men put the needles in their pockets.
6. I was scared and took the elevator back to my floor.

The Mass Shelters

Welfare hotels are not the only facilities in which the City shelters homeless families with children. Shortly after Special Term issued an order in June 1983 requiring minimally adequate hotel conditions (CA53-58), the City began sending families to "mass shelters."

Mass shelters are cavernous rooms where dozens of men, women, infants and children, including teenagers and adults of opposite sexes, sleep together on tightly packed rows of cots (SA862-69, SA900, SA940, SA1011, SA1506). The first of these "shelters" was nothing more than a basketball court at Roberto Clemente State Park ("Clemente") (SA862). By April 1984, the City had opened two additional mass shelters in former offices on 151st Street in the Bronx and on Forbell Street in Brooklyn (SA862).⁷

⁷ On September 24, 1986, in the wake of a critical report by the State Health Commissioner documenting health and safety violations at Clemente—and more than two years after the State defendant originally terminated State reimbursement and instructed the City to cease housing homeless families in the gymnasium (SA1281)—the City closed the Clemente mass shelter.

Since this record was compiled, the City has opened several additional mass shelters, including the Taft High School gymnasium in the

Sleep in mass shelters is difficult if not impossible amid the din of dozens of families occupying the same room (SA900, SA940, SA1011, SA1506). Family living spaces are not separated even by partitions (SA897, SA1141). Privacy is, by definition, nonexistent (CA75). The most basic furnishings—tables, chairs, bureaus for clothing—are lacking (SA903, SA1143). Children are unable to do homework (SA903). Communal bathrooms lack security: indeed, a number of young children were exposed to sexual molestation by strangers in the communal bathrooms in the Clemente mass shelter (SA898-99, SA931, SA941, SA1014).

Moreover, persons with communicable illnesses are referred to mass shelters without adequate medical screening. Because families with contagious illnesses live on beds separated by only one or two feet from those of other families (SA1142, SA862) and share communal bathrooms, contagious diseases spread rapidly throughout the mass shelters.⁸

Dr. Saundra Shepherd,⁹ Director of Pediatric Training in the Residency Program in Social Medicine at the Albert Einstein

Bronx and the Bushwick High School gymnasium in Brooklyn. In addition, the City has opened three barracks-style shelters in which 10 to 35 men, women, and children of opposite sexes characteristically share a single room: Catherine Street, an abandoned junior high school in lower Manhattan; Cumberland, a former hospital in Brooklyn; and East Third Street, a shelter formerly housing homeless women in Manhattan. The Catherine Street shelter was closed by court order for health and safety violations between April and August, 1986, but is now open again. *Barnes v. Koch*, No. 41464/86 (Sup. Ct. N.Y. Co. April 17, 1986) (granting application for temporary restraining order).

⁸ See, e.g., SA1536 (gastroenteritis, diarrhea, and fevers); SA1537 (respiratory infection, diarrhea, high fever); SA1540 (ringworm, conjunctivitis); SA1194, SA1196 (strep throat, ringworm). Even the City's expert witness conceded that "[s]kin rash is common" in the shelters (SA1261).

⁹ Dr. Shepherd earned her Masters degree in Molecular Biology from Hunter College and her Doctorate of Medicine from the Yale Medical College. She is a member of the American Academy of Pediatricians and of the pediatric faculty for the Program in Social Medicine at Montefiore Hospital (SA908-909).

College of Medicine, documented the dangers faced by homeless families exposed to communicable disease in mass shelters. Dr. Shepherd noted that families whose children had apparently fallen behind in their immunizations had been referred to the Clemente gymnasium from the East Harlem community during an outbreak of measles. Pregnant women, she attested, were at grave risk of exposure to children whose immunization against rubella was not current (SA919). Dr. Shepherd further found that infectious diarrhea exposed homeless infants and young children in mass shelters to serious risks to their health (SA1538-39, SA921).¹⁰

Unsanitary conditions at mass shelters aggravate the risk of spreading communicable disease. Parents were compelled to wash clothing in the same bathroom sinks as were used to bathe infants and children (SA914). Sanitary facilities are grossly inadequate. At least 232 people were crowded into the Clemente mass shelter (SA1526). Most of them were women and young children (SA916). There were a mere 13 toilets, 12 sinks, and 8 showers (SA915-16) for these women and young children. Six of the toilets were operative for only one and a half hours each morning and evening (SA915-17). Intensive and continuous use of the sanitary facilities at Clemente produced conditions of abject filth (SA899). As Dr. Shepherd found on a July evening at Clemente:

[T]he bathrooms themselves are filthy. I went into the women's bathroom at the back of the gymnasium, and I observed paper and mud on the floor. Only one sink had a functioning soap receptacle. . . .

Only four of the eight showers in the women's room apparently worked, and, of these, two showers had hot water *only*, and two had only cold water. There still are no curtains for the women's room even though the City has

¹⁰ Infectious diarrhea spread rapidly among homeless children placed by the City in mass shelters. Dr. Shepherd spoke to 20 families in Clemente, "and all of the families mentioned that their children had just had diarrhea, were just getting diarrhea or had had diarrhea the whole time that the families were at Clemente" (SA1538).

at least been on notice of this condition since the plaintiffs' May 4th Order to show cause.

Dr. Finch . . . went into the men's bathroom at the back of the gymnasium and also observed filthy conditions there. Apparently, the stench emanating from the room was so strong that it was difficult to even enter the bathroom.

(SA1528-29).

Homeless families routinely endured these conditions for many months. Ramon Remedios attested that "[m]y family has spent 48 of the last 66 days in mass shelters" (SA1474). The Carroll family resided in the 151st Street shelter for 37 of 52 consecutive days (SA1405). Miriam Byer, five months pregnant, resided 39 of 49 days in mass shelters (SA1446); Elouise Davis resided 42 of 47 days in the Clemente and Forbell Street shelters (SA1346).¹¹

PROCEDURAL HISTORY

Long before the commencement of this action, defendants were put on notice of decrepit conditions existing in hotels and shelters for homeless families. In 1982, the New York City Comptroller found that conditions at "many of the hotels were extremely poor and often dangerous" (SA56). In January 1983, the Citizens' Committee for Children found "an evident lack of security and maintenance" in three hotels surveyed (SA154). None had window guards, cooking facilities, or laundry facilities. *Id.* Indeed, prior to the filing of this action, plaintiffs' counsel met with representatives of the City defendants and provided detailed descriptions and photographs of the squalid conditions in the City's emergency housing (SA27).

¹¹ Mass shelter placements are generally interrupted by brief referrals to welfare hotels, after which time families are shuttled back to mass shelters (SA1148). Because of repeated dislocations of this kind, City statistics on the average length of stay in mass shelters understate the total length of consignment to these shelters.

The City defendants, however, indicated no willingness to resolve plaintiffs' complaints about these dangerous conditions without litigation. *Id.*

Responding to defendants' failure to correct these deficiencies, thirteen plaintiff families with children, either homeless or living in grossly inadequate emergency housing conditions, commenced this action on March 31, 1983, on behalf of themselves and all other destitute, homeless families with children in New York City (A42-173). During the week of May 9, 1983, nineteen additional homeless families who had been denied emergency housing or placed in emergency housing dangerous to their health and safety, moved to intervene in this action (SA21-24, SA508-16, SA549-57).

Proceedings Before Special Term

On June 20, 1983, Special Term issued an "Interim Order" providing emergency relief for destitute families sent by the City to grossly unsanitary or dangerous living conditions (CA53-58). The Interim Order required that emergency housing provided to homeless families meet rudimentary standards of safety and habitability—such as heat and hot water, beds, and door locks.¹²

¹² In pertinent part, the Interim Order provided:

When a family is not denied emergency housing, assistance and services, DSS and HPD shall arrange so far as is practicable in the placement in emergency housing, that such housing:

- a. contains a bed for each family member, or a crib in the case of an infant, with a clean mattress and pillow and with clean and sufficient sheets and blankets;
- b. contains a sufficient number of clean towels;
- c. contains sufficient space for the family based on City laws governing residential units [citation omitted];
- d. has accessible to it a sanitary bathroom with hot water;
- e. is sufficiently heated pursuant to City law;
- [f]. contains basic furniture essential for daily living;
- [g]. has window guards as required by the laws governing residential multiple dwellings;
- [h]. has locks on the emergency housing unit's outside doors.

(CA56-57).

Shortly after issuance of the Interim Order, the State defendant issued an Administrative Directive, 83 ADM-47, which provides: "Local districts as well as State entities have constitutional and statutory responsibilities to assist homeless persons in obtaining housing" (SA1689). The Administrative Directive requires that "Emergency housing must . . . be provided immediately if a homeless person is determined eligible" *Id.*

The State defendant then promulgated regulations governing conditions in hotels and motels used for housing homeless families. 18 N. Y.C.R.R. § 352.3(e)-(h). These regulations provide that the City shall not refer homeless families to a hotel or motel that does not comply with minimum standards of habitability similar to those of the Interim Order. The regulations apply only to hotels and motels, and not to mass shelters or other forms of emergency housing.

Notwithstanding these orders and regulations, the City continued to use substantial numbers of hotel and motel rooms in violation of the State regulations and the Interim Order. In July 1983, four additional families intervened in this action in order to obtain cribs for infants who had been forced to sleep on hotel room floors or in bureau drawers (SA678-86). By May 1984, no fewer than ten State hearing decisions¹³ found that the City had engaged in flagrant violations of the Administrative Directive and State regulations: The City had placed Bernice P. and her two children in a hotel without bathing or shower facilities for two months (A1310, A1314). Their single twin bed was "stained with dirt and urine" (A1313); a hole in the floor was covered only by a carpet (A1310); the windows were missing window panes, "causing cold drafts in the room" (A1314). Defendants had placed Peggy Michel in a room infested with roaches, without heat or door locks. She and her

¹³ See A958-61 (Patterson), A1158-66 (Dancy), A1308-16 (Bernice P.), A1326-31 (Joanna A.), A1596-1604 (Martinez), SA1017-23 (Michel), SA2124-29 (Britt), SA2163-72 (Mercado), SA2176-84 (Nicholson), SA1336-41 (Taylor).

children had to "go to another resident's room to bathe and shower" (SA1022). The City had placed Victoria Martinez and her three children in a room with falling plaster and lead paint, exposed electrical wiring, and rodent infestation (A1602).

Faced with continuing violations of State regulations and the Interim Order, plaintiffs moved for emergency relief for numerous additional families and to hold City defendants Krauskopf and Burdick in contempt (A832-42, A1090-96, A18-23). Although declining to hold these defendants in contempt, Special Term found the living conditions of the intervenors "entirely inadequate":

Two of the families from the present application have been placed in entirely inadequate facilities. One family of six is in a hotel room without electricity where there are only two beds for six people. The facility has already been found inadequate after a State conducted Fair Hearing. Another family has been in a room for over a year with stained and torn mattresses and totally filthy surroundings.

(CA62-63). The Court added:

[T]he City agencies must redouble their efforts to find available facilities instead of throwing up their hands at the futility of the task. There is no excuse for keeping families in palaces of crumbling plaster where filth is the watchword of the day and the vermin outnumber the humans. Temporary facilities, however, must be substituted by better housing arrangements at the earliest opportunity and the City is mandated to set up a program to attempt to achieve this.

(CA63).

After lengthy deliberation over the voluminous record, Special Term granted plaintiffs' motion for preliminary injunction on June 22, 1984 and converted the Interim Order into a preliminary injunction. *McCain v. Koch*, 127 Misc. 2d 23 (Sup. Ct. N.Y. Co. 1984) (CA49-52). Special Term noted that

because the "substance of the interim order has since been codified under 18 NYCRR 352.3," defendants' objections to its content were largely academic. The central remaining issue was defendants' failure to comply with the rudimentary standards of safety and habitability set forth in the Interim Order and State law. The question before the court was whether, in the face of record evidence of repeated noncompliance, an order should be entered compelling compliance with these minimum standards.

Answering affirmatively, Special Term held that "[t]he equitable powers of this court may be invoked to compel compliance with minimal standards." *McCain*, 127 Misc. 2d at 25 (CA52). The court reasoned:

By the interim order, this court sought to establish general principles by which the agencies may be guided. These general principles are not immutable nor exhaustive, but indicative of the minimum standards which this society at this time finds acceptable within the meaning of the word shelter. It may well be that in other places and times shelter means or meant literally, a roof over one's head. In a civilized society a "shelter" which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all. Providing a homeless family with a hotel room—often a cubicle in a crumbling plaster palace, or in rooms infested with vermin, with filthy bedding, children sleeping on the floor for lack of cribs, an entire family sleeping in one bed, exposed electrical wires and rooms soiled by human waste are unacceptable shelter for anyone, and especially families with young children.

127 Misc. 2d at 24-25 (CA51-52). "If convicted criminals have such rights," Special Term concluded, "the homeless who become interim wards of a governmental entity are entitled to no less" (CA52).

Mass Shelter Motions and Regulations

Neither the preliminary injunction nor the State hotel/motel regulations addressed the deplorable conditions in mass shelters, where the City sent homeless families after the Interim Order, which governed only hotel conditions, became effective. As conditions in the mass shelters deteriorated, plaintiffs moved to enjoin or limit their use, to establish a "screening system" for pregnant women and others with communicable diseases, and to set certain minimal standards of habitability. By order dated November 2, 1984 (CA67-72), Special Term denied these motions. The court found that mass shelters "are not by definition conducive to privacy":

These shelters may provide greater opportunity for infection by communicable disease and for deviant sexual behavior. Mass shelters should not be used for long term stays and the defendants should provide a mechanism for placing needy families in more private quarters after a short stay in a mass shelter.

(CA75). Nevertheless, the court believed that "[n]one of the brutal, unsanitary and hazardous conditions alleged in the original motion are present here." *Id.*

While appeals from this order were pending in the Appellate Division, the State defendant issued regulations governing living conditions in mass shelters. 18 N.Y.C.R.R. Part 900. Unlike State hotel/motel regulations, State shelter regulations may be waived by the State defendant. 18 N.Y.C.R.R. §§ 900.3(c), 900.4.

Decision of the Appellate Division

Finding a "strong likelihood of success on the merits of their claims" to a right to emergency shelter, the Appellate Division granted a preliminary injunction barring the denial of emergency shelter to homeless families. *McCain*, 117 A.D.2d at 211-16 (CA36-41). The court issued this injunction "on the law, the facts and in the exercise of discretion" (CA21). As

indicated earlier, the Appellate Division denied the City defendants' motion for leave to appeal from this order (CA14-16). This Court has held that an appeal by the City defendants to this Court from the order does not lie.¹⁴

Notwithstanding factual findings by the Appellate Division that plaintiffs "have persuasively documented the unsafe and squalid conditions prevalent in welfare hotel accommodations," 117 A.D.2d at 217 (CA42), however, the court "reluctantly" vacated Special Term's injunction compelling "compliance with certain reasonable minimal standards." *Id.* at 216 (CA41).

The Appellate Division found that "thousands of children are put at risk in their physical and mental health, and [are] subject to inevitable emotional scarring, because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability." 117 A.D.2d at 216 (CA41). The "lives and characters of the young," the court added, "are too precious to be dealt with in a way justified, as argued, on the ground that the government's efforts are more than token." They "may be more than token," the Appellate Division held: "but they are inadequate." *Id.*

Nevertheless, believing its hands tied by this Court's decision in *Matter of Bernstein v. Toia*, 43 N.Y.2d 437 (1977), the Appellate Division found itself "unable to afford the plaintiffs complete and meaningful relief." The court below construed *Bernstein* as suggesting the "inability of the courts to set even minimum standards for meeting 'the legitimate needs of each recipient.'" *McCain*, 117 A.D.2d at 216 (CA41). This the court found "discouraging, saddening, and disheartening." "[I]t is time," the Appellate Division urged, "for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area." *Id.* However, the court held, "on the authority of *Matter of Bernstein v. Toia* (*supra*), we reluctantly conclude

¹⁴ See n. 2 *supra*.

that Special Term erred in invoking its equitable powers to compel compliance with certain reasonable minimal standards." *Id.*¹⁵

ARGUMENT

POINT I

ARTICLE XVII, § 1 OF THE STATE CONSTITUTION REQUIRES DEFENDANTS TO PROVIDE MINIMALLY ADEQUATE SHELTER TO HOMELESS FAMILIES

In the aftermath of the Great Depression the State of New York adopted Article XVII, § 1 of the State Constitution.¹⁶ This provision makes the "aid, care and support" of the needy a fundamental obligation of state and local government. *Tucker v. Toia*, 43 N.Y.2d 1 (1977); see *Matter of Bernstein v. Toia*, 43 N.Y.2d 437, 449 (1977); *Matter of Lee v. Smith*, 43 N.Y.2d 453, 460 (1977); *Matter of Jones v. Berman*, 37 N.Y.2d 42, 54 (1975). Article XVII, § 1 has no parallel in the Federal Constitution and reflects the distinctive problems and history of New York State. As the Appellate Division recognized in this case, the governmental obligation to provide "aid, care and support" to the needy requires that defendants provide emergency shelter to destitute homeless families. At issue on

¹⁵ With regard to plaintiffs' mass shelter motions, the Appellate Division found that "the lack of privacy clearly renders such facilities unsuitable for long-term stays." 117 A.D.2d at 219 (CA44). However, while the court affirmed so much of Special Term's determination not to compel the closing of mass shelters, the Appellate Division, like Special Term, did not address plaintiffs' motion insofar as it sought to limit the length of placement in mass shelters, establish a screening system for pregnant women and others with communicable diseases, and set certain minimum standards of adequacy.

¹⁶ Art. XVII, § 1 of the New York State Constitution provides:
The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

this appeal is whether this duty requires defendants to provide shelter that meets basic standards of minimal decency, or whether instead this obligation is satisfied by the provision of grossly inadequate and dangerous accommodations.

The essential purpose of shelter is to provide safety from the elements, disease, crime, and physical injury. The language and intent of Article XVII should be interpreted consistently with this common sense understanding. Facilities which are grossly inadequate in serving these purposes do not satisfy defendants' constitutional responsibility. The Appellate Division agreed with this conclusion, but believed itself constrained from implementing Article XVII's mandate by its reading of this Court's decision in *Matter of Bernstein v. Toia*, 43 N.Y.2d 437 (1977):

When thousands of children are put at risk in their physical and mental health, and subject to inevitable emotional scarring, because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability, it is time for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area.

117 A.D.2d at 216 (CA41). However, no such reexamination of precedent is necessary. The language and history of Article XVII, coupled with decisions of this Court, compel, rather than foreclose, the conclusion that defendants must supply minimally adequate shelter to homeless families.

A. Grossly Inadequate Shelter Is Not The Shelter Required by Article XVII

The provision of inadequate emergency shelter leaves essential subsistence needs unmet just as surely as does the denial of shelter. A hotel room without heat in the winter and without glass in the windows does not protect against the elements, and thus is not shelter. Families who must sleep shivering fully clothed without blankets, are not sheltered. A room with a filthy mattress, dirty linens and no access to hot water pro-

vides rather than protects against disease and thus does not shelter. Lodgings that are havens for crime and are permeated by dangerous conditions do not provide shelter from physical injury. Children who must sleep and eat on floors for want of beds, cribs, tables and chairs are endangered by unsanitary conditions, and are not safely sheltered. These realities led Special Term to conclude in this case that "[i]n a civilized society a 'shelter' which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all." 127 Misc. 2d at 24 (CA51); see *Matter of Lamboy v. Gross*, 129 Misc. 2d 564, 575-76 (Sup. Ct. N.Y. Co. 1985) (appeal pending) (welfare offices do not satisfy obligation to provide emergency shelter).

That shelter means living conditions fit for human habitation is neither novel nor controversial. As this Court has observed, "no one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit." *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 328 (1979). Similarly, the District of Columbia Circuit has held that shelter is an aggregate of a number of necessities—

a well known package of goods and services—a package that includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

These principles were sounded as early as the 1938 Constitutional Convention that drafted and recommended adoption of Article XVII. Harold Riegelman, a delegate to the Convention, stated:

Provision for proper housing for families unable to afford that necessity is a community responsibility of the

same order as provision of food, clothing and medical care for families unable to afford those necessities.

By proper housing I mean housing which conforms at least to minimum tolerable standards of fire-protection, light, air and sanitation consistent with health and decency.

II *Revised Record of the Constitutional Convention of New York State 1532* (1938) (hereinafter "*Revised Record*"). Mr. Reigelman echoed the consensus prevailing even during this period that deteriorated and inadequate housing does not provide the essentials of shelter. As Governor Herbert H. Lehman explained, "[m]odern standards of housing for all people have come to seem not only a possibility but a right." Herbert H. Lehman, *Public Papers* 691 (1934).

Even earlier it was recognized that government must provide adequate conditions for those in its care. In the 1920s, a public consensus developed against sheltering the poor in squalid, neglected conditions in poorhouses. Reports that New York's poorhouses were overcrowded, physically deteriorated and poorly heated shocked the public and led in part to the passage of the Public Welfare Law in 1929. 1929 N.Y. Laws, ch. 565; see D. Schneider & A. Deutsch, *History of Public Welfare Law in New York State, 1867-1940*, 278-79 (1941) (hereinafter "D. Schneider & A. Deutsch"). Indeed, this "revolt against conditions in the almshouse," *id.* at 376, proved to be so powerful that it was largely responsible for shaping the system of public welfare established during the Depression.

More recently, recognition of the essential nature of decent shelter has led courts to require that government provide minimally adequate conditions to those in the care or custody of the State. Thus, courts have held that prisoners, pre-trial detainees, and mental patients are entitled to minimally habitable living conditions. See, e.g., *Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1492 (1986) (detainees); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (prisoners); *Society for Good Will to*

Retarded Children v. Cuomo, 737 F.2d 1239, 1243-44 (2d Cir. 1984) (mentally retarded).

In these situations, courts have required government to provide adequate bedding to those in its care. *Lareau v. Manson*, 651 F.2d 96, 107 (2d Cir. 1981); *Martino v. Carey*, 563 F. Supp. 984, 991, 1000 (D. Or. 1983). Similarly, courts have affirmed that adequate showers, toilets and plumbing must be provided. *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985); *Goodson v. City of Atlanta*, 763 F.2d 1381, 1387 (11th Cir. 1985); *Martino, supra*, 563 F. Supp. at 999 ("Functioning plumbing, including toilets, sinks and showers is a basic necessity of civilized life"). They have also held that protection from the elements is an essential component of shelter. *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976); *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972); *Martino, supra*, 563 F. Supp. at 999 ("[a]nother basic minimum of 'adequate shelter' is a means for heating the cells in winter, and cooling or ventilating them in summer"). Likewise, the provision of sufficient security has been found to be a basic necessity. *Hoptowit, supra*, 753 F.2d at 784.

In sum, the legal system has rejected the argument that a living environment provided for those in the care of the government can be dangerous and unhealthy and still constitute "shelter." As Special Term recognized, "[i]f convicted criminals have such rights, the homeless who become interir wards of a governmental entity are entitled to no less." 12 Misc. 2d at 24-25 (CA51-52).¹⁷

B. The Framers of the State Constitution Intended That Article XVII Prohibit the Sheltering of Homeless Persons in Grossly Substandard Emergency Housing

The historical context and "legislative" history of Article XVII underscore the intent of its framers to prohibit th

¹⁷ See also *Goodson v. City of Atlanta, supra*, 763 F.2d at 1387: "Even sentenced prisoners are to be furnished, as an obligation under the Eighth Amendment, with adequate food, clothing, shelter, sanitation facilities, medical care, and personal safety."

sheltering of homeless families in dangerous and filthy emergency housing. This Court has noted that in interpreting the State Constitution one must look to the "history and traditions of the state" and the "distinctive attitudes of the state citizenry toward" the right in question. *People v. P.J. Video, Inc.*, ___ N.Y.2d ___, No. 304, slip op. at 8 (Ct. of App. Oct. 28, 1986); see *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159 (1978). Homelessness has long been a persistent problem in New York. For the past ninety years the City defendants have acknowledged that access to decent emergency shelter is a vital necessity to the homeless. The adoption of Article XVII in 1938 changed the provision of decent shelter from an act of public charity to one of legal obligation. Although standards of decency evolve over time, and shelter provided by defendants has not always lived up to the prevailing standards of the day, this is the first time in ninety years that defendants have disclaimed altogether their moral, and later legal, obligation to provide decent shelter.

As early as the 1880s, when care for the needy was generally considered the bailiwick of private charities, see J. Axinn & H. Levin, *Public Welfare: A History of the American Response to Need*, 89-94 (1975), the City of New York sheltered homeless men and women in police precincts. D. Schneider & A. Deutsch, *supra*, at 107-08. Yet even at this early date it was recognized that provision of shelter in government offices was inadequate. *Id.* Complaints that conditions in precinct stations were "filthy and degrading," *id.* at 108, prompted legislation authorizing the establishment of municipal shelters in New York City. 1886 N.Y. Laws, ch. 535.

In accordance with this statutory authority, New York City opened the Municipal Lodging House in 1896. In 1915 the City claimed that it "is making full and adequate provision" for the homeless and that the Lodging House was "the largest and best-equipped" shelter in the world. W. Whiting, *What the City of New York Provides for the Homeless* 2, 8 (1915). During the winter of 1915, the Lodging House provided as many as 2300

homeless men and women each night with beds, clean linen, medical examinations, meals, and baths. *Id.* at 8-9.

During the Great Depression, the problem of homelessness assumed crisis proportions in New York City. The City's provisions for sheltering the homeless were simply overwhelmed. Makeshift shacks of crudely built tin and wood clustered on the waterfront. D. Schneider & A. Deutsch, *supra*, at 326-27. The devastating impact of the Depression brought with it a fundamental shift in attitudes toward the poor. During this period government responsibility to aid the poor became a fundamental premise of American society. New York State was in the forefront of establishing and implementing this principle. In the summer of 1931, Governor Franklin Roosevelt convened an extraordinary session of the Legislature and asked that sweeping steps be taken to aid the victims of the Depression. In addressing the Legislature, Roosevelt articulated the core principles of this new attitude toward the poor:

One of these duties of the State is that of caring for those of its citizens who find themselves the victims of such adverse circumstances as makes them unable to obtain even the necessities for mere existence without the aid of others. That responsibility is recognized by every civilized Nation. . . .

In broad terms I assert that modern society, acting through its Government, owes the definite obligation to prevent the starvation or the dire want of any of its fellow men and women who try to maintain themselves but cannot.

1 *Public Papers and Addresses of Franklin D. Roosevelt* 458 (1938) (Address to the Legislature, August 28, 1931).

The provision of decent shelter to the homeless was viewed as an integral aspect of government's obligation to care for the needy. In January 1938, Governor Lehman affirmed that "government must adhere to the policy of assuring to the needy adequate food, clothing, and shelter." Herbert H.

Lehman, *Public Papers* 39 (1938).¹⁸ The City responded to this vastly increased demand for emergency shelter by expanding its facilities. Six annexes supplemented the Lodging House. The Department of Welfare's Vacancy and Rehousing Bureau was open twenty-four hours per day to find temporary shelter for homeless families "burned out during the night."¹⁹

As the number of homeless men and women sheltered in New York City swelled to over 11,000 per night,²⁰ the New York electorate recognized that fundamental changes were required in the legal obligations of State and local government to the poor. In 1936 the voters called for a State Constitutional Convention. The Convention convened in Albany during the Spring and Summer of 1938. The Honorable Frederick E. Crane, Chief Judge of the Court of Appeals, presided over 168 convention delegates, among them many leaders of New York State and local government. In the area of social welfare, the Convention sought to assure that the Constitution embodied an enlightened view of government responsibility to the needy. See D. Schneider & A. Deutsch, *supra*, at 373-75.

¹⁸ Governor Lehman affirmed that although "[d]istress relief—the providing of food and shelter to the destitute—has always been recognized and still is recognized as the primary function of private initiative and local government," the State must nevertheless step in to provide such assistance when needed. Herbert H. Lehman, *Public Papers*, 30 (1933) (Address to the Legislature, January 4, 1933).

¹⁹ See N.Y. City Dep't of Pub. Welfare, *Annual Report for the Eighteen Month Period Jan. 1, 1938 - June 30, 1939*, at 87. In 1935 the City opened a shelter designed specifically for women and children. N.Y. City Dep't of Pub. Welfare, *Ann. Report for the Year 1936*, at 55.

The number of homeless persons sheltered by the City climbed from 1118 per night in 1930, see 1936 *Ann. Report, supra*, at 57, to an average of 7818 in 1932. See Welfare Council of New York City, *Homeless Men in New York City*, at 23 (1949) (average computed from table). By 1936 the nightly total had reached at least 9334. See N.Y. City Dep't of Pub. Welfare, *Ann. Report for the Year 1937*, at 38. By comparison, the City housed 8972 homeless single men and women on September 21 of this year. See *Barnes v. Koch*, No. 41464/86, City Def. Exhs. M, N (Sup. Ct. N.Y. Co.).

²⁰ See Welfare Council of New York City, *Homeless Men in New York City, supra* note 19, at 23 (table).

Echoing Governor Roosevelt's 1931 Address to the Legislature, Edward F. Corsi, Chairman of the Convention Committee on Social Welfare and Deputy Commissioner of the New York City Department of Welfare, proposed language intended to assure that government in New York shall provide for the essential needs of the poor:

We have made provision for the relief of the needy. Convinced that the care of the unemployed and their dependents is in our modern industrial society a permanent problem of major importance affecting the whole of society, we have recommended that:

"The aid, care and support of the needy are public concerns and shall be provided by the State and by such of its subdivisions and in such manner and by such means as the Legislature may from time to time determine."

III *Revised Record, supra*, at 2126. Addressing the text that became Article XVII, § 1 of the Constitution, Mr. Corsi explained:

Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First, to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and second, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.

While the obligation expressed in this recommendation is mandatory, in that the Legislature shall provide for the aid, care and support of persons in need, the manner and means by which it shall do so are discretionary.

The Legislature may continue the system of relief now in operation. It may preserve the present plan of reimbursement to the localities. It may devise new ways of dealing with the problem. Its hands are untied. What it

may not do is shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.

Id. at 2126; see *Tucker v. Toia*, 43 N.Y.2d 1, 7-8 (1977).

Jacob Livingston, a member of the Committee that drafted and recommended adoption of Article XVII, reiterated the view that government may not neglect fundamental needs of the poor:

They have to eat, they have to live, they have to have shelter, and you and I will never rest comfortably, as well off as we may be, unless these people have the necessities of life.

III *Revised Record, supra*, at 2172.

The Convention delegates were keenly aware that just a few years before these words were spoken, thousands of homeless men and women had eked out an existence in crudely built tin shacks, shantytowns that had become national symbols of disgrace and despair. The framers of Article XVII intended that this spectacle of poverty and destitution should never recur in New York State. They realized that poverty "is a permanent problem in modern society", *id.* at 2126, and by enacting Article XVII sought to assure that care for the poor would henceforth be treated as a fundamental responsibility of government, rather than a problem to be dealt with in a haphazard or makeshift manner. Accordingly, Article XVII imposed an enduring obligation to alleviate destitution.

That obligation extends not only to sheltering homeless families, but to securing safe and adequate shelter. The words of Article XVII are more than rhetoric; they are words of obligation. Homeless families are not recipients of whatever "charity" defendants choose to provide, but rather are entitled to the essential elements of shelter: heat, hot water, protection from the elements and disease, the rudiments necessary for safe and healthful living. Although Article XVII was not intended to enshrine in the Constitution particular forms and

conditions of shelter, it does not tolerate the City's placement of homeless parents and children in conditions as dangerous and harmful as those in the shantytowns the framers sought to erase from the New York waterfront. Such treatment is fundamentally at odds with "the relationship of the people to their government," *id.* at 2126, embodied in Article XVII.

In short, Article XVII is a constitutional commitment that government will never shirk its responsibility to provide safe living conditions to destitute persons temporarily without a home. In the years following the adoption of Article XVII, the City defendants acknowledged this legal obligation to provide minimally adequate shelter for the homeless:

It is the mission of the Department of Welfare, mandated by City, State and Federal laws, to provide the minimum necessities of life from shelter to medical care either in their own homes or in institutions, for those people who cannot provide these for themselves and their dependents.

N.Y. City Dep't of Welfare, *Annual Report for the Year 1962*, at 7.

Regrettably, some ninety years after the first municipal shelter opened its doors in New York City, defendants have now disavowed their legal obligation to provide minimally adequate emergency shelter to the most vulnerable of the homeless—families with children. Whereas in the past the City proudly proclaimed its emergency shelter to be the "largest and best-equipped" in the world, Whiting, *supra*, at 2, and boasted that it was "considered by many eminent sociologists as the model institution of its kind,"²¹ today the City defendants maintain that they bear no responsibility for the quality of shelter they provide to homeless families. The City's about-face repudiates its past acknowledgment of this duty and the

²¹ J. Mannix, *Care for the Homeless*, at 1, reprinted in N.Y. City Dep't of Pub. Welfare, *A City Cares for Its Own* (1933) (bound volume available at Municipal Research and Reference Center, New York City).

very concept of government obligation to the needy embodied in Article XVII.

C. Precedents of New York Courts Demonstrate That Article XVII Requires Defendants to Provide Decent Shelter to Homeless Families

New York courts have long demanded that the Legislature attend to the essential needs of the poor. This Court has stated that the Legislature must address the "realities of the needy's plight," *Tucker, supra*, 43 N.Y.2d at 9, and held that Article XVII, § 1 is violated when the Legislative scheme leaves one to "wonder" how the needy will survive. *Id.* at 7. In *Tucker*, this Court struck down a statute that raised "a substantial barrier to the efforts of some needy children to obtain the public assistance necessary to their maintenance of a minimal level of health, nutrition and security." 89 Misc. 2d 116, 131 (Sup. Ct. Monroe Co. 1977), *aff'd* 43 N.Y.2d 1 (1977). In reaching this conclusion the *Tucker* Court drew on the decision in *Fuller v. Nassau Department of Social Services*, 77 Misc. 2d 677, 683-86 (Sup. Ct. Nassau Co. 1974); there the Supreme Court held: "Patently, under the Constitution and Social Services Law, the State cannot let people starve or be evicted from their shelter in winter." *See* 43 N.Y.2d at 8. And in *Matter of Lee v. Smith*, 43 N.Y.2d 453, 463 (1977), this Court affirmed the lower court's decision holding that Article XVII is violated when the State fails "to provide ways and means by which inadequate grants could be brought up to the subsistence level." 87 Misc. 2d 1018, 1023 (Sup. Ct. N.Y. Co. 1976), *aff'd*, 58 A.D. 2d 528 (1st Dep't 1977), *aff'd*, 43 N.Y.2d 453 (1977).

New York's lower courts have followed this course as well. In *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. Co. 1979), the court concluded that homeless men "are entitled to board and lodging [and] . . . it is incumbent on those public officials responsible for caring for the needy to find such lodgings." In *Key v. Blum*, 100 Misc. 2d 411, 413 (Sup. Ct. N.Y. Co. 1979), the court relied on Article XVII to hold that the State has "an affirmative duty to adequately provide for the needy which mandates granting

assistance to cover essential needs." *See Matter of Rosenfeld v. Blum*, 82 A.D.2d 559, 561 n.1 (2d Dep't 1981) (Art. XVII mandates a "minimum standard of living").

The Appellate Division's decision in this case conflicts with these precedents. In reluctantly holding that Article XVII only obligates the government to provide aid that is "more than a token," the Appellate Division concluded, in effect, that the needy have no claim on the State beyond a general assurance that some form of aid will be provided—no matter how insufficient or inappropriate. The Appellate Division's ruling would require that defendants provide food to the hungry—but it need not nourish; and shelter to the homeless—but it need not protect.

This Court's decision in *Bernstein, supra*, 43 N.Y.2d at 437, does not compel these conclusions. The Court in *Bernstein* upheld the policy of providing uniform shelter grants to public assistance recipients without exceptions to accommodate individual circumstances. The Court stressed that the amount of the flat grant was carefully calculated to meet the actual housing costs of 95 percent of all grant recipients. *Id.* at 447. The plaintiffs in *Bernstein* sought individual exceptions to the flat grant system so as to enable them to remain in their particular dwellings. They did not claim to be threatened with homelessness; nor did they claim that the flat grant was insufficient to secure adequate alternative housing. As the State Attorney General pointed out to this Court, "[n]one of them allege that they have looked for less costly accommodations, even within the[ir] neighborhood[s]." *See* Brief of the State Appellant, *Matter of Bernstein v. Toia, supra*, at 17-18. Indeed, the State stressed that the flat grant was sufficient to enable the *Bernstein* plaintiffs to obtain alternative housing. *Id.* at 18-19; *see also Mayor V. Toia*, 419 F. Supp. 1161, 1163 (S.D.N.Y. 1976) (stating that the record indicated the existence of "sufficient facilities available presently for recipients on welfare within the maximum allowances for shelter").

This case stands in stark contrast to *Bernstein*: Here, not only has the Appellate Division found that conditions in

plaintiffs' emergency housing accommodations are "inadequate," *McCain*, 117 A.D.2d at 216 (CA41); but unlike *Bernstein*, plaintiffs have neither the funds for nor the means of securing alternative adequate emergency accommodations. Thus, unlike *Bernstein*, where government aid was sufficient to meet the needs in question, here the assistance is grossly inadequate. The plaintiffs in *McCain* are captive to the dangerous and unhealthy emergency accommodations documented in the record. Until they obtain permanent housing, homeless families must either endure the filthy and crime-ridden emergency accommodations defendants provide; or they and their children must sleep, like the Perez family, on beaches and in parks; like the Shepard family, on subways and in hallways.

In sum, in *Bernstein* this Court was not presented with, and did not address, a situation where defendants refused to provide a basic necessity such as adequate emergency shelter. Instead, *Bernstein* dealt with a cash grant concededly adequate to secure alternative shelter. The holding in *Bernstein* therefore in no way constrains the judiciary from barring the provision of assistance that is altogether inadequate and, indeed, is dangerous and harmful to the needy.²²

* * *

In conclusion, the history of Article XVII demonstrates that the constitutional obligation to aid the needy was intended to go beyond empty guarantees. It was intended to create a "concrete social obligation," III *Revised Record, supra*, at 2126, recognized by this Court to be a "fundamental part of

²² In *Levittown UFSD v. Nyquist*, 57 N.Y.2d 27 (1982), the Court rejected a claim that disparities in the funding of school districts violate Article XI, § 1 of the State Constitution, which provides that the "Legislature shall provide for the maintenance and support of a system of free common schools, wherein all children may be educated." The Court noted that the state system satisfied the constitutional requirement because it provided a "sound basic education." *Id.* at 48. Moreover, the Court indicated that Article XI was intended to assure "minimal acceptable facilities and services." *Id.* at 47. Here, in contrast, the Appellate Division found that the shelter provided by defendants fails to meet "minimum standards of decency and habitability." 117 A.D.2d at 216 (CA41).

the social contract." *Tucker*, 43 N.Y.2d at 7. As the framers of Article XVII, the courts of this State, and the defendants themselves have recognized, this obligation is only meaningful if, at minimum, it includes a right to safe emergency shelter for homeless children and their families.

A refusal to provide safe emergency shelter has such a devastating impact on homeless children that it cannot be considered a mere selection of the "means" or "manner" in which aid is provided. Rather, such a refusal must be regarded as shirking the duty to provide the needy with "aid, care and support." It is self-evident that conditions not fit for human habitation do not constitute shelter. Accordingly, Article XVII requires that defendants provide emergency shelter to homeless families that meets minimum standards of decency. Any suggestion that defendants may provide unfit and inadequate shelter reflects the conception that Article XVII was intended to lay to rest—that the provision of aid to the needy is a matter of "legislative grace" rather than a fundamental responsibility of government. *Tucker, supra*, 43 N.Y.2d at 7.

POINT II

DEFENDANTS' PROVISION OF UNSAFE AND HARMFUL SHELTER VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OF ARTICLE I, § 6 OF THE NEW YORK STATE CONSTITUTION

When the State undertakes to provide shelter to homeless families, whether as a matter of policy, or obligation, State and federal constitutional protections prohibit it from maintaining shelters with grossly inadequate conditions. As set forth below, it is now well established that the State may not inflict harm on those in its care by maintaining dangerous and unsafe living conditions. Since the health and safety of those in the care of the State depend upon the living environment established by government, conditions of care are subject to constitutional scrutiny. By providing shelter permeated with

dangerous conditions, defendants inflict physical and psychological harm on homeless families. This infliction of harm unjustifiably infringes the liberty interests of homeless families in bodily safety. *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 322 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Rivers v. Katz*, 67 N.Y.2d 485 (1986).

Because individuals in State care retain constitutionally protected interests in bodily integrity, the State must respect these basic rights by providing "a basically safe and humane living environment." *Goodman v. Parawatiker*, 570 F.2d 801, 804 (8th Cir. 1978). Courts have recognized that this principle protects patients in State mental institutions. See *Youngberg, supra*, 457 U.S. at 315-16; *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1243 (2d Cir. 1984); *Goodman, supra*, 570 F.2d at 804.

Due Process rights to adequate and safe living conditions have also been recognized as protecting pre-trial detainees. *Cooper v. Morin*, 49 N.Y.2d 69 (1979); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (inadequate conditions may constitute impermissible "punishment" of detainees); *Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1492 (1986) (due process right to "reasonably adequate food, clothing, shelter, and sanitation").

Convicted prisoners are also entitled to minimally adequate conditions. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Relying on the rights of prisoners to establish a minimum threshold, courts have found that other populations are entitled to "rights of personal freedom at least as great as prison inmates." *Society for Good Will, supra*, 737 F.2d at 1246 (mentally retarded); see *Youngberg, supra*, 457 U.S. at 315-16; *Goodson v. City of Atlanta*, 763 F.2d 1381, 1387 (11th Cir. 1985) (detainees); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973) (mentally retarded). As Special Term held in this case, "[i]f convicted criminals have such rights, the homeless who become interim wards of a government entity are entitled to no less." 127 Misc. 2d at 25 (CA52).

These due process guarantees also extend to individuals who are in State custody because they have no practical alternative and are "compelled *de facto* to endure the conditions" maintained by the State. *Harper v. Cserr*, 544 F.2d 1121, 1123 (1st Cir. 1976). Thus, courts have held that voluntarily committed patients in State mental institutions have the same due process right to safe conditions as those involuntarily committed. See *Society for Good Will, supra*, 737 F.2d at 1243; *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 94 (3rd Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *Goodman, supra*, 570 F.2d at 804; *Kolpak v. Bell*, 619 F. Supp. 359, 377-79 (N.D. Ill. 1985); *Flowers v. Webb*, 575 F. Supp. 1450, 1454-55 (E.D.N.Y. 1983); *Seide v. Prevost*, 536 F. Supp. 1121, 1134-38 (S.D.N.Y. 1982); *New York State Ass'n for Retarded Children, supra*, 357 F. Supp. at 764-65. In *Goodman, supra*, 570 F.2d at 804, the Eighth Circuit stated:

Although there is nothing in the Constitution which requires the state of Missouri to admit all patients seeking treatment, once [the plaintiff] was admitted as a patient, voluntary or involuntary, she had a constitutional right to a basically safe and humane living environment.

Additionally, the Second Circuit has emphasized that when the State accepts custody over an individual it must provide adequate and safe living conditions because the individual becomes dependent upon the State for protection:

Even granting that the State of New York was not required to build schools for the mentally retarded or admit voluntary residents, once it chose to house these voluntary residents, thus making them dependent upon the state, it was required to do so in a manner that would not deprive them of constitutional rights.

Society for Good Will, supra, 737 F.2d at 1246; see *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 484-85 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983).

Homeless parents and children clearly have no place to turn other than to government. Like the "voluntarily" committed

mentally ill or retarded, homeless families are compelled to look to government for shelter. See *Seide, supra*, 536 F. Supp. at 1136 (categorization of psychiatric patients as "voluntary" is "of dubious value" when they "have no adequate alternative living arrangement"); *New York State Ass'n for Retarded Children, supra*, 357 F. Supp. at 759 ("a large part of the residents of Willowbrook entered because they had no alternative"). As "interim wards of a government entity," 127 Misc. 2d at 25 (CA52), homeless families lodged by the government in shelters or hotels are dependent upon the State for the rudiments of decent living conditions. Once placed by defendants in hotels or shelters, homeless families have no opportunity to obtain for themselves necessities such as heat, hot water, and working sanitary facilities. Even if defendants were under no legal obligation to provide emergency shelter for the homeless, due process requires that when they do provide such shelter, it must include these necessities because homeless families are neither free to depart, nor able to control, their living conditions.

The provision of grossly inadequate emergency shelter violates not only due process rights of homeless families under the Fourteenth Amendment of the United States Constitution, but those accorded by the State Constitution as well. Indeed, Article I, § 6 of the State Constitution requires the State to respect the liberty interests of individuals in its care to a greater extent than does the Fourteenth Amendment. In *Cooper, supra*, 49 N.Y.2d at 79-80, this Court held that the State Constitution requires New York courts to scrutinize the validity of restrictions placed on detainees more closely than is required when applying the Fourteenth Amendment. The Court reaffirmed that it has "not hesitated when [it] concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principles that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution" *Cooper, supra*, 49 N.Y.2d at 79; see *People v. P.J. Video, Inc.*

____ N.Y.2d ____, No. 304, slip op. at 8-9 (Ct. of App. Oct. 28, 1986) (noting that the Court of Appeals has "frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than accorded by the Federal Constitution in cases concerning individual rights and liberties").

Due Process, as this Court has explained,

embraces fundamental rights and immutable principles of justice . . . and the use of the term is but another way of saying that every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice. . . . Due process of law guarantees respect for personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

People v. Isaacson, 44 N.Y.2d 511, 520 (1978). The "unsafe and squalid conditions," 117 A.D.2d at 217 (CA42), which the Appellate Division found lead to "inevitable emotional scarring" and place the physical and mental health of thousands of children at risk, *id.* at 216 (CA41), violate this basic tenet of due process that government must respect the fundamental rights of citizens.

POINT III

THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS REQUIRE THAT HOMELESS FAMILIES WITH CHILDREN, LIKE SINGLE ADULTS, BE PROVIDED WITH MINIMALLY ADEQUATE SHELTER

Under basic principles of equal protection, where adequate shelter is, as a matter of law and practice, provided to all homeless single adults, it cannot legitimately be denied to homeless children and their parents.

The City provides minimally adequate shelter to all destitute homeless single men pursuant to standards set forth in a 1981

consent decree entered in *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. Co. 1979). See *City of New York v. Blum*, 121 Misc. 2d 982, 986 (Sup. Ct. N.Y. Co. 1982). The City's refusal to make adequate shelter available to homeless women after entry of the *Callahan* decree was condemned as violative of equal protection. In *Eldredge v. Koch*, 118 Misc. 2d 163 (Sup. Ct. N.Y. Co.), *rev'd on other grounds*, 98 A.D.2d 675, 676 (1st Dep't 1983), the Appellate Division held that "homeless women are constitutionally entitled to treatment equal to that accorded to homeless men." Consequently, the City now provides minimally adequate shelter to all destitute homeless men and women and, accordingly, may not fail to do the same for homeless families.

The Fourteenth Amendment of the United States Constitution mandates that State and local government shall not "deny to any person within its jurisdiction the equal protection of the laws." The New York Constitution similarly requires that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," N.Y. Const. art. 1, § 11, a command "as broad in its coverage as that of the Fourteenth Amendment." *Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965); see *Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982); *Matter of Lee v. Smith*, 43 N.Y.2d 453, 463 (1977). Under these guarantees of equal protection, "any classification which denies to one class of needy persons public assistance which is available to all others, cannot be justified unless it is rationally related to a legitimate State interest." *Matter of Lee v. Smith*, 43 N.Y.2d at 460; see *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

The Appellate Division correctly ruled that plaintiff homeless families were likely to prevail in claiming that their denial of emergency shelter violated State and federal guarantees of equal protection of the laws. 117 A.D.2d at 213-14 (CA38-39). Noting that in *Eldredge*, "we upheld the constitutional right of homeless single women to shelter equal to that provided for

homeless men under the *Callahan* decree," the court found "no apparent reasonable basis for the City's denial of emergency shelter to plaintiffs." *Id.* at 214 (CA39). Similarly, principles of equal protection require provision of minimally adequate shelter to homeless families with children.

The Appellate Division ruled in *Eldredge* that the City must provide to homeless women not merely shelter, but minimally adequate shelter as is provided to homeless men under the *Callahan* decree. In remanding *Eldredge* on factual issues, the court recognized the role of the judiciary in

determining the adequacy of the facilities provided in each shelter, and whether or not the facilities provided for homeless women, taken as a whole, are equal to those provided for homeless men.

98 A.D.2d at 676.

Since, as the Appellate Division determined here, there is no rational basis for distinguishing between homeless families with children and single adults in the City's provision of emergency shelter, it is equally irrational to permit the City to provide inadequate shelter to families while ensuring the availability of minimally adequate shelter to single men and women.²³ As the court stated:

It is axiomatic that children need stable, secure homes and are among the least able to bear the hardships of poverty and destitution. Public policy strongly favors assistance to

²³ Certainly, financial considerations cannot provide such a rational basis. The courts have repeatedly rejected governmental excuses that a lack of funds may justify a deprivation of constitutional rights. See Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 725 n.71 (1978). This Court recently called such an excuse "particularly unconvincing" with regard to provision of adequate housing and treatment to the homeless mentally ill. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984).

families with destitute children. . . . Indeed, the needs of plaintiffs are greater than those of single adults.

117 A.D.2d at 214 (CA39) (citations omitted).²⁴

Courts have not hesitated to forbid disparate treatment in the provision of benefits where, as in this case, no rational basis for unequal treatment exists. Thus, in *Matter of Lee v. Smith*, 87 Misc. 2d 1018, 1023 (Sup. Ct. N.Y. Co. 1976), *aff'd*, 58 A.D.2d 528 (1st Dep't), *aff'd*, 43 N.Y.2d 453 (1977), New York's categorical denial of home relief to Supplemental Security Income recipients, when such benefits were available to other needy persons, was held to violate plaintiffs' right to equal protection of the laws. In affirming that decision, this Court concluded that "[w]hile the state may have a legitimate interest in reducing the costs of administering the home relief program, it may not accomplish this result by arbitrarily denying one class of persons access to public funds available to all others." 43 N.Y.2d at 462 (citation omitted).

Similarly, in *Bacon v. Toia*, 648 F.2d 801, 806-08 (2d Cir. 1981), *aff'd on other grounds*, 457 U.S. 132 (1982), the Second Circuit held that New York State violated the principle of equal protection by providing only emergency services to welfare recipients while permitting other claimants to receive cash or services, or both. See also *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536 (1973) (denying food assistance to households containing unrelated individuals while providing assistance to households of related individuals was not conduct rationally related to the State's interest in preventing fraud).

²⁴ Since the needs of plaintiff homeless families with children are greater than those of single adults, the shelter provided must be commensurate with the needs of such families, and not simply identical to the shelter that is provided to homeless men and women. This principle is recognized and embodied in State regulations governing conditions in shelters for homeless single adults and shelters for families with children. Compare 18 N.Y.C.R.R. Part 491 (single adult shelters) with 18 N.Y.C.R.R. Part 900 (family shelters) and 18 N.Y.C.R.R. § 352.3(g) (hotels/motels used for emergency housing of families).

Finally, as the Appellate Division here and in *Eldredge* correctly concluded, the governmental act of entering into a consent judgment raises no barrier to plaintiffs' equal protection claim. 117 A.D.2d at 214 (CA39); *Eldredge v. Koch*, 98 A.D.2d at 675-76. See *Canterino v. Wilson*, 546 F. Supp. 174, 213-16 (W.D. Ky. 1982) (equal protection rights of inmates in Kentucky prisons for women violated by conditions that failed to meet standards established by consent decree for inmates in Kentucky prisons for men). The government's entry into a judicial consent decree, like its action by statute, regulation, or administrative policy, is governmental action subject to analysis under constitutional principles of equal protection. Distinctions which are otherwise wholly without rational foundation do not acquire legitimacy simply because government "consents" to differential treatment of one class. See also *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 784-87 (11th Cir. 1984) (preliminary injunction granted on Alabama plaintiffs' claim of equal protection right to Farmers Home Administration's use of judicial foreclosure method because Georgia residents, pursuant to consent decree with FHA, had been granted that right notwithstanding Georgia statute allowing non-judicial foreclosure).²⁵

There exists no rational basis for denying minimally adequate emergency shelter to children and their families while

²⁵ As the Appellate Division held, *Sundheimer v. Blum*, 79 A.D.2d 512 (1st Dep't 1980), *aff'd on opinion below*, 55 N.Y.2d 756 (1981), is not to the contrary. 117 A.D.2d at 214 (CA39). In *Sundheimer*, the issue was whether the equal protection clause required the State to extend family care provider payments to parents of all disabled children, where the State had extended such payments to parents in the "Willowbrook" case. The court held that there was a rational basis for distinguishing Willowbrook parents from others because the Willowbrook facility was required, by the terms of a consent decree, to reduce its patient population substantially and expeditiously; because there was a need to give Willowbrook parents an incentive to remove their children; and because of the relatively small number of Willowbrook patients. *Id.* Thus, the mere existence of a consent decree did not in and of itself defeat plaintiffs' equal protection claims in *Sundheimer*.

providing it to single adults. The constitutional guarantee of equal protection therefore requires that emergency shelter provided by the City to homeless families meet minimal standards of adequacy.

POINT IV

THE APPELLATE DIVISION ERRED IN RULING THAT THE DEFENDANTS HAVE NO STATUTORY OBLIGATION TO PROVIDE EMERGENCY SHELTER THAT MEETS MINIMUM STANDARDS OF DECENCY AND HABITABILITY

Various New York State statutes evince a clear legislative intent that emergency housing accommodations provided to homeless families must meet minimum standards of decency and habitability. Indeed, the Appellate Division concluded that various constitutional and statutory provisions, including New York's program of Emergency Assistance to Families, require City and State defendants to provide emergency shelter to homeless families with children. 117 A.D.2d at 212-16 (CA37-41). However, the court erroneously determined that the Legislature failed to set minimum standards governing conditions in such emergency housing. To the contrary, the Legislature has established a requirement that defendants provide homeless families with minimally adequate emergency shelter.

The most explicit enunciation of the Legislature's determination that defendants shall provide homeless families with minimally adequate shelter is found in the Emergency Assistance statute itself. Under N.Y. Soc. Serv. Law § 350-j.3, social services officials "shall" provide homeless families with "living arrangements in a home" For the following reasons, the phrase "living arrangements in a home" must refer to *adequate* living arrangements.

In choosing the phrase "living arrangements in a home," the Legislature clearly contemplated the provision of shelter which comports with the essential elements of shelter in a home: heat,

hot water, working plumbing, door locks, and the like. The Legislature could not merely have meant four walls and a roof over one's heads when the beds are vermin infested, there is no heat in the winter and the wind whips through holes left by missing window panes. Any other interpretation would lead to an absurd construction of the plain language of section 350-j and frustrate its obvious intent. *See, e.g., Shapiro v. United States*, 335 U.S. 1, 31 (1947) ("we must heed the equally well-settled doctrine of this Court to read a statute, assuming it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

The Superior Court of New Jersey recently found such a right to adequate shelter under a New Jersey statute requiring municipalities to provide needy persons with "such aid and material assistance . . . necessary to the end that such persons may not suffer unnecessarily from cold, hunger, sickness, or be deprived of shelter" N.J. Stat. Ann. § 44:8-122. The court concluded that homeless persons were entitled not merely to shelter, but to shelter that is "*safe and suitable*." *Maticka v. City of Atlantic City*, No. L-8306-84E, slip op. ¶¶ 15, 16, 19 (N.J. Super. Ct. Feb. 8, 1985) (emphasis added).

Moreover, State regulations render the meaning of the statute more explicit. Regulations governing the Emergency Assistance to Families program in New York State define emergency assistance as including "securing family shelter." 18 N.Y.C.R.R. § 372.4(d). Here the term "shelter" must be understood in light of the State hotel/motel and shelter regulations defining the adequacy of emergency shelter provided pursuant to § 350-j. These regulations, codified at 18 N.Y.C.R.R. § 352.3(g) and 18 N.Y.C.R.R. Part 900, put flesh on the bones of "shelter" as that term is conventionally understood, and indicate that the phrase "living arrangements in a home" in § 350-j must include minimally adequate living conditions.

Finally, § 350-j must be construed in harmony with defendants' statutory obligations to preserve family unity. The

Legislature has codified the government's long-standing duty to care for children in a state of want or neglect by directing defendants to provide "preventive services" to "destitute children." "Preventive services" are supportive services necessary to avert a disruption of family life which may result in the placement of a child in foster care. N.Y. Soc. Serv. Law § 409.²⁶ "Destitute children" are children who are either "homeless" or "in a state of want or suffering due to lack of sufficient . . . shelter." N.Y. Soc. Serv. Law § 371.3. Defendants must provide destitute children with services "appropriate to meet" their needs. N.Y. Soc. Serv. Law § 409-d.3(b)(ii). Obviously, the emergency shelter provided by defendants, which places "thousands of children . . . at risk in their physical and mental health, and subject to inevitable emotional scarring," in "conditions particularly undesirable for young children," 117 A.D.2d at 216, 217 (CA41, 42), is not appropriate to meet their needs.²⁷ The Legislature certainly could not have meant that homeless children are to be provided with dangerous living conditions.²⁸ Thus, to countenance the provi-

²⁶ The critical importance of the provision of adequate emergency shelter is further emphasized by provisions of the Social Services regulations setting out New York's system of preventive services to prevent family disintegration. Such preventive services explicitly include the provision of emergency shelter. 18 N.Y.C.R.R. §§ 423.2(b)(15), 423.4(k). See also N.Y. Soc. Serv. Law §§ 397.1(b), 409-a.1(a)(i).

²⁷ Analyzing a virtually identical statutory scheme requiring the provision of "such services as are available and appropriate in the circumstances," to adults "deprived of adequate food or shelter," West Virginia's highest court ordered the West Virginia Department of Welfare to place the homeless in emergency shelter. *Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983).

²⁸ In fact, as discussed *supra*, at 22, the periodic scandals surrounding conditions in public "almshouses" formed the impetus for New York's overhaul in 1929 of its entire public assistance scheme. See D. Schneider & A. Deutsch, *History of Public Welfare in New York State 1867-1940*, 279-289, 376 (1941). It would indeed be anomalous if the very legislative scheme that arose, in part, as a response to squalid conditions in almshouses were read to permit a return to the use of such poorhouse conditions in the 1980's.

sion of inadequate shelter under § 350-j would conflict with the purpose of § 409-d.3.

In sum, the exceedingly dangerous and unhealthy conditions in emergency shelter provided by the New York City and State Departments of Social Services contravene the mandate of § 350-j and stand in stark contrast to the legislatively imposed obligation to preserve family integrity.²⁹ Instead, these conditions inexorably lead to the breakdown of normal family life and, indeed, invite the separation of parents and children. In this way preservation of the integrity of the family, perhaps the most critical of all State governmental functions, is undermined.

POINT V

JUDICIAL RELIEF ON PLAINTIFFS' CONSTITUTIONAL AND STATUTORY CLAIMS IS NECESSARY AND APPROPRIATE

As plaintiffs have demonstrated above, destitute, homeless families have constitutional and statutory rights to the government's provision of emergency housing that satisfies standards of minimal adequacy and habitability. So, too, have plaintiffs shown that this Court's prior precedents, and, in particular, *Matter of Bernstein v. Toia*, erect no obstacles to the declaration of plaintiffs' constitutional and statutory rights to minimally adequate emergency housing or to the issuance of appropriate judicial relief. This Court's decisions make it the duty of the judiciary to declare and enforce legal rights that flow from state law commands embodied in the Constitution and statutes. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 536-37 (1984); *Bruno v. Codd*, 47 N.Y.2d 582, 588-89 (1984). This duty requires courts to give "substantive significan-

²⁹ See also N.Y. Soc. Serv. Law § 131.3:

As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.

the Constitution, and to vigorously enforce its dictates. *Flushing National Bank v. M.A.C.*, 40 N.Y.2d 731, 739 (1976); see *Sgaglione v. Levitt*, 37 N.Y.2d 507, 514 (1975) ("The courts did not make the Constitution; the courts may not unmake the Constitution."); *Birnbaum v. Teachers Retirement System*, 5 N.Y.2d 1, 12 (1958) (court may not ignore "the will of the people as expressed in their Constitution").

Nor is there question that homeless children and their families living in grossly substandard "welfare hotels" in New York City are at grave risk of irreparable injury. Indeed, the Appellate Division found that "thousands of children are put at risk in their physical and mental health, and subject to inevitable emotional scarring, because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability." *McCain*, 117 A.D.2d at 216 (CA41).

The equitable relief fashioned in this case by Special Term was prudent, narrowly tailored, and well within the court's equitable power to remedy the demonstrated irreparable harm ensuing from the defendants' violation of plaintiffs' constitutional and statutory rights.³⁰ The rudiments of "shelter" required by the order—heat, hot water, bedding, door locks—are essentials of safe shelter for human beings. As Special Term acknowledged, these standards "are not immutable nor exhaustive, but indicative of the minimum standards which this society at this time finds acceptable within the meaning of the

³⁰ The task of defining minimally adequate emergency shelter is well within the bounds of judicial competence. Standards of decent conditions are neither obscure nor esoteric. The warranty of habitability, developed initially by courts, *Tonetti v. Penati*, 48 A.D.2d 25 (2d Dep't 1975); *Jackson v. Rivera*, 65 Misc. 2d 468 (Civ. Ct. N.Y. Co. 1971), and later codified by the Legislature, N.Y. Real Prop. Law § 235-b, looks to the judiciary to define fitness for human habitation. See *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 327-28 (1979).

word shelter." 127 Misc. 2d at 24 (CA51). The injunction was squarely supported by the court's equitable power.³¹

Judicial relief predicated on constitutional and statutory rights of homeless families is essential. More than three and one half years have elapsed since this suit was instituted. Over this period, plaintiff homeless families and their children have suffered egregious harm due to conditions in emergency housing that fall far short of minimum standards of adequacy and decency. Compounding that harm has been the failure of government, which has steadfastly resisted and undermined plaintiffs' rights to decent emergency housing. Thoroughly documented in this record has been the City's unremitting failure to provide adequate emergency housing to homeless families, coupled with a refusal to recognize even in principle its obligation to provide shelter to these families.

Following the entry of Special Term's Interim Order, the State promulgated regulations detailing standards for hotels and motels that are utilized as emergency housing for homeless families. Regrettably, these regulations were not enforced and the plaintiffs and the court were confounded by the City's persistent and flagrant violation of the standards embodied in them. After the City turned to the large-scale use of barracks-style mass shelters to accommodate homeless families, the State promulgated regulations relating to those facilities. But

³¹ An application for preliminary injunction is addressed to the trial court's sound discretion. See *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Tucker v. Toia*, 54 A.D.2d 322, 325 (4th Dep't 1976); *Gambar Enterprises, Inc. v. Kelly Services, Inc.*, 69 A.D.2d 297, 307 (4th Dep't 1979). On appeal, an order granting preliminary injunctive relief will be reviewed "only to determine whether that discretion has been abused." *Id.*; see *Eidelberg v. Steinberg*, 6 A.D.2d 895, 895 (2d Dep't 1958) ("The general rule is that, except in unusual circumstances, an appellate court is loath to interfere with the discretion exercised by a Justice at Special Term in granting or denying an injunction *pendente lite*"). In this case, Special Term arrived at its equitable order based upon an extensive familiarity with the substantial record of violations developed by plaintiffs.

these regulations are permeated by waiver provisions and encumbered by defendants' claims that they merely prohibit State reimbursement for noncomplying facilities. The upshot was the spectacle of the City's continued use for two years of the Roberto Clemente gymnasium as grossly substandard shelter for homeless families, even after the State condemned its use for that purpose and terminated State reimbursement.³²

Against this background of the undiminished suffering of homeless families and a persistent default in government responsibility, the plaintiffs come to this Court, as the forum of last resort, seeking vindication of basic constitutional and statutory rights to decent emergency housing. These rights should receive authoritative recognition from this Court as rooted firmly in the enduring mandate of constitutional and statutory law. At stake is the well-being of countless homeless families and their young children who need now and in the years to come the basic protection of emergency housing that is safe instead of dangerous, habitable instead of intolerable, and humane instead of inhuman.

Accordingly, this Court should rule that plaintiff homeless families and their children have constitutional and statutory rights to minimally adequate conditions in emergency housing, and that the order of Special Term appropriately enforced those rights in the face of their flagrant and unremitting violation.

³² See n.7 *supra*.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully urge that this Court reverse the order of the Appellate Division, First Department insofar as it barred judicial relief to establish and enforce minimum conditions of habitability in emergency housing for homeless families.

Dated: New York, New York
November 14, 1986

Respectfully submitted,

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MAY 13 1986

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Yvonne McCain, Emily Moses, Steven Moses, Yvonne
Perez, Barbara Dancy, Lillie Sullivan, Belinda
Randolph, Barbara Downs, Jeri Evans, Mary Brown,
Patricia Rodak, William Sanders, Carolyn Sanders,
Victoria Smith, and Carolyn King, on behalf of
themselves and their children or other dependent
minor relatives in their care and on behalf of all
others similarly situated.

Plaintiffs-Respondents-Appellants,

Donna Keyes, Barbara Rivera, Suzette Walker, Raphaela
Campos, Sylvia Free, Wanda Perry, Linda Turner, Roslyn
Elson, Lydia Robles, Roberta Hackett, Lola Scott,
Bethziada Serrano, Sondria Kennebrew, Camella Kennebrew,
Marie Kennebrew, Eric Sullivan, Flora Colley, Jewel
Bryant, Cammie Singleton, Anita Shepard, Loretta
LaFrenier, Marsha Cunningham, Genell Satterwhite,
Marie Boursiquot, Mildred Kornegay, Adolph Kornegay,
Evril Patterson, Valerie Frazier, Barbara Storms and
Elsie Burgos.

Plaintiffs-Intervenors-Respondents-Appellants,

Carolyn Lee, Shirley Haywood, Miriam Byer, Ramon
Remedios, Ernestine Robinson, Betty Hodge, Fred
Nesbitt, Jonathan Mims, Jorge Crespo, Norma Gomez
and Tonia Sebastian, 240

Proposed-Plaintiffs-Intervenors-Appellants,

Linda James and Ronald Eric Wright, on behalf of
themselves and their children and other dependent
minors in their care, 240

Plaintiffs-Intervenors-Appellants,

-against-

Edward I. Koch, as Mayor of the City of New York,
The City of New York, James Krauskopf, as Commis-
sioner of The Human Resources Administration of
the City of New York and of the New York City De-
partment of Social Services, Martin Burdick, as
Deputy Director of Income Maintenance Operations
of the New York City Department of Social Services,
Robert Jorgen, as Director of Crisis Intervention
Services of the New York City Human Resources Ad-
ministration, Anthony Gleidman, as Commissioner of
the New York City Department of Housing Preserva-
tion and Development, Wilfredo Vargas, as Assis-
tant Commissioner of the New York City Department
of Housing Preservation and Development, Division
of Relocation Operations,

Defendants-Appellants-Respondents,

Cesar A. Perales, as Commissioner of the New York State Department of Social Services,

Defendant.

In the Matter of the Application of Sharon Fulton, Roslyn Elson, Mary Baker, Yvonne McCain and Marlene Williams, on behalf of themselves and their children and other dependent minor relatives in their care and on behalf of all others similarly situated,

Petitioners-Respondents,

and

Patricia Cossley,

Petitioner-Intervenor-Respondent,

-against-

James Krauskopf, as Commissioner of The Human Resources Administration of The City of New York and of The New York City Department of Social Services, and Martin Burdick, in his capacity as Deputy Director of Income Maintenance Operations of the New York City Department of Social Services,

Respondents-Appellants.

The Municipal defendants in the McCain action appeal from so much of an order of the Supreme Court, New York County (Greenfield, J.), entered on June 27, 1984 which, inter alia, granted plaintiffs' motion for a preliminary injunction requiring the Departments of Social Services and Housing Preservation to meet certain minimal requirements, so far as practicable, when providing emergency housing for homeless families with children and the plaintiffs-intervenors and proposed plaintiffs-intervenors cross-appeal from so much of said order which denied their application for class action status and for intervention; the Municipal defendants in the McCain action also appeal from an order of said court which was also entered on June 27, 1984 which denied their motion to vacate the court's prior temporary restraining order barring them from transferring homeless families with children to and from emergency shelters; plaintiffs and proposed plaintiffs-intervenors appeal from an order of said Court which was entered on November 9, 1984 which denied their motion for intervention and for a preliminary injunction barring defendants from placing homeless families with

children in "mass shelters"; the proposed plaintiffs-intervenors-appellants further appeal from an order of the Supreme Court, New York County (Myers, J.), entered on May 30, 1985 which denied their motion to intervene, for class action status and for a preliminary injunction; the Municipal respondents and the State Commissioner in the Fulton action appeal from an order of the Supreme Court, New York County (Greenfield, J.), entered on June 29, 1984 which, inter alia, denied their cross-motions to dismiss the petition, certified the proceeding as a class action and granted petitioners' motion for a preliminary injunction to the extent of requiring the municipal and State defendants to provide each child and, where necessary, their parents, with sufficient funds to travel to and from school until such time as passes become available therefor.

Ann Moynihan and Arthur J. Fried, of counsel (Steven Banks, John E. Kirklin, Shawn P. Leary, Stephen J. Loffredo, Foster S. Maer, Scott A. Rosenberg, Alan Rosner and Marcella Silverman with them on the brief; Kalman Finkel as Attorney-in-Charge for The Legal Aid Society, attorneys) for the plaintiffs-respondents-appellants (other than Barbara Downs); the plaintiffs-intervenors-respondents-appellants; the proposed plaintiffs-intervenors-appellants; and the petitioners-respondents

Lee Bantle, of counsel (Debevoise & Plimpton, attorneys) for plaintiff-respondent-appellant Barbara Downs and as co-counsel for the remaining plaintiffs-respondents-appellants; the plaintiffs-intervenors-respondents-appellants; the proposed plaintiffs-intervenors-appellants; and the petitioners-respondents

Samuel J. Silverman, of counsel (Jay Greenfield, Anne Louise Oates and Todd Stern with him on the brief; Paul, Weiss, Rifkind, Wharton & Garrison, and Robert M. Hayes and Nadine Strossen, representing, respectively, the Coalition for the Homeless and the Washington Square Legal Services, Inc., as attorneys) for the plaintiffs-intervenors-appellants.

Barry P. Schwartz, of counsel (Fay Leoussis with him on the brief; Frederick A.O. Schwarz, Jr., attorney) for all of the municipal appellants

Lillian Z. Cohen, of counsel (Robert Abrams, attorney) as the Attorney General of the State of New York representing Cesar Perales as Commissioner of the New York State Department of Social Services.

24072-3 Yvonne McCain, et al. v Edward I. Koch and
Cesar A. Perales and other parties

24074N Yvonne McCain, et al. and Linda James, et al.
v Edward I. Koch, et al.

ROSENBERGER, J.

On these consolidated appeals we are called upon to consider whether homeless families with children are entitled to emergency shelter under the guarantees of equal protection of the New York State Constitution, the federal Constitution, and the State Plan for Emergency Assistance to Families with Needy Children. The issues arise in the context of appeals and cross-appeals from four orders entered by Special Term, New York County, in Yvonne McCain v Koch and from an order entered in Matter of Sharon Fulton v Krauskopf.

Statutory Framework and Factual Background

Under the New York Social Services Laws, policy and rule-making authority are concentrated in the State Department of Social Services (State DSS). See Social Services Law § 20. Primary responsibility for providing assistance and care, and day-to-day administration of the manifold public assistance programs devolves upon the local social services departments. See, Social Services Law § 62.

New York participates in the federally funded program for Aid to Families With Dependent Children (AFDC). In conjunction with the AFDC program, New York has elected to participate in the program for Emergency Assistance to Needy Families with Children (EAF). Additional emergency and short-term aid are available under state-funded public assistance programs such as Home Relief (HR) and Emergency Assistance to Adults. Social Services Law §§ 157, 300. The State DSS monitors the local services departments, and when it discovers a failure to adhere to binding policies, directives, state regulations or federal regulations in the AFDC and EAF programs, it may withhold or deny state reimbursement or require corrective action. Social Services Law § 20, 45 CFR 206.10(a)(12).

The City Department of Social Services (City DSS) operates Income Maintenance Centers (IMCs) which administer inter alia, the AFDC, EAF and HR programs for client-recipient on a daily basis, and place families who have requested emergency shelter. The City DSS operates an Emergency Assistance Unit

(EAU) in each borough except Staten Island. Families who seek emergency shelter during a weekend, or who have not received referrals to temporary housing from an IMC at the end of the business day, are referred to an EAU for placement. The City DSS attempts to locate hotel accommodations for homeless families. It provides shelter allowances for such accommodations for six months, and thereafter, for so long as the client seeks permanent housing. It receives state reimbursement for these payments for six months and thereafter, unless the average length of stay in such accommodations exceeds six months. 18 NYCRR 352.3(f). More recently the City DSS has sought space for clients in three family shelters operated by non-profit sponsors under contract with the City.

Families who are without shelter because of damage to their homes or because of vacate orders are initially assisted by the Bureau of Emergency Housing Services within the City Department of Housing, Preservation, and Development (HPD). HPD provides emergency shelter, makes referrals to permanent housing in the area of choice, and pays relocation expenses. It transfers those families it has been unable to rehouse to the City DSS for assistance.

McCain v Koch

Plaintiff Yvonne McCain and members of thirteen other homeless families with children commenced an action against the

City, the State and City Commissioners of Social Services, and various city officials charged with the administration of programs to assist homeless families in locating housing, seeking a declaratory judgment, injunctive relief, and class certification. They allege in their amended complaint, inter alia, that the state and municipal defendants arbitrarily deny them adequate emergency shelter without written notice and an opportunity for a hearing, and shuttle them between local welfare offices, IMCs, and EAUs in cycles lasting for days, sometimes weeks at a time. Plaintiffs also claim that defendants lodge them overnight in the EAUs, having them sleep under fluorescent lights on floors, formica counter tops, desks, and chairs and relocate them in squalid and dangerous hotels, located at considerable distances from their children's schools.

The following poignant scenarios illustrate plaintiff allegations that defendants arbitrarily deny adequate emergency shelter to homeless families with children. Plaintiff William Sanders, his wife Carolyn, and their two daughters, aged 10 and 13, became homeless in June 1982, when a fire destroyed their home and Mr. Sanders lost his job. The Sanders plaintiffs allege that City DSS denied their request for emergency shelter on March 26, 1983. Housing was later provided, but terminated on March 31, 1983, for no stated reason. Their AFDC benefits were discontinued on the ground that they lacked a permanent address.

Plaintiff Barbara Downs, a recipient of Social Security Survivor's benefits, and her two children left their apartment

December 1979, because of unsafe, unsanitary conditions. They allege that the City DSS terminated their shelter allowance grant of public assistance upon learning that they had moved in with relatives. When Ms. Downs reapplied for assistance, a social worker advised her to seek permanent housing, since the hotels were unsuitable for families.

In March 1983, plaintiff Patricia Rodak and her five year old daughter, AFDC recipients, became homeless as a result of their eviction for nonpayment of rent. The Rodak plaintiffs allege that the City DSS denied their request for emergency shelter on March 18 and March 24, 1983.

Plaintiff Yvonne Perez and her three children, AFDC recipients, were also evicted from their apartment for nonpayment of rent in November 1981. Ms. Perez alleges that she searched in vain for an apartment while living with a series of neighbors and friends for five months, until she finally requested emergency shelter. On April 25 and July 2, 1982, the IMC denied her requests. A friend sheltered two of her children from July 2 to July 4. Ms. Perez and her asthmatic six-year old son spent the nights of July 2 and 3 sleeping on a Coney Island beach. She and her son slept on the ground in Sunset Park, Brooklyn, the night of July 4th.

The City DSS placed Yvonne McCain and three of her children at the Martinique Hotel in Manhattan. They have lived there since October 1983 in two rodent and bug-infested rooms, containing minimal furniture and four beds with dirty linen. The

windows have no guardrails and there is an open electrical box the hallway within easy reach of her children.

The City DSS referred plaintiffs Steven and Emily Mc and their eight children to rodent-infested three room accommodations in the Martinique Hotel. The rooms had broken windows, six single beds, and no other furniture. Due to the repeated complaints, they were moved to slightly better rooms the hotel, which had three twin beds, a double bed and one dresser. In early September, the Martinique refused to continue housing the Moses family. The City DSS then relocated them to the Granada Hotel in Brooklyn. Their accommodations at the Granada Hotel were insect and rodent-infested. The Moses children aged two to twelve, share three twin beds with soiled mattresses and inadequate linen. During their six-month occupancy of the Granada, there have been approximately six fire and fire alarms have failed to ring although they ring on other occasions. Two of the Moses children reported having been threatened with a knife. Mr. Moses has witnessed muggings perpetrated with both guns and knives. Heat and hot water were so infrequent that their children were forced to sleep fully clothed on many nights and contracted colds. Indeed, their year old daughter was hospitalized for pneumonia.

Proposed plaintiff-intervenor Valerie Frazier and her two children reside in similarly dangerous and squalid conditions at the Regent Hotel in Manhattan. They eat on the floor because there is no table.

Proposed plaintiff-intervenor Genell Salterwhite's two six-month old infants sleep on the floor because they otherwise crawl out of the bed and fall onto the floor. Her room at the Conca D'Oro Hotel in Staten Island has two double beds for two adults and six children.

In their amended complaint, plaintiffs McCain, et al. request a declaration that defendants' failures to provide eligible homeless families with (1) safe, suitable, and adequate emergency housing; (2) relocation benefits; (3) school transportation allowances, and, (4) notice and a hearing prior to termination of emergency shelter, violate the federal and state constitutions, statutes, and regulations. Plaintiffs pray for an injunction requiring defendants, inter alia, to provide the aforementioned benefits and to "locate and make available additional emergency housing units within New York City so that all families in need of emergency housing obtain the housing in New York City immediately, and so that families can, where appropriate, be given emergency housing near their children's schools." Plaintiffs also seek to enjoin defendants from denying emergency housing to families in need of such housing and from placing such families in housing that is dangerous to the life, health, and safety of their children and which is inadequate to meet the family's needs.

Matter of Fulton v Krauskopf

Petitioners Sharon Fulton and four other members of homeless families, including petitioner Yvonne McCain, commenced an Article 78 proceeding seeking class certification and a preliminary injunction requiring respondent Commissioners of the State and City DSS to provide emergency housing within the area where their minor children attend school or to provide transportation allowances based on actual costs for children and for their parents where necessary. Their petition alleges that the City DSS has failed to comply with state policy concerning school transportation allowances and that its refusal to provide such allowances deprives their children of their right to a free education.

Procedural History and Decision at Special
Term in McCain v Koch

By an interim order dated June 20, 1983, Special Term (Greenfield, J.) directed the City DSS and HPD, when providing emergency housing for homeless families with children, to assure insofar as practicable, that such housing meets specified minimum standards of health, safety, and decency suitable for young children, including placement in light of educational needs; to afford emergency shelter recipients with timely and adequate notice of any proposed termination, and a hearing; to designate an individual to facilitate implementation of the order; and

required State and City DSS to provide public assistance, food stamps, and Medicaid benefits for which emergency shelter recipients are eligible without interruption, to the extent practicable.

On September 29, 1983, the Commissioner of the State DSS issued Administrative Directive 83 ADM-47, which largely incorporated the terms of the interim order and made them binding on a statewide basis. It directs social services departments "to assist homeless persons in obtaining housing." The Administrative Directive also indicates that "[e]mergency housing must either be provided immediately if a homeless person is determined eligible or written notice must be given that no assistance will be provided where a homeless person is determined ineligible. A person who is determined ineligible shall be advised of the right to an expedited State Fair Hearing."

The State Commissioner also promulgated subdivisions (g) and (h) of 18 NYCRR § 352.3. These provisions require local social services departments semi-annually to inspect hotels and motels used for client referrals and verify that they meet certain enumerated standards. Referrals are prohibited to facilities not verified as meeting these criteria.

By decision, reported at 127 Misc2d 23, and order entered June 27, 1984, Special Term (Greenfield, J.) granted a preliminary injunction to the extent of converting the interim order into a preliminary injunction. This is one of the five orders at issue on this appeal. Special Term found the case moot

to the extent that the substance of the interim order had been codified in 18 NYCRR § 352.3(g) and (h). Without reaching the constitutional and statutory issues, except to note the absence of an explicit mandate, Justice Greenfield held "[o]nce the defendants have undertaken to provide emergency shelter, whether for 30 days pursuant to AFDC or beyond, instead of providing direct cash grants", defendants must ensure that the shelter meets "minimal standards of cleanliness, warmth, space and rudimentary conveniences." The court invoked its equitable powers to compel compliance with reasonable minimum standards, reasoning that the homeless as "interim wards of a governmental entity" are entitled to no less than convicted criminals. The court also held that the procedural safeguards delineated in the interim order should be adhered to, citing Matter of Jones v. Berman, 37 NY2d 42, 56 (1975). It rejected plaintiffs' request for additional safeguards. The court framed the order in terms of class-wide relief, but determined that the action could not properly be maintained as a class action because the remaining issues, such as eligibility for relocation benefits, moving expenses, and storage fees, presented issues of law and fact which were not common to all members of the proposed class.

By separate decision and order, entered June 27, 1984, Special Term (Greenfield, J.) denied the City's motion to vacate the Temporary Restraining Order which it had issued on March 2, 1984. The TRO prohibits the City from transferring the named plaintiffs from satisfactory facilities to an alternate housing

location until reasonable notice and an opportunity to be heard are given.

By decision, dated August 3, 1984, and a third order entered November 9, 1984, Special Term (Greenfield, J.) denied the motion of plaintiffs Yvonne McCain, et al. and proposed plaintiff-intervenors Carolyn Lee et al. for intervention, class certification, and a preliminary injunction prohibiting defendants from placing any additional families in the three existing congregate or mass shelter facilities, barring the opening of any additional such facilities, and seeking to require the utilization of hotels or other housing accommodations providing privacy and meeting the minimal standards of the interim order.¹ Plaintiffs alleged that the mass shelters had substandard living conditions and caused their children psychological harm. In the alternative, plaintiffs requested an order directing limitation of the use of mass shelters to initial one-time placements not to exceed five days, implementation of a "screening system" for pregnant women and others whose mental or physical health would be adversely affected, as well as individuals with communicable disease, and the setting of certain minimal standards for mass shelters.

Special Term recognized that mass shelters are not conducive to privacy, increased the likelihood of the spread of infectious diseases and of deviant sexual behavior, and should be utilized only for short stays. Nevertheless, it declined to

¹After Special Term issued its interim order, and State DSS reflected the order in State Administrative Directive 83 ADM-47, the City began utilizing "mass shelters" for emergency housing.

compel the closing of such shelters, stating: "However imperfect mass shelters provide homeless families with an alternative to sleeping in the street..." Justice Greenfield declined to close the Roberto Clemente facility on the ground that plaintiffs had failed to demonstrate clearly the reasons for its unacceptability to the State.

By order entered May 30, 1985, Special Term (Myers, J.) denied the motion of proposed plaintiffs-intervenors Linda James and Ronald Wright et al. for leave to intervene in McCain v. City of New York and for a preliminary injunction barring the defendants from denying emergency shelter to eligible families.² In their complaint, James alleged that she had unsuccessfully requested emergency shelter on behalf of herself and her two children from their eviction in April 1985. She alleged that her family slept in the Brooklyn EAU office on three successive nights. Justice Myers deemed the motion to intervene as moot because the two proposed intervenors had been housed by the City. The court further declined to consider the motion for a preliminary injunction on the merits since Justice Greenfield had denied the prior motion for the same relief.

Decision at Special Term in
Matter of Fulton v Krauskopf

²Ronald Wright's prior motion to intervene in Canaday v Koch, 65 F. Supp 1460 (SDNY, 1985), a similar action, was denied, and the action was stayed pending disposition of this appeal by order of decision dated May 10, 1985.

By decision, reported at 127 Misc2d 20, and order entered June 29, 1984, in Matter of Sharon Fulton v Krauskopf, Special Term (Greenfield, J.) issued a preliminary injunction directing respondents, the State and City Commissioners of DSS, to provide an allowance for actual school transportation costs on an individualized basis to homeless children and their parents. Special Term held that the \$18 weekly travel allowance provided to parents as a matter of City policy was inadequate. Justice Greenfield granted class certification, holding that the numerical requirement was met by the estimated number of 2,500 families affected and, additionally, that the matter would be decided most appropriately pursuant to generally applicable principles. It denied the cross-motion to dismiss, and ruled that the matter was not moot because of its "ongoing nature, and the lack of adequate general provision." Thereafter, respondents' application for leave to appeal to this court was granted, and the appeal was consolidated with the appeals pending in McCain v Koch. Subsequently, a Justice of this Court granted the motion by the City for leave to appeal from the order entered November 9, 1984, the motion by proposed plaintiff-intervenors Linda James and Ronald Wright for an expedited appeal, and consolidated these appeals with the foregoing matters.

McCain v Koch

1. Right to Emergency Shelter

The threshold issue in McCain v Koch is whether homeless families with children are entitled to emergency

shelter. We reverse Special Term's order of May 30, 1985, which denied proposed plaintiffs-intervenors Linda Jones and Ronald Wright's motion for intervention and for a preliminary injunction, seeking to bar the defendants from denying emergency shelter to eligible families. We cannot agree with Special Term's conclusion that the City's provision of emergency housing to the proposed intervenors mooted their claims. The questions presented are of public importance and significance, likely to recur and yet evade review. See Matter of Jones v Berman, 83 NY2d 37 at 57. We therefore grant a preliminary injunction barring the denial of emergency shelter to homeless families.

In our view, plaintiffs made the requisite showing (1) a balancing of equities favoring such an injunction pendente lite, (2) risk of irreparable injury, and (3) a strong likelihood of success on the merits of their claims. CPLR § 6301. See Tucker v Toia, 54 AD2d 322, 325 (4th Dept, 1976), Albini v S. Associates, 37 AD2d 835 (2d Dept, 1971). Plaintiffs assert defendants are obligated to provide emergency shelter to them under the EAF program, the state and federal constitutional guarantees of equal protection, and Article 17, Section 1 of the New York State Constitution. The proposed intervenors assert that in the event a preliminary injunction is not granted, they will be forced to sleep on the floors, desks, and counter-tops of IMCs and EAUs. The irreparable injury to be sustained by homeless families clearly outweighs the burden that providing temporary emergency shelter imposes upon defendants.

Consideration of the public interest also strongly favors an injunction pending a final determination on the merits. In many instances, parents of children in homeless families lack employment and adequate support systems. The public interest is better served by having them housed, than by forcing them to find shelter and food that may be beyond their means to attain. See Williams v Barry, 490 F. Supp 941 (D.D.C., 1980), affd in part and vacated in part, 708 F2d 789 (D.C. Cir, 1983) Of course, final determination of the case will await a plenary hearing on the merits. Tucker v Toja, supra.

We believe that plaintiffs have a high probability of establishing that the City is mandated to provide emergency shelter to eligible families for thirty days in one twelve-month period pursuant to the State Plan for EAF. Pursuant to 45 CFR 233.120(a)(3), the State EAF Plan must specify the emergency needs that will be met and the methods that will be used in meeting those needs. New York has elected to provide the service of "securing family shelter" when necessary to cope with emergency situations. Social Services Law § 350-j(3), 18 NYCRR 372.4(d). We agree with Special Term to the extent that the State's participation in the EAF program obligates the City DSS, budgetary constraints notwithstanding, to secure the amount of emergency shelter necessary for homeless families found within the City's borders. In view of the dire and increasing shortage of available, decent low-income housing, any other interpretation of the term "securing" would render the State EAF Plan meaningless.

Plaintiffs also have a high probability of establishing that in failing to assure emergency shelter for all eligible homeless families, both the State and City DSS have violated the Social Security Act requirement of mandatory enforcement of the State Plan. 42 USC § 602(a)(1). Koster v Webb, 598 F Supp 1134, 1137 (EDNY, 1983), see also Barnes v Cohen, 749 F2d 1009, 1019 n.6 (3d Cir, 1984), cert den sub nom Cohen v Betson, ___US___, 105 S.Ct. 2126 (1985). But see, Oberlander v Perales, 740 F2d 116 (2d Cir, 1984), Canaday v Koch, supra, at 1472. Defendants' ad hoc, uneven practices and policy further violate 45 CFR 233.10(a)(1), which provides that the State Plan may not exclude individuals "on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in light of the provisions and purposes of the public assistance titles of the Social Security Act." See Bacon v Blum, 457 US 132 (1982).

The City's contention that its duty to provide emergency assistance is limited to the provision of cash benefits and ancillary services, such as providing information and making inquiries as to the whereabouts of available temporary housing seems to violate subdivision 3 of Social Services Law § 350-j. That subdivision expressly states that emergency assistance shall be provided "...when...necessary to avoid destitution or to provide...living arrangements in a home." Assuming, arguendo, that subdivision 3 defines when, rather than how assistance is to be provided, 18 NYCRR § 372.4(d) would nonetheless seem to impose upon the State and City DSS the duty of "securing family shelter" as a service during an emergency situation.

The municipal defendants' attempt to distinguish the "securing" and the "providing" of shelter is unavailing. The proposed distinction is, in our view, one without a difference. In electing to secure family shelter as an emergency service for thirty days per year, the State DSS and the Legislature could only have reasonably meant "secure" as synonymous with "provide." More troubling is the City's argument that a broad reading of the State EAF Plan to include a right to emergency shelter is inconsistent with the terms and purposes of the EAF program as discussed in Quern v Mandley, 436 US 725, 744 (1978). However, in our view Quern is distinguishable from the present case. Plaintiffs in Quern challenged the validity of Illinois' State Plan for Emergency Assistance to Needy Families, which only provided emergency aid to families without shelter as a result of damage to their homes or court-ordered eviction other than for non-payment of rent. The United States Supreme Court held that a state may define categorical eligibility for emergency assistance more narrowly than the federal criteria. Clearly, Quern does not stand for the proposition that defendants may arbitrarily enforce or ignore the express provisions of the State Plan, particularly since AFDC families are often affected. See Blum v Bacon, *supra*. (New York's EAF Plan which denied AFDC recipients certain emergency benefits available to non-AFDC recipient families conflicted with a federal regulation and violated the Supremacy Clause.) As the State EAF Plan does not resolve plaintiffs' claim of entitlement to emergency shelter beyond thirty days, we find it necessary to reach plaintiffs' constitutional claims.

The City makes emergency shelter available to homeless single men, who meet the eligibility criteria of the MR program or who suffer a physical or mental dysfunction, pursuant to the consent judgment in Callahan v Carey, Index No. 42582/79 (Sup NY County) entered on or about August 26, 1981. The consent judgment also established minimum qualitative operating standards for shelters. See City of New York v Blum, 121 Misc2d 982, 9 (Sup Ct, NY County, 1982). Under the equal protection guarantee of the State and Federal Constitutions, "any classification which denies to one class of needy persons public assistance which is available to all others, cannot be justified unless it is rationally related to a legitimate State interest (citations omitted)." Matter of Lee v Smith, 43 NY2d 453, 460 (1977). See U.S. Department of Agriculture v Moreno, 413 US 528 (1973). There is no apparent reasonable basis for the City's denial of emergency shelter to plaintiffs. This Court's recent decision Eldredge v Koch, 98 AD2d 675 (1st Dept, 1983), *rev'g on other grounds* 118 Misc2d 163 (Sup Ct, NY County, 1983) is illustrative. There we upheld the constitutional right of homeless single women to shelter equal to that provided for homeless men under the Callahan decree. It is axiomatic that children need stable, secure homes and are among those least able to bear the hardships of poverty and destitution. Public policy strongly favors assistance to families with destitute children. See Social Services Law §§ 131(3), 397(1)(b); See generally Social Services Law Art 6. Indeed, the needs of plaintiffs are greater than

those of single adults. Matter of Lee v Smith, supra, at 460-61. Defendants' less than equal treatment of plaintiffs is plainly irrational.

Sundheimer v Blum, 79 AD2d 512 (1st Dept, 1980), aff'd on memorandum below 55 NY2d 756 (1981), cited by the City, is not to the contrary. In Sundheimer, the issue was whether the equal protection clause required the State to extend family care provider payments to parents of all disabled children, where the State had extended such payments to parents in the so called Willowbrook case. N. Y. Assn. for Retarded Children v Rockefeller, 357 F.Supp. 752 (E.D.N.Y., 1973). This Court held that there was a rational basis for distinguishing Willowbrook parents from others; Willowbrook was subject to a consent decree, a central requirement of which was an expedited, massive reduction in the patient population; and the need to give Willowbrook parents an incentive to remove their children. Sundheimer is also inapposite in view of the small size of the class under the consent decree in Willowbrook and the dimension of the class to which it was proposed to extend benefits. The class of homeless single men under the consent decree in Callahan v Carey is much more comparable to the proposed class here, approximately 2,500 homeless families with two or three children per family, than the parents of Willowbrook patients and the proposed class in Sundheimer.

It is also likely that plaintiffs will succeed on their claim that Article 17 of the State Constitution obligates

defendants to provide emergency shelter for homeless families. New York State has made the care of its needy residents a constitutional mandate. Article 17, Section 1 of the State Constitution provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." The framers of the State Constitution intended Article 17 to require the State to take positive steps to assist the needy, rather than to voice aspiration towards ideal social policy. In moving the adoption of Article 17 at the 1938 New York Constitutional Convention, Edward F. Corsi, chairman of the Committee on Social Welfare, said:

Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government. III Revised Record of the Constitutional Convention 2126 (1938), quoted in Note, "Establishing A Right to Shelter For the Homeless", 50 Brooklyn Law Review 939, 944 (1985).

The tenet that the provision for assistance is a positive duty, not a matter of legislative grace, is well-expressed in Tucker v Toia, 43 NY2d 1 (1977), in circumstances analogous to those in the present case. In Tucker, the Court of Appeals noted: "Although our Constitution provides the

Legislature with discretion in determining the means by which [the duty] is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term 'needy', it unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy." Tucker v Toia, supra, at 8. There the court held violative of Article 17, Section 1 a statute pursuant to which emancipated single mothers under age twenty-one were denied HR benefits until they had commenced support proceedings against their parents or legally responsible relatives and obtained orders of disposition.

It is uncontroverted that plaintiffs are classified as needy. Social Services Law § 371(3)(a) defines a "[d]estitute child" as one who, through no neglect on the part of its parents, is "homeless." Social Services Law § 397(1) requires that aid be provided to families with destitute children when the families are unable to provide the necessary care. There is ample evidence in the record for us to conclude that the City DSS' current policy of only providing cash allowances and information concerning housing availability amounts to the denial of aid to homeless families. The number of such families, approximately 2,500, and the average period of homelessness, seven months to one year, bespeak the dimensions of the problem. In view of the scarcity of decent low-income housing, the City's policy simply ignores the brutal realities of plaintiffs' situation. It contravenes both the letter and spirit of the State's affirmative obligation to aid all its needy residents under Section 1 of

Article 17 of the State Constitution. Tucker v Toia, supra NY2d at 9.

2. The June 22, 1984 Preliminary Injunction

Plaintiffs seek a declaration of their right to emergency shelter based upon mandatory, not precatory, state and constitutional directives. As exemplified by Klostern Cuomo, 61 NY2d 525, 539 (1984) such claims present a just controversy even though the activity contemplated on the one part may be complex and rife with the exercise of discretion.

We are bound to follow the holdings of the Court of Appeals. In light of that court's holdings in Matter of Bernstein v Toia, 43 NY2d 437 (1977) and Tucker v Toia, supra, that the adequacy of the level of welfare benefits is a matter committed to the discretion of the Legislature, we are unable to afford the plaintiffs complete and meaningful relief. The inability of courts to set even minimum standards for meeting "the legitimate needs of each recipient" (See Matter of Bernstein v Toia, supra, at page 449) upon the failure of the Legislature to do so is discouraging, saddening, and disheartening. Thousands of children are put at risk in their physical and mental health, and subject to inevitable emotional scarring because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability, it is time for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area. The lives and characters of the young are too precious to

dealt with in a way justified, as argued, on the ground that the government's efforts are more than token. They may be more than token, but they are inadequate. On this record and on the authority of Matter of Bernstein v Toia, *supra*, we reluctantly conclude that Special Term erred in invoking its equitable powers to compel compliance with certain reasonable minimal standards.

In Matter of Bernstein v Toia, *supra*, petitioners contended that Article 17 of the State Constitution obligated the State to provide public assistance recipients with individualized shelter grants sufficient to meet rent expenses, rather than flat grants in accordance with a schedule of maximum allowances. The Court of Appeals rejected this contention, holding "We do not read this declaration and precept as a mandate that public assistance must be granted on an individual basis in every instance...or indeed as commanding that...the State must always meet in full measure all the legitimate needs of each recipient." 43 NY2d at 448-449; *see also* RAM v Blum, 77 AD2d 278, 280-82 (1st Dept, 1980) (Fein, J. concurring), citing Dandridge v Williams, 397 US 471, 484-85 (1970) and Jefferson v Hackney, 406 US 535 (1972).

The plaintiffs in the present case have persuasively documented the unsafe and squalid conditions prevalent in welfare hotel accommodations, conditions particularly undesirable for young children. On the other hand, the evidence demonstrates that the emergency housing provided by the City "is more than token, and is genuine and meaningful." RAM v Blum, *supra*, at 282

(Sandler, J. concurring). In light of the broad discretion vested in the Legislature, we cannot conclude that plaintiffs are likely to prove that Article 17 substantively guarantees minimal physical standards of cleanliness, warmth, space, and rudimentary convenience in emergency shelter.

We disagree with Special Term that the October 1983 amendments to 18 NYCRR 352.3, which codified more extensive minimal standards for emergency shelter than those contained in Special Term's interim order, rendered the City's challenge to the preliminary injunction partially moot. An administrative agency only has authority to promulgate rules implementing the statutory mandate. Matter of Jones v Berman, *supra*, 37 NY2d 42 at 53. Although not constitutionally mandated to do so, the State Commissioner clearly had authority to promulgate minimal standards for hotel accommodations consonant with his authority to secure shelter in emergency situations under Social Services Law § 350-j. The issuance of these regulations obviated the need for injunctive relief essentially duplicative in nature.

This same flaw exists in the injunctive relief granted procedural safeguards. The system of procedural safeguards delineated by Special Term duplicates those already set forth, more extensively, in social services regulations which predated this litigation. *See, e.g.*, 18 NYCRR 351.8, 355.2, 355.4, 372.9. As the record reflects only isolated instances, rather than a continuing pattern of violations, broad-based relief was unwarranted. The other injunctive relief granted by Special Term

also constituted improper and undue intrusion into the administration of public assistance. Since we vacate the preliminary injunction, we affirm Special Term's determination to deny class certification without reaching the merits.

3. The Temporary Restraining Order

For similar reasons we reverse Special Term's order of June 27, 1984, which denied the City's motion to vacate the March 22, 1984 Temporary Restraining Order. This order prohibited transfer of emergency shelter recipients to alternate facilities until notice and an opportunity to be heard were given. The requirement for a hearing before transfer interferes with the newly established State inspection procedures for hotel and motel facilities set forth in 18 NYCRR 352.3(h). Emergency shelter residents must be transferred when substandard facilities are decertified following inspection. In O'Bannon v Town Court Nursing Center, 447 US 773, 785-90 (1980), the United States Supreme Court held that decertification pursuant to state administrative procedure does not entitle the residents of a facility to pre-transfer hearings. The City DSS provides notice of transfers and expedited hearings pursuant to 18 NYCRR §§ 355.1 and 358.3, respectively. The additional requirement of a hearing prior to transfer would often effectively preclude relocation since alternative placements would become unavailable pending a hearing.

Contrary to plaintiffs' contention, Title 18 NYCRR § 352.3(g)(1) does not create an entitlement to continued residency

in the emergency shelter of one's choice. It only requires emergency housing placement based upon primary consideration the needs of children, including educational needs and the minimal disruption of community ties. The procedural protection imposed by Special Term exceeded these concerns and restricted all transfers. Emergency shelter residents do not have no due process right to be housed in any particular neighborhood or of housing. See Caton v Barry, 500 F.Supp 45, 53 (D.D.C., 1980).

4. Mass Shelters

The plaintiffs "do not seek to compel the use of a one or more particular means of providing shelter for destitute families with children." In accordance with our recognition of the State's discretion as to the quality of emergency shelter, and on this record, we are unable to disturb Special Term's determination not to compel the closing of mass shelters for homeless families. Parenthetically, we note that on March 19, 1986, the State Commissioner published a notice of proposed rule-making in the State Register to amend the social service regulations. _____SR_____ March 19, 1986. The proposed amendment would impose a salutary twenty-one day limit upon the use of mass shelters for homeless families.

While mass shelters are not good environments, the affidavit of Deputy Administrator Jorgan establishes that they do not afford families food, security, outdoor recreational space, social services which do not exist at emergency hotel placements.

As Special Term noted, the lack of privacy clearly renders such facilities unsuitable for long-term stays. We do not take an overly optimistic view in finding that the shelters constitute a cleaner, more secure, and healthier environment than the hotels and, in some instances, the homes in which plaintiffs previously resided.

Plaintiffs urge that two letters, dated April 19 and June 13, 1984, sent by State DSS Commissioner Cesar Perales to the then City Commissioner James Krauskopf, which they term "directives", enunciate State policy against the use of mass shelters. These letters neither enunciate State policy nor constitute binding directives. When the State Commissioner adopts a broad-based policy which must be implemented at the local level, he ensures compliance by promulgating regulations or formal administrative directives. Moreover, it appears that the State DSS' disapproval of the facility in Roberto Clemente State Park was based upon its prior designation of that facility for community use and its forthcoming regulations restricting the use of mass shelters.

Matter of Sharon Fulton v Koch

We modify Special Term's order in Matter of Sharon Fulton v Koch to dismiss the proceeding as against the respondent State Commissioner. His cross-motion to dismiss the petition should have been granted since injunctive relief was inappropriate against him. Section 62 of the Social Services Law places primary responsibility upon the local social services

agencies for the delivery of services and assistance to need families. See Matter of Toia v Regan, 54 AD2d 46, 50 (4th D 1976), aff'd 40 NY2d 837 (1976). The State DSS, in contrast, responsible for supervision and reimbursement for the various state-funded programs of public assistance. Only the City D is the relevant party here, because it alone is accountable for direct payment of actual transportation expenses incurred by for relocation of homeless families. Contrary to the content of the City DSS, this controversy is not moot. The City's failure, either to rehouse families in the area of their children's schools, or provide an adequate transportation allowance to cover the expense of commuting to school for children until they receive a transportation pass as well as the parents of children too young to travel alone, presents ongoing problem of public importance which is properly entertainable. Matter of Jones v Berman, supra, 37 NY2d at

Under Article 11, Section 1 of the New York State Constitution and Article 65 of the Education Law, the State provide free education to all children over age five. Compulsory attendance on a full-time basis is required, with exceptions here relevant. Education Law § 3205(1). Section 3209 of the Education Law squarely places responsibility upon public welfare officials in local social services districts to provide indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend school. See also Social Services Law § 397(1)(c). Funds for school transportation

necessity under the meaning of these provisions. In our view, these statutes clearly obligate City DSS to provide actual transportation expenses, both for children until they obtain transportation passes from the Board of Education, and for the parents of young children who must be accompanied to school.

We agree with Special Term that the recently adopted City DSS policy of providing a flat travel allowance of \$18 per week for parents is inadequate. In many instances the parents of children who reside in emergency shelters must travel through more than one fare zone each day. It makes no provision for children until their receipt of a transportation pass from the Board of Education. A flat grant forces these families to make an impossible choice between adequate nourishment and education. This policy is unconstitutional in that it deprives indigent children of the right to free education and amounts to a refusal to aid needy children. See Tucker v Toia, supra, 43 NY2d at 8.

Contrary to respondents' contentions, Social Services Law § 350-j and its implementing regulation, 18 NYCRR § 372.4(d), also mandate the payment of transportation allowances for eligible families residing in emergency shelter. The State Commissioner's interpretation of the Section 350-j and 18 NYCRR § 372.4(d) as only authorizing benefits on a case-by-case basis cannot be sustained since it is irrational and unreasonable. As the EAF program concededly authorizes the subject benefits for eligible families in emergency situations, these benefits should be administered, like the emergency shelter benefits to which

they relate, on a mandatory basis. 42 USC § 602(a)(1). See Quern v Mandley, supra, at 741-742. The State Commissioner's argument that ad hoc determinations distinct from the initial EA eligibility determination are necessary is not persuasive. Homeless families who have met the test of eligibility for emergency shelter under the EAF program are automatically entitled to a transportation allowance if they have been relocated at a distance from their former communities and their children's schools. Special Term only recognized and declared petitioners' substantive right to reimbursement for actual transportation expenses. The court neither usurped the municipal respondents' adjudicatory authority nor bypassed the eligibility criteria for the EAF program.

We reverse Special Term's determination granting class certification. Class certification is superfluous where, as here, the record does not evidence any unwillingness on the part of respondent government official to comply with and apply court rulings equally to all persons similarly situated. Williams v Blum, 93 AD2d 755 (1st Dept, 1983), mot's for lv to app dsmd, 61 NY2d 606, 905 (1984).

Consequently, the order of the Supreme Court, New York County (Greenfield, J.), entered June 27, 1984 in McCain v Koch which (1) granted the motion of plaintiffs Yvonne McCain, et al. for a preliminary injunction requiring the New York City Departments of Social Services and of Housing, Preservation and Development, when providing emergency housing for homeless

families with children, to (a) assure insofar as practicable that such housing meets certain minimal standards of sanitation, safety, and decency suitable for young children, including placement in light of educational needs; (b) afford emergency shelter recipients with timely and adequate notice of any proposed termination, and the opportunity to contest termination at a hearing; (c) designate an individual to facilitate implementation of the order; and require the State and City Departments of Social Services to provide other public assistance benefits to emergency shelter recipients without interruption to the extent practicable, and (2) denied the motion of plaintiffs McCain, et al. for class certification, should be modified, on the law, the motion for a preliminary injunction should be denied and the injunction vacated, and, as so modified, should otherwise be affirmed, without costs.

Order of the Supreme Court, New York County (Greenfield, J.), entered June 27, 1984, which denied the municipal defendants' motion to vacate the temporary restraining order (Greenfield, J.) entered March 22, 1984, prohibiting transfer to alternate shelter locations absent adequate notice and an opportunity to be heard, should be reversed, on the law, and the motion to vacate should be granted, without costs.

Order of the Supreme Court, New York County (Greenfield, J.), entered November 9, 1984, which denied the motion of proposed plaintiff-intervenors Carolyn Lee, et al. for intervention and denied the motion of plaintiffs and proposed

plaintiff-intervenors for a preliminary injunction against placing homeless families with children in mass shelters, should be affirmed, without costs.

Order of the Supreme Court, New York County (Myers, J.), entered May 30, 1985, which denied the motion of proposed plaintiff-intervenors Linda James and Ronald Wright for intervention and a preliminary injunction barring denial of emergency shelter to eligible homeless families with children, should be reversed, on the law, the facts and in the exercise of discretion, and the motions should be granted, without costs.

Order of the Supreme Court, New York County (Greenfield, J.), entered June 29, 1984, in Matter of Sharon Fulton v Koch, et al., which granted petitioners' motion for class certification and a preliminary injunction to the extent of directing respondent State and City Commissioners of Social Services to provide the parent of each school-age child who needs accompaniment to and from school, a transportation allowance, and to provide each such child with such an allowance until the Board of Education provides such child with a transportation pass and denied respondents' cross-motions to dismiss the proceeding, should be modified, on the law, the motion for class certification should be denied, the cross motion of the respondent State Commissioner to dismiss the petition should be granted and the proceeding should be dismissed against him, and, as so modified, should otherwise be affirmed, without costs.

All concur.
Order filed.