COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 2012-

ARISE FOR SOCIAL JUSTICE,
COALITION FOR SOCIAL JUSTICE,
MASSACHUSETTS COALITION FOR THE HOMELESS, and
NEIGHBOR TO NEIGHBOR-MASSACHUSETTS,
Plaintiffs,
v.

THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, et al.,
Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION AGAINST IMPLEMENTATION OF RESTRICTIVE "HEALTH AND SAFETY" RULES DENYING EMERGENCY SHELTER TO HOMELESS FAMILIES WITH CHILDREN

I. INTRODUCTION

Plaintiffs ARISE for Social Justice, the Coalition for Social Justice, the Massachusetts Coalition for the Homeless, and Neighbor to Neighbor-Massachusetts, on behalf of themselves and their members, seek emergency temporary or preliminary injunctive relief prohibiting the Department of Housing and Community Development (DHCD) from implementing proposed emergency regulations and policies that will severely restrict access to emergency shelter for homeless families with children. The proposed regulations and policies – which DHCD plans to implement on *August 2, 2012* – would impose restrictive new rules for determining when a family's health and safety are sufficiently at risk in the family's current housing situation to qualify the family for emergency shelter. Under the new regulations and policies, only exposure to certain very limited and extreme forms and levels of harm will qualify a family for shelter, forcing many other at-risk families to remain in danger. The new rules will deny emergency shelter to many families who desperately need a safe place to stay and who are eligible under current regulations.

The Fiscal Year 2013 (FY 2013) state budget, St. 2012, c. 139, § 2, item 7004-0101, which authorizes expenditures for emergency shelter for homeless families with children, unequivocally requires DHCD to give 60 days' advance notice to the Legislature before promulgating *any* regulations or policies that would "alter eligibility" for emergency shelter "other than that which would benefit the clients." The line item is attached as Exhibit 1 to this Memorandum.

Notwithstanding this clear mandate for 60 days' advance notice to the Legislature, DHCD plans to begin applying emergency regulations and revised policies *on Thursday, August 2, 2012 – after only 15 days advance notice to the Legislature*. Those regulations will implement new restrictive rules for determining whether health and safety risks in the family's current housing situation qualify a family for emergency shelter. Attached to the Affidavit of Kelly Turley ("Turley Aff.") as Ex. A is a letter dated July 17, 2012 from DHCD to certain members and clerks of the Legislature informing them of proposed changes in "health and safety" regulations and policies.

These new "health and safety" rules and policies will "alter eligibility" for emergency shelter in ways that do not "benefit the clients" and are therefore subject to the 60-day advance notice requirement. DHCD's planned promulgation of the new rules in violation of the 60-day advance notice mandate should therefore be enjoined. In addition, implementation of these "health and safety" rules and policies should be enjoined because they deny emergency shelter to families who are required to be covered under the line item, and because they violate the statutory requirements that DHCD administer the emergency shelter program in a "fair, just and equitable manner" and promulgate rules and regulations "to ensure simplicity of administration, in the best interest of needy persons." G.L. c. 23B, § 30. The regulations are also unlawfully being promulgated without any opportunity for advance notice and comment by the public, given that, particularly in light of the 60-day notice requirement, there is no "emergency" that warrants implementing the regulations on an emergency basis.

II. LEGAL AND REGULATORY BACKGROUND

The Emergency Assistance (EA) program provides emergency shelter and re-housing services to very low-income homeless families with children. To qualify for EA benefits, a family must have gross income at or below 115% of the federal poverty line and less than $2500 in assets: only the very poorest families in the Commonwealth qualify for EA benefits. *See* 106 C.M.R. § 309.020(E), (F). The EA program is administered by DHCD and authorized by G.L. c. 23B, § 30. For FY 2013, EA is funded and further authorized by St. 2012, c. 139, § 2, items 7004-0101 and 7004-0103.

The regulations governing which homeless families are eligible for shelter are codified at 106 C.M.R. § 309.000, *et seq*. and in other regulations incorporated through 106 C.M.R. § 309.021(A). The Legislature previously mandated that DHCD apply these regulations in administering the EA program, unless and until the agency lawfully amended them. St. 2009, c. 27, § 109. A complete set of the current regulations is attached to this Memorandum as Exhibit 2.

The Fiscal Year 2013 (FY 2013) state budget, St. 2012, c. 139, § 2, item 7004-0101, authorizes expenditures for emergency shelter for homeless families with children. The line item broadly and clearly states:

> provided further, that notwithstanding any general or special law to the contrary, 60 days before promulgating or amending any regulation, administrative practice or policy that would alter eligibility for, or the level of benefits under, this program, other than that which would benefit the clients, the department shall file with the house and senate committees on ways and means, the clerks of the senate and house of representatives, and the joint committee on children, families and persons with disabilities a written report setting forth justification for any such change including, but not limited to, any determination by the secretary of housing and economic development that available appropriations from the program will be insufficient to meet projected need. (emphasis supplied).

The EA line item for FY 2013, St. 2012, c. 139, § 2, item 7004-0101, also provides that families eligible for emergency shelter "shall include" four categories of families including (i)

certain families at risk of domestic violence, (ii) certain families homeless due to fire, flood or natural disaster, (iii) certain families subject to eviction from their most recent housing, and

> (iv) families who are in a housing situation in which they are not the primary leaseholder or who are in a housing situation not meant for human habitation and where there is a substantial health and safety risk to the family that is likely to result in significant harm should the family remain in such housing situation; provided further, that the health and safety risk shall be determined by the department of children and families through risk assessments; provided further, that no later than 15 days in advance of implementation of this item, the department of housing and community development shall provide to the house and senate clerks, the house and senate committees on ways and means, and the joint committee on housing, the written criteria to be used to determine if a substantial health and safety risk is likely to result in significant harm under clause (iv). . . .

By letter dated July 17, 2012, DHCD notified the clerks of the House and Senate, the chairs of the House and Senate Committees on Ways and Means, and the chairs of the Joint Committee on Children, Families, and Persons with Disabilities that it was submitting proposed regulations and policy materials regarding "health and safety assessments" and that the regulations would be effective as emergency regulations in 15 days, provided the Legislature did not take any contrary action. Turley Aff., Ex. A.

Subsequent to July 17, several legislators met with representatives of the Administration to express their grave concern over the restrictiveness of the regulations. In response, the Administration agreed to make some changes, which do not rectify the major problems. Turley Aff. ¶ 10, Ex. H. However, as of the time of filing of this Motion, DHCD has not yet provided a copy of the regulations to be implemented on August 2 containing the July 30 changes, but has indicated that the relevant changes from the July 30 communications will be incorporated into the version of the regulations that will be filed and become effective on August 2. So, for purposes of this Memorandum, plaintiffs will assume the minor changes indicated on July 30 are in fact being made to the health and safety regulations.

With this assumption, the revised regulations that DHCD plans to apply beginning August 2, 2012 – purportedly to implement clause (iv) of the line item – provide at 106 C.M.R. 309.040(A)(1) and (6) that:

> (1) A household must meet the eligibility criteria specified in this chapter, including, but not limited to, those households who are eligible because:
>
> (i) the household in [sic] a housing situation where the household members
> (I) do not include the primary lease holder or
> (II) the child(ren) of the household are in a housing situation not meant for human habitation,
> and where
> (III) there is a substantial health and safety risk to the child(ren) that is likely to result in significant harm should the child(ren) remain in such housing situation. …
>
> (6) For purposes of this chapter:
>
> (a) *Substantial health and safety risk that is likely to result in significant harm* shall mean, for purposes of 106 CMR 309.040 (A) (1) (iv):
>
> (i) Exposure, in a dwelling unit occupied by the children of the applicant household and rented to or owned by a non-member of the applicant household, to either felony or misdemeanor crimes of violence or violent physical conduct, other than domestic violence as defined in 106 CMR 309.040(A)(6), in the housing situation where the household resides, perpetrated by the primary tenant or a member of the primary tenant's household who is not a member of the applicant household that cannot be addressed through law enforcement intervention or other alternative dispute resolution measures in a timely manner and that are likely to cause significant physical, psychological, mental, or emotional harm to the members of the applicant household. For purposes of this provision and (ii) and (iii) below, the repeated conduct of a regular guest is attributable to the primary tenant.[1]
>
> (ii) Exposure, in a dwelling unit occupied by the children of the applicant household and rented to or owned by a non-member of the applicant household, to mental health issues exhibited by the primary tenant and/or a member of primary tenant's household who is not a member of the applicant household that cannot be addressed through referral for mental health or medical treatment in a timely manner and that are likely to cause significant physical, psychological, mental, or emotional harm to the members of the applicant household.

[1] Clause (i) of the regulations as originally proposed covers only "crimes of violence," does not include the word "timely," requires the harm to be "direct" as well as "significant," and does not cover "repeated conduct of a regular guest." Turley Aff., Exh. B.

(iii) Exposure, in a dwelling unit occupied by the children of the applicant household and rented to or owned by a non-member of the applicant household, to on-going substance abuse by the primary tenant and/or member of primary tenant household who is not a member of the applicant household that cannot be addressed through referral for substance abuse treatment in a timely manner and that that [sic] are likely to cause significant physical, psychological, mental, or emotional harm to the members of the applicant household.[2]

(iv) (I) The presence in the housing situation where the children of the applicant household are sleeping of physical condition(s) that led to the condemnation for safety violations of the housing situation without the fault of the members of the applicant household; or
(II) The presence in the housing situation where the children of the applicant household are sleeping of the following physical condition(s) that cannot be corrected by the property owner's remediation of the conditions before such conditions are likely to cause significant direct[3] physical, psychological, mental, or emotional harm to the members of the applicant household:

(A) Lack of a supply of hot and cold water, or inability to access the same for personal use.
(B) Lack of heat from September 16 through June 14.
(C) Lack of electricity, or inability to access the same for personal use, or lack of lighting, or inability to access the same for daytime use and to minimize the same for evening sleeping purposes.
(D) Lack of toilet and/or operable sewage or waste disposal system.
(E) Unsanitary conditions in the unit that result in an accumulation of garbage, rubbish, filth or other causes of sickness which may provide a food source or harborage for rodents, insects or other pests or otherwise contribute to accidents or to the creation or spread of disease; or any such accumulation in the building that creates a food source or harborage for such pests, to the extent that such pests infest the unit;[4] or

(III) The lack of a regular overnight sleeping situation as defined in 106 C.M.R. 309.040(A)(6)(g)(ii), if this has been persistent, as opposed to occasional, and cannot be remedied immediately by access to feasible alternative housing.[5]

(b) *housing situation* shall mean, for purposes of 106 CMR 309.040(A)(1)(iv), either (i) a specific housing situation, being the location where the children of the applicant

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[2] Clauses (ii) and (iii) of the regulations as originally proposed require the harm to be "direct" as well as "significant" and do not include the word "timely."
[3] The regulations as purportedly revised on July 30 continue to require "significant direct" harm here.
[4] Clause (iv) of the regulations as originally proposed and that apparently will actually take effect on August 2 requires the harm from the conditions to be "direct" as well as "significant" and does not include the phrases about "inability to access the same for personal use" or "inability to access the same for daytime use and to minimize the same for evening sleeping purposes." Turley Aff., Ex. B and ¶ 10.
[5] This clause (III), whatever it means, is not included in the regulations as originally proposed and that apparently will actually take effect on August 2. Turley Aff., Ex. B and ¶ 10.

> household are regularly sleeping overnight, or (ii) lack of a regular overnight sleeping situation. A regular overnight sleeping situation is one that is consistent and continually available, not intermittent or occurring for an individual instance.
>
> (c) *housing situation not meant for human habitation* shall mean, for purposes of 106 CMR 309.040(A)(1)(iv), a housing situation that is defined in 106 CMR 309.040(A)(6)(f)(iv)(II).

Proposed 106 C.M.R. § 309.040(A)(6), Turley Aff., Exhibits B and H, incorporating minor changes proposed by DHCD as of July 30, 2012 (underscored emphasis supplied).

The extremely narrow definition of "health and safety" risk in the proposed regulations makes those regulations far more restrictive than current regulations, which recognize that an otherwise eligible family is homeless and therefore eligible for shelter if it lacks "feasible alternative housing." 106 C.M.R. § 309.040(A)(2). Housing under the current regulations is considered not "feasible" if it presents a "threat to the health and safety of the household" because it is overcrowded or violates the State Sanitary Code, or a threat exists in the current or most recent living arrangement requiring immediate removal. 106 C.M.R. §§ 309.040(A)(2), (A)(5)(c) and (d). The proposed regulations require not only a lack of feasible alternative housing but also the presence of the heightened health and safety risk set forth in new 309.040(A)(1), (5)(c) and (d), and (6)(a), thereby replacing the current (A)(5)(c) and (d) with much more stringent standards.

III. ARGUMENT

A. THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF ARE FULLY MET IN THIS CASE.

When presented with a motion for preliminary injunction, "[t]he task for the motion judge is to balance the risk of irreparable harm to the plaintiff and defendant 'in light of [each] party's chance of success on the merits' at trial." *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 710 (1990)(quoting *Packaging Indus., Inc. v. Cheney*, 380 Mass. 609, 616-17 (1980)). A court faced with a request for a preliminary injunction should weigh the potential harm to the plaintiff and her likelihood of success on the merits against any showing of

irreparable harm that might ensue if the injunction were granted. *Commonwealth v. Massachusetts CRINC*, 392 Mass. 79, 87-88 (1984).

In ruling on a request for a preliminary injunction, the court must seek to minimize the risk of irreparable harm. If the moving party can demonstrate that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuance of the injunction. *Packaging Indus., Inc. v. Cheney*, 380 Mass. at 617.

For the reasons set forth in Part B below, plaintiffs have a very strong likelihood of success on the merits of their claims that implementation of the new "health and safety" rules on August 2, 2012 is unlawful. For the reasons set forth in Part C, the plaintiffs and the families who are their members face immediate and irreparable harm if preliminary relief is not granted and there is no substantial risk of irreparable harm to DHCD if relief is granted pending 60 days advance notice to the Legislature and formulation of lawful policies.

B. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

1. Defendants Failed to Give the Required 60 Days' Notice.

The line item unequivocally provides that "notwithstanding *any* general or special law to the contrary," DHCD must provide 60 days' advance notice to the Legislature before "promulgating or amending *any* regulations, administrative practice or policy" that would alter eligibility for the emergency assistance program and would not benefit the clients. St. 2012, c. 139, § 2, 7004-0101 (emphasis added). DHCD takes the position that it is required to give only 15 days' notice of its implementation of changes to the "health and safety" rules because of the proviso that reads:

> provided further, that no later than 15 days in advance of implementation of this item, the department of housing and community development shall provide to the house and senate clerks, the house and senate committees on ways and means, and the joint committee on housing, the written criteria to be used to determine if a

> substantial health and safety risk is likely to result in significant harm under clause (iv) . . .

DHCD's position is incorrect for a number of reasons. First, and most importantly, the line item expressly requires 60 days' advance notice "notwithstanding *any* general or special law to the contrary." "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Field v. Napolitano*, 663 F.3d 505, 511 (1st Cir. 2011) (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)). "A clearer statement is difficult to imagine." *Cisneros,* 508 U.S. at 18 (quoting *Liberty Mar. Corp. v. United States*, 928 F.2d 413, 416 (D.C.Cir.1991)); *accord Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed.Cir. 2004) ("The introductory phrase '[n]otwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary" to the terms of the law introduced by the phrase); *see also United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007) (citing *Cisneros* for the holding that the language "[n]otwithstanding any other Federal law" is an "unambiguous" statement that the statute overrides conflicting provisions in the federal Bankruptcy Code). Thus, the 60-day proviso trumps the 15-day notice provision and indeed eliminates any conflict with it. *See Kidde America v. Director of Revenue*, 242 S.W. 3d 709, 712 (Mo. 2008) ("notwithstanding any other provision of law" clause eliminates conflict because "no other provisions in law can be held in conflict with it") (citing *State ex rel. City of Jennings v. Riley,* 236 S.W.3d 630, 632 (Mo. 2007)). "Indeed, a conflict would exist only if both statutes included a prefatory "notwithstanding" clause or if neither included such a clause." *Kidde America,* 242 S.W. 3d, at 712 (citing *Riley*, 236 S.W.3d, at 632).

Second, the 15-day proviso only says that DHCD is required to provide the Legislature with "written criteria" to be used for health and safety assessments 15 days before implementation of the

line item.[6] It does not say those *criteria* can be *implemented* with only 15 days notice. And to interpret it that way would be to create a conflict with the 60-day notice provision, which is not appropriate. *See Water Dep't of Fairhaven v. Dep't of Revenue*, 455 Mass. 740, 744-45 (2010) ("Where possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction") (citations omitted). Hence, the Legislature wanted to know what the "written criteria" used to make health and safety

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[6] There is some ambiguity as to what was intended by the 15-day notice proviso. It literally requires action "15-days in advance of the implementation of this item." As normally used, the term "this item" would refer to the entire line item, 7004-0101, including the authorization of the expenditure of the funds in the item. See G.L. c. 29, § 1 (defining "line item" as "a separate unit of appropriation identified by an eight-digit number"). But, the line item, including the 15 days notice requirement, was not signed into law until July 8, 2012. A directive to provide "written criteria" 15 days in advance of that date (or the budget's retroactive effective date of July 1) is therefore effectively a nullity unless some adjustment in interpretation is made.

Under such circumstances, where a literal interpretation of a statute is impossible, the courts must adjust the usual rules of statutory interpretation. "'We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable. We assume the Legislature intended to act reasonably.'" *N. Shore Realty Trust v. Com.*, 434 Mass. 109, 112-13 (2001) (quoting *Champigny v. Com.*, 422 Mass. 249, 251 (1996)). *See also Attorney Gen. v. Sch. Comm. of Essex*, 387 Mass. 326, 336-37 (1982).

Here, the 15-day notice provision could be read to mean that the Legislature wanted notice of the "health and safety" criteria that would ultimately be implemented to be provided 15 days before any funds were expended from the item or any other provision of the item was implemented. But that interpretation would have left the agency without any funding to provide shelter for 15 days after July 8, so it is not a reasonable interpretation. And DHCD's interpretation, that the 15-day notice proviso authorized them to implement category (iv) after only 15 days notice, creates a direct conflict with the 60-days notice proviso, a result that is also to be avoided. *See Water Dep't of Fairhaven v. Dep't of Revenue*, 455 Mass. 740, 744-45 (2010)

Hence, the most reasonable way to give effect to the 15-day notice provision and to harmonize it with the 60-day notice provision is to interpret it as requiring 15 days notice before "implementation" of any "regulations, administrative practice, or policy" that "alter eligibility." If 60 days' advance notice in advance of "implementation" had not been required because the written criteria DHCD had chosen to promulgate would "benefit the clients," then the written criteria could be put into effect 15 days after notice was given. But where, as here, the new standards definitely do not "benefit the clients" and do "alter eligibility," 60 days' advance notice is required, and, in addition, at least 15 days before the end of the 60-day period, the Department is required to given notice of any additional "written criteria," implementation of which would not further "alter eligibility." This interpretation gives full meaning to each proviso and recognizes the supremacy of the 60-day provision which applies "notwithstanding any general or special law to the contrary." In any event, "'[i]f a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat the purpose.'" *N. Shore Realty Trust*, 434 Mass. at 112-13 (quoting *Champigny v. Com.*, 422 Mass. at 251). Here, the unequivocal purpose of the words as whole is to assure that the Legislature has 60 days' advance notice before the agency promulgates regulations or policies that would alter eligibility. Allowing DHCD to avoid that clear mandate with respect to the "health safety" regulations and policies would violate that purpose and should not be allowed.

determinations would be (*see* note 6), but forbade DHCD from implementing those criteria or other policies that "alter eligibility" without 60 days advance notice.

Third, the 15-day proviso applies only to "written criteria" to determine whether a substantial health and safety risk exists. But DHCD has issued not only proposed "written criteria" but also has issued proposed *regulations, policies, and procedures* which it intends to put into effect on August 2, 2012, after only 15 days notice. The line item, however, expressly prohibits promulgation of *any regulation, administrative practice or policy* without 60 days' advance notice. "The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." *Hollum v. Contributory Ret. Appeal Bd.*, 53 Mass. App. Ct. 220, 223 (2001) (citations omitted)*; see United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945) ("any" employee means all employees under the Fair Labor Standards Act, unless specifically excluded) (cited with approval in *Hollum*). As the Appeals Court stated in *Mackay v. Contributory Ret. Appeal Bd*., 56 Mass. App. Ct. 924, 925 (2002), "[t]he word 'any' reaches broadly [citing *Hollum*] . . . Had the Legislature intended to constrict the meaning of "any" . . . it could easily have said so."

It is well-established that a statute is to be interpreted according to the words actually used by the Legislature. *Boston Police Patrolman's Ass'n v. City of Boston*, 435 Mass. 718, 719-20 (2002) (citing cases); *see also Smith v. Comm'r of Transitional Assistance*, 431 Mass. 638, 646 (2000) (where an agency interpretation of a statute is contrary to its plain meaning, it must be rejected by the Court); *Herrick v. Essex Reg'l Ret. Bd*., 77 Mass. App. Ct. 645, 649-51(2010) ("Agency expertise or policy preference cannot alter the plain meaning of unambiguous statutory language"). Because the Legislature said the advance notice requirement applies "notwithstanding any general or special law to the contrary," and specifically applies to the agency's promulgation of

"any regulation," 60 days' advance notice is required before new "health and safety" regulations can be implemented.[7]

Defendants concede by their actions that 60 days' notice is required prior to implementation of regulations or policies effectuating categories (i) through (iii) in the line item, which, like category (iv), set forth families who must be eligible for shelter. *See* Turley Aff., Ex. C and D. It would be simply illogical, as well as inconsistent with the plain language of the line item, to conclude that the Legislature intended 60 days' advance notice before implementation of most but not all of the categories. Moreover, the health and safety regulations DHCD proposes to implement on August 2 expressly exclude from the category of families subject to "crimes of violence" and/or "violent conduct" who may be eligible for shelter those who are subject to "domestic violence." Proposed 106 C.M.R. § 309.040(A)(6)(a)(i), Turley Aff. Ex. B. At the same time, the separate category of families who must be eligible based on domestic violence will not take effect until

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[7] The history of the advance notice provision in this line item leaves no doubt that the Legislature intended the 60-day proviso to apply to any regulations, policies or practices that have the effect of restricting access to the program. In the initial FY 2012 budget, St. 2011, c. 68, § 2, item 7004-0101, the advance notice proviso read:

> notwithstanding any general or special law to the contrary, 60 days before promulgating any such eligibility restrictions or benefit reductions, the undersecretary shall file with the house and senate committees on ways and means [and] the clerks of the senate and house of representatives a determination by the secretary of housing and economic development that available appropriations from the program will be insufficient to meet projected expenses and a report setting forth such proposed changes.

In October 2011, three months after the budget was signed into law, DHCD proposed drastic restrictions on access to emergency shelter without any advance notice, contending that no advance notice was required because it was restricting access to benefits without "promulgating" new regulations. Turley Aff., ¶ 12. Within days, the Legislature amended the line item to require notice whenever the Department intended to "promulgat[e] or amend[] any regulation or policy affecting eligibility, benefits or administration of the program." St. 2011, c. 171, § 6. When DHCD then started taking the position that the revised language prevented it from even instructing DHCD workers as to how properly to apply existing policy for the benefit of homeless families, Turley Aff., ¶ 12, the Legislature once again amended the language to make clear that it applies to any promulgation or amendment of "any regulation, administrative practice or policy that would alter eligibility for, or the level of benefits under, this program, other than that which would benefit the clients …." St. 2012, c. 36, § 32. This history confirms that the Legislature intended the 60 days' advance notice provision to apply broadly and without exception to any change that restricts eligibility.

September 17, proposed 106 C.M.R. § 309.040(A)(1)(i) in Turley Aff. Exs. D and H, leaving families who are victims of domestic violence *ineligible* between August 2 and September 17, *notwithstanding the express requirements in category (i) of the line item that families at risk of domestic violence must be eligible for shelter.* This approach cannot therefore comport with legislative intent.

For all these reasons, plaintiffs have a strong likelihood of success on their claim that DHCD was and is required to provide 60 days' advance notice to the Legislature before it lawfully can implement any new "health and safety" regulations, unless the new regulations "would benefit the clients" which the proposed "health and safety" regulations patently do not.[8]

2. The Proposed Health and Safety Regulations Violate the Plain Language of the Line Item and the Purpose of the EA Program.

The line item, St. 2012, c. 139, § 2, item 7004-0101, provides that families eligible for emergency shelter "shall include . . . (iv) families who are in a housing situation in which they are not the primary leaseholder or who are in a housing situation not meant for human habitation and where there is a substantial health and safety risk to the family that is likely to result in significant harm should the family remain in such housing situation . . . ."

However, under the proposed regulations (even assuming the minor revisions announced on July 30 but not yet included in the August 2 regulations), many families who are subject to a "substantial health and safety risk ... that is likely to result in significant harm should the family remain in such housing situation" will not be eligible for shelter. For instance, the only families who, under the proposed regulations, can access shelter based on the risk of harm they face are those:

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[8] For the same reason, plaintiffs have a strong likelihood of success on their claim that there is no "emergency" warranting implementation of these regulations without providing an opportunity for public comment. Complaint, Count 5. Given the need for 60 days' notice to the Legislature, there is plenty of time for DHCD to get public input before implementation.

- who are at risk due to "[e]xposure to violent physical conduct ... perpetrated by the primary tenant and/or a member of the primary tenant's household" (or "repeated conduct of a regular guest"),
- who are at risk due to "[e]xposure to mental health issues exhibited by the primary tenant or a member of the primary tenant's household" (or "repeated conduct of a regular guest"),
- who are at risk due to "[e]xposure to on-going substance abuse by the primary tenant and/or member of the primary tenant household" (or "repeated conduct of a regular guest"),
- who lack a regular overnight sleeping situation or are living in housing that has been condemned or lacks water, heat, electricity, lighting or toilet and waste removal or has unsanitary conditions that result in an accumulation of garbage, filth or other cause of sickness.

Proposed 106 C.M.R. §§ 309.040(A)(6)(a)(i) - (iv); 309.040(A)(6)(c), as proposed to be revised on July 30, 2012.

Excluded by these convoluted and narrow definitions are those who are "subject to a substantial health and safety risk" due to exposure to violent or other harmful conduct by a neighbor or other person who is not a guest or member of the host's household, those who are at risk due to theft or extortion of resources needed to pay for daily living expenses, and those who are living in places where there are serious violations of the Sanitary Code other than a near-total lack of water, utilities, toilet facilities or the narrowly defined types of unsanitary conditions. Hence, those forced to live in places with exposed wiring, no insulation, no locks on the doors, missing windows, rodents that bite the children and that are not present due to "accumulation of garbage, filth or other causes of sickness," lead paint or other serious conditions are not eligible unless and until the

property is condemned, even though they are subject to a "substantial health and safety risk…that is likely to result in significant harm should the family remain in such a housing situation." And even those who are exposed to violent conduct by members or guests of the host's household or to lack of water, utilities and toilet facilities are not eligible unless the problem "cannot" be corrected by the landlord or law enforcement in a timely manner, whether or not the problem "will" be corrected, thereby leaving children and families in unsafe situations. And because the regulations categorically exclude from shelter families who are *tenants* in the household, covering only those who are doubled up with others, proposed 106 C.M.R. § 309.040(A)(1)(i)(I) and (6)(a)(i)-(iii), the families at issue have no legal rights to force the landlord to fix the conditions or to have the housing condemned and will be at very high risk of being kicked out if they do report violent conduct by the host to law enforcement.

The regulations on their face therefore exclude many families who the line item says "shall [be] include[d]" among "eligible families" pursuant to category (iv). And, as discussed above, the health and safety regulations DHCD proposes to implement on August 2 expressly exclude from the category of families subject to "crimes of violence" or "violent conduct" those who are subject to "domestic violence." At the same time, the separate category of families who must be eligible based on domestic violence will not take effect until September 17, *notwithstanding the express requirements in category (i) of the line item that families at risk of domestic violence must be eligible for shelter.* This approach cannot therefore comport with legislative intent.

In addition to being inconsistent with the mandatory language of categories (i) and (iv) in the line item, these contorted rules are also contrary to the purpose of the governing statute which is to provide "emergency housing assistance to needy families . . . who are homeless or at-risk of homelessness." G.L. c. 23B, § 30.

Where an agency interpretation of a statute is contrary to its plain meaning and underlying purpose, it must be rejected. *See Smith v. Comm'r of Transitional Assistance*, 431 Mass. 638, 646 (2000); *accord Herrick v. Essex Reg'l Ret. Bd.*, 77 Mass. App. Ct. 645, 649-51 (2010) (agency expertise or policy preference cannot alter statutory language). Plaintiffs therefore have a strong likelihood of success on their claim that the proposed "health and safety" regulations violate the G.L. c. 23B, § 30 and the line item.

3. DHCD's "Health and Safety" Regulations Violate Its Duty to Assure Fair, Just and Equitable Administration and Simplicity of Administration in the Best Interest of Needy Families.

DHCD's governing statute, G.L. c. 23B, § 30, also requires DHCD to "administer the program in a fair, just and equitable manner" and to "promulgate rules and regulations to ensure simplicity of administration, in the best interest of needy families." DHCD's "health and safety" rules violate these statutory mandates.

As set forth above, DHCD's regulations make distinctions between different subsets of homeless children and families who are similarly situated with regard to the threat of harm they face. Some families staying in places not meant for human habitation will qualify and others will not. Some families subject to criminal violence in their current housing situation will qualify and others will not. The difference is not the severity of the violence or the risk of harm, but irrelevant factors such as whether the perpetrator is a member of the host's family or his guest, whether non-violent but threatening conduct is caused by mental health issues or substance abuse or instead caused by simple greed or malevolence (in which case the children will be left in the threatening situation until actual violence occurs), and whether law enforcement or the landlord could theoretically address the problem in a "timely" manner, leaving children at risk while "assessments" of the odds that such intervention will not correct the problem are being made.

Under the proposed regulations, families living in dangerous conditions that "cannot" be corrected may qualify, but families living in identical conditions that could be corrected but the landlord *will not* correct are not covered. Lack of hot and cold water, heat, electricity, and a toilet, and presence of unsanitary conditions that actually cause sickness may qualify a family for shelter, but other equally dangerous conditions such as exposed electrical wiring, severe overcrowding, or other serious Sanitary Code violations will not qualify. These "arbitrary and technical reasons" for denying shelter are inconsistent with the agency's statutory duty to administer state welfare programs in a manner that is "fair, just and equitable." *Correia v. Dep't of Pub. Welfare*, 414 Mass. 157, 164-65 (1993) (upholding preliminary injunction against system that denied applications for arbitrary and technical reasons on grounds that it violated requirement of fair, just and equitable administration); *see also Salaam v. Dep't of Transitional Assistance*, 43 Mass. App. Ct. 38, 42-43 (1997) (unreasonable verification requirements violate "fair, just and equitable" requirement).[9]

DHCD's proposed "health and safety" rules and regulations also fail to ensure "simplicity of administration, in the best interest of needy recipients," as required by the statute. The rules have numerous complicated exceptions and qualifications which are nearly impossible to parse. The rules also contain cross-references to regulations that are proposed in the regulations for which DHCD has given 60 days' notice, but the referenced regulations are not currently in effect and are not

[9] *Dowell v. Comm'r of Transitional Assistance*, 424 Mass. 610 (1997) is not to the contrary. In that case the Court upheld EA regulations denying emergency shelter to those who had been evicted from subsidized housing on the grounds that in allocating scarce resources it was rational to distinguish between those who had previously received a valuable housing benefit and those who had not. As the Court stated in *Dowell*, "It is within the discretion of an agency to determine priorities for allocation of resources among services where the enabling statute does not itself clearly establish particular priorities." *Id.* at 615 (quoting *Williams v. Sec'y of Human Servs*., 414 Mass. 551, 567 (1993)). Here the statute does establish priorities, expressly requiring inclusion of families who are at risk of harm; the agency does not have the discretion to pick and choose among them or restrict their scope.

included in the proposed "health and safety" rules.[10] In the meantime therefore, critical elements of the proposed "health and safety" regulations are unintelligible. Moreover, by putting in place the health and safety standards on August 2, 2012 and then revising the regulations again as of September 17, the proposals will generate confusion by workers, applicants for shelter, and those seeking to assist them, including the plaintiffs. And the rules are manifestly designed to keep homeless families out of shelter and by no stretch of the imagination were promulgated to promote "the best interests of needy recipients." Plaintiffs are therefore likely to succeed on their claims that implementation of the proposed "health and safety" rules as of August 2 is not "fair, just and equitable" or "in the best interests of needy recipients."[11]

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED AND DEFENDANTS WILL SUFFER NO IRREPARABLE HARM IF AN INJUNCTION IS GRANTED.

The plaintiff organizations and the families who are their members face immediate irreparable harm because "without the requested relief [they] may suffer loss of right that cannot be vindicated should [they] prevail after a full hearing on the merits." *Healey v. Comm'r of Pub.*

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[10] For example, the "health and safety" regulation related to "crimes of violence" and/or, as presumably revised, "violent conduct," refers to a family not qualifying where the violent conduct is "domestic violence as defined in 106 CMR 309.040(A)(6)." *See* proposed 106 C.M.R. § 309.040(A)(6)(a)(i), Turley Aff., Ex. B and Ex. H. But the "health and safety" regulations do not contain a definition of domestic violence in proposed 106 C.M.R. § 309.040(A)(6) or anywhere else. In addition, proposed "health and safety" regulation 106 C.M.R. § 309.040(A)(6)(c) defines a "housing situation not meant for human habitation" as "a housing situation that is defined in 106 CMR 309.040(A)(6)(f)(iv)(II)," which also does not currently exist because, as DHCD concedes, it is subject to 60 days advance notice to the Legislature. Likewise, proposed 106 C.M.R. § 309.040(A)(6)(a) and (b) both cross-reference 309.040(A)(1)(iv), which does not yet exist. DHCD's cover letter accompanying the proposed "health and safety" regulations states that the numbering in that document "will be in effect only until the approval of the full package . . . after 60-days Legislative review." Turley Aff., Ex. C.

[11] As discussed above, the proposed "health and safety" rules arbitrarily deny emergency shelter to children and families who have no safe place to stay and are at imminent risk of harm. The proposed rules also make irrational distinctions between different subsets of homeless families which have no bearing on the risk of harm to the family or the need for emergency shelter. Plaintiffs' Complaint includes a claim that implementation of the rules therefore violates the families' right to due process of law and the equal protection of the laws protected by Articles 1, 10, and 12 of the Massachusetts Declaration of Rights, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983. Plaintiffs do not seek preliminary relief on their constitutional claims at this time.

Welfare, 414 Mass. 18, 27-28, (1992) (irreparable harm when the Department delayed child care)(citations omitted). The harm facing the families is extreme and irreparable. Without relief, they do not know where they will sleep from night to night. The Supreme Judicial Court has long recognized the severity of harm that both children and adults endure during a period of homelessness:

> Homelessness and the threat of homelessness produce highly stressful situations which take a heavy toll on family members. . . . Parents experience feelings of degradation and depression and fear for the well-being of their children. Children are particularly vulnerable to the loss of security and to the disruption homelessness produces. They face repeated interruptions, changes of schooling, loss of friends, malnutrition, and infection. They often exhibit behavior problems which were not evident when the family had a home.

Massachusetts Coal. for the Homeless v. Sec'y of Human Servs., 400 Mass. 806, 821 n.15 (1987).

The organizational plaintiffs also face direct irreparable harm if relief is not granted. The organizations provide assistance, advice and support to their members and other families applying for emergency shelter on a daily basis. Turley Aff. ¶ 2-3. But their resources are extremely limited and they do not have the capacity to help anywhere near the number of families who will be rendered ineligible for shelter when these regulations take effect. Turley Aff. ¶ 2-3. The pressure and expense of trying to assist more homeless families who cannot access shelter is real harm. DHCD's proposed "health and safety" regulations would affect every or nearly every family applying for emergency shelter, requiring the organizational plaintiffs to spend more of their limited resources helping families navigate the convoluted and incomprehensible rules and even more of their limited resources finding and providing shelter, counseling, and other financial support to families who do not meet the new, very restrictive eligibility rules for emergency shelter eligibility. The issuance of the regulations without an opportunity for comment and indeed without any reasonable opportunity for input will also cause irreparable harm to the organizational plaintiffs by

depriving them of an opportunity to make their views known and try to obtain changes to the proposed "health and safety" rules.

Against the harm to the organizations and the very dire consequences faced by their members, the consequences to the defendants of granting relief are negligible. The FY 2013 budget appropriates $96 million to DHCD for emergency shelter so there is no risk that funds will be exhausted pending a decision on the merits. St. 2012, c. 139, § 2, items 7004-0101 and 7004-0103. In any event, the payment of funds by a state agency, when the expenditure is legally required, cannot constitute irreparable harm to the Commonwealth, even if it would cause the reduction of other expenditures. *Healey v. Comm'r of Pub. Welfare*, 414 Mass. at 28. The balance of harms therefore manifestly favors issuance of the requested preliminary relief. *See McFadden v. Moll*, 16 Mass.L.Rptr. 266, 2003 WL 21341728 at *3 (Mass.Super. May 28, 2003) (recognizing family homelessness and the consequent of risk of parents and children being separated as an important factor to weigh in the balance of harms).

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that implementation of the proposed "health and safety" regulations be preliminarily enjoined.

Respectfully submitted on behalf of plaintiffs,

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Certificate of Service

I, Ruth A. Bourquin, hereby certify that on this 31st day of July, 2012, I caused to be served by hand delivery a copy of the Complaint for Declaratory and Injunctive Relief, Plaintiffs' Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction, this Memorandum in Support of that Motion, and the Affidavit of Kelly Turley on William Porter, Assistant Attorney General, One Ashburton Place, Room 2019, Boston, MA 02111 and Deborah Goddard, Chief Counsel, Department of Housing and Community Development, 100 Cambridge Street, 3rd Floor, Boston, MA 02114.

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Ruth A. Bourquin