NYLAG
New York Legal Assistance Group

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BY E-MAIL AND FIRST CLASS MAIL

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Dear Commissioner Hein and Commissioner Banks,

We write concerning a grievous violation of our clients' rights based on a flawed administrative directive which prevents eligible homeless families from accessing shelter.

Many homeless families with children are denied admission to homeless shelters in New York City ("the City") because they purportedly have another available housing option—when in fact they do not. The City relies on state administrative directive 16-ADM-11 in issuing these denials.

Specifically, the City's Department of Homeless Services ("DHS") interprets 16-ADM-11 to permit a social services district to deny entry to a shelter if a third party with no legal responsibility to the family (such as a distant relative or acquaintance) does not provide a "reasonable justification" for its decision not to house the family – even where, in fact, that third party has refused the family access to the housing. As a result, prior to the current COVID-19 pandemic, homeless families with children were left to sleep on the street or in hospital emergency rooms, or on the subway, or in other unsafe situations, as described in further detail below.

The City's practice of denying shelter to families who ***in fact*** have no other housing option, based on 16-ADM-11, violates state statutes and regulations, the state and federal Constitutions, and the court-ordered settlement decree in *Ebony Boston, et al. v. City of New York, et al.,* Index No. 402295/08, entered on December 18, 2008, which mandates that New York City provide shelter to homeless families with minor children ("the *Boston* Settlement").

We ask that you take immediate action to suspend enforcement of the portion of 16-ADM-11 that allows social service districts to deny shelter to an otherwise eligible homeless family with children on the ground that a non-legally responsible third party has failed to provide a "reasonable justification" for not housing the family, and revise 16-ADM-11 accordingly. We also ask that you provide shelter for all otherwise eligible homeless families with minor children.

I. Background

The New York Legal Assistance Group ("NYLAG") is a non-profit legal services organization that provides free civil legal services to low-income New Yorkers, including assistance with public benefits, housing, family law, and immigration. The Shelter Advocacy Initiative at NYLAG provides legal services and advocacy to people who are experiencing homelessness and are in, or trying to access, the City shelter system. We offer legal advice and representation throughout each step of the shelter application process. Additionally, we assist and advocate for clients who are already in shelter as they navigate the transfer process, seek adequate facility conditions and resources for their needs.

Numerous NYLAG clients with minor children who are experiencing homelessness have been forced into street homelessness because DHS determined that they have an "available housing option" based on 16-ADM-11, when in fact they have no safe place to sleep.

16-ADM-11 states that "[t]emporary housing assistance will be provided only to persons who do not have other available resources, and who meet and comply with the requirements set forth in this directive." It provides that "[a] housing resource is defined as available when it is within the control or ability of the applicant . . . to live at the residence or when the applicant has permission . . . to live there" and that the "***resource must actually be available" (emphasis added).***

However, 16-ADM-11 also provides that "a housing resource should not be considered available if after an investigation it is found that the primary tenant, who is not a legally responsible relative of the applicant provides a reasonable justification to decline to allow the applicant to return to the residence." The ADM directs the City to determine whether a third-party primary tenant's justification for refusing to allow an applicant to live in the home is "reasonable" by reviewing "a totality of factors." 16-ADM-11 further states that the refusal of a primary tenant to seek permission from the landlord for the applicant to live in the premises does not render the housing resource "unavailable," if there is evidence that such permission would be granted.

Thus, on its face and as applied, 16-ADM-11 provides that a homeless family seeking shelter must be denied—even if the family has no viable housing options—merely because a third party (often, an ex-boyfriend, distant relative, or acquaintance) failed to give the authorities a "reasonable justification" for refusing to house the family. A third party's simple refusal to accept the family, or failure to seek permission from his or her landlord to do so, is not deemed to be a "reasonable justification," even when that third party owes no legal obligation to the family. Moreover, if the third party gives a justification but the City deems the proffered justification "unreasonable," the City will classify the third party's residence as "an available housing option," even if the third party unequivocally tells City investigators that the family cannot live with them.

16-ADM-11 puts an impossible burden on homeless families. They must not only demonstrate that they have no housing available to them, but also rely on third parties to expend the effort to cooperate with government investigators by providing a "reasonable justification" for not allowing the family to live with them. And when those third parties fail to do so, often the family is forced into street homelessness or returning to a dangerous situation. While DHS has allowed families to reapply from within shelter during the COVID crisis, the Agency still applies 16-ADM-11 to determine that families are ineligible for shelter, often repeatedly.

During the COVID-19 pandemic, DHS has made many changes to the application process for families with minor children. Currently, families are not ejected from shelter when their applications are denied on the ground that they have an alleged "available housing option." Instead, families whose applications for shelter have been denied are currently allowed to re-apply for shelter over the telephone while remaining in successive 10-day temporary shelter placements. As a result, the most extreme harms that our clients experience under 16-ADM-11 are temporarily abated. However, DHS has indicated that policy changes made to address COVID conditions will not be permanent. And the fact that DHS implemented this COVID policy change reflects an understanding that as regularly administered, 16-ADM-11 causes families to be without shelter—a condition which is dangerous in *all* times, not only COVID times.

Furthermore, our clients are currently being harmed by 16-ADM-11's application, even under the COVID-specific practice. When clients receive only a series of temporary placements, rather than being permanently assigned to a homeless shelter, they cannot access City services and benefits provided to DHS residents. Among the benefits from which they are excluded are most housing vouchers, which are most families' best chance to escape homelessness. Thus 16-ADM-11 is still very much harming homeless families now, and is likely to do so even more egregiously after the pandemic.

II. NYLAG Client Examples

For years, NYLAG clients have been denied shelter on the grounds that they allegedly have a place to stay, despite the fact that the residence is ***not actually available*** to them. Some examples from prior to the pandemic follow:

- Two adult NYLAG clients and their toddler daughter were denied shelter while street homeless. DHS claimed that the family could live with the parents of one of the adults in Pennsylvania, even though (1) the parents were unwilling to house the family, and (2) a DHS investigator recommended in documented DHS case notes that the address be precluded because it was overcrowded and unsuitable for a family. This family was still denied temporary housing because DHS alleged that was an available housing option.

- DHS denied shelter to NYLAG clients, a family with a five-month-old baby, on the basis that housing was available in the home of a grandmother of one of the adults. The grandmother, however, refused to let the family stay with her for even one night, and provided a written statement to that effect. DHS nonetheless denied the family access to temporary shelter on the incorrect basis that they had an available housing option.

- NYLAG represented a family of two parents with disabilities, one of whom required a wheelchair, and an eight-year-old son with autism. The family was denied shelter based on an allegedly available housing option, but that home was accessible only by stairs and was therefore inaccessible to our client. In addition, the primary tenant, who was a sister of one of the parents, explicitly stated that the family was not permitted to live with her. Because DHS denied the family access to temporary shelter, they were forced to move every night. The resulting lack of stability exacerbated their autistic son's condition and caused severe health complications for the parent who was confined to a wheelchair. She was not able to use her power wheelchair because it was too bulky for their constant moving, and instead had to use her manual wheelchair, which caused her increased pain and resulted in frequent trips to the emergency room.

- Another NYLAG client family, a single mother and her twelve-year-old son who were living on the street, were denied temporary shelter based upon an alleged available housing option in South Carolina. That residence, however, was entirely unavailable and inappropriate: the mother had been banned by the landlord, and the primary tenant was verbally abusive to the family. The abusive environment had exacerbated the son's diagnosed depression, necessitating intensive behavioral therapy.

- A street homeless couple with a four-year-old son was forced to sleep on the street after DHS denied their application for temporary shelter on the ground that the family could live with the mother's parents in Brooklyn, despite the fact that the mother's parents, as primary tenants, had expressly refused to allow the family to live in the home. When the family arrived at the apartment and requested permission to sleep there, the primary tenants called the police and had the family removed from the premises. DHS's improper denial not only prevented the family from accessing shelter, but also put them in danger of being incarcerated, being separated from one another, and experiencing violence or health issues from sleeping on the street.

- Other NYLAG clients, a couple with two elementary school-aged children, were denied housing because DHS stated that they could stay with the mother's grandmother, despite a letter from the grandmother saying that they could not live with her. The denial of shelter forced the family to stay in a different location every night. They spent evenings on the street and in hospital emergency room waiting areas. This upheaval and uncertainty caused the children to miss excessive amounts of school. This harmed the children's education and caused school officials to call the family multiple times to express concern about the children's attendance record.

- One NYLAG client family was rejected based on an alleged available housing option that an investigator had previously disqualified as an available housing option, and the family was left with no shelter and walked through the streets with their one-year old baby all night. The father has severe asthma and, without a place to set up his nebulizer, became increasingly ill. He was hospitalized for his asthma, but checked himself out of the hospital against medical advice because he feared for his fiancé and daughter on the street without him. A stranger on the subway saw the mother sobbing and holding her baby and let them sleep in her home one night while the father slept outside their door, but that Good Samaritan was not able to provide ongoing housing.

The stories here are just a sample of the overwhelming number of NYLAG clients who were denied shelter based upon alleged available housing options that were not actually available to them. These denials were all based on the application of 16-ADM-11. Luckily, these families reached NYLAG, and we were able to help them gain access to the DHS shelter system. But for every family that was able to find legal representation, there are many more who were not.

As explained above, since the COVID-19 pandemic began, DHS has allowed applicants who were rejected based on 16-ADM-11 to re-apply from within temporary shelter. While this is a vast improvement over children experiencing street homelessness, these families still suffer from the application of 16-ADM-11. For example, during the pandemic:

- One family of NYLAG clients was told they should return to a housing situation where the applicant-mother was being verbally abused by the primary tenant. The primary tenant had forced the family to leave when the applicant-mother had gotten pregnant and refused to terminate the pregnancy. Despite the primary tenant's refusal to house the family, they were found ineligible based on this alleged Available Housing Option. Since they were allowed to reapply from within their temporary shelter placement, they were not forced into street homelessness, but they suffered significant harm nonetheless. The applicant family was informed repeatedly by shelter staff that they could be forced to leave at any time as the staff did not know when the COVID policy of re-applying from within temporary shelter would be rescinded. Additionally, as they were not eligible for shelter, they were not considered DHS program participants and thus were not eligible for a CityFHEPS voucher. This significantly lengthened the amount of time they had to be in shelter by preventing them from moving on to more permanent housing.

- Many NYLAG clients were also caught in the endless cycle of applying for shelter, attempting to establish eligibility, being found ineligible and reapplying from within temporary shelter. During that period, they suffered the stress of not knowing whether they would be thrown from temporary shelter at a moment's notice, and were ineligible for services that would have helped them find permanent housing. The cycle of application after application does not ameliorate homelessness, it exacerbates it.

III. 16-ADM-11 violates New York State Law and Regulations, as well as the New York and United States Constitutions; the City's reliance on 16-ADM-11 also violates the *Boston* Settlement.

a. 16-ADM-11 Cannot Withstand an Article 78 Challenge

Article 78 allows an administrative determination to be challenged if the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Because 16-ADM-11 conditions aid on factors beyond applicants' control, it inevitably leads to the arbitrary and capricious denial of shelter.

Moreover, the "reasonable justification" requirement renders 16-ADM-11 internally inconsistent, as the directive also provides that a housing option cannot be considered available unless it is "actually available." When a primary tenant refuses to allow an applicant

family to stay with them, that housing option cannot be considered "actually available" to the applicant family under any reasonable construction of that phrase. Nevertheless, DHS takes the position that under 16-ADM-11, the agency is required to deny applicant families shelter because a third party failed to provide a reasonable justification. This renders the "actually available" language meaningless and the regulation as a whole fatally flawed.

Additionally, the change in policy from 15-ADM-06 (the prior controlling administrative directive) to 16-ADM-11 was neither justified nor rational. 15-ADM-06 specifically provided that a third-party housing resource could not be deemed available to a homeless family if the third party declined to house them or declined to seek his or her landlord's permission. However, in 2016, the City asked the State to replace 15-ADM-06 with language mandating that third parties provide a "reasonable justification" for failing to provide housing. Neither the City nor the State has articulated any justification for why this policy change was warranted, nor could they.

b. 16-ADM-11 Violates State Law and Regulations

The New York State Administrative Procedure Act (SAPA) provides that agencies "may adopt additional procedures not inconsistent with statute." SAPA § 201. However, 16-ADM-11 is inconsistent with Social Services Law and Department of Social Services regulations governing the provision of Temporary Housing Assistance.

New York State Social Services Law § 131 mandates that "[i]t shall be the duty of social services officials . . . to provide adequately for those unable to maintain themselves," and 18 NYCRR 352.35, one of its implementing regulations, establishes "eligibility requirements and standards for the provision of temporary shelter and other assistance." 18 NYCRR 352.35 provides that Temporary Housing Assistance should be denied if the applicant "has other housing available." However, 16-ADM-11 results in routine denials of shelter to applicant families based on the purported "availability" of a third-party's home, even when that third-party has refused to open their home to the family. As such, the Directive permits the outright denial of Temporary Housing Assistance where an applicant family has complied with the eligibility requirements laid out in 18 NYCRR 352.35. Since the "reasonable justification" criterion renders 16-ADM-11 inconsistent with state statutes and regulations, it is invalid.

c. The City's Application of 16-ADM-11 Violates the *Boston* Settlement

In the *Boston* Settlement, the City agreed that it would not deny emergency shelter to families with children who lack alternate housing. The court-ordered consent decree provides that "[e]ligible homeless families with children, defined as families with children who lack alternate housing, and families with children seeking shelter who, pending the City's eligibility determination, qualify for shelter pursuant to [applicable law], are entitled to emergency shelter and the City shall not deny shelter to such families." The City violates this agreement when it employs 16-ADM-11's flawed eligibility criteria.

d. 16-ADM-11 Violates Homeless Families' Due Process Rights

Denying homeless families shelter also violates their rights to due process under the Constitutions of the United States and New York. Section 1 of the 14th Amendment to the U.S. Constitution provides that no state "shall deprive any person of life, liberty, or property,

without due process of law." Article I, Section 6 of the New York Constitution similarly provides that "[n]o person shall be deprived of life, liberty or property without due process of law." New York Social Services Law mandates that assistance shall be provided to the homeless, and authorizes the provision of "temporary emergency shelter for eligible homeless households." The implementing state regulations unequivocally create a property interest in temporary housing assistance for families who meet eligibility criteria set forth in those regulations. 18 NYCRR 372.4, for example, provides that "[s]ervices necessary to cope with the emergency situation, including . . . securing family shelter" "shall be provided." 18 NYCRR 352.35 "governs the provision of temporary housing assistance to persons who are homeless," and "sets forth the requirements with which an individual or family who applies for temporary housing must comply in order to be eligible for temporary housing assistance." The regulation explains that families must comply with its requirements "[a]s a condition of eligibility," and that assistance "will be denied or discontinued under the conditions specified." Under this regulatory scheme, Temporary Housing Assistance must be provided to applicants who meet eligibility criteria.

Homeless families thus possess a legitimate property interest in temporary housing assistance benefits under the applicable state laws and regulations. 16-ADM-11's "reasonable justification" language removes the procedural safeguards necessary to adequately protect those interests from the shelter application process. The procedure of evaluating whether a third party's justification for declining to allow an applicant to reside with them is "reasonable" is patently unfair, since in reality such inquiry has no effect on whether the applicant is in need of shelter and meets the eligibility criteria set forth by the relevant regulations. While this renders 16-ADM-11 unconstitutional on its face, for these same reasons, DHS's practice of denying shelter to applicant families because a third party offered no "reasonable justification" renders it unconstitutional as applied to applicant families.

IV. Requested Changes

16-ADM-11's "reasonable justification" provision is causing our clients and thousands of others similarly situated to suffer urgent and serious harms.

We ask that you take the following steps to remedy those harms:

1. Immediately suspend enforcement of that portion of 16-ADM-11 authorizing DHS to deem the home of a non-legally responsible third party to be an available housing option unless such third party provides a "reasonable justification" for not providing an applicant family housing.

2. Preclude DHS from considering as available housing options all addresses where the primary tenant, who is not otherwise legally responsible for the applicant family, has failed or refused to provide or request permission for the applicant family to live in the premises.

3. Provide all otherwise eligible homeless families with minor children with shelter.

4. As to the State, revise 16-ADM-11 to remove the "reasonable justification" mandate.

5. As to the City, refrain from all further violations of the *Boston* Settlement.

Your immediate review of this matter is requested. If we do not hear from you by June 25, 2021, we will have no choice but to pursue all available legal remedies. This letter serves as notice prior to seeking relief as required by paragraph 6 of the *Boston* Settlement.

Sincerely,

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