1996 WL 633382
United States District Court, E.D. New York.

HENRIETTA D., Nidia S., Simone A., Ezzard S., John R., and Pedro R., on behalf of themselves and others similarly situated, Plaintiffs,
v.
Rudolph GIULIANI, Mayor of the City of New York, Marva Hammons, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services, and Mary E. Glass, Commissioner of the New York State Department of Social Services, Defendants.

No. 95 CV 0641 (SJ).
|
Oct. 25, 1996.

**Synopsis**
City residents with Acquired Immune Deficiency Syndrome (AIDS) or Human Immunodeficiency Virus (HIV) and eligible for public assistance benefits sought class certification and preliminary injunction against city and state officials, claiming that system for distributing benefits was ineffectual and that proposed restructuring would exacerbate its inadequacies. City and state moved to dismiss. The District Court, Johnson, J., held that: (1) residents failed to demonstrate likelihood of success and thus were not entitled to preliminary injunction; but (2) residents stated causes of action for violations of Americans with Disabilities Act (ADA) and Rehabilitation Act, and that officials violated residents' rights to due process; and (3) residents would be certified as class.

Granted in part and denied in part.

**Attorneys and Law Firms**

HIV Law Project, New York City by Theresa M. McGovern, Housing Works, Inc. New York City by Michael Kink, Winthrop, Stimson, Putnam & Roberts, New York City by Susan J. Kohlmann, for Plaintiffs.

Corporation Counsel, City of New York Law Department, New York City by Georgia Pestana, for Defendant City of New York.

Attorney General, New York City by Jeanne Lahiff, Assistant Attorney General, for Defendant State of New York.

*MEMORANDUM AND ORDER*

JOHNSON, District Judge:

***1** Currently before this Court are plaintiffs' motions for a preliminary injunction and for class certification and defendants' motion to dismiss for failure to state a claim and for lack of jurisdiction. For the reasons stated below, plaintiffs' motion for preliminary injunction and defendants' motion are denied, and plaintiffs' motion for class certification is granted.

BACKGROUND

Henrietta D., Nidia S., Simone A., Ezzard S., John R., and Pedro R. ("plaintiffs") instituted this action against the City and State of New York ("defendants") on behalf of themselves and others similarly situated.[1] Plaintiffs are all New York City residents with Acquired Immune Deficiency Syndrome ("AIDS") or with Human Immunodeficiency Virus ("HIV") related disease and are all eligible for public assistance benefits. Plaintiffs, and others like them, are currently provided such benefits through the Human Resources Administration's ("HRA") Division of AIDS Services ("DAS"). Plaintiffs claim that DAS is currently ineffectual and that a proposed restructuring plan developed by City defendants will only further diminish DAS' already limited abilities.

Plaintiffs argue that the deficiencies in services provided by DAS are so severe that defendants have effectively violated federal and state statutory and constitutional law, including the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29

U.S.C. § 794(a) ( "Rehabilitation Act"). Those latter federal statutes require, in part, that state and local governments provide disabled persons with equal access to all benefits and services provided to the general public.

Plaintiffs have moved for class certification pursuant to Fed.R.Civ.P. 23 and preliminary injunctive relief pursuant to Fed.R.Civ.P. 65(a). They specifically request that this Court enjoin City defendants from further reducing DAS and from altering the present structure and functions of DAS without demonstrating to the Court how any alteration would enable defendants to comply with their obligations under applicable law to provide plaintiffs with meaningful and equal access to programs, benefits, and services. They also request that the Court compel State defendants to comply with their legal requirement to supervise the City in its administration of federal and state benefit programs.

Defendants, in turn, have moved to dismiss certain of plaintiffs' claims for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and to dismiss certain of plaintiffs' claims for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

DISCUSSION

I. *Findings of Fact.*

After the initial announcement of its creation in 1985 by the City of New York ("City"), DAS began in 1986 to assist people who have AIDS or an HIV-related disease in getting their public assistance benefits. Persons are eligible for DAS if they show that they are Medicaid-eligible, residents of New York City, and medically-eligible for DAS services. Shapiro Aff. ¶ 14. Medical eligibility is established when an applicant shows that she or he (1) has AIDS as defined by the Centers for Disease Control ("CDC"), or (2) has advanced HIV-related disease that is defined by the New York State Department of Health's AIDS Institute *and* is in need of personal care services. *Id.* In short, persons eligible for DAS are not otherwise healthy, albeit HIV-positive, New Yorkers. They are, as required by the DAS' own Draft Policies and Procedures Manual, persons who are entitled to Medicaid and are unhealthy and in need of assistance to access their benefits. *Id.* at Ex. A, p. 33.

***2** People with HIV infection develop numerous illnesses and physical conditions not found in the general population, and experience manifestations of common illnesses that are much more aggressive, recurrent, and difficult to treat. Torres Aff. ¶ 4. Infections and cancers spread more rapidly in a person whose immune system has been compromised, and the effectiveness of medicine is reduced by nutritional problems that limit the body's ability to absorb what is ingested. *Id.* Illnesses not lethal to the general population can kill an HIV-infected person. *Id.* For all these reasons, persons with AIDS and HIV-related disease experience serious functional limitations that make it extremely difficult, if not in some cases impossible, to negotiate the complicated City social service system on their own.

DAS has attempted to help its clients navigate that system. For much of its existence, DAS has operated under a case management system, with each DAS client assigned to a specific case manager who serves as the client's contact person for all social services and who helps to process the client's applications for various forms of aid and social services. Case managers also provide DAS clients with Nutrition and Transportation Supplements to purchase fresh foods and vegetables and to travel locally. Cavalier Decl. ¶ 5.

Plaintiffs claim, through their own and others' supporting affidavits, that DAS is ineffective in providing those coordinating and contact services. Specifically, their allegations include claims that (1) the assignment of case managers to individual cases is frequently delayed and that this in turn causes delays in plaintiffs' receipt of benefits and services, *see* John R. Aff.; Ezzard S. Aff.; (2) transfers of public assistance cases to DAS from other HRA agencies often take a long time to complete, again causing delays in the receipt of benefits, *see* Simone A. Aff.; (3) DAS clients at times receive less than the level of benefits they are entitled to receive, *see* Nidia S. Aff.; and (4) mismanagement at DAS frequently causes delays in processing requests for services such as home care, homemaking, apartment lease approvals, rent and special moving grants, payment of rent arrears and emergency housing placement. *See, e.g.,* Henrietta D. Aff.; John R. Aff.; Nidia S. Aff.; Simone A. Aff. In sum, plaintiffs allege that DAS systematically operates with "widespread, protracted delays, errors, and unjustified denials of crucial subsistence benefits." Pl.Mem. at 6.

Although the City denies these allegations, it has also

recognized the need for increased efficiency in the face of a growing DAS-eligible population. To that end, it has proposed and begun implementing a restructuring plan which modifies the case management system. Under the new plan individual clients are assigned "Assessment Workers" for approximately three months or until a new client's case is "stabilized", Colon Decl. ¶¶ 8, 9, while family cases continue to receive comprehensive case management services. *Id.* at ¶¶ 5, 10. Perhaps more significantly, the proposed changes streamline into one system a process that had formerly been accomplished by two systems. Specifically, caseworkers who assess needs and address individual crises now work in the same unit with eligibility specialists, who determine the public assistance benefits to which each client is entitled. *Id.* at ¶¶ 7–11. This unified approach is meant to decrease delays caused by the transfer of paperwork and multiple levels of decision making. *Id.* at ¶ 11. Jeanette Colon, the Assistant Deputy Commissioner of DAS, pointed out that the restructuring plan maintains the DAS goal to "expedite access to essential social services needed by Medicaid-eligible persons living with AIDS or advanced HIV illness and their families." *Id.* at ¶ 3.

***3** It is clear that plaintiffs suffer greatly from their disease and that DAS has shown a tendency to be insensitive and at times inefficient in assisting them in getting their basic and much needed benefits. For example, although Simone A.'s DAS case was received through "ServiceLine" on March 17, 1994, her case manager did not request that her public assistance case be transferred to DAS until May 6, 1994, a delay of almost two months. Cavaliero Decl. ¶ 46. At a minimum there is frequent miscommunication between DAS case managers and clients. *See, e.g.,* John R. Aff. ¶ 6 (stating that he requested homecare services), *contra* Cavaliero Decl. ¶ 63 (stating that John R. had expressed that he did not want homecare until he was placed in his own apartment).

Although I find that plaintiffs have experienced delays and errors, I also find that they have received certain expedited services and cash supplements which assist plaintiffs in meaningfully accessing their benefits and which are not generally provided to other New Yorkers who are eligible for public assistance. For example, John R. was initially interviewed by DAS on September 30, 1994,[2] and because he was homeless, he was immediately placed in an available Single Room Occupancy in Manhattan, rather than being referred to a shelter as others eligible for public assistance would have been. Additionally, DAS clients who are homebound at times receive home visits from their case managers. *See, e.g.,* Simone A. Aff. ¶ 15; Cavaliero Decl. ¶ 12. Petty cash funds and supplements are made available to DAS clients on an expedited basis. *See, e.g.,* Cavalier Decl. ¶ 53 (stating that Ezzard S. received cash funds and an emergency assistance grant within five days of his initial interview). DAS clients also receive Nutrition and Transportation Supplements to purchase fresh food and travel to doctor visits—supplements not available to other New Yorkers on public assistance. Cavalier Decl. ¶¶ 17, 48.

In short, while DAS is not always an efficient bureaucracy, it does provide supplemental and at times expedited services to assist AIDS and HIV-positive clients in accessing their public assistance. While delays have occurred in these plaintiffs' cases, I do not find, based on the current submissions and presentations made to the Court, that the delays are systemic. Additionally, I find that the proposed restructuring plan is designed to increase efficiency by eliminating the bifurcated system of case management and eligibility processing.

II. *Motion to Dismiss for Lack of Jurisdiction.*

As an initial matter, this Court will address defendants' arguments that plaintiffs' motion should be dismissed for lack of justiciability and that some of their claims must be dismissed for lack of subject matter jurisdiction. Because these arguments address the power of this Court to consider the other motions before it at the present time, they must be addressed first.

A. *Justiciability.*

***4** Defendants argue that the issues presented by plaintiffs' motion for preliminary injunction are nonjusticiable because they fall within the province of executive and legislative discretion to allocate funds and to make budgetary decisions. As defendants themselves are careful to point out, however, a district court may enjoin executive or legislative action if that action is unconstitutional or violates statutes or regulations. *Dandridge v. Williams,* 397 U.S. 471, 487 (1973).

Plaintiffs argue that defendants fail to comply with federal and state constitutional, statutory, and regulatory

requirements in their provision of public assistance to persons with AIDS or who are HIV-positive and are sick. Defendants inaccurately characterize plaintiffs' remedies as requiring "second-guessing" of executive and legislative decisions. The relief that plaintiffs request "does not invade the decision-making provinces of State and City executive and legislative officials, but would require City Defendants to resolve their ... difficulties in a fashion that complies with the Constitution and the law." *Morel v. Giuliani,* 927 F.Supp. 622, 632 (S.D.N.Y.1995) (citing *Dunn v. New York State Dep't of Labor,* 474 F.Supp. 269, 274–76 (S.D.N.Y.1979)). *See also Brown v. Giuliani,* 158 F.R.D. 251, 267–68 (E.D.N.Y.1994).

The issues presented by plaintiffs' motion for preliminary injunction are therefore justiciable.

B. *Subject Matter Jurisdiction Over Claims Made Under the Medicaid, AFDC, and Food Stamp Acts.*

Defendants assert that this Court lacks subject matter jurisdiction to consider plaintiffs' allegations of violations of the Social Security Act, including claims under the Medicaid Act, 42 U.S.C. §§ 1396a(a)(8), (19), the Aid to Families with Dependent Children Act ("AFDC"), 42 U.S.C. § 602(a)(10), and various federal regulations under the Medicaid, AFDC, and Food Stamp Acts.

Federal district courts are courts of limited jurisdiction and may consider only "civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. This Court therefore has subject matter jurisdiction over claims based on plaintiffs' allegations that the defendants are violating federal statutory and regulatory schemes. *See, e.g., Moore v. Perales,* 692 F.Supp. 137, 141 (E.D.N.Y.1988). As pointed out by plaintiffs, other federal courts have impliedly found jurisdiction in actions where welfare beneficiaries sought to compel state compliance with the Social Security Act. *See, e.g., Beno v. Shalala,* 30 F.3d 1057 (9th Cir.1994) (granting preliminary injunctive relief to AFDC recipients who challenged cuts related to new work incentive programs); *Skandalis v. Rowe,* 14 F.3d 173 (2d Cir.1994) (adjudicating on the merits claims made under the Medicaid Act by Connecticut residents over the age of 65 who were denied home care benefits).

III. *Preliminary Injunction.*

In deciding whether to issue a preliminary injunction, a district court may generally apply one of two possible standards.

> ***5** The party seeking the injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief.

*Resolution Trust Corp. v. Elman,* 949 F.2d 624, 626 (2d Cir.1991). When, however, "the injunction seeks to prevent government action taken pursuant to statutory authority, which is presumed to be in the public interest," only the "likelihood of success" standard is applicable. *Molloy v. MTA,* 94 F.3d 808, 811 (2d Cir.1996). Here, the City of New York's decision to implement restructuring plans that affect DAS as a social service program are actions taken pursuant to statutory authority. *See* N.Y.Soc.Serv. § 131. Thus, only the "likelihood of success" standard is applicable, and plaintiffs have the burden of showing that likelihood, as well as irreparable harm.[3] *See Molloy v. MTA,* 94 F.3d at 811; *New York Urban League, Inc. v. State of New York,* 71 F.3d 1031, 1036 n. 7 (2d Cir.1995).

Defendants additionally assert that plaintiffs must meet a heightened "likelihood of success" standard, that is, one of "substantial, or clear showing of, likelihood of success," because the injunction will both alter, rather than maintain, the status quo, and because it will provide plaintiffs with "substantially all the relief sought." *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025–26 (2d Cir.1985). While it is true that since the filing of plaintiffs' preliminary injunction, the City has implemented some of the challenged restructuring, plaintiffs filed their papers prior to that implementation. Thus, at the time of their motion, their request for relief was that defendants maintain the status quo. As for plaintiffs' requesting "substantially all the relief they ultimately seek," *id.* at 1026, the Second Circuit Court of Appeals has recently clarified that the test is *not* whether the movant for a preliminary injunction will literally obtain substantially all the relief he or she requests, but whether the

"preliminary injunction will make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial." *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.,* 60 F.3d. 27, 35 (2d Cir.1995). Should defendants prevail at trial in this case, they clearly would then be able to go ahead with the proposed restructuring and any "undoing" of a preliminary injunction would not be difficult. Plaintiffs therefore need not meet the heightened standard, and instead "need only make a showing that the probability of [their] prevailing is better than fifty percent. There may remain considerable room for doubt." *Abdul Wali v. Coughlin,* 754 F.2d at 1025.

A. *Likelihood of Success on the Merits.*

Despite that considerable room for doubt, plaintiffs still fail to make a showing that they are likely to succeed on the merits of each of their legal claims.[4]

1. *Claims Under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act.*

***6** Congress passed the ADA in 1990 to prohibit discrimination against persons with disabilities. 42 U.S.C. § 12101. Title II of the Act, which prohibits discrimination against disabled persons in public services provides in part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The precursor to the ADA was Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Rehabilitation Act") which states:

> No otherwise qualified individual with a disability in the United States, ..., shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).

The similarity between the ADA and the Rehabilitation Act does not end with the wording of these two sections. Congress also directed that the Department of Justice ("DOJ") promulgate regulations pursuant to the ADA that would be consistent with the provisions of the Rehabilitation Act. 42 U.S.C. § 12134(b). While the ADA regulations are not all replicas of the Rehabilitation Act, particularly because the ADA applies more broadly to state and local governments regardless of federal funding, *see Lincoln CERCPAC v. Health and Hospitals Corp.,* 920 F.Supp. 488, 497 (S.D.N.Y.1996) (citing H.R.Rep. No. 101–485(II) (1990), U.S.Code Cong. & Admin.News 1990 pp. 267, 303, 366–67), the regulations implementing Title II "confirm the uniformity of interpretation between the ADA and the Rehabilitation Act." *Id.* (citing 28 C.F.R. § 35.103). Those ADA regulations provide, in part:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided others;
>
> ....

28 C.F.R. § 35.130(b)(1).

As a result of the overlap between the ADA and the Rehabilitation Act, their "substantive standards for determining liability are the same." *McDonald v. Commonwealth of Pennsylvania,* 62 F.3d 92, 95 (3d Cir.1995) (citing *Myers v. Hose,* 50 F.3d 278, 281 (4th Cir.1995)); *see also Lincoln CERCPAC v. Health and Hospitals Corp.,* 920 F.Supp. at 497; *Clarkson v. Coughlin,* 898 F.Supp. 1019, 1037 (S.D.N.Y.1995) (citing *Martin v. Voinovich,* 840 F.Supp. 1175, 1192 (S.D.Ohio 1993) and *Galloway v. Superior Court,* 816 F.Supp. 12, 19 (D.D.C.1993)). Plaintiffs must therefore make similar *prima facie* showings under both Acts.

***7** Under the ADA, a plaintiff must show that "(1) he or she is a 'qualified individual with a disability'; (2) he or she is being excluded from participation in, or being denied the benefits of some service, program, or activity by reason of his or her disability; and (3) the entity which provides the service, program, or activity is a public entity." *Clarkson v. Coughlin,* 898 F.Supp. at 1037 (citations omitted). Defendants concede that a person with AIDS or who is HIV-positive qualifies as an "individual with a disability" within the meaning of the ADA and the Rehabilitation Act, *see, e.g.,* 28 C.F.R. § 35.104 (defining the term "disability" and listing "HIV disease (whether symptomatic or asymptomatic)" as an example of physical impairment); *Gates v. Rowland,* 39 F.3d 1439, 1446 (9th Cir.1994). Defendants also agree that DAS, which provides public assistance benefits and services to plaintiffs, is a "public entity." *See* 42 U.S.C. § 12131(1). The parties' dispute focuses exclusively on the second element, that is, whether plaintiffs are being excluded from, or being denied public assistance benefits or services by reason of their disability.

Under the Rehabilitation Act, in addition to the elements described above, plaintiffs must also show that they are "otherwise qualified to participate in the offered activity or to enjoy its benefits" and that "the program denying the plaintiff participation receives federal financial assistance." *Rothschild v. Grottenthaler,* 907 F.2d 286, 289–90 (2d Cir.1990) (citing *Doe v. New York University,* 666 F.2d 761, 774–75 (2d Cir.1981)). Defendants agree that these elements are also satisfied by plaintiffs and that the Rehabilitation Act applies to the programs at issue. As with the ADA claim, defendants assert that plaintiffs do not make a *prima facie* case under the Rehabilitation Act because they cannot show that they are "being excluded from ... participation or enjoyment solely by reason of [their] handicap." *Id.*

Defendants argue that plaintiffs here, and indeed all DAS-eligible clients, are not being excluded from or denied public assistance benefits or services in any way, much less for the sole reason of their HIV-positive or AIDS status. Plaintiffs, in defendants' view, are provided the same access to Food Stamps, Home Relief, and other public assistance benefits as others eligible for such entitlements in New York. According to defendants, the services which DAS provides, such as individual case managers, rent allowances, and expedited application procedures, are *enhanced* benefits which supplement the basic public assistance most eligible New Yorkers receive, and are therefore not required by the Rehabilitation Act or the ADA, because neither of those acts oblige defendants "to provide disabled persons with benefits different from or better than those provided to the larger population." City Def.Mem. at 22–23. In short, it is defendants' position that DAS is a "special" service which New York City provides out of discretion rather than legal necessity and which exceeds the services that are provided to the general public.

***8** Plaintiffs, on the other hand, have a very different view of the services DAS provides. To them, DAS is meant to fulfill the requirements that are mandated by the ADA and Rehabilitation Act because without a properly functioning DAS, they are unable to access the basic public assistance for which they are eligible. Plaintiffs liken DAS to the ramp that is required for persons in wheelchairs to access public buildings. Without DAS case managers to coordinate and facilitate the processing of their benefits, plaintiffs argue that their disability would prevent them from accessing those benefits to which they are entitled. Unlike eligible New Yorkers who are healthy, plaintiffs point out that they cannot easily travel long distances, and that even when they succeed, standing in line for long periods of time may be both painful and, more significantly, may expose them to infections which healthy people may not even notice, but which may prove deadly for them.

Both plaintiffs and defendants find support for their positions in the statutes and relevant case law,[5] by interpreting the terms "meaningful access" and "reasonable accommodations" in different ways. The Supreme Court long ago read the Rehabilitation Act to require that "an otherwise qualified handicapped individual [ ] be provided with meaningful access to the benefit that the grantee offers.... [T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v.*

*Choate,* 469 U.S. 287, 301 (1985) (footnote omitted). The ADA regulations follow this approach of requiring "reasonable modifications":

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
> 28 C.F.R. § 35.130(b)(7).

To defendants, the very fact that plaintiffs receive public assistance benefits at all means that they have "meaningful access" to Food Stamps and other benefits. To plaintiffs, only a properly functioning DAS, which facilitates and assists them in receiving their benefits, "reasonably accommodates" their access to those benefits. Without DAS, plaintiffs claim, they would not receive the public assistance benefits which other eligible New Yorkers receive.

Defendants are incorrect to the extent that their argument is based on the presumption that they need not make *any* affirmative efforts to assist plaintiffs in getting their benefits and that DAS is therefore entirely legally gratuitous. The Second Circuit stated over ten years ago that the Rehabilitation Act "requires some degree of positive effort" and "at least 'modest, affirmative steps' to accommodate the handicapped." *Dopico v. Goldschmidt,* 687 F.2d 644, 653 n. 6 & 652 (2d Cir.1982) (citations omitted); *see also* 45 C.F.R., pt. 84, App. A, ¶ 6 (1984) ("[A]djustments to regular programs or the provision of different programs may sometimes be necessary."). While the focus in *Dopico v. Goldschmidt* was access to public transportation, the Second Circuit has applied this principle of proactive accommodation to ensure equal access to other public services as well. *See, e.g., Rothschild v. Grottenhaler,* 907 F.2d 286, 293 (2d Cir.1990) (requiring that sign language interpreter services be provided at school district expense to parents). Courts have followed the reasoning applied in Rehabilitation Act cases that the "reasonable modification" requirement of the ADA may similarly require a public entity to take modest, affirmative steps. *See, e.g., Tugg v. Towey,* 864 F.Supp. 1201, 1208 (S.D.Fla.1994) (requiring the state to provide mental health counselors with sign language ability for deaf and hearing-impaired plaintiffs); *Tyler v. City of Manhattan,* 857 F.Supp. 800, 822 (D.Kansas 1994) (requiring the city to install ramps and relocate city-sponsored ball games to fields accessible to wheelchair-bound plaintiff); *Concerned Parents to Save Dreher Park v. City of West Palm Beach,* 846 F.Supp. 986, 993 (S.D.Fla.1994) (requiring the city to continue running recreational programs for the disabled).

***9** Public assistance is generally provided to eligible New Yorkers when they meet their periodic appointment schedules and verify their status in other ways. Frequently this means waiting in long lines, and if they receive more than one type of benefit, it means doing so at several different locations. Given plaintiffs' disability and, in particular, the ease with which even minor infections can profoundly threaten their health, it is clear that defendants must provide Food Stamps, Home Relief, and other public assistance benefits in some modified fashion to these plaintiffs. For this reason, defendants' effort to present DAS as *entirely* discretionary and simply a service provided out of the kindness of their hearts is inaccurate, if not insincere. The goal of DAS, at least in part, is to facilitate HIV-positive clients who are ill through the complex maze of social services that provide the variety of public assistance benefits to which plaintiffs are entitled. At a minimum, in its most basic, facilitory efforts, DAS is a necessary modification to, and not a fundamental alteration of, the public assistance services that the City provides to all eligible New Yorkers.

On the other hand, plaintiffs' claim that DAS is currently so debilitated—or will imminently become so through implementation of the proposed restructuring—that defendants therefore currently violate or will soon violate the ADA and the Rehabilitation Act will still not likely succeed at trial. Although this Court agrees that defendants must make *some* effort to reasonably modify the processing and distribution of public assistance benefits to eligible, ill HIV-positive persons so that their access to those benefits is meaningful, and that such reasonable modification may require a version of facilitation which DAS now attempts to provide, it does not seem likely at this stage that plaintiffs will succeed in proving that the current or future form of DAS no longer provides or will no longer provide the required reasonable modification to ensure meaningful access.

As the Supreme Court long ago pointed out with reference to the Rehabilitation Act, any interpretation of that act "must ... be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." *Alexander v. Choate,* 469 U.S. at 298. Bearing these two considerations in mind,

some courts have explored the difficult question of what constitutes a "reasonable modification." *Cf. Concerned Parents to Save Dreher Park v. City of West Palm Beach,* 846 F.Supp. at 990 n. 11 (describing the analysis of what "reasonable modifications" must be made to defendants' recreational programs as opening "a Pandora's Box of questions").

Most courts that have addressed this issue have been careful to note that a reasonable modification is both moderate and not unduly burdensome. The Third Circuit Court of Appeals has pointed out that part of what determines the "reasonableness" of a modification is "whether ... [it] imposes an undue burden or hardship in light of the overall program." *Easley v. Snider,* 36 F.3d 297, 305 (3d Cir.1994) (emphasis added) (citing *School Board of Nassau County v. Arline,* 480 U.S. 273, 287 n. 17 (1987); *Alexander v. Choate,* 469 U.S. 287, 300 (1985); *Nathanson v. Medical College of Pennsylvania,* 926 F.2d 1368, 1384–86 (3d Cir.1991)). One district court emphasized that "the word 'modification' 'connotes moderate change.' " *Sandison v. Michigan High School Athletic Ass'n,* 64 F.3d 1026, 1037 (6th Cir.1995) (quoting *MCI Telecommunications Corp. v. AT & T Co.,* 512 U.S. 218, ——, 114 S.Ct. 2223, 2230, 129 L.Ed.2d 182 (1984)).

***10** The Second Circuit, although affirming an injunction that required a local school district to provide sign-language interpreters for parents of students, took care to point out that such a service was properly limited by the district court to only certain conferences. The Court of Appeals noted approvingly that the district court was "[m]indful of the need to strike a balance between the rights of the [plaintiffs] and the legitimate financial and administrative concerns of the School District...." *Rothschild v. Grottenhaler,* 907 F.2d 286, 293 (2d Cir.1990). Acting on similar concerns, the Third Circuit found that plaintiffs' proposed "reasonable modification," that is, the use of surrogates as decision-makers for non-mentally alert consumers, "would create an undue and perhaps impossible burden on the State, possibly jeopardizing the whole [attendant care] program, by forcing it to provide attendant care services to all physically disabled individuals, whether or not mentally alert." *Easley v. Snider,* 36 F.3d 297, 305 (3d Cir.1994). The court therefore found that such a modification would not be reasonable under the ADA. *See also Roberts v. Kindercare Learning Centers, Inc.,* 86 F.3d 844, 846 (8th Cir.1996) (affirming a finding that requiring a day-care center to provide full-time, one-on-one care for a disabled child would place an undue burden on defendant and therefore was not reasonable); *New Mexico Ass'n for Retarded Citizens v. State of New Mexico,* 678 F.2d 847, 855 (10th Cir.1982) (remanding to district court with directions to make findings that the proposed "program modification would not jeopardize the overall viability of the State's educational system."). Similarly, injunctions issued by various district courts pursuant to the ADA and/or the Rehabilitation Act generally involved relatively unburdensome modifications, on both financial and administrative levels. *See, e.g., Civic Ass'n of the Deaf of New York City v. Giuliani,* 915 F.Supp. 622, 636 (S.D.N.Y.1996) (requiring that New York City stop its removal of street fire alarm boxes); *Tugg v. Towey,* 864 F.Supp. 1201, 1211 (S.D.Fla.1994) (requiring the state to provide mental health counselors with sign language ability and an understanding of the deaf community to deaf and hearing-impaired individuals eligible for counseling services); *Tyler v. City of Manhattan,* 857 F.Supp. 800, 822 (D.Kansas 1994) (requiring city defendant to complete a self-evaluation of its services and policies, to modify a steel barricade blocking the entrance to a park and to stop further relocation of city-sponsored ball games from taking place at a field inaccessible to wheelchair bound plaintiff); *Concerned Parents to Save Dreher Park v. City of West Palm Beach,* 846 F.Supp. 986, 993 (S.D.Fla.1994) (requiring defendant city to continue to provide some form of its recreational program to the disabled plaintiffs).

In the instant case, plaintiffs essentially claim that DAS, as it stands or will stand after the restructuring, does not satisfy the reasonable modification requirement of the ADA and the Rehabilitation Act. Again, while it seems true that some form of DAS or an agency like it must exist to facilitate and assist plaintiffs in their accessing of public assistance, it does not seem likely, based on the facts found thus far, that plaintiffs will be able to prove at trial that the current or restructured DAS is or will be debilitated to such a degree that it no longer acts or will act as the required reasonable modification to New York City's public assistance programs for AIDS and HIV-positive clients. Although it is clear that DAS has its problems and that those problems sometimes affect plaintiffs' receipt of the benefits to which they are entitled, it is also clear that DAS has acted to expedite plaintiffs' receipt of some forms of aid, provides cash supplements to plaintiffs which are not available to others eligible for public assistance, and modifies New York City's general public assistance program by diminishing disabled clients' required visits to offices. Although not perfect in the execution of its services, based on the facts found thus far, DAS does appear to serve as a reasonable

modification to public assistance benefits programs and to assist plaintiffs in meaningfully accessing welfare benefits which other New Yorkers receive. Additionally, the proposed restructuring plan attempts to address the bureaucratic problems which DAS, not unlike other New York social service agencies, seems plagued by. To the extent that DAS remains at times bureaucratically inefficient, the restructuring may in fact provide improvement.

***11** For these reasons, this Court finds that plaintiffs are not likely to succeed in proving that DAS as it functions now, or will function under the proposed plan, does not or will not serve to reasonably modify New York City public assistance services so that ill, HIV-positive and AIDS eligible beneficiaries have meaningful and equal access to such services.

2. *Claims Under the NY Social Service Laws and the NY Constitution.*

Plaintiffs also argue that a preliminary injunction should be issued because they have established a likelihood of success on the merits of their claims under New York Social Service Laws and the New York Constitution. This Court finds that plaintiffs are also not likely to succeed based on these legal claims.

New York's Constitution provides that "[t]he 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." N.Y. Const. Art XVII, § 1. As pointed out by plaintiffs, New York's highest court has determined that this provision imposes an "affirmative duty" on the state and its subdivisions to provide for the needy. *Tucker v. Toia,* 371 N.E.2d 449, 451–52 (N.Y.1977). Plaintiffs have not, thus far, shown that they are likely to prove at trial that State and City defendants do not provide to the needy as required by the New York Constitution. Defendants do provide assistance to AIDS and HIV-positive clients to access their public assistance in the form of DAS. And while DAS is far from perfectly functioning as noted above, its inefficiency does not seem to the Court to rise to the level of unconstitutionality, as would be proscribed by N.Y. Const. Art XVII, § 1.

Additionally, plaintiffs argue that State defendants have violated the provision of New York law which requires them to properly oversee City defendants in administering certain federal and state benefit programs. N.Y.Soc.Serv.Law §§ 20, 34(3) (McKinney 1993). Because this Court has not found a likelihood of success on the merits of those claims against the City defendant directly, plaintiffs cannot make such a likelihood of success showing for its claim against the State defendant for improper supervision of the City.

B. *Irreparable harm.*

Because I find that plaintiffs have not borne their burden of showing a likelihood of success on the merits, and because that failure alone precludes the issuance of a preliminary injunction, I do not reach the issue of irreparable harm.

IV. *Motion to Dismiss for failure to state a claim under the ADA, the Rehabilitation Act, and Constitutional Due Process.*

A district court may not dismiss a claim under Fed.R.Civ.P. 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts to support a claim which would entitle him or her to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). In determining whether the facts presented in a complaint support a claim upon which relief may be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. *Sheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Sheuer,* 468 U.S. 183 (1984); *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969). All factual allegations in the complaint must be accepted as true and the complaint must be viewed in the light most favorable to the plaintiff. *See LaBounty v. Adler,* 933 F.2d 121, 123 (2d Cir.1991); *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1099 (2d Cir.1988), *cert. denied,* 490 U.S. 10007 (1989). The issue in reviewing the sufficiency of the complaint is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *Sheuer v. Rhodes,* 416 U.S. at 236. In short, a district court's role is not to weigh the evidence which might be offered at trial, but is to assess the legal feasibility of the complaint. *Festa v. Local 3, Int'l*

*Brotherhood of Electrical Workers,* 905 F.2d 35, 37 (2d Cir.1990); *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir.1980).

***12** Given this very different standard by which a court assesses a motion to dismiss, it may find, as in this case I find, that while a party has not established a likelihood of success on the merits for a preliminary injunction, it still presents a cognizable legal claim for a remedy which may be proved at trial. As discussed at length above, this Court does not agree with defendants' presentation of DAS as *entirely* legally gratuitous and discretionary. Defendants' argument that DAS is a "special" or "additional" service provided to AIDS and HIV-positive clients which is not provided to the public at large and is therefore not required by the ADA or the Rehabilitation Act is inaccurate. Rather, it seems clear that the ADA, the Rehabilitation Act, and their implementing regulations do envision some form of a "ramp" to provide assistance and thereby meaningful access to receiving public assistance benefits to the disabled plaintiffs who have instituted this action. While, as also discussed above, it does not seem to this Court that plaintiffs will likely succeed at trial, it is clear that, taking all factual allegations in the complaint as true, plaintiffs state a claim upon which relief could be granted.

Defendants also argue that plaintiffs' due process claim must be dismissed, at least with regard to their allegation that "Nutrition and Transportation Supplements" provided to DAS clients are property interests which they cannot be deprived of without due process. Defendants state little in support of this argument, except that the supplements "are discretionary grants provided by HRA to DAS clients." City Def. Reply Mem. at 22. They assert that because no regulation requires them to distribute these supplements, plaintiffs cannot have a property interest in them. Plaintiffs successfully counter this argument by citing *Perry v. Sinderman,* 408 U.S. 593, 601 (1971), in which the Supreme Court stated that " 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *Id.* (quoting *Board of Regents v. Roth,* 408 U.S. 564, 571–72 and 577 (1972)). Plaintiffs further point out that Nutrition and Transportation Supplements totaling $193 per month have been provided to all DAS clients consistently since the establishment of DAS in 1986. Taking all their allegations as true, plaintiffs therefore do state a claim upon which relief may be granted under the federal constitution's due process clause.

V. *Class Certification.*

Plaintiffs have moved pursuant to Fed.R.Civ.P. 23 ("Rule 23") to certify a class of similarly situated persons, consisting of "all New York City residents who have AIDS or HIV-related disease who, as a result of their disability, require reasonable modifications to obtain essential benefits and services from the City of New York." Pl.Mem. at 48. In particular, plaintiffs wish to include in the class those individuals currently registered with DAS and eligible for DAS. Plaintiffs estimate that the proposed class comprises 17,000 individuals. *Id.* at 49.

A. *Rule 23(a).*

***13** Rule 23(a) requires a potential class representative to show:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a). A class action may only be maintained if all four of these prerequisites are satisfied. Rule 23(b).

1. *Numerosity.*

Rule 23(a)(1) requires that a proposed class be so numerous that joinder is impracticable. In the instant case, the estimated 17,000 potential class members clearly makes joinder impracticable. *See Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir.1993) (citing a treatise conclusion

that the difficulty of joining as few as 40 class members should raise a presumption that joinder is impracticable) (citation omitted).

In addition to sheer size of the class, many of the additional factors relevant to joinder which the Second Circuit considers important, *id.* at 936, are present in this case. Specifically, consolidating the numerous cases into a single class action serves judicial economy; individuals comprising the class are all economically disadvantaged, "making individual suits difficult to pursue," *id.;* and finally, an injunction requiring defendants to comply with the relevant laws "could affect all potential class members, and individual suits could lead to potentially inconsistent results." *Id.* For these reasons, the first prerequisite of Rule 23(a) is met.

2. *Commonality.*

Defendants argue that the putative class members share only the common circumstance of having AIDS or being HIV-positive, and that all other questions of fact and law vary greatly as to each individual. In particular, defendants argue that the question of whether plaintiffs' disabilities have been reasonably accomodated is a question that "requires an individualized assessment of each putative plaintiff...." City Def.Mem. at 40. As defendants themselves point out, however, the overarching issue for each of the putative class members is actually identical, that is, whether "reasonable accomodation is needed to access public assistance entitlements and, ... whether City Defendants have provided such accomodation or have violated the ADA or Rehab [iliation] Act." *Id.* at 42.

In other words, the unifying legal and factual question is whether defendants violated their legal obligations to provide plaintiffs with meaningful access, as required by the ADA and the Rehabilitation Act, to public assistance benefits and services. As one district court pertinently pointed out:

> Although there may be factual differences among members of the class in that the educational, medical and other needs of the individuals vary, this does not preclude certification. Rather, as long as there is a common question, individual differences do not bar class treatment.

***14** *Jane B. v. New York City Dep't of Soc. Serv.,* 117 F.R.D. 64, 70 (S.D.N.Y.1987). *See also, Brown v. Giuliani,* 158 F.R.D. 251, 268 (E.D.N.Y.1994) ("The existence of factual variations in the types of irreparable injury suffered or in the length of the delay does not preclude class certification. The individual facts unique to each named plaintiff are merely methods of proving the ultimate fact.") (citations omitted).

While the details of each individual plaintiff's alleged injury may vary, the predominant issues of fact and law include plaintiffs' disability, defendants' alleged reduction of DAS and the alleged resulting denial of meaningful and timely access to public assistance offered by New York City. Plaintiffs therefore satisfy Rule 23(a)(2)'s commonality requirement.

3. *Typicality.*

Rule 23(a)(3)'s typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.
*Robidoux v. Celani,* 987 F.2d at 936–37 (citations omitted). As stated above, named plaintiffs and the putative class in the instant case allege that the same unlawful conduct, *i.e.,* the failure of the City and State to comply with the ADA and Rehabilitation Act by reasonably modifying the provision of public assistance to plaintiffs' disability, and defendants' failure to provide benefits in a timely manner as required by federal and state regulations, affects them all as disabled New York City residents who are entitled to these services. In short, "[p]laintiffs meet the typicality requirement because their claims arise from the same conduct as those of the proposed members of the class, their claims are premised on the same legal bases, and their interests are not adverse to the interests of other

class members." *Morel v. Giuliani,* 927 F.Supp. 622, 633 (S.D.N.Y.1995) (citations omitted).

4. *Fair and Adequate Representation.*

Plaintiffs must also be fairly and adequately representative of the proposed class. Rule 23(a)(4). In order to satisfy this requirement, plaintiffs must show first, an absence of antagonistic interests between plaintiffs and the proposed class members, and second, that plaintiffs' counsel is " 'qualified, experienced and generally able' to conduct the litigation." *In Re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir.1992) (citing *Eisen v. Carslisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir.1968)).

On the record before the Court, there is no conflict between plaintiffs and members of the proposed class. Additionally, this Court finds plaintiffs are adequate representatives of the proposed class, and that their counsel are skilled advocates with experience representing similarly situated plaintiffs. Plaintiffs therefore satisfy the fourth requirement of Rule 23(a).

B. *Rule 23(b).*

***15** In addition to satisfying the prerequisites of Rule 23(a), plaintiffs' action must additionally fall into one of the categories of Rule 23(b). In the instant case, plaintiffs maintain that subsection (2) of Rule 23(b) is applicable, *i.e.,* that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2).

Here, plaintiffs allege that the City and State defendants, by making drastic cuts to DAS, affect and will affect the class. Additionally, they "seek class-wide preliminary and final declaratory and injunctive relief to compel defendants to provide meaningful and equal access to benefits and services as required by federal and state statutory and constitutional law." Pl.Mem. at 55. Indeed, this Court agrees with plaintiffs' assertion that the type of injunctive and declaratory relief they are seeking is more appropriate in a class action setting than in an individual action. *See, e.g., Marisol v. Giuliani,* 929 F.Supp. 662, 692 (S.D.N.Y.1996); *Morel v. Giuliani,* 927 F.Supp. 622, 634 (S.D.N.Y.1995); *Brown v. Giuliani,* 158 F.R.D. 251, 269 (E.D.N.Y.1994).

Defendants argue that based on the holdings of several Second Circuit Court of Appeals cases, class certification is not appropriate where, as here, injunctive and declaratory relief is sought against a governmental entity. In particular, defendants point to the "seminal case" in this area, *Galvan v. Levine,* 490 F.2d 1255 (2d Cir.1973), *cert. denied,* 417 U.S. 936 (1974). In that case, however, the court held that class certification was properly denied where the defendant had "made clear that it underst[ood] the judgment to bind it with respect to all claimants." *Id.* at 1261. Similarly, in *Berger v. Heckler,* 771 F.2d 1556 (2d Cir.1985), class certification was deemed unnecessary because it was "undisputed that the Secretary [of the Department of Health and Human Services] agreed, in signing the [consent] decree, to confer certain benefits on nonparties." *Id.* at 1567. Additionally, defendants "ignore a long line of cases in this Circuit allowing class actions that seek to enjoin governmental action." *Brown v. Giuliani,* 158 F.R.D. 251, 269 (E.D.N.Y.1994) (citing *Robidoux v. Celani,* 987 F.2d at 937; *Barnett v. Bowen,* 794 F.2d 17 (2d Cir.1986); *Cutler v. Perales,* 128 F.R.D. 39, 47 (S.D.N.Y.1989); *Jane B. v. New York City Dep't of Soc. Serv.,* 117 F.R.D. 64, 70 (S.D.N.Y.1987); *Lewis v. Gross,* 663 F.Supp. 1164, 1169 (E.D.N.Y.1986); *Ellender v. Schweiker,* 550 F.Supp. 1348, 1349 (S.D.N.Y.1982); *RAM v. Blum,* 533 F.Supp. 933, 938 (S.D.N.Y.1982)). Because State and City defendants have not given the type of assurance that was given in *Galvan v. Levine* or *Berger v. Heckler,* class certification is therefore appropriate under Rule 23(b)(2).

***16** Plaintiff's class is hereby certified, and the class is defined as:

> All DAS-eligible persons, *i.e.,* persons who are New York City residents, are Medicaid eligible and meet the medical condition of having either (1) CDC-defined AIDS, or (2) an HIV-related condition and a need for home care services.

CONCLUSION

For the reasons stated herein, plaintiffs' motion for preliminary injunction and defendants' motion to dismiss are DENIED. Plaintiffs' motion for class certification is GRANTED.

SO ORDERED.

**All Citations**

Not Reported in F.Supp., 1996 WL 633382, 21 A.D.D. 329

**Footnotes**

1 Henrietta D. died shortly after this case was filed on February 28, 1995.

2 Although John R. credibly states that he had contacted DAS on earlier occasions, it is not clear that he was necessarily eligible for DAS services on those occasions.

3 Indeed, plaintiffs do not address the fair-ground-for-litigation standard. Pl.Mem. at 7 n. 3.

4 Although plaintiffs' amended complaint alleges violations under several federal and state laws, they have based their argument for preliminary injunctive relief primarily on their ADA and Rehabilitation Act claims.

5 As pointed out already, the ADA incorporated the Rehabilitation Act's regulations to a large degree. Accordingly, "the case law interpreting the Rehab[ilitation] Act is relevant to claims arising under the ADA." *Lincoln CERCPAC v. Health and Hospitals Corp.,* 920 F.Supp. 488, 497 (S.D.N.Y.1996). *See also Helen L. v. DiDario,* 46 F.3d 325, 330 n. 7 (3d Cir.) (citing *Easley v. Snider,* 36 F.3d 297 (3d Cir.1994) and 28 C.F.R. § 35.103), *cert. denied, Pennsylvania Sec'y of Public Welfare v. Idell S.,* 516 U.S. 813, 116 S.Ct. 64 (1995).