SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 9

BARBARA JIGGETTS, et al.,	:	
Plaintiffs,	:	
-against-	:	Index No. 40582/87
CESAR PERALES, as Commissioner of the Department of Social Services, et al.,	:	
Defendants.	:	

PLAINTIFFS' POST-TRIAL REPLY MEMORANDUM OF LAW

Preliminary Statement

Despite the great length of the State defendant's brief, it completely fails to rebut plaintiffs' strong showing that the shelter allowance is thoroughly inadequate to enable A.F.D.C. families to obtain or retain housing in New York City. It also fails to refute the overwhelming evidence that the allowance was not calculated to bear a reasonable relation to the cost of housing in New York City and that its inadequacy contributes significantly to homelessness among families.

Unable to answer convincingly plaintiffs' evidence on these points, the State defendant attempts to revive arguments that are already foreclosed by the decision of the Court of Appeals in this action. Thus, it pretends that the shelter allowance is higher than it actually is by adding various portions of other grants to it, even though the Court of Appeals has mandated that shelter

allowances must bear a reasonable relation to the cost of housing. 75 N.Y.2d 411, 415 (1990).

The State defendant also attempts to show that the Legislature has somehow set the allowance schedule, despite the fact that the Court of Appeals has stated that the Commissioner of Social Services bears the responsibility for establishing an adequate allowance and seeking any appropriations that are necessary to fund it. Finally, it argues that the provision of adequate shelter allowances to needy families is a bad policy choice, because, among other things, the funds are better spent elsewhere. This contention, however, is also precluded by the Court of Appeals decision which has found that the Legislature has mandated that adequate allowances be provided to A.F.D.C. households.

In addition to advancing arguments already foreclosed by the Court of Appeals, the State defendant pleads for judicial deference. As explained in this memorandum, basic principles of administrative law dictate that no special deference is warranted in this case because the State defendant has never made an administrative determination that the shelter allowance bears a reasonable relation to the cost of housing in New York City. See infra, at pp. 113-120. In fact, the evidence shows that the officials involved in setting the shelter allowance did not even claim that it was adequate. Thus, there is no administrative determination upon which the State defendant may rely.

In support of its arguments, the State defendant asks the Court to find as facts a broad range of completely unsupported

propositions. Many of the critical findings that it proposes are completely unaccompanied by any cites to evidence in the record.[1] In many instances, it is clear that no authority is cited because none exists. For example, the State defendant asks for an unsupported finding that "[c]arefully used, the grant package provides funds sufficient to enable families to pay rents in excess of the shelter allowance," Def's Prop. Findings, at ¶ 353, despite the fact that no witness testified to this proposition and no documents support it. See also Def's Prop. Findings, at ¶¶ 351, 362. In addition to asking the Court to adopt unsupported propositions as findings of fact, the State defendant's proposals are littered with inaccuracies and arithmetical errors. See, e.g., infra, at pp. 28, 39, 47 n.51, 54 n.54, 62 n.62, 65, 92-103.[2]

For the reasons explained below, the State defendant has not cast doubt on the strong evidence of inadequacy presented by plaintiffs and the Court should adopt the findings of fact proposed by plaintiffs in their November 4, 1991 submission.[3]

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[1] Examples of such unsupported proposed findings include Defendant's Proposed Findings, ¶¶ 161, 162, 176, 242, 250, 302, 313, 351, 352, 353, 355, 356, 358-62, and 414.

[2] Some of the State defendant's proposed findings make no sense. For example, ¶ 161 asks for a finding that "[a]s recently as 1990, on average, the overwhelming majority of ADC families in New York City were living in apartments which they could afford." Is the State defendant proposing that "on average" families are living in apartments they can afford, or that the "overwhelming majority" are living in such apartments?

[3] Many of the arguments presented by the State defendant are refuted in plaintiffs' initial submission. These refutations are not reiterated in this reply.

EVIDENCE PRESENTED AT TRIAL

I. The Shelter Allowance is not Calculated to Reflect the Cost of Housing in New York City

a. The 1988 Shelter Allowance Schedule

Although the State defendant attempts to cloud the issues with extraneous matter, it does not refute the fundamental flaws in the methodology that it used to set the shelter allowance. Most importantly, the State defendant has offered no evidence to contradict the fact that the shelter allowance was set to cover an arbitrary percentile of public assistance recipients' rents with no consideration of how recipients whose rents were not covered would manage, and with no study or basis for concluding that the percentile chosen had any special significance.

The State defendant makes much of the "extensive communications" between the Department of Social Services and the Division of the Budget. Def's Brief at 15. See id., at 15-20 (describing contacts). The fact that officials discussed the shelter allowance and sent memoranda to each other is of no significance. The evidence establishes that the Division of the Budget did no substantive analysis of housing market conditions in assessing the proposal by the Department of Social Services. See Colfer Tr. 1401-02; PX. 140-156, at pp. 49-50.[4] In fact, the State

[4] The State defendant inaccurately cites to the testimony of Mr. Colfer, Tr. 1327-28, for the proposition that the Division of the Budget determined the increase to be "significant and sufficient." Def's Brief at 18. However, Mr. Colfer only stated that a "significant" increase could be provided at less than amounts requested by the Department of Social Services. He did not state that the increase in the shelter allowance was "sufficient."

defendant effectively concedes that the Division of the Budget cut the Department of Social Services' proposal in half because of budgetary considerations, rather than due to any analysis of the housing market. See Def's Brief at 18-19. ("DOB did not approve DSS' budget request as submitted because there were other competing and necessary expenditure requirements").[5]

In its brief, the State defendant also relies on the fact that individual members of the Legislature were told of the shelter allowance issue during the State budget cycle in 1987, and that Mark Lewis continued to lobby for the increase originally proposed by the Department of Social Services. Def's Brief at 19-20.[6] Although the State defendant presented evidence that Mr. Lewis communicated with one particular legislator about the issue,[7] no evidence was presented that the Commissioner of Social Services made any formal request to the Legislature for an increase greater than that proposed in the Governor's budget or that the Legislature

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Colfer Tr. 1327. Def's Prop. Finding, ¶ 31, is similarly inaccurate.

[5] The State defendant, however, did not establish that other demands mandated by the Legislature prevented the Division of the Budget from including a greater increase for the shelter allowance. Similarly, the State defendant did not establish that other revenue could not have been made available.

[6] Of course, plaintiffs do not concede that the increase originally proposed by DSS would have been adequate. See Plfs' Prop. Findings, at ¶¶ 45-62.

[7] Citing DX. AL-118, the State defendant indicates that Mr. Lewis provided information to specific legislators. Def's Prop. Findings, at ¶ 43. That exhibit, however, only shows that additional information was sent to a single legislator -- Assemblywoman Daniels.

made any determination to reject a greater shelter allowance increase.

The fact remains that the Legislature appropriated the funds sought in the Governor's budget, and there is no evidence that the Legislature would not have approved a request for greater funding had such a request been included in the Governor's budget submission. In fact, there is no evidence that the Legislature has ever refused to appropriate funds for the shelter allowance schedule requested in the Governor's budget. See infra, at pp. 125-31.

The State defendant also provides a lengthy discussion of the process within the Department of Social Services that led to its proposed shelter allowance increase in 1988. Def's Brief at 32-37. This process, including "call letters," "senior executive retreats" and "discussion papers," also does not bear on whether the resulting shelter allowance schedule was calculated to reflect the cost of housing in New York City. This fundamental question can only be answered by looking at the substantive consideration of the housing market, if any, that went into establishing the Department's shelter allowance proposal. The State defendant cites no analysis of the housing market that justified the Department's ultimate proposal.[8]

The only rationale suggested in the State defendant's brief

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[8] These documents do, however, show that State officials considered the shelter allowance at the time to be "clearly inadequate," PX. 10-6, and that they knew that the proposed increases would not correct the problem. See, e.g., PX. 11-9.

was that the proposal restored the situation to what it had been after the 1984 increase. Def's Brief at 36-37. No witness testified that this was the rationale behind the proposal. In fact, as noted in Plaintiffs' Proposed Findings, at ¶ 50, the State defendant was unable to produce any witness for a deposition who could state the rationale for the proposal. In support of this point the State defendant now cites to a memorandum written by James Welsh on the issue. PX. 17-20.[9] At trial, however, Dr. Welsh admitted that he did not know the rationale for the proposal. Welsh Tr. 1699.[10] In fact, the 1988 increase did not restore recipients to the same situation as immediately following the 1984 increase. In January 1984 73% of recipients in New York City had their full rents covered by the shelter allowance, while in January 1988, the figure was only 68%. Compare Def's Prop. Findings, at ¶ 96 with id., at ¶ 33.[11] As the record shows, a seemingly small difference in percentiles can mean a great deal in actual dollar amounts. See Plfs' Prop. Findings, at ¶ 52 (reduction in coverage by 5 percentiles cut increase in half).

The State defendant cites to a number of other proposals that

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[9] The State defendant incorrectly refers to this memorandum as "Plaintiffs' Ex. 11-230." Def's Brief at 37. There is no such exhibit.

[10] Counsel for the State defendant avoided asking Dr. Welsh a direct question on the issue. Welsh Tr. 1598-1600.

[11] In January 1988 67.7 % of all public assistance households had rent in excess of the shelter allowance. PX. 47-77 (Table labelled "New York City/Shelter Cost in Relation to the Maxima (effective 1/88)/ Public and Private Housing/ New and Continued Households. January 1988").

it considered, including indexing, a "two tier shelter schedule" and proposals relating to fuel costs. Def's Brief at 35. It is difficult to see how these proposals, none of which were implemented, demonstrate the rationality of the shelter allowance.[12]

b. The 1984 Shelter Allowance Schedule

The State defendant offers a number of unconvincing arguments in support of its 1984 shelter allowance schedule. It suggests that the 1984 increase was based on the spirit, if not the letter of the methodology recommended in the Department's 1982 report on shelter allowances, PX. 13. Def's Brief at 24-29; Def's Prop. Findings, at ¶ 82. In fact, the Department used a methodology that was in key respects precisely the opposite of what the Report found to be appropriate.

The 1982 Report recommended that shelter allowances be based on an estimate of the market cost of a "minimum standard unit." PX.

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[12] The State defendant also cites to a number of other factors that it purportedly considered, such as "work disincentives" supposedly stemming from an increase in the shelter allowance. Def's Brief at 35-36. This issue, however, clearly does not bear on the relationship between the shelter allowance and the cost of housing. Promulgation of an inadequate shelter allowance, based on fears that people might quit their jobs in order to obtain public assistance if the shelter allowance were adequate, cannot be reconciled with the Legislature's determination that shelter allowances must be adequate. See infra, at pp. 109-10, & n. 104. In any event, no witness claimed and no documents show that proposed increases were specifically reduced because of this concern.

The State defendant also quotes William Shapiro's testimony that it would be inappropriate to give recipients a "blank check." Id., at 33. Plaintiffs have never argued that recipients should receive a blank check. They seek only to vindicate their statutory right to an adequate shelter allowance.

13, at p. 10. The Report proposed that the shelter allowance for a family of three be based on the median rent of non-public assistance recipients in private, non-subsidized housing in each area that met certain standards of quality. Id., at pp. 11-12. It concluded that HUD fair market rents were a "good proxy" of the cost of a minimum standard unit. Id., at p. 10. Instead of adopting this method, the 1984 shelter allowance schedule for New York City was based on the median rent of public assistance households as determined three years prior to the date the schedule was implemented. Plfs' Prop. Findings, at ¶¶ 30-36. Thus, the Department of Social Services relied exclusively on the median rent of the group that its own report concluded should be excluded from the calculation.[13]

The State defendant also seeks credit for the methodology that it used upstate, which utilized the median rent of poor households. Def's Brief at 28. The relevance of the upstate methodology to this case is far from clear. In any event, this method contains the same basic defect as the method used in New York City -- it

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[13] Plaintiffs do not point out these distinctions to endorse the methodology recommended in the 1982 Report, but rather to show that the State defendant did not rely on that report in setting the shelter allowance in 1984.

The record does not show what the shelter allowance for a family of three would be today under the methodology proposed in 1982, except that the overall median contract rent as adjusted for inflation was $426.65 at the end of 1990. See Plfs' Prop. Findings, at ¶ 82, n. 11. The shelter allowance for a family of three, however, would be significantly higher than $426.65 because the 1982 Report proposed excluding substandard units, units occupied by public assistance recipients, and units of public or subsidized housing from the calculation. PX. 13-13, at pp. 11-12.

makes the unwarranted assumption that half of all poor people live in housing that is unreasonably expensive.[14]

The State defendant points out that the method used upstate would have resulted in lower shelter allowances in New York City and claims that, in contrast to the upstate methodology, the use of the median rent of public assistance recipients in New York City was somehow "overly generous." This claim is based on Dr. Filer's unsupported theory that public assistance recipients choose to spend more money on rent than other poor families because of the targeted nature of the shelter allowance. Def's Brief at 66-67 & n. 24.

There is no evidence that any difference in rents is due to recipient choice or to the targeted nature of the shelter allowance. There is no evidence that public assistance recipients live in better housing than other poor families. To the contrary, each of the last three Housing and Vacancy Surveys found that public assistance recipients are more likely to live in dilapidated or substandard housing than poor families generally. PX. 70-209, at p. 135. Moreover, there is no evidence that any Department official or employee shares Dr. Filer's view on this issue or that

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[14] The State defendant also claims that the Division of the Budget determined the 1984 increase to be "adequate." Def's Prop. Finding ¶ 54 (citing Colfer Tr. 1312). This claim is not supported by the transcript cited. Mr. Colfer only stated that: "I'm not a statistician so I can't say I concluded it was statistically valid. It seemed reasonable." Colfer Tr. 1312. DOB did not evaluate the adequacy of the proposal in relation to the cost of housing. Its evaluation was only intended to determine whether the increase provided a "substantial significant programmatic benefit." Id.

it was a factor in setting the shelter allowance. It is not surprising that the methodology used upstate would have resulted in lower amounts for New York City than the method ultimately adopted. The New York City methodology was based on 1981 data, while the upstate methodology used 1980 data. PX. 14.[15]

c. Post-1988 Consideration of the Shelter Allowance

The State defendant's attempts to rely on the sparse analysis

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[15] Dr. Filer's claim that public assistance families generally pay more rent than other households with the same incomes does not establish his argument. Many things other than choice could account for this phenomenon, if it exists, including the fact that public assistance families are relatively young, and thus are less likely to have lived continuously in the same apartment, are less likely to live in rent controlled housing, and are less likely to have SCRIE subsidies. Additionally, differences in household size and composition may also account for any small difference in rents.

The State defendant continues to complain about the exclusion of one of Dr. Filer's exhibits on this issue, DX. AF-4. Def's Brief at 70, n. 25. The Court, however, clearly provided the State defendant with an opportunity to recalculate the chart in a manner that was not misleading. Tr. 1864-65. In fact, other charts that Dr. Filer recalculated were introduced. See, e.g., PX. 147; 148; 149; 150. Furthermore, Dr. Filer was not precluded from presenting oral testimony on the subject.

For the record, plaintiffs note that DX. AF-4 did not show any significant difference in rents between public assistance recipients and other poor families. State defendant's brief is completely misleading on this point. For example, State defendant claims that the chart shows that more than 50% of non-public assistance poor households had rents under $280, while over 50% of public assistance households had rents over $280. In fact, the chart shows that 49.1% of public assistance households paid under $280 in rent, while 50.7% of non-public assistance households reflected on the chart paid less than that amount. Thus, the median rents were virtually identical for the two groups. Furthermore, DX. AF-4 shows that 14% of public assistance recipients paid over $361, while 19% of the comparison group had rents over that amount.

it has done after implementation of the 1988 increase are also unsuccessful. First, the State defendant relies on PX. 21-29 for the proposition that there is a debate about whether shelter allowance increases generally lead to increases in recipient rents. Def's Brief at 38. The State defendant, however, neglects to mention that PX. 21-29 is its own formal report refuting the argument that shelter allowance increases are inflationary. Second, the State defendant attempts to elevate the "evaluation" done by Richard Higgins, who was not responsible in any way for establishing the shelter allowance, into a consensus view held by the Department of Social Services, the Division of the Budget and the Governor's office. Def's Brief at 63, n.23. This insinuation is completely unsupported by the record. As explained in Plaintiffs' Proposed Findings of Fact, at ¶¶ 71-73, no official in any of those agencies or offices testified that he or she relied on Mr. Higgins' evaluation at all.

Third, the State defendant suggests that a formal determination not to increase the shelter allowance was made at the time the Department of Social Services proposed to increase the basic grant effective in January 1990. Def's Brief at 55-56. The record, however, shows that no meaningful evaluation of the need for a shelter allowance increase was undertaken. Colfer Tr. 1343-46. There is no evidence that the Department of Social Services considered the issue at all, only that some discussions occurred at the Department of Budget. Colfer Tr. 1343-44. The matter appears to have come up at the DOB as an "either/or" choice between a small

increase either in the shelter allowance or the basic grant. Id. Once again, the Division of the Budget failed to evaluate the need for a shelter allowance increase in light of housing costs, and instead determined not to even ask the Legislature for additional shelter allowance appropriations because of costs.[16]

d. The Other Reports and Memoranda Relied on By the State Defendant Do not Show the Shelter Allowance to be Calculated to Bear a Reasonable Relationship to the Cost of Housing

The State defendant also seeks to rely on a number of memoranda and studies that its employees prepared over the years concerning the shelter allowance, even though it provided no evidence as to whether or how these documents were used by decision makers. For example, the State defendant describes a series of memoranda by James Welsh written in the summer of 1985, but it is clear that no change in the shelter allowance resulted from these memoranda, and no testimony was offered as to how they were considered, if at all. Def's Brief, at 30-32. Thus, the existence of these memoranda do not show the rationality of the shelter allowance.

Similarly, the State defendant makes much of a 1979 report

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[16] The State defendant seeks to rely on advice given to the Division of the Budget by a welfare advocate, Mr. Ronald (sic) Sykes. Def's Brief at 56. Having unreasonably set the parameters of the question posed to advocates, the State cannot now seek to rely on their responses. The Division of the Budget could have proposed substantial increases in both the basic grant and the shelter allowance, which would not have placed advocates in the dilemma of choosing between food or shelter for their clients. There is no evidence that Mr. Sykes, or any other advocate, believed a shelter allowance increase not to be necessary.

that it issued that analyzed 1977-78 data. Def's Brief at 23-24 (citing DX. AZ-129). The existence of this 12 year old report does not bear on the adequacy of the shelter allowance today, or even over the past ten years. Because the data was gathered shortly after the establishment of the original shelter allowance, it is not surprising that only 12.8 percent of recipients had rents in excess of the shelter allowance at that time, and that the amounts by which rents exceeded the shelter allowance were not large.[17]

The State defendant seeks to rely on a finding in the 1979 report that some households which reported rents in excess of the shelter allowance also reported additional income through work or

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[17] This report is not in evidence for its truth, but only for the fact that the Department of Social Services issued such a report. Tr. 3274-78. The following colloquy occurred at the time the document was admitted in evidence:

MS. NATHAN: Plaintiffs have recognized that this is a document of the Department. We are not offering it for the truth as a business record. We are offering it as a Department document.

THE COURT: That means that you cannot propose a finding of fact for me to make based on any information in this document. If you intend to use anything that is in this document as a foundation for something you wish the Court to find, you cannot do that on this offer.

MS. NATHAN: There was an ongoing monitoring process and this was something in the Department's files and referenced. We understand we can't make findings of fact.

Tr. 3275-76.

Despite this limitation, the State defendant relies on DX. AZ-129 repeatedly for its truth. See, e.g., Def's Prop Findings, at ¶¶ 57-63, 269, 279, 350.

roommates. Def's Brief at 24; DX. AZ-129, at pp. 12-13. This finding does not support the State defendant's contentions that the shelter allowance was calculated by a reasonable methodology. No employee who worked on setting the shelter allowance testified that they made any decisions or recommendations based on this finding or any other in the report. In fact, no one testified that they had even read exhibit DX. AZ-129. See Hickey Tr. 2585-98 (only testimony regarding DX. AZ-129); DX. CJ (stipulation that Caryn Schwab, the author of AZ-129, does not even remember having written it).[18] Because the Report was not admitted in evidence for its truth, its findings cannot be used for any other purpose.[19]

II. The State Defendant Has Failed to Rebut the Overwhelming

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[18] The State defendant argues that it "could reasonably have acted in reliance on the data contained" in DX. AZ-129. Def's Brief, at 71, n. 26. The fact remains, however, that the Department did not rely on the report, and the fact that it "could" have is of no significance.

[19] Even if the 1979 report had been admitted in evidence for its truth, it would have been entitled to little weight. The Report does not contain the data that provides the basis for its conclusions regarding payment of excess rent. It does not show what proportion of recipients with rents above the shelter allowance had any of the forms of income described. For example, it states that "a higher proportion of cases with earned income are paying higher rents," but does not reveal what proportion of cases with rents in excess of the shelter allowance had earned income.

In any event, there is no evidence that this finding would hold true today. Clearly, conditions have changed dramatically since 1978, when less than 13% of recipients had rents in excess of the shelter allowance. See Stegman Tr. 3369 (in 1978, 60% of apartments in New York City rented within the shelter allowance); PX. 10-6, at p. 1 (statement by Dr. Welsh that "[s]ince 1979 our clients' ability to compete for housing has been substantially compromised"). The most striking fact concerning the 1979 Report is that the Department has not done a similar study at any time over the past 12 years.

Evidence that the Shelter Allowance Does Not Reflect the Cost of Housing in New York City

a. Large Numbers of A.F.D.C. Families Have Rents Substantially in Excess of their Shelter Allowances

The State defendant tries to cloak the inadequacy of its shelter allowance schedule in a series of statistical fig leafs. The simple fact is, however, that the State defendant cannot successfully disguise the extent and degree of hardship caused by the shelter allowance.

The State defendant cites the statistic that the average rent of all A.F.D.C. families at the end of 1990 was $276.74, and $300 for A.F.D.C. families in private housing. Def's Brief at 43-44.[20] The State defendant claims that these statistics somehow show that "on average the overwhelming majority of A.F.D.C. families in New York City were living in apartments which they could afford." Id. In fact, the data does not support this conclusion. A closer look shows that even the mean rents of A.F.D.C. families in private housing exceed the shelter allowance maximum for each household size. For example, the mean rent for families of three was $311, while the applicable shelter allowance maximum is only $286. DX. U-87. Similarly, the mean rent for families of two was $277, while the shelter allowance maximum is only $250. Id. Moreover, the mean rent exceeded the mean shelter allowance payment by even

[20] The State defendant's brief cites to PX. 62-92 for these statistics. In fact that exhibit only includes data through September 1990. Data for December 1990 is found in DX. U, and differs slightly from the data for September 1990. Exhibit DX. U-87 shows that the mean rent for the 158,519 A.F.D.C. families in private housing in December 1990 was $300.95.

larger amounts. Thus, the mean rent for a family of three was $51 in excess of the mean shelter allowance payment of $260 for a family of that size. Id. This data shows that "on average" families cannot afford the apartments in which they live.

In any event, even if families could "on average" afford their apartments, this fact would be of no significance. The State defendant cannot simply leave fifty percent of all A.F.D.C. families struggling to cling to apartments that they cannot afford.

The State defendant also attempts to hide the inadequacy of the shelter allowance schedule by offering unimpressive statistics concerning the percentages of recipients who have fractions of their rents paid by the shelter allowance. Def's Brief at 44-47. For example, the State defendant claims that at the end of 1990, 72.7 percent of A.F.D.C. families received shelter allowances covering 80 percent of their rents. Id. at 45.[21] This figure shows that over a quarter of all public assistance recipients did not receive allowances sufficient to cover even 80 percent of their rents. Assuming this figure holds true across family sizes, it means, for example, that more than a quarter of A.F.D.C. families of four had rents at or above $390, an amount $78 above the maximum allowance each month. Clearly, the percentage is even higher when public assistance families in public housing are excluded.

The State defendant also seeks to obscure the erosion of the

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[21] It is not clear how the State defendant calculated these percentages, which are not contained in the exhibit to which it cites. PX. 62-92.

shelter allowance by stating that "it is approximately the same" as when it was implemented, because in March 1987 Dr. Welsh projected that the January 1988 shelter allowance increase would cover 80 percent of the rent in 85 percent of all public assistance cases, and the shelter allowance now covers 70 percent of the rent in almost 80 percent of all New York City A.F.D.C. cases. Def's Brief at 46-47 (citing PX. 18-23).[22] This comparison shows on its face that the shelter allowance has eroded considerably since it was implemented, as it covers a smaller percentage of the rent in fewer cases.

In any case, a more illuminating comparison is the percentage of A.F.D.C. recipients in private housing with rents in excess of the shelter allowance. In January 1988, immediately after the last increase, 39.9 % of A.F.D.C. cases in private housing continued to have rents in excess of the shelter maximum. PX. 84-262. By December 1990, the percentage had risen to 49.85%. DX. U-90. Approximately 18,000 more A.F.D.C. families had rents in excess of the shelter allowance in December 1990 than in January 1988.[23]

Furthermore, in December 1990, those households with rents in excess of the shelter allowance had rents further above the maximum allowance than those who did in January 1988. In January 1988,

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[22] On the previous page, the State defendant's brief states that 78% of recipients had at least 70 percent of their rent covered in September 1990. Def's Brief at 45 (citing PX. 62-92). Also, the State defendant does not state whether Dr. Welsh's projection proved to be correct.

[23] Compare DX. U-90 (79,022 in December 1990) with PX. 84-262 (61,095 in January 1988).

10,123 households, or 6.34% of A.F.D.C. cases in private housing had rents greater than 150% of their shelter allowances. PX. 47-77, at p. 38 (Table labelled "New York City/ Shelter Cost in Relation to the Maximum (effective 1/88)/ Private Housing/New and Continued Households/ January 1988"). By December 1990 these figures had more than doubled -- 23,313 households or 14.10% of A.F.D.C. cases in private housing had rents greater than 150% of their shelter allowances. DX. U-90.

b. The Value of the Shelter Allowance has Eroded Substantially Over Time

The State defendant attempts to disparage the various measures which show the tremendous deterioration in the purchasing power of the shelter allowance without presenting any evidence to refute the fact that its real value has plummeted since it was first established in 1975. In the absence of any evidence that the measures of changes in the housing market relied on by plaintiffs are in fact inaccurate, the State defendant's arguments completely fail to cast doubt on plaintiffs' proof.

The State defendant asks the Court to discount the testimony of Professor Stegman concerning the comparative rates of increases in rents and the shelter allowance by arguing that median rent increases and the Consumer Price Index for residential rent are inappropriate measures of rent increases in low income housing. Def's Brief at 69, 73-74. The State defendant, however, has offered no alternative measure which purports to show that rents for low income housing have increased less rapidly than rents in

the market generally.

In fact, the available evidence shows that, if anything, rents of less expensive units have increased at a faster rate than rents of luxury apartments. Stegman Tr. 440-42; PX. 70-209, at p. 82 ("Our analysis of changes in low and high rents shows that low-rent units increased at substantially higher rates than did high rent units"). Indeed, the HVS data comparing rents in the same units between 1984 and 1987 shows that rents of stabilized units increased far more quickly at the bottom of the market than at the top. Id., at p. 81, Table 4.21. Thus, general measures of the change in rent levels in New York City, such as median rents and the CPI, may well understate the rate of increase at the low end of the market.

Moreover, as stated in Plaintiffs' Proposed Findings of Fact, at ¶ 84, the State defendant itself has frequently used the Consumer Price Index for residential rent as a basis for comparison with the value of the shelter allowance.[24]

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[24] At trial, the State defendant introduced two graphs based on other components of the CPI. DX. V-5 and V-5A. DX. V-5 is a graph of increases from 1983 through 1990 in the CPI for housing as compared to the combined total of the shelter allowance and utility grants. As explained, infra, at p. 83, n. 85, the adequacy of public assistance utility grants is not before this Court and is irrelevant to this lawsuit. No witness explained the relevance of the CPI for housing. Welsh Tr. 1615-17. In fact, Dr. Welsh, who created DX. V-5, has explained how that measure is inappropriate for evaluating the shelter allowance. PX. 15-16, at p. 4 ("more than half of the Housing component [of the CPI] involves things covered by grants other than the Shelter Allowance").

DX. V-5A graphs changes in the shelter allowance for a household of three as compared to the CPI for shelter. DX. V-5A only shows the period from 1983 forward, after the shelter

The State defendant points out that from 1975 to 1978 the CPI increased at a faster rate than the mean shelter allowance paid to public assistance recipients. Def's Brief at 23 (citing DX. AZ-129).[25] This fact is of no consequence because the shelter allowance is capped. For example, if a recipient in an apartment renting at the shelter ceiling receives a 20 percent rent increase, his or her shelter allowance payment will remain unchanged. After acknowledging this fact, the report cited by the State defendant concluded that "the actual increase in rents by family size was about the same or higher than the increase in the Consumer Price Index." DX. AZ-129, at p. 10.[26]

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allowance had already eroded in value tremendously. Cf. PX. 85-287. By 1983 the shelter allowance had not been increased for 8 years and "the schedules had become palpably inadequate." PX. 24-34, at p. 1; 8-2, at p. 1. Additionally, the graph shows that the shelter allowance has not kept up with the CPI for shelter since 1983.

[25] The State defendant inappropriately relies on PX. AZ-129 for this proposition. As noted above, supra, at p. 14, n.17, this exhibit is not in evidence for its truth.

[26] The State defendant also criticizes Professor Stegman's use of an unweighted average to show the rate of increase in the shelter allowance. Def's Brief at 72. Once again, there is little substance to this criticism. Among the most prevalent household sizes, households of two, three and four, the largest increase in the shelter allowance was only 47.4% for a household of three, as compared to the unweighted average of 40.5%. See PX. 67-250; DX. U-85 (showing number of public assistance households of different sizes). The weighted average, however, would necessarily be lower than 47.4% because households of two and four received smaller increases. In fact, the most common household size among A.F.D.C. families, households of two, has received a cumulative increase in the shelter maximum of only 36.6% since 1975. See PX. 67-250; DX. U-85 (69,663 A.F.D.C. households of two in December 1990). In light of these facts, it is clear that the unweighted average is a fair indicator of the increases in the shelter allowance.

The State defendant's main answer to plaintiffs' evidence showing that rent increases authorized by the Rent Guidelines Board have far outstripped the shelter allowance is a recalculation of plaintiffs' chart (PX. 79-257) that starts with the mean shelter allowance of A.F.D.C. families in 1975, rather than the maximum allowance. Def's Brief at 71-72.[27] This recalculation in no way detracts from plaintiffs' point that authorized rent increases have far exceeded the changes in the shelter allowance, and that if the increases were taken, apartments renting at the maximum in 1975 would be well above the shelter allowance maximum today, even if they were continuously occupied by the same tenant. Thus, the stock of housing renting within the shelter allowance has shrunk tremendously.[28]

The State defendant also disputes the significance of Professor Stegman's testimony that the total number of apartments renting for under $300 has fallen by two-thirds since the shelter allowance was established in 1975. As noted in Plaintiffs'

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[27] The State defendant's brief erroneously claims that $149 was the mean rent for public assistance families of three in 1975. Def's Brief at 71-72. In fact, according to the State defendant's exhibit, it was the mean shelter allowance. DX. AZ-129, at p. 10. Additionally, the State defendant's chart is based on an exhibit that is not in evidence for its truth.

[28] The mean shelter allowance in 1975 has no special significance. By definition, it is only a halfway point. The State defendant also argues that owners have not taken all possible rent increases. As noted in Plaintiffs' Proposed Findings of Fact, at ¶ 89, data on actual rent increases in stabilized buildings shows that rents have gone up dramatically. PX. 79-257 actually understates the rent increases for a typical apartment since 1975 because it does not take into account vacancy increases and MCI increases.

Proposed Findings at ¶ 90, this figure illustrates the dramatic effect of rent increases on the housing market. The State defendant argues that this fact is of no significance because it does not take into account increases in the shelter allowance. Once again, the State defendant can make no argument that consideration of this factor would change the analysis in any meaningful way. As shown in Plaintiffs' Proposed Findings, at ¶ 91, more than twice as many apartments rented within the shelter maximum for a family of three in 1975 as rent within the maximum for that household size today.

c. The State Defendant has Failed to Rebut the Evidence Showing that Apartments Renting within the Shelter Allowance are Almost Impossible to Find

In view of the fact that the State defendant cannot seriously deny the failure of the shelter allowance to keep pace with changes in the housing market, it advances a second basic argument: that the erosion of the shelter allowance is irrelevant, and that the only pertinent question is the availability of housing today. The history, however, cannot be so lightly dismissed. As Professor Stegman demonstrated, the aggregate number of apartments renting within the shelter allowance, as shown in DX. AF-1, is not in itself informative because it does not address the issue of whether units are available to public assistance recipients. Plfs' Prop. Findings, at ¶¶ 95-100.

The State defendant ignores this fact. It reasons that if the total number of apartments renting within the shelter allowance

corresponds with the total number of public assistance recipients and nonrecipients with the same income as recipients, then the allowances must be adequate, despite the fact that literally 99 percent of these apartments are occupied and almost eighty thousand A.F.D.C. families do not have such apartments. This definition of adequacy would be tenable only if housing resources in New York City were dramatically redistributed so that the apartments renting within the shelter allowance were allocated to public assistance recipients.

Because the aggregate number of apartments renting within the shelter allowance does not, by itself, show the number of apartments available to public assistance recipients, it is extremely significant that the State defendant originally considered a schedule to be appropriate that brought more than twice the number of apartments within the maximum allowance as the schedule that is in effect today. Id., at ¶ 91.

Moreover, since the 1975 schedule codified pre-existing shelter allowance levels and therefore did not result in increased expenditures, Colfer Tr. 1307-08, it is clear that it did not reflect a one time spasm of generosity, but rather embodied longstanding views about the level of shelter allowances necessary to "provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community." 18 N.Y.C.R.R. § 352.3(a)(repealed 1975).

The question of availability can also be analyzed in terms of vacancy rates. Both Professor Stegman and Dr. Filer presented such

analyses. Essentially, both experts looked at similar data on the issue -- showing a vacancy rate of about 1 percent -- and reached opposite conclusions. Dr. Filer's opinion that such a vacancy rate is sufficient to enable anyone who wants such an apartment to find one is totally unsupported. In contrast, Professor Stegman's conclusion is corroborated by overwhelming evidence. This evidence includes (1) the fact that this vacancy rate is only a fraction of the rate which is considered to be appropriate in a well functioning market (Plfs' Prop. Findings, at ¶¶ 102-03); (2) the fact that all evidence presented by individuals who have looked for housing renting within the shelter allowance levels shows that such housing is impossible to find (Id., at ¶¶ 108-114, 293, 304, 310); and (3) the State defendant's own admissions indicating that it agrees with Professor Stegman that such apartments cannot be found (Id., at ¶¶ 116, 118). Additionally, as an expert on housing markets with 25 years of experience and the author of the last three Housing and Vacancy Survey Reports, Professor Stegman's testimony in this regard is entitled to more weight than Dr. Filer's opinion which is based on only scant experience with New York City housing issues.[29]

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[29] The State defendant also quibbles with the way in which the vacancy rate is calculated in the HVS. The method relied on by Professor Stegman is, however, the official calculation used by the Department of Housing Preservation and Development in conjunction with New York City's rent regulation laws. Moreover, if the definition of a vacant apartment were changed as Dr. Filer suggests, there is no reason to believe that experts would still consider 5 percent to be an appropriate vacancy rate. In any event, it is far from clear why buildings under construction and other categories cited by Dr. Filer should be included in the calculation.

The State defendant has not cast doubt on any of the testimony of individuals who have actually looked for housing renting within the shelter allowance. In response to the testimony of Scott Auwarter, an expert in the availability of low income housing in the Bronx, the State defendant claims that Mr. Auwarter "had not conducted research prior to forming his opinions" and that he "offered no data to support his personal observations." Def's Brief at 8-9. These attacks on Mr. Auwarter's expertise cannot conceal the underlying truth that the State defendant has offered no grounds for disputing his testimony. Mr. Auwarter's knowledge does not come from statistical analysis of data, but rather from extensive experience helping hundreds of families search for housing. Mr. Auwarter's work gives him direct personal knowledge of the market for low-income housing in the Bronx and his conclusions based on this knowledge are uncontradicted.[30]

The State defendant also seeks to answer Mr. Auwarter's testimony about the availability of housing with the completely unrelated fact that Mr. Auwarter has advised a handful of his clients that they would be better off in the shelter system than in their current housing situations. Def's Brief at 9 (citing Auwarter Tr. 652). Clearly, this fact in no way casts doubt on Mr. Auwarter's testimony concerning the availability of housing. In any event, Mr. Auwarter explained that he has given such advice in fewer than twenty cases and then only in instances when the

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[30] In fact, the State defendant did not contest Mr. Auwarter's qualifications to offer expert testimony. See Tr. 619-20.

families' current arrangements placed them in danger. Auwarter Tr. 664-65.

The State defendant also mischaracterizes Mr. Auwarter's testimony by claiming that he stated that "landlords often do not want to rent to public assistance families, regardless of the level of the allowances." Def's Brief at 54 (citing Auwarter Tr. 657-58). Mr. Auwarter made no such statement. To the contrary, Mr. Auwarter testified that the level of the shelter allowance is the primary reason that landlords will not rent apartments to public assistance recipients. Auwarter Tr. 654.[31]

Similarly, the State defendant cannot answer the testimony of three public assistance recipients who testified that they have been unable to find housing renting within the shelter allowance. The State defendant offers no rebuttal to the testimony of Jacqueline Remy and Mabel Irizarry concerning their searches for housing. See Plfs' Prop. Findings, at ¶¶ 293, 310. In response to Enid Diaz's testimony, the State defendant claims that she has only looked in her own neighborhood. The evidence, however, reveals that Ms. Diaz has looked for housing over a substantial portion of the borough of the Bronx. In fact, she has gone door to door over

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[31] The State defendant also seeks to discredit Mr. Auwarter's testimony on the ground that his knowledge is limited to the Bronx. Def's Brief at 54. The Bronx, however, is the poorest borough in the City of New York. It has the lowest median income, PX. 70-209, at p. 100, the lowest median rents, id., at p. 68, the highest concentration of low income households, id, at p. 110, and the highest percentage of buildings that housed a public assistance recipient between 1978 through 1987. Id., at p. 75. It is difficult to see where the State defendant would have public assistance recipients look for housing, if they cannot afford to live in the Bronx.

an area of nearly 50 blocks, looking for empty windows and asking about apartments that may be vacant. Diaz Tr. 85 (from 159th Street to 205th Street). The evidence shows that Ms. Diaz's extraordinary efforts to find a cheaper apartment cannot possibly be faulted as inadequate. See Diaz Tr. 100 (constant continuing efforts to find housing).

The State defendant offers a barrage of arguments seeking to discount the three month study of classified advertisements in newspapers, which was conducted by law students. These arguments are of two varieties. First, the State defendant argues that the study is incomplete for a number of reasons, including the fact that it did not include every single newspaper in Brooklyn and that the researchers did not telephone advertisers to ascertain the rents or sizes of apartments listed in advertisements that did not include that information. Def's Brief at 52-53.

The fact that the study did not encompass every single advertisement for a Brooklyn apartment listed in a newspaper does not discredit its central result. The fact remains that the study included major City-wide dailies, borough-wide weeklies, community newspapers, Spanish language and other minority oriented newspapers and even a newspaper specifically devoted to running apartment advertisements.[32] The researchers reviewed literally thousands of

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[32] Eileen McCarthy, who coordinated the study, explained that in selecting newspapers, the researchers consulted a study of New York media conducted by the Urban Research Center at the Wagner School of Public Administration at New York University that contained data about circulation and ethnicity of readership. They also reviewed the selection of Brooklyn newspapers at the Brooklyn Public Library, McCarthy Tr. 831-32,

advertisements and not a single advertisement listed an apartment affordable to public assistance families. In fact, the number of advertisements consulted far exceeds the number that any individual looking for housing could possibly read. There is no reason to believe that the inclusion of any additional newspapers would have yielded a different result.

The second basic criticism leveled by the State defendant is that the researchers made a number of errors on the summary sheets that they prepared. Despite its efforts to identify these errors, the State defendant has not found any omission of an apartment renting within the shelter allowance. Since the advertisements themselves were available to the State defendant, and indeed are part of the trial record in this case, the State defendant was free to bring to the Court's attention any advertisement that the students overlooked. The fact that the errors pointed out by counsel all involved apartments renting substantially above shelter allowance levels only underscores the fact that there were no listings for apartments renting within the schedule. See, e.g., Staunton Tr. 981-82 (omission of $425 one bedroom apartment); Bolen Tr. 1005-06 (omission of $400 one bedroom apartment, and $850 four bedroom apartment); Collins Tr. 1020-21 (omission of $550 a month apartment); Lee Tr. 1046-47; 1051 (omission of two bedroom

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and statistics in the Housing and Vacancy Survey showing the neighborhoods in which public assistance recipients are concentrated. Id., at 840-44. The researchers omitted a few local newspapers that covered areas with low concentrations of public assistance recipients. Id., at 839-45.

apartment for $600 and one bedroom for $350).[33]

Finally, the State defendant seeks to reargue the admissibility of the newspaper study. The Court correctly admitted the newspaper advertisements, not for the truth of the assertions in the advertisements, but rather to show what apartments can be found by consulting newspaper listings. Given this purpose, the State defendant's objections that there was no testimony concerning how many public assistance recipients look for apartments in each of these twelve newspapers is without merit. The presence of thousands of advertisements in these newspapers shows that newspaper listings are a major form of transmitting information about the availability of apartments. The study itself amply demonstrates that looking for apartments renting within the shelter allowance by consulting newspapers is a futile endeavor.[34]

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[33] The State defendant also objects to the exclusion of apartments available to Section 8 tenants. Def's Brief at 53. The purpose of the study, however, was to determine whether public assistance recipients looking for housing with only the shelter allowance could find apartments by consulting newspaper advertisements. As noted in Plaintiffs' Proposed Findings, at ¶¶ 94, 99, n. 13, the Section 8 program is extremely limited and such subsidies are not available to the vast majority of public assistance recipients.

[34] The State defendant incorrectly argues that the study was admitted subject to a connection that was not made. Def's Brief at 51-52 & n. 19. The Court ruled that the excerpts of each newspaper were admissible if connected to a larger comprehensive study. Tr. 828-31. Because this connection was established, the testimony and documents were properly admitted. In any event, all three public assistance recipients who testified stated that they do look for apartments by consulting newspaper advertisements. Remy Tr. 31-32; Diaz Tr. 83; Irizarry Tr. 112. This testimony establishes that newspaper advertisements are a means of looking for housing that public assistance recipients use.

The State defendant has asserted that thousands of apartments renting within the shelter allowance are readily available and that anyone could find one. The State defendant's claim is belied by the fact that not a single one of the thousands of apartment listings that appeared in a dozen newspapers over the course of a three month period for the City's most populous borough, showed an apartment renting within the shelter allowance to be available.

d. The State Defendant Has Failed to Rebut the Fact that the Inadequacy of the Shelter Allowance is Illustrated by Comparison with HUD Fair Market Rents

The State defendant seeks to discount fair market rents on a number of grounds. It characterizes them as "an attempt by HUD to determine the 45th percentile of rents for the general population." Def's Brief at 29, n. 3; Def's Prop. Findings, at ¶ 88. In fact, fair market rents are HUD's estimate of the cost of decent nonluxury housing in an area. See Plfs' Prop. Findings, at ¶ 121; 24 C.F.R. § 882.102 (defining fair market rent as the amount "which would be required to be paid in order to obtain privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature"). While Dr. Welsh testified that he does not understand the significance of the 45th percentile, Welsh Tr. 1443, HUD has made a determination that it provides a reasonable methodology.

Dr. Welsh's lack of understanding of the significance of fair market rents is recent. In a 1988 Report to the Legislature, written by Dr. Welsh, the Department of Social Services acknowledged that HUD fair market rents are "a common measure of housing costs for the low-income population," and that they are "a fair and independent measure" of such costs. PX. 21-29, at pp. 11-12. The Report pointed out that fair market rents are subject to notice and comment so that if HUD's formula yields an inappropriate figure in any instance, correction may be made. Id. ("[f]ollowing public comment period, [fair market rents] are modified if localities demonstrate that an adjustment is necessary to reflect real market conditions"). Moreover, the State defendant's 1982 report on shelter allowance methodologies stated that "[s]ection 8 Fair Market Rents (FMR's) provide a good proxy for the rents needed for adequate housing". PX. 13, at p. 10. See also Plfs' Prop. Findings, at ¶ 126 (listing citations to State documents in evidence that rely on HUD fair market rents).

The State defendant argues that HUD fair market rents are an inappropriate basis of comparison with the shelter allowance because HUD has quality standards which assure that "Section 8" certificates are only used in decent housing while public assistance recipients often live in housing that does not meet these standards. Def's Prop. Findings, at ¶ 89.[35] Essentially, the

[35] The State Defendant insinuates that HUD standards demand palatial apartments. In fact, HUD standards only require such bare necessities as working sanitary facilities, cooking facilities, heat, working electrical fixtures, and an absence of structural conditions that pose a threat to the health and safety

State defendant is arguing that public assistance recipients should be penalized because the shelter allowance often forces them to live in substandard housing. The fact that the shelter allowance does not enable public assistance families to afford decent housing cannot be used as a basis for denying them the income necessary to obtain decent apartments.[36]

The State defendant also criticizes fair market rents because they are based on data that is not precisely divided along county lines.[37] Def's Prop. Findings, at ¶ 88. This criticism is

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of occupants. 24 C.F.R. § 882.109. Rather than finding these standards to be excessive or luxurious, the State defendant used them in calculating the 1984 shelter allowance for upstate counties. Welsh Tr. 1435-36.

[36] The State defendant relies on the testimony of Richard Higgins for the proposition that "[i]t is inappropriate to set rents in an entitlement programs [sic] as high as a program that has quality standards built into it and is only for a limited population." Def's Prop. Findings, at ¶ 92 (citing Tr. 2798). This proposed fact is one of many offered by the State defendant that relies on Mr. Higgins' opinions. See also id., at ¶¶ 93, 131, 132, 252. Mr. Higgins, however, was never offered as an expert by the State defendant and did not testify on that basis. Tr. 2757 (statement by defendant's counsel that witness was being offered for factual testimony rather than opinion). Instead, Mr. Higgins' testimony was offered to show that he advised the Commissioner of Social Services of an evaluation that he had performed. His opinions were admitted in evidence for that purpose only. Tr. 2797-2801. The State defendant's attempt to bootstrap this testimony into opinion evidence is directly contrary to the purposes for which it was offered and admitted in evidence.

As the Court recognized, the mere fact that Mr. Higgins previously held appointive office does not entitle him to offer opinion evidence in a court of law. Tr. 2775. Nor could the State defendant have offered Mr. Higgins as an expert. Apart from serving as Commissioner of the State Division of Housing and Community Renewal for approximately two years, Mr. Higgins had no prior or subsequent experience or training working on low income housing issues. Higgins Tr. 2750-51.

particularly ironic in light of the fact that in its 1988 Report to the Legislature, the Department of Social Services relied on fair market rents to assess whether variations in the shelter allowance among the different counties are equitable. PX. 21-29, at pp. 11-12. This analysis showed that fair market rents in New York State exhibit the same degree of variation across county lines as does the current shelter allowance. Id. Thus, rather than faulting HUD rents on the ground that they are not tailored to each locality, the Department considers them to be an appropriate benchmark for determining the extent of variation in housing costs across different counties.

The State defendant also makes much of the fact that in comparing HUD fair market rents to the shelter allowance, Professor Stegman used a different method of relating bedroom sizes to number of residents than he used in the HVS Report. Def's Brief at 74-75. The space assumptions used in Professor Stegman's charts in this case, however, are reasonable and have been used by the State defendant on many occasions and by New York City's Department of Housing Preservation and Development. See Plfs' Prop. Findings, at ¶¶ 138-39.

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[37] It is not true that HUD ignores distinctions between counties in calculating fair market rents. It is true that HUD uses data for the New York City metropolitan area. But it then differentiates between counties by applying ratios of rents taken from the U.S. Census that reflect the variations in rent among counties within the metropolitan area. PX. 13-13, at p. 15. The fair market rent for New York City thus differs from the fair market rents for Westchester, Nassau and Suffolk counties, the largest suburban areas. The only counties that have the same fair market rents as New York City are Rockland and Putnam. 56 Fed. Reg. 49058 (Sept. 26, 1991).

In any event, the State defendant cannot show that this disparity undermines Professor Stegman's conclusions in any way. When exhibit PX. 82-260, which compares HUD fair market rents to the shelter allowance, is recalculated using the space assumptions in the Housing and Vacancy Report, PX. 70-209, at p. 90, n *, the results differ only minimally -- the shelter allowance, on average, is still only 53.5% of the HUD rent levels.[38] The State defendant's own comparison between fair market rent levels and the shelter allowances also shows that the "FMRs" are roughly twice as high as the shelter allowance. See PX. 27-43, at p. 2 (in 1988 the shelter allowance ranged between 49% and 55% of the fair market rents).[39]

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[38] Below is a recalculation of PX. 82-260:

Bedrooms	HUD Rent w/out utilities	No. of Persons	Avg. Shelter Maximum	Shelter Max. as a % of HUD Rents
0	399	1	215	53.9%
1	490	2 - 3	268	54.7%
2	578	4 - 5	325	56.2%
3	732	6 - 7	376	51.4%
4	822	8+	421	51.2%
Shelter Maximum as an average percentage of HUD rents:				53.5%

[39] Similarly, the State defendant's complaint that PX. 81-259, which compares the fair market rent for a two bedroom apartment and the shelter allowance for a family of four at three different points, omits the year 1988 is another attempt to imply unfairness where none exists. Def's Brief at 74. The fair market rent for a two bedroom apartment in 1988 was $491 -- an amount that is $179 in excess of the shelter allowance for a family of four. PX. 141. This fact supports the point that the

e. The Evidence Shows that the Shelter Allowance has Not Kept Pace with the Costs of Providing Housing and that it is Inadequate to Enable Owners to Operate and Maintain Apartments

The State defendant has failed to refute plaintiffs' evidence that the shelter allowance has not kept pace with the rising cost of operating and maintaining buildings. The State defendant questions the use of the Price Index of Operating Costs (PIOC) to gauge increases in operating and maintenance costs on the ground that it is not specific to the older buildings that provide most low income housing. Def's Brief at 64-65. Once again, the State defendant presented no evidence that any other measure yields a different conclusion.

To the contrary, Professor Tobier testified that criticism of the PIOC on the ground that it did not reflect cost increases in older buildings is "not very serious," Tobier Tr. 507, because the trends in both older and newer buildings have been the same. Id., at p. 508 (broad trend in costs in older buildings mimics general rate of increase).

The State defendant's continual references to swimming pools, doormen and chandeliers in luxury apartments are simply a smoke-screen to detract attention from its failure to rebut the validity of the PIOC. Def's Brief at 74. These references are based on a misconception that, because luxury housing is expensive, its inclusion in the PIOC necessarily raises the index. This

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1988 increase did not interrupt the steady erosion in the purchasing power of the shelter allowance.

supposition is incorrect. Since the PIOC is a measure of changes in cost, rather than absolute costs, the inclusion of luxury housing as well as low income housing skews the measure only if the costs in these buildings rose more quickly than costs in low income buildings. No evidence was presented that this was the case. In any event, Professor Tobier testified that older buildings are actually more expensive to maintain properly than newer ones. Id., at 509.

The State defendant also questions the use of the PIOC on the ground that annual rent increases approved by the Rent Guidelines Board have not been as high as the PIOC. This fact, however, does not detract from the validity of the PIOC as a measure of increases in the cost of operating buildings.[40] The bottom line is that the State defendant has presented no evidence suggesting that the shelter allowance has kept pace with increases in the cost of operating and maintaining apartments. The State defendant's attempt to discount the evidence that increases in operating costs have far outstripped increases in the shelter allowance by claiming that operating costs are still within the shelter allowance is without merit. As explained in Plaintiffs' Proposed Findings, at ¶¶ 146-47, Dr. Filer conceded that in 1988, at least 80 to 85

[40] Additionally, while it may be true that increases in the PIOC have exceeded the lease renewal increases authorized by the Rent Guidelines Board, rents in rent stabilized buildings increase in other ways, such as through vacancy increases, major capital improvement increases, and surcharges on low-rent apartments. In any event, the evidence shows that the level of rent increases authorized by the Board have also far exceeded the rate of increase in the shelter allowance. See Plfs' Prop. Findings, at ¶ 89.

percent of rent stabilized buildings had costs in excess of the shelter allowance. Additionally, Dr. Filer did not take into account the condition of the 15 to 20 percent of the stock that had costs within the shelter allowance amounts in 1988. Thus, in many of these buildings, the low operating costs could have been attributable to the fact that they were not maintained properly.

The total number of buildings that Dr. Filer found to have costs within shelter allowance levels is not impressive. In December 1990, there were more than twice as many public assistance households living in private housing as the number of rent stabilized apartments in 1988 that Dr. Filer viewed as having costs covered by the shelter allowance. Fifteen percent of the total rent stabilized stock amounts to a total of only 140,306 units, PX. 70-209, at p. 37 ((662,742 + 272,631) x .15 = 140,306), while 282,296 public assistance households resided in private housing. DX. U-88.

In any event, even on its own terms, the State defendant's brief distorts or misstates the evidence in several respects. First, the brief states that in 1989 the average operating and maintenance cost of apartments in Brooklyn was $265 per month. Def's Brief at 62. In fact, the testimony shows that this figure

relates to the Bronx and that the data reflects 1988 costs.[41] Filer Tr. 1848-49; id., at 2123-24; Stegman Tr. 3336, 3348.

Second, and more importantly, when capital costs are considered in addition to the operating and maintenance costs, the average total costs of the buildings that Dr. Filer testified about were almost all well above the shelter allowance. As both Professors Stegman and Tobier explained, only between two-thirds to three quarters of total costs consist of operating and maintenance costs. Stegman Tr. 3358; Tobier Tr. 462-63. See Filer Tr. 2154 (data that he reviewed did not include information on capital costs). Thus, average total costs for the Bronx buildings that Dr. Filer discussed would range between $353 and $395 per unit, amounts well above the shelter allowance.

The same is true with respect to most of the other buildings that Dr. Filer testified about.[42] Furthermore, Dr. Filer admitted that all of these building categories had costs that were below the

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[41] Dr. Filer omitted from his testimony on direct examination the fact that in 1988 the average operating and maintenance expense for pre-1947 buildings in Brooklyn with 11 to 19 units was $274.25. Filer Tr. 2151. The average operating cost to rent ratio for those buildings was 68.8%, id., at 2150, making the average rent $399. Id., at 2151-52.

[42] Applying the same analysis, average total costs of the pre-1947 Brooklyn buildings with 20-99 units that Dr. Filer discussed would range from $327 to $366; average total costs in pre-1947 Queens buildings, would range from $266 to $299. Thus, only Queens buildings, which account for less than 10% of the rent stabilized stock, had total per unit costs that approach the shelter allowance. See PX. 70-209, at p. 37 (181,158/935,373). The average rents in these Queens buildings were $345 and $296, amounts above the shelter allowance for a family of three. Filer Tr. 2148-49 (operating cost to rent ratios for Queens' buildings).

overall average. Filer Tr. 2128. Thus, even the least costly building categories in the City had average per unit total costs in excess of the shelter allowance in 1988.[43] Given these facts, it is not surprising that based on the same data, Professor Stegman concluded the shelter allowance is inadequate to enable owners to cover the costs of providing housing. Stegman Tr. 3357-58.

The State defendant also claims that Richard Higgins "recognized that the current shelter allowance schedule was still high enough to meet operating and maintenance costs." Def's Brief at 62.[44] In fact, Mr. Higgins' memorandum warned that "the current shelter allowance is dangerously close to the operating cost level," DX. BE, at p. 8. Mr. Higgins also acknowledged that an additional "cushion for debt service and profit" is necessary to prevent owner abandonment. Id. Given these statements, it is clear that Mr. Higgins' evaluation does not support the State defendant's position that the shelter allowance is sufficient to enable owners to cover their costs.

Lastly, the State defendant argues that because public assistance recipients often live in buildings with non-public assistance recipients, landlords can charge other tenants higher

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[43] Dr. Filer testified about five of the nineteen categories in a 500 building study of Real Property Income and Expense (R.P.I.E.) forms conducted by the Rent Guidelines Board. These categories totalled only 134 of the 500 rent stabilized buildings in the sample. Filer Tr. 2124-27. Moreover, Dr. Filer did not discuss the findings of the Rent Guideline Board's own study of this data. Id., at 2121-22; 2140-41.

[44] As explained supra, at p. 34, n. 36, the State defendant's reliance on Mr. Higgins' testimony as if it were expert opinion is improper.

rents to recover the loss incurred in renting an apartment at the shelter allowance level. Def's Brief at 65. A shelter allowance schedule predicated on the supposition that landlords are willing to lose money by renting to public assistance recipients clearly cannot be considered adequate. As Professor Tobier explained, such a schedule is short-sighted and ultimately results in a reduction of the supply of low income housing. Tobier Tr. 470-71.

III. The State Defendant Overstates its Efforts to Create Housing for Public Assistance Recipients

The State defendant argues that the Commissioner of Social Services is excused from setting an adequate shelter allowance because the State is making efforts to fund housing programs. See Def's Prop. Findings at ¶¶ 130-56; Def's Brief at 39-42. As explained, infra at p. 108, these efforts do not excuse the State defendant from compliance with the mandate of Social Services Law § 350. In any event, the State defendant has greatly exaggerated the efforts that the State has undertaken in this area.

Indeed, the practical irrelevance of this evidence is underscored by the fact that the State defendant does not offer any specific figures for the number of units built with these funds which are available to New York City public assistance families. Rather, its citation to DX. BB-120 for the proposition that "a total of 121,763 units are completed," Def's Prop. Findings, at ¶ 135 (incorrectly citing exhibit as BB-121), encompasses units repaired, renovated, financed or constructed for households of all

levels of income.[45] In fact, the State defendant has admitted that "[m]ost publicly supported housing programs focus on providing housing that is affordable to families earning incomes that are less than 100% of the median income in the area. This formula results in housing costs that public assistance recipients generally cannot afford." PX. 159, at p. 5.[46]

The State defendant also implies that State housing programs build new units. As the report that it relies on admits, the State is not in the business of building affordable housing. DX. BB-120 at pp. iv, 3, 24, and 33. Units counted as "completed" do not equate with new units built. Rather, a unit is included as a completed unit if the only work done on the unit was weatherization, or sprucing up of the facade -- for example, the

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[45] Although not stated, the State defendant is apparently citing to p. 36 of DX. BB-120. The table on that page, however, does not state how many of the assisted units are in New York City. The State defendant proposes that this Court find that approximately 90% of the units under contract, award, or construction in New York City are to be rented to low or very low income families. Def's Prop. Findings, at ¶ 136. There is simply nothing in the record to support this assumption. The record is replete with references to state assistance for moderate income -- Mitchell Lama, for example -- or even luxury housing in, for example, Battery Park City or on Roosevelt Island. See, e.g., DX BB-120 at pp. 18, 23, 52, 64, 66, and 77.

[46] This statement reflects the fact that many of the housing assistance programs define "low-income" at levels that are much higher than the public assistance level. Many programs consider households with 80% or 90% of the median income to be "low income" households. See, e.g., DX. BB-120 at pp. 47, 50, 56, 60, 74, 91. The median household income in New York City in 1986 was $20,000. PX. 70-209, at p. 94a (Table 5.1a).

replacing of broken window panes or the scraping, puttying and painting of windows -- or when the only assistance given was a mortgage subsidy. See DX. BB-120 at pp. 15, 24, 62, 88. Of the units completed in New York City, 48% of them fall within the repair category. See DX. BB-120, at pp. 104-114 (of the 61,073 units completed, 29,221 units fell into the category of repair only).

In fact, the report relied on by the State defendant, DX. BB-120, recognizes that fully a third of state assistance to completed units and half of the assistance to units that are not yet complete has gone to pre-existing State assisted buildings, such as Mitchell-Lama projects. Id., at p. 33. The State cannot claim that it is undertaking Herculean efforts when it is simply maintaining previously existing State housing stock. As the Report notes:

> [T]he largest block of units assisted are units in State-assisted public and Mitchell-Lama housing projects (44,072 completed units, 38,596 under construction, 27,060 under award). This reflects the State's emphasis on the preservation of its existing 120,000 unit inventory of low and moderate income housing.

Id.[47]

Moreover, the cost figures cited by the State defendant include "assistance" for all units -- a broad term that includes

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[47] The figures that the State defendant cites also include assistance provided through programs that are federally funded, but state administered. Id., at p. 33 (listing seven such programs included in the report).

units for which an award has been made, even if no repair work or construction has begun.[48]

Finally, the State defendant argues that it made a deliberate choice to address the housing needs of the poor by committing substantial money to State housing programs, instead of raising the shelter allowance. Even a cursory review of DX. BB-120 reveals that, contrary to the State defendant's argument, the State housing programs were not implemented to supplement an inadequate shelter allowance.[49] Indeed, the term "shelter allowances" does not even

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[48] The misleading use of this broad definition is perhaps best illustrated by the testimony of Nancy Travers. She testified on direct examination that the Low Income Turnkey Program was a $128,000,000 program. Tr. 2668. On cross-examination, Ms. Travers admitted that as of November 30, 1990, only 21 units had actually been completed in New York County, and that there is no requirement that those units be rented to public assistance families. Tr. 2682-83. The record also reflects that there are no units completed in Bronx, Kings, Queens, and Richmond. DX. BC-121, at p. 47.

[49] In its review of State housing programs, the State defendant also cites to two bill jackets. Def's Brief at 40-42 (citing to DX. AM and AN). These two bill jackets are irrelevant. As plaintiffs argued at trial, the Commissioner of Social Services cannot be excused from the obligations of section 350 of the Social Service Law by proposing financial assistance for the homeless. Based on plaintiffs' argument, the Court indicated that it did not know whether it would consider the bill jackets. Tr. 2352.

Moreover, the legislation referred to in the bill jackets created little or no housing and was in no way a substitute for an adequate shelter allowance. The Homeless Rehousing Assistance Program (DX. AN), provides state financial assistance for supportive services to families who are already homeless. Id. According to a report by the State defendant, the Housing Demonstration Program (DX. AM) had by 1990 "completed" only 72 units in New York City, including placements in existing units and renovations. PX. 159, at p. 12.

appear in DX BB-120 and very few of the programs are specifically targeted to public assistance recipients.

Rather, the programs are a direct response to cuts in federal aid in the 1980s to housing programs for all New Yorkers. As the Report explains, the "overall tightening of the housing market resulted in pressures on middle and moderate income New Yorkers, resulting in needs which encompass all parts of the State -- urban, rural and suburban --and virtually all income groups." DX. BB-120, at p. 2. In fact, counting all resources, including, for example, bonds that were authorized but not issued, State housing programs have barely replaced one in every three dollars lost by the federal cuts. DX. BB-120, at p. 2 (although there have been nearly $20 billion in federal housing aid cuts, New York State has only made $6.7 billion dollars available).[50] Although cuts in federal housing assistance may have created a vacuum appropriately addressed by the State, the repair and renovation of housing that is not targeted to public assistance recipients in no way substitutes for the provision of adequate shelter allowances.

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[50] The $6.7 billion figure reflects the gross dollars available for housing. See, e.g., Def's Prop. Finding ¶ 133. As the evidence makes clear, only slightly more than 50% of the funds available were actually disbursed. DX. BB-120 at p. 19. Of the $6.7 billion figure, only $1.25 billion represents appropriations by the Legislature. Id., at p. 21. Fully $4.5 billion of the total consists of bonds, a portion of which have been authorized, but not issued. Id.

IV. Inadequate Shelter Allowances Contribute to Families Becoming Homeless

Plaintiffs have shown that the inadequate shelter allowance is an important factor contributing to family homelessness. See Plfs' Prop. Findings, at ¶¶ 158-249. The State defendant unsuccessfully tries to rebut this showing by claiming, contrary to all available evidence, that family homelessness in New York City is not a major problem; by stating that there are many causes of homelessness; and by claiming that evictions for nonpayment of rent are not significantly related to family homelessness. In making its arguments, the State defendant distorts and misuses DX. B-108, the study by James Knickman and Beth Weitzman of New York University (the "Knickman Report");[51] it claims to have discovered

[51] The State distorts the conclusions and the analysis of the Knickman Report throughout its argument on homelessness. See infra, at pp. 51-57. The State also gets many of the basic details of the Knickman Report wrong. For example, the report is based on 1228 interviews conducted in the first seven months of 1988, not 1204 interviews in 1989 as stated in State defendant's brief. Compare DX. B-108, vol. 1, at pp. 2, 4-5 with Def's Brief at 88-89.

At different points in its brief it claims that the Knickman Report reaches contradictory conclusions on the same point. Compare, e.g., Def's Brief at 97 (55% of homeless families once had their own apartment) with Def's Brief at 101 ("Over half the families entering the EAUs had never had a lease in their own name."). The correct finding from the Report is that 55% of homeless families once had their own apartment. DX. B-108, vol. 1, at p. 14.

Furthermore, the State defendant is often incomprehensible in its attempts to rely on the Knickman Report. For example, the second paragraph on page 90 of the State defendant's brief reads in its entirety:

Less than 20 percent of those who had been doubled up

discrepancies that do not exist between the testimony and published work of plaintiffs' expert, Dr. Anna Lou Dehavenon; and it conveniently ignores the often-stated position of the Department of Social Services itself that inadequate shelter allowances cause evictions and homelessness.

Finally, as discussed above, supra at pp. 24-32, the State defendant has not refuted plaintiffs' larger point that because apartments renting within the shelter allowance are impossible to find, the shelter allowance forces families into the emergency shelter system by rendering them unable to find apartments regardless of the reasons they left their previous living situations. This fact transcends any analysis of the paths that brought particular families into the shelter system. If, at any point prior to a family's entering the shelter system, it could have rented an apartment with its shelter allowance, that family's homelessness would have been averted. If a homeless family could find an apartment today or tomorrow renting within its shelter

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> at any time had been primary tenants immediately prior to their entry into the EAU. Defendant's Ex. B-108, Vol. 1, Table 3. Fourteen percent of these lived with parents, while 30 percent lived with friends or other family members. Defendant's Ex. B-108, Vol. 1, p. 9.

Table 3 in Volume 1 of the Knickman Report is entitled "Reasons for Leaving the Place Stayed Last Night." It does not contain anything like the data for which it is cited. It is not possible to tell what "these" in the second sentence refers to, but the data on page 9 of volume 1 clearly is not a measure of anything referred to in the first sentence. It is a breakdown of the 44% of families who had never had an apartment of their own for at least a year. Finally, after misciting these two pieces of data, the State defendant does not tell the Court why it believes they are significant or what argument it imagines they advance.

allowance, its homelessness could be brought to an end. In this sense, a shelter allowance which does not allow families to rent apartments on the market contributes to causing the homelessness of every homeless family.

a. Contrary to State Defendant's Suggestions, Homelessness Among Families in New York City is a Serious Problem

Incredibly, State defendant suggests that homelessness among families in New York City is not a serious problem. In support of this theory, it repeatedly refers to Dr. Filer's testimony that less than two percent of the City's A.F.D.C. families are in the homeless shelter system. Def's Brief at pp. 88, 99, 143; Def's Prop. Findings at ¶ 379 (citing Filer Tr. 1973); see also Def's Brief at 4-5, 13; Def's Prop. Findings at ¶ 266. The absurdity of this attempt to belittle the problem of homelessness is shown by examination of the actual numbers of families who are homeless at a given time and the number of families receiving public assistance who have spent time in the emergency shelter system. In January 1991, the last month for which data is in the record, 4,156 families containing 7,319 children and a total of 12,828 people were in the City's emergency shelter system for families. PX. 124-101; see DX AQ (data for other months).[52]

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[52] The Court of Appeals was cognizant of the magnitude of the City's problem with homeless families when it found that plaintiffs' complaint states a cause of action. See Proposed Complaint of Bernadine Niles and Rita Bell, para. 2 (alleging "over 5,000 families" in the emergency shelter system in December 1987).

Moreover, because Dr. Filer's statistic is only a snapshot taken at a given moment, it understates the true size of the problem. Many more families have been or will become homeless than are present in the shelter system at any one time. In their study, conducted during the first seven months of 1988, Knickman and Weitzman found that 7% of the housed public assistance population had previously been homeless and had sought emergency shelter. DX. B-108, vol.1, at pp. 4, 12. This means that by July 1988 approximately 16,100 public assistance families had spent time in the shelter system in addition to more than 5,200 families then in the system. Id. at p. 4 (at time of study there were approximately 230,000 families on public assistance; 7% of 230,000 is 16,100); DX. AQ (number of families in the shelter system was 5,206 in July 1988). Thus, over 21,000 families who were receiving public assistance in July 1988 were, or had been, homeless.[53] Because between 650 and 1,171 families have entered the shelter system each month since the middle of 1988, DX. AQ; BV, the number of public assistance families who have spent time in the shelter system now greatly exceeds the 21,000 derived from Knickman and Weitzman's 1988 data. In fact, H.R.A. has estimated that in 1990 alone 10,800 different families receiving public assistance requested emergency shelter. PX. 160, at p. 29, n.9.

Although the State defendant may, for the purposes of this litigation, choose to downplay the scope of homelessness among

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[53] Additional families had undoubtedly been homeless, but were not receiving public assistance at the time the data was collected for the Knickman Report.

public assistance recipients, it has acknowledged elsewhere that family homelessness is among the greatest social services crises our society faces. In a 1990 report entitled, "The Homelessness Prevention Program: Outcomes and Effectiveness," the State defendant wrote:

> One of the most critical issues confronting New York State in the 1980's and the 1990's has been the problem of homelessness.... In the past decade the ranks of the homeless have swelled and the face of homelessness has changed from the stereotypical skid row alcoholic male, to include families with children (many headed by single women), young adults who have run away or been forced to leave their homes and the deinstitutionalized mentally ill.

PX. 160, at p. 5.

b. Inadequate Shelter Allowances Contribute to Families Being Evicted and Becoming Homeless

i. The Other "Causes" of Homelessness Identified By the State Defendant Are Fully Consistent with the Fact that the Shelter Allowance is also a Contributing Cause

In a section of its brief captioned "The Various Cause [sic] of Homelessness," the State defendant relies on the Knickman Report to argue that, because there are other factors which contribute to homelessness among families, the shelter allowance is unrelated to homelessness. See Def's Brief at 88-109. In reality, there is no inconsistency between the self-evident point that many factors contribute to homelessness among families in New York City and plaintiffs' point that the inadequacy of the shelter allowance is one important factor. Moreover, the State defendant misuses the

Knickman Report by confusing the concepts of correlation and causation when it writes about the "various causes of homelessness." As the authors of the Knickman Report explain, the purpose of their study was to identify correlates of emergency shelter use as an aid in "the development of a technical forecasting model that will allow H.R.A. to identify in advance families at high risk of becoming homeless." DX. B-108, vol. 1, at p. 3; see generally id., at pp. 1-3; see also Filer Tr. 1995-96 (describing the distinction between correlation and causation). The study was not designed to determine the underlying causes of family homelessness.

The State defendant summarizes several findings in volume one of the Knickman Report regarding correlates of shelter use. One of the correlates of shelter use that the State defendant does not refer to, that black families are more likely than other families to request emergency shelter, DX. B-108, vol. 1, at p. 21, highlights the mistake the State defendant makes throughout this section of its brief. As Knickman and Weitzman explain, "race in and of itself does not seem to affect the likelihood of homelessness but rather race acts as an important proxy for other risk factors." DX. B-108, vol. 1, at p. 21. Just as race does not in and of itself cause families to become homeless, several of the other factors referred to as "causes" by the State defendant are either proxies for other factors or parts of the phenomenon of becoming homeless.

The first three correlates of shelter use referred to by the State defendant are doubling up, prior shelter use, and multiple residences. Def's Brief at 90-94. See DX. B-108, vol. 1, at pp. 8-13. The correlation between each of these factors and homelessness exists not because they cause homelessness, but because they are part of the phenomenon of becoming homeless. Knickman and Weitzman recognize that doubling up "often represents an interim situation" that eventually leads to a need for emergency shelter. DX. B-108, vol. 1, at p. 40. Among doubled up families, they report that "[t]he highest risk of seeking shelter is faced by families which once had their own place to live, but lost this apartment for one reason or another." Id., vol. 1, at pp. 9-10. Later in the Report, they note that "[t]he pathways to homelessness generally include a period of trying less and less viable housing outside the shelter system before coming to the EAUs." Id., vol. 2, at p. 34. Similarly, in analyzing the correlation between previous shelter use and homelessness, the Report notes the importance of "housing instability (e.g., frequent moves and being doubled up) in the period following an incident of shelter use" in contributing to this correlation. Id., vol. 1, at p. 12. Thus, doubling up, multiple residences and prior shelter use correlate with homelessness because, together with emergency shelter use, they are part of a process in which a family loses a stable residence, doubles up, resorts to less and less viable double-ups, enters the shelter system, leaves for an unstable living arrangement and returns again to the shelters. None of these is a cause of any of

the others; they all represent points in a cycle of displacement and homelessness. The causes of this cycle are to be found elsewhere.[54]

The next correlate of homelessness from the Knickman Report that the State defendant deals with is pregnancy. Def's Brief at 95. See DX. B-108, vol. 1, at pp. 16-17. The State writes that "in attempting to explain this finding [the correlation between pregnancy and seeking shelter], Drs. Knickman and Weitzman referred to New York City housing policies that favor women who are pregnant or have infants." Id., at p. 55.[55] Knickman and Weitzman do refer to preferential policies for pregnant women, but they do not endorse the theory that these policies explain the correlation between pregnancy and homelessness. They state that "it is

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[54] Plaintiffs address Dr. Filer's analysis of doubling up in their Proposed Findings of Fact at ¶¶ 206-12. Plaintiffs, however, note here that the State defendant's suggestion that doubled up families in multi-generational households do not have serious housing problems, Def's Brief at 102, overlooks the fact that the Knickman Report found that 19% of all families entering the emergency shelter system reported that the home of the parents of the head of household was the place they had stayed longest during the past year. DX. B-108, vol. 2, at table 6.

Also, the State defendant's arithmetic is wrong when it claims that 42% of non-public assistance doubled up households fell into the categories Dr. Filer referred to as "elderly 'parent' living with child" and "child and grandchild living with parent." Def's Brief at 93. In fact, according to Dr. Filer's chart 28% of those households fall into those two categories. DX. AF-5 ([58,847 - 5,741] + [33,297 - 10,518] divided by (307,185 - 35,489) = 28%).

[55] Knickman and Weitzman note that these policies were in flux at the time they wrote their report. DX. B-108, vol. 1, at p. 16, n. 1. Dr. Filer testified that the preferential treatment of pregnant woman in obtaining referrals to permanent housing has been abolished. Filer Tr. 2194-95.

noteworthy that our analyses also indicate that pregnancy and recent births seem to be highly related to housing instability, not just to shelter requests. This would indicate that pregnancies are related to the actual housing situation and not just to the decision to seek emergency shelter." DX. B-108, vol. 1, at p. 17. Knickman and Weitzman offer an alternative hypothesis: that pregnancies place strains on the family unit which lead to homelessness. However, they also leave open the possibility "that pregnancy or new motherhood is not actually the precipitant of homelessness so much as it is a correlate of a range of characteristics associated with families on the verge of becoming homeless." Id. Thus, contrary to the State defendant's suggestion, Knickman and Weitzman do not endorse Dr. Filer's view that City policies regarding the provision of emergency shelter are a primary cause of family homelessness. See Filer Tr. 1944-45, 1954-57.

The next two correlates of homelessness from the Knickman Report addressed by the State defendant are "youth of head of household" and "disruptive experiences." Def's Brief at 95-96. See DX. B-108, vol. 1, at pp. 18, 20. Although Knickman and Weitzman found that homeless families are much more likely to have heads of households who are less than 30 and less than 25 years old than other families on public assistance, they stressed, as the State defendant acknowledges in its brief, that the youth of a head of household "does not directly affect shelter use." DX. B-108, vol. 1, at p. 20. It is closely related to other factors, which

are in turn related to homelessness. Id. Again, therefore, this is a correlate, not a cause.

The Knickman Report found that families were more likely to become homeless when the head of household had experienced one or more "disruptive experiences," such as physical or sexual abuse, living in a foster home or group home, running away, and living on the streets. DX. B-108, vol. 1, at p. 18. The Report, however, cautioned that attempting to use disruptive experiences as a predictor of homelessness results in a large number of "false alarms" because many families who are stably housed have heads of household who have experienced disruptive events. DX. B-108, vol. 2, at p. 82.[56]

The State defendant asserts, that administrative case closings are "a primary factor causing homelessness." Def's Brief at 96, 104-05. See DX. B-108, vol. 1, at p. 22. The Knickman Report, however, found that the relationship between administrative case closings and homelessness is largely indirect. "Rather than

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[56] The State defendant is misleading when it suggests that Professor Tobier would have testified that behavioral problems may cause homelessness had he not been precluded from doing so by the Court. Def's Brief at 108. The record shows that Professor Tobier's opinion was that behavioral issues have little to do with the phenomenon of family homelessness because homelessness is largely explained by the "inadequate purchasing power" of families who become homeless. Tobier Tr. 478-79.

The State defendant itself has elsewhere cast doubt on the significance of disruptive experiences. In its 1984 report to the Legislature on homelessness, the State defendant stated "[t]he majority of those in emergency shelter -- and most particularly, nearly all those in families -- exhibited none of the social or mental disabilities commonly associated with homelessness." PX. 128-64, at p. iii.

being directly tied to the need for shelter, administrative closings may merely be an indicator of other problems and needs in the household...." DX. B-108, vol. 1, at p. 22. For example, the frequent changes in address experienced by families with unstable housing situations may make those families more likely to have their cases administratively closed. See id., vol. 2, at p. 67. Two of plaintiffs' expert witnesses, Dr. Dehavenon and Professor Tobier, testified that administrative case closings are a factor in causing family homelessness. Dehavenon Tr. 592; Tobier Tr. 458-59. There is no inconsistency between plaintiffs' point that the shelter allowance contributes to causing homelessness among families and that administrative case closings are a factor as well.[57]

ii. Many Homeless Families Were Evicted for Nonpayment of Rent

The State defendant is completely unsuccessful in its attempt to show that eviction for non-payment of rent is not significantly related to family homelessness. Although it attempts to utilize the Knickman Report in its argument, an examination of the Report shows that eviction for nonpayment of rent plays an important role

[57] The State defendant's attempt to elevate "churning" into the principal cause of family homelessness is ironic in light of its responsibility for overseeing HRA, the alleged villain in this scenario. See Beaudoin v. Toia, 45 N.Y.2d 343 (1978)(local social service agencies are agents of the State Department of Social Services); Social Services Law §§ 17, 20, 34, 65. See also Tr. 3178 (State defendant's counsel's statement that "HRA is an agent of the State.") In effect, the State defendant is claiming that it should prevail in this case because it causes homelessness in one way rather than another.

in explaining family homelessness. The Knickman Report shows that a higher percentage of homeless families were evicted for non-payment of rent or lost an apartment for another rent-related reason than is claimed by the State defendant; that literally thousands of homeless families have been evicted for non-payment; and that homeless families are far more likely than housed families to have lost a primary residence through a non-payment eviction.

The State defendant understates the prevalence of non-payment evictions and losses of apartments for other rent-related reasons among the homeless families studied in the Knickman Report. As the State defendant points out, the Knickman Report found that 55% of homeless families had once had their own apartment for at least a year. Def's Brief at 97 (citing DX. B-108, vol. 1, at p. 14, vol. 2, table 15). The State defendant then says that "approximately one-third of the families who lost their own apartments were evicted." Id. In fact, the Knickman Report shows that 36% of these families were evicted, 24% for nonpayment of rent and 12% for other reasons. DX. B-108, vol. 2, table 15. The State then inaccurately concludes that this shows that "a total of 11-13 percent of the total EAU population" were evicted for non-payment. Def's Brief at 97. In fact, the data shows that 13.4% of the families in the EAUs were evicted for non-payment.[58] Another 9% of the families who lost their own apartments lost them because of

[58] DX. B-108, vol. 2, table 15 states that 24% of the 394 homeless families who lost a primary residence lost it through a non-payment eviction. Twenty-four percent of 394 is 95. Ninety-five is 13.4% of 704, the total number of homeless families interviewed.

other rent related or landlord related problems. DX. B-108, vol. 2, table 15. These families represent an additional 5% of the total EAU population at that time (9% of 394 is 35; 35 is 5% of 704). Thus, according to Knickman and Weitzman a total of 18.4% of the EAU population lost their own apartments through non-payment evictions or because of other rent and landlord related problems.[59]

In January 1991, the last month for which there is data in the record, there were 4,156 families in New York City's emergency shelter system. PX. 124-101. Applying Knickman and Weitzman's findings, one would expect that approximately 765 of these families lost their own apartments through non-payment evictions or other landlord and rent related reasons (765 is 18.4% of 4,156) and 557 lost their own apartments through non-payment evictions alone (549 is 13.2% of 4156). Over the last six months for which data regarding entries into the shelter system are in the record (July 1990-December 1990), an average of 960 homeless families entered the system each month. DX. AQ.[60] Thus, based on the Knickman

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[59] At some points in its brief, State defendant claims that fewer than 10% of homeless families were evicted for non-payment. See, e.g., Def's Brief at 9. The origin of this misinterpretation of the Knickman Report can be found in footnote 36 on page 99 of State defendant's brief. In that footnote, the State defendant claims that Knickman and Weitzman concluded that only 9% of the families in the EAUs had been evicted for rent related reasons, citing "DX. B-108, table 3 [sic]." Presumably, this refers to table 3 in volume 1 of the report. That table, however, is only a breakdown of why families left the place they stayed the night before they requested emergency shelter. It says nothing about why families who at anytime in the past had apartments of their own lost those apartments.

[60] The entries to the shelter system were as follows:

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Report, one would expect that during the last six months of 1990 an average of 177 new homeless families each month lost their own apartments due to non-payment evictions or other landlord and rent related problems (18.4% of 960 = 177) and that 129 new homeless families each month lost their own apartments through non-payment evictions alone (13.4% of 960 = 129). Based on the estimate above that over 21,000 families had been homeless for some period by July 1988, the Knickman Report supports the conclusion that by July 1988 over 3900 homeless families had lost their own apartments due to non-payment evictions or other landlord and rent problems (18.4% of 21,300 = 3919) and over 2800 of the families had lost their own apartments because of non-payment evictions alone (13.4% of 21,300 = 2854). Today, over three years later, these numbers would of course be much higher.

State defendant's argument that the numbers of homeless families who had lost a primary residence through eviction or for other rent and landlord related reasons "were not significantly different" than the number of housed public assistance recipients who had done so is a complete distortion of Knickman and Weitzman's data. See Def's Brief at 97. In fact, the data shows that homeless families are far more likely to have lost apartments and thus are far more likely to have been evicted for non-payment or to have lost an apartment for other rent related reasons. In making

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August	1990	1171
Sept.	1990	1005
Oct.	1990	960
Nov.	1990	806
Dec.	1990	758

its argument, the State defendant ignores how few of the housed public assistance families had lost their last primary residence for any reason. Only 34 of the 524 housed families surveyed had lost their last primary residence, while 394 of 704 homeless families had. DX. B-108, vol. 2, table 15; vol. 1, at p. 2 (524 housed families and 704 homeless families were interviewed). Thus, while 56% of homeless families had lost their last primary residence, only 7% of the housed public assistance recipients had. Compared to the 13.4% of homeless families who had lost their last primary residence through a non-payment eviction, less than 1% of housed public assistance recipients had done so. Id. (15% of the 34 housed families who had lost a primary residence lost it through a nonpayment eviction. 15% of 34 is 5; 5 is less than 1% of the 524 housed families interviewed). Based on this data, Knickman and Weitzman concluded that for families who once had their own apartment eviction is a "very important predictor of homelessness," DX. B-108, vol. 1, at p. 15, and that "[i]t is very possible that the most effective policies to prevent homelessness would focus on keeping people in apartments or houses where they were the primary tenant." Id., vol. 2, at p. 27.[61]

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[61] Even putting aside how few housed families had lost their last primary residence, the State defendant is incorrect. Homeless families who lost apartments were significantly more likely to have been evicted than other families who lost apartments. Of the homeless families who lost primary residences, 36% lost them through an eviction and 9% for other rent and landlord related reasons, for a total of 45%. Twenty-three percent of the housed families who lost primary residences lost them through evictions and 7% lost them because of other rent and landlord related reasons, for a total of 30%. DX. B-108, vol. 2, table 15. Thus, homeless families were half again more

The State is equally unsuccessful in its attempt to turn the testimony and research of Dr. Dehavenon to its advantage on this question.[62] Dr. Dehavenon's 1989-90 study found that 68% of the families in the EAUs had once had their own apartment.[63] Fifty-five percent of these families had lost their apartments through evictions and 60% of the evictions were for non-payment of rent. Dehavenon Tr. 551-52.[64] Dr. Dehavenon's data shows that 33% of homeless families who once had their own apartments (which is 18% of all homeless families) lost them due to a nonpayment eviction. DX. C, at p. 23. Thus, like the Knickman Report, Dr. Dehavenon's

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likely to lose apartments for these reasons as housed families.

[62] As in its treatment of the Knickman Report, the State defendant misstates and distorts Dr. Dehavenon's findings and makes elementary arithmetic errors in its analysis of her data. For example, the State is not only mistaken, but it also contradicts itself, when in discussing Dr. Dehavenon's work it writes in the space of half a page, "In 1989, just over one-half of the families who were evicted lost their apartments due to rent related reasons," and "According to Dr. Dehavenon's survey, one-third of the evictions...were due to non-payment of rent." Def's Brief at 98. In fact, Dr. Dehavenon testified and her 1990 report states that 60% of evicted homeless families in 1989 had been evicted for non-payment of rent. Dehavenon Tr. 552, DX. C, at p. 23.

[63] Dr. Dehavenon's data shows a somewhat higher percentage of families who once had their own apartments than does Knickman and Weitzman's data. This is at least in part because she counted all families who ever had their own apartment while Knickman and Weitzman counted only those families who had had their own apartment for at least a year. Compare DX. C, at p. 23 with DX. B-108, vol. 1, p. 9. This may also account for why Dr. Dehavenon found that a greater percentage of the homeless population had been evicted for non-payment of rent.

[64] Dr.Dehavenon was not able to establish why all of the families lost their apartments. Fifty-five percent is the percentage of those families for whom she was able to establish causes. See DX. C, at p. 23.

work shows that eviction for nonpayment of rent is a significant contributing factor to homelessness among families in New York City.

The State defendant appears to argue that because "families turn to other alternatives, notably sharing living arrangements with other relatives, prior to becoming homeless and turning to the shelter system," loss of apartments through evictions is not a cause of homelessness. Def's Brief at 101. It is true that there is often a lag time between loss of an apartment and resort to the shelter system while families struggle to avoid the shelters. See DX. C, at p. 23 (the median time between loss of their own apartments and families' interviews at the EAUs was 6 to 12 months); DX. B-108, vol. 2, at p. 34 ("The pathways to homelessness generally include a period of trying less and less viable housing options outside the shelter system before coming to the EAUs"). It is, however, a fallacy to suggest that because families spend time exhausting all possible alternatives before resorting to the shelters, the loss of their own apartments is not in an important sense the cause of their eventually turning to the shelter system. A cause need not happen immediately before the event it causes. By the State defendant's reasoning, if a shooting victim lingers before dying, then the bullet is not the cause of his death.

In arguing that eviction is not a significantly related to homelessness, the State defendant conveniently ignores its own longheld position to the contrary. In its income maintenance

planning package for 1988-89, dated June 10, 1987, it stated "[c]urrently, eviction is one of the primary causes of homelessness." PX. 39-68, at p. 58. Again in its 1990 report entitled "The Homelessness Prevention Program: Outcomes and Effectiveness," the Department admitted that there is "a strong, casual link between landlord eviction and homelessness." PX. 160, at p. 14.[65] On this question, as on the question of the extent of family homelessness, the State defendant has apparently taken a litigation position that it does not itself believe.

iii. The Inadequate Level of the Shelter Allowance Is a Cause of Evictions, and thus of Homelessness

The State defendant is equally unsuccessful when it attempts to rebut plaintiffs' showing that there is a significant link between the shelter allowance and the homelessness resulting from non-payment evictions. Plaintiffs have already demonstrated that Randall Filer's theories about homelessness are a mixture of unsupported assertions, ignorance and distortions of data. See Plfs' Prop. Findings, at ¶¶ 213-49. The State defendant's attempts to use the Knickman Report and Dr. Dehavenon's work to support its argument fail, as does its attempt to create a conflict between Dr. Dehavenon's testimony and her published work.

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[65] In this report, the State defendant estimated that 27% of all requests for emergency shelter could be traced to evictions. PX. 160, at p. 29, endnote 5. The State defendant also estimated that between 34% and 60% of public assistance families who are evicted eventually end up in the City's emergency shelter system. Id., at pp. 20-21.

The State defendant claims without citation that the Knickman Report concluded that the levels of public assistance benefits are not connected "in any notable way" to the causes of homelessness even though no such conclusion is found anywhere in that report. Def's Brief at 104. In fact, Professor Knickman testified that the study did not examine the level of the shelter allowance because the shelter maxima are the same for all families on public assistance, and the purpose of the study was to identify how homeless families differed from other families on public assistance. Knickman Tr. 2745-46. It is therefore not possible to tell from the Knickman Report why the 13.4% of homeless families identified in that report as having lost their apartments through non-payment evictions were unable to pay their rent.[66]

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[66] The State defendant cites data from the Knickman Report showing that 34% of families in the EAUs compared with 46% of housed public assistance families had rents over $300 in the last apartment in which they were the primary tenant. Def's Brief at 99 (citing DX. B-108, vol. 2, table 16). From this, the State defendant argues that having a rent in excess of the shelter allowance must not be related to homelessness because "those families who remained housed had higher rents than families seeking shelter." Id. This argument overlooks several key points.

First, the State defendant is comparing rents at two different points in time. For most housed families the "last place they were the primary tenant" was their current apartment and the data therefore reflects the rent for that apartment at the time the data was collected. See DX. B-108, vol. 2, table 4 (88% of housed families stayed in their own apartment the night before the interview). On the other hand, for most homeless families, a period of time had passed since they were last a primary tenant. See DX. C, at p. 23 ("The median time between the loss of their own apartment and the interview in the EAU was 6 months to 12 months (range 1 day to 10 years)"); B-108, vol. 2, table 4 (only 18% of homeless families spent the night before requesting emergency shelter in their own apartments); Filer Tr. 2224-25. For homeless families, the data often reflects a rent

There is, however, extensive evidence from other sources linking the level of the shelter allowance to non-payment evictions. For example, Dr. Dehavenon's research shows that 75% of non-payment evictions among homeless families were related to at least one of three public assistance problems: "PA case closed, PA wouldn't pay, and PA didn't send the rent check to the landlord." DX. C, at p. 23. Dr. Dehavenon testified that in this context "PA wouldn't pay" means that the family's shelter allowance was not high enough to pay its rent. Dehavenon Tr. 575-76. Dr. Dehavenon's report does not break down how many evicted families had each of these welfare-related problems at the time of their evictions except to report that 30% of the families evicted for non-payment of rent had their cases closed at the time of their evictions. DX. C, at p. 24. The State defendant seizes on this

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that they were charged six months to a year or longer before the data was collected. Therefore, it is no surprise that the earlier rents (those of the EAU sample) were lower than the later rents (those of the housed sample).

Second, the State defendant's argument overlooks the fact that in the period immediately prior to the collection of data for the Knickman Report, $300 was over the shelter allowance for all family sizes under six. Homeless families who had rents under $300.00/month in their last primary residence may have nevertheless had rents above their shelter allowances.

Finally, the Knickman Report did not separate out data on rents of families evicted for nonpayment of rent from the data on homeless families generally. Thus, families who lost apartments due to eviction for nonpayment or for other rent related reasons may well have had significantly higher rents than other families.

The fact is that the Knickman Report does not contain sufficient data on rents to enable the State defendant to draw the conclusion that it asks this Court to adopt.

to argue that the shelter allowance played no part in causing the evictions of the 30% of families whose cases were closed when they were evicted for non-payment. Def's Brief at 98. However, Dr. Dehavenon's report does not support that conclusion because some families whose cases were closed at the time of their evictions may well have fallen into arrears because their shelter allowances had been insufficient to pay their rents.[67] Based on this data and her interviews with hundreds of homeless public assistance recipients, Dr. Dehavenon testified that "the current level of the shelter allowance is a substantial reason for families having to enter the emergency shelter system." Dehavenon Tr. 557.

State defendant asserts that Dr. Dehavenon's testimony that the shelter allowance is a significant cause of homelessness is "so inconsistent with her report, Defendant's Ex. C, as to be incredible...." Def's Brief at 102. To the contrary, Dr. Dehavenon's testimony is based on the research compiled in her 1989-90 report and in earlier reports and is completely consistent with them. One supposed inconsistency is that the 1989-90 report identified administrative case closings as a cause of homelessness. See DX. C at p. viii. The inconsistency is imagined. In her testimony, Dr. Dehavenon also mentioned administrative closings as one cause, but not the only cause, of homelessness. Dehavenon Tr.

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[67] In fact, absent inability to pay rent in the future, families whose public assistance cases were closed would, upon reapplication for public assistance, be eligible for rent arrears grants from H.R.A. equal to the full amount of any arrears which accrued while their cases were closed. DX. BI at p. 5.

592.[68] The State defendant also claims that the recommendations in Dr. Dehavenon's report "fail to mention the level of the shelter allowance...." Def's Brief at 103. This is untrue. On page 77 of the report, under the heading "Recommendations at the New York State Level," the second recommendation is: "permit the payment of PA rental allowances in the amounts needed to obtain and retain decent shelter." DX. C, at p. 77.[69] See also id. at p. 2 ("At the same time in the face of galloping rent increases, the A.F.D.C. maximum shelter grant -- the family's allotment for rent -- rose only slightly to an unrealistic $286 a month for the median A.F.D.C. family of three"); id. at pp. 2-3 ("Since 1979, this project documented how low A.F.D.C. benefits periodically throw

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[68] The State defendant inaccurately claims that in her report Dr. Dehavenon attributes one-third of all apartment losses to administrative closings. Def's Brief at 103. What Dr. Dehavenon actually wrote was that one third of the families who lost apartments had their cases administratively closed at the time they lost their apartments. She did not draw the conclusion that the administrative closing was the only cause of the lost apartment in each of those cases. DX. C, at p. viii.

[69] The State defendant was undoubtedly aware of this recommendation. On cross examination, its counsel drew Dr. Dehavenon's attention to it and inquired about it:

> Q At the end of your report, Dr. Dehavenon, you reach a conclusion about the inadequacy of the shelter allowance. If you didn't collect data on rent levels, how did you reach that conclusion?
>
> A Well, because families were reporting to us that one of the reasons that they lost apartments was because Welfare was not giving them enough money for rent. The shelter allowance that they were getting was not enough to pay the rent, that is where we got the information. We got it without specifically asking them what the rent was that they had been paying.

Dehavenon Tr. 574-75.

families into 'food emergencies' when they run out of money for food. More recently, it has documented how low grant levels lead to evictions and homelessness").

The State defendant barely addresses, much less rebuts, other evidence submitted by plaintiffs to show that the shelter allowance is a cause of non-payment evictions. In response to 129 fair hearing decisions (PX. 119-300-424; 120-426-429) that show families on the verge of eviction who were denied emergency assistance by the State defendant because their rents are in excess of their shelter allowances, the State defendant merely points out that these 129 families "represent only a minute fraction of the ADC population." Def's Brief at 77. While it is undoubtedly true that 129 is a small fraction of the over 200,000 families currently receiving A.F.D.C., it is unclear how many families would have been enough for the State defendant. Five hundred or even 2,000 would also be a small fraction of 200,000. These fair hearing decisions themselves no doubt reflect only a small fraction of the families who have faced eviction due to the level of the shelter allowance during the pendency of this lawsuit. With the exception of two decisions regarding plaintiffs in this action, the decisions cover only the period from April 18, 1990 to February 4, 1991. They reflect only those families who pursued their claims to fair hearings in spite of the State defendant's clear policy prohibiting payment of arrears over the shelter allowance. They do not reflect families who did not even apply for emergency assistance because they knew that State defendant's policies would make the

application futile. The State defendant has offered no reason why these fair hearing decisions should be viewed as unrepresentative. They show conclusively that the level of State defendant's shelter allowance causes families to fall into rent arrears, that they are then sued for non-payment of rent, and that when they come to the State defendant on the verge of eviction they are denied assistance.[70]

The State defendant has also failed to rebut plaintiffs' showing that the three public assistance recipients who testified, as well as the eleven whose case files were introduced by State defendant and the 135 families listed on PX. 92, were threatened with eviction because their shelter allowances did not cover their rents. See infra, at pp. 88-103; Plfs' Prop. Findings, at ¶¶ 280-381.

In other contexts, the State defendant has admitted that there is a link between the shelter allowance and the growth of homelessness. The Governor's Executive Budget for 1987-88 states that "[i]nadequate shelter ceilings also contribute to the rapidly growing homeless population...." PX. 37-66 at p. 361. Similarly,

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[70] The State defendant points to data showing that 31% of homeless families had at some time fallen two or more months behind on their rent, in comparison with 24% of housed public assistance recipients. Def's Brief at 99. The fair hearing decisions illustrate why this is irrelevant. Whether a family falls behind on its rent is not the key question. Under State policy, recipients without "excess" rent can obtain a rent arrears grant if they fall behind on their rent while those with "excess" rent cannot.

For a more detailed treatment of PX. 119-300-424; 120-426-429, see Plfs' Prop. Findings, at ¶¶ 182-192.

the State defendant admitted in the New York State Register (September 16, 1987) that: "It is also a fact that insufficient shelter allowances help increase the homeless population and contribute to the reduction of suitable housing for public assistance recipients." PX. 38-67 at p. 20. In 1989, the Division of Income Maintenance admitted in its 1990-91 planning package that, "As of June 1989, 54% of the public assistance caseload statewide paid over the shelter maximum. Many of these cases face eviction and temporary housing with all its attendant costs." PX. 35-62, at p. 4.[71] Again, the State defendant would have this Court accept a litigation position that it has never truly believed.

V. Public Assistance Recipients Do Not Receive Any Extra Funds That Can Be Used for Shelter Expenses

The State defendant seeks to shift the focus of this case away from the inadequacy of the shelter allowance to a debate on whether A.F.D.C. families are able to pay their rents using funds that they receive for other purposes. As described below, infra, at pp. 104-07, the Social Services Law does not permit the State defendant to provide inadequate shelter allowances and force families into this

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[71] Similarly, HRA has concluded that the shelter allowance contributes to causing evictions of families on public assistance: "Monthly rents often exceed IM's shelter allowance. Since we can't pay excess rents for recipients, this is one of the most serious hurdles faced by clients trying to keep their homes." DX. BI, at p. 9.

dilemma. However, apart from the legal problem with the State defendant's argument, it fails as a factual matter as well.

a. The State Defendant has Failed to Rebut Plaintiffs' Evidence that there is No Surplus of Funds in Other Portions of the Public Assistance Grant that may be Applied to Rent without Sacrificing Basic Needs

Lacking any real refutation of plaintiffs' experts, Elizabeth Krueger and Anna Lou Dehavenon, the State defendant asks the Court to disregard their testimony regarding the connection between the shelter allowance and food emergencies as speculative. See, e.g., Def's Prop. Findings, at ¶¶ 363-366. However, the testimony of both experts is supported by direct experience concerning the subject matter of their testimony. Moreover, no witnesses contradicted either Dr. Dehavenon's or Ms. Krueger's testimony on this issue.

Dr. Anna Lou Dehavenon, an expert on the shelter and hunger problems of poor people in New York City, Dehavenon Tr. 268; PX. 86-603, has spent years studying family food emergencies in New York City. Every year since 1979, Dr. Dehavenon has worked with a coalition of voluntary agencies to produce an annual study of food emergencies. Tr. 255, 547. Beginning in 1981, Dr. Dehavenon's studies of food emergencies have been based on interviews with at least 500 families annually. Tr. 549. Relying on this extensive research, Dr. Dehavenon testified that 25% of families on public assistance who experienced food emergencies cited the use of food money to pay the rent as one of the primary reasons that they ran out of food. Her conclusion that "many families give up purchase of food and other necessary items in order to be able to pay excess

rent and keep a roof over their heads" is based on years of research, not speculation. Dehavenon Tr. 558.[72]

Elizabeth Krueger was qualified as an expert on public assistance, food stamps and the operation of emergency food providers in New York City. Krueger Tr. 668; PX. 91-604. Ms. Krueger has extensive experience working with providers of emergency food supplies and monitoring the provision of food stamps and other public benefits to needy New Yorkers. Tr. 600-01. Far from being speculative, Ms. Krueger's testimony was based on her direct knowledge of the emergency food network in New York and on many published reports and studies which she referred to in her testimony.

Unable to rebut the core of Ms. Krueger's testimony, the State defendant attacks her use of an example, PX. 90-263, which showed clearly that A.F.D.C. families have no extra money in their basic grants with which they can pay rent. Def's Brief at 86-87. Ms. Krueger's example, however, is accurate.

Dr. Welsh claimed at trial that Ms. Krueger's use of the official U.S.D.A. food stamp allotment amount of $277 in her example was erroneous, because it did not incorporate certain

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[72] This directly belies the State defendant's assertion that plaintiffs provide no data on "why families on ADC have food emergencies". Def's Prop. Findings, at ¶ 363. The State defendant also claims that plaintiffs have failed to show "how many of the people who use the food and hunger hotline were on public assistance." Id. In fact, Ms. Krueger did provide data on the use of emergency food resources by public assistance recipients. She testified that the State Department of Health has concluded that between 50 and 65 percent of people seeking emergency food assistance are recipients of public assistance. Krueger Tr. 705.

adjustments to the U.S.D.A. figure that he made in his report, PX. 89-30. Compare Welsh Tr. 1649-50 with Krueger Tr. 698-99.[73] The figure that Dr. Welsh used in his report, which he termed the "New York State Thrifty Food Plan Cost," was $242 for a family of three. PX. 89-30, at p. 13; Welsh Tr. 1649. That figure, however, was for food costs in 1988. PX. 89-30, at p. 9 (Table labelled "Adjusted and Official USDA Food Plans, 1988"). Thus, the $242 figure that the State defendant uses as the basis for its recalculation of PX. 63-290, Def's Brief at 86-87; Def's Prop. Findings, at ¶¶ 368-72, could not possibly be correct -- it is three years out of date. Dr. Welsh testified that he did not know what the comparable figure would be today. See Welsh Tr. 1650.[74] Moreover, as Ms. Krueger explained, although she used the official U.S.D.A. amount, rather than an adjusted measure, the adjustments made by Dr. Welsh had the net effect of increasing the total. Thus, Ms. Krueger's omission of the adjustments makes her measure more conservative than that used by Dr. Welsh. See Plfs' Prop. Findings, at ¶ 271; Krueger Tr.

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[73] There is no real dispute that $277 is the official U.S.D.A. amount upon which food stamp allotments are based. Ms. Krueger attached a food stamp budget worksheet which started with a thrifty food plan amount of $277 and derived a food stamp allotment of $210 for a family of three -- the same figure used in the State defendant's exhibit AT-2. See PX. 90-263, at p. 3, line items no. 31 and 34.

[74] The State defendant's recalculation of Ms. Krueger's chart, Def's Brief at 87, is not correct even as a budgeting example for the year 1988 because the basic grant for a family of three was $200 at that time, rather than $238. Soc. Serv. L. § 131-a. Additionally, a family of three would not have received the 1991 amount of $210 in food stamps.

698-99.[75] In any event, Dr. Welsh clearly agrees with Ms. Krueger on the underlying issue that no portion of the basic grant is readily available for rent expenses. See PX. 89-30, at p. 16 (recommending 79% increase in basic grant).[76]

b. The State Defendant's Attempts to Find Surplus Money in the Basic Grant are Without Merit

In an attempt to find extra money in the basic grant that it can deem available to pay rent, the State defendant advances a series of totally unsupported assertions. It argues that (1) the basic grant contains excess funds because A.F.D.C. families receive food stamps in addition to the portion of the grant allocated for food expenses and (2) that the generosity of the basic public assistance grant is shown by an H.R.A. policy which deems 30% of

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[75] Similarly, State defendant attempts to cast doubt on Ms. Krueger's use of the .93 multiplier, which was used in her example in order to calculate the amount of funds required by poor and near-poor families to be spent on non-food necessities as compared to food necessities. Def's Prop. Findings, at ¶¶ 374-75. In fact, Ms. Krueger was using Dr. Welsh's methodology. As the OPPAD Report states, the figure .93 was used as the multiplier for all family sizes even though average ratios by family sizes varied slightly. PX. 89-30, at p. 12. Criticisms of the use of the Consumer Expenditure Survey in deriving the amount of nonfood costs are addressed in Plfs' Prop. Findings, at ¶¶ 273-74.

[76] The State defendant also seeks to discredit Ms. Krueger's testimony because she authored a 1986 report that relied on HRA data to conclude that landlords raised rents after the 1984 shelter allowance increase. Def's Brief at 8; Krueger Tr. 744-46. Aside from the irrelevance of this point to Ms. Krueger's testimony, her 1986 report recommended increasing the shelter allowance and indexation. Krueger Tr. 747. Moreover, Ms. Krueger explained that she has read subsequent studies of the issue which refuted the original HRA statistics. These studies have led her to change her views on the subject. Id., at 748.

the basic grant as available to pay excess rent costs in very limited circumstances.

Both of these arguments grasp at straws. Each claim is fundamentally belied by the fact that, despite a parade of witnesses, no State official or expert witness testified that A.F.D.C. recipients have any public assistance income to pay their shelter costs other than their shelter allowance. Nor were any State documents submitted into evidence that support this view. Instead, it is clear from all the evidence that these arguments are fabrications of State defendant's counsel, and that there is no policy of viewing recipients as able to pay excess shelter costs out of funds designated for other purposes.[77]

In fact, all of the State witnesses who appeared testified that they view the basic grant and the shelter allowance as two discrete and independent elements of the standard of need. For example, Mr. Hickey stated that "[t]he basic needs allowance is a combination of money that is available for food, clothing, personal incidentals, household supplies, reading material, [and] recreation." Hickey Tr. 2519.[78] Similarly, none of the State

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[77] Although Mr. Hickey testified to the derivation of the basic grant in 1969, he did not testify to any determination that the basic grant is currently so generous that it contains surplus money. Hickey Tr. 2520.

[78] Dr. Welsh has stated that he did not consider rent issues in his reevaluation of the components of the basic grant because his study addressed "basic needs in the only way in which it is defined by the State of New York, as a component of the standard of needs separate and distinct from shelter needs . . . ." PX. 138-154, at pp. 245-46; id., at pp. 237-38; PX. 89-30, at p. 1.

reports on the shelter allowance claim that other portions of the basic grant are available to pay rent. See, e.g., PX. 13; 20-27; 21-29. See also Plfs' Prop. Findings, at ¶¶ 264-65 & n.32.

i. The State Defendant's Argument that Part of the Basic Grant can be Spent on Rent Because of Food Stamps is Absurd

The State defendant claims that 53% of the basic grant is designated for the purchase of food because that was the percentage of the grant calculated for food expenditures in 1969. Def's Brief at 47, n. 14, 84, 140; Def's Prop. Findings, at ¶¶ 354-358. See PX. 89-30, at p. 2 & endnote 1; Hickey Tr. 2611-12.[79] The State defendant makes a tortured argument that because the establishment of the basic grant preceded the creation of the food stamp program in the early 1970s, a portion of this money is now surplus. See Def's Prop. Findings, at ¶¶ 356-58; Def's Brief at p. 140.[80] The

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[79] The figure was derived from an affidavit, known as the "Chesbro Affidavit," prepared for litigation in Rosado v. Wyman, 397 U.S. 397 (1970), by George Chesbro, former First Deputy Commissioner of the State Department of Social Services. PX. 89-30, at p. 2, endnote 1; Hickey Tr. 2611-12.

[80] In fact, the Food Stamp Act expects recipients to spend 30% of their gross income, less certain deductions, on food. Hickey Tr. 2539-40. As the OPPAD Report states "[a]lthough the food stamp calculation is complicated, one of its most important features is that 30 percent of a family's net income is considered available to meet food needs." PX. 89-30, at p. 14. Thus, a family of three on A.F.D.C. in 1991 receives only $210 in food stamps, even though the program assumes a food need of $277, PX. 90-263, leaving a deficit of $67 which must be paid out of the basic grant. As Ms. Krueger explained, in reality, this deficit is larger because the $277 figure is based on the Thrifty Food Plan which cannot be purchased in New York City for the official national amount. Krueger Tr. 735.

fallacy of this argument is that it relies on calculations of the cost of living made over twenty years ago that are not embodied in current law or regulations in any way. The current reality is that there is no surplus of funds in the basic grant that can be applied to other needs without sacrificing basic necessities. No witness testified to the contrary.

The State defendant's argument rests on the premise that particular percentages of the basic grant are designated for specific needs. However, it is not true that the basic grant is comprised of several components, each of which is assigned a percentage of the whole. Although the basic grant includes funds for food, home furnishings and operations, transportation, clothing, personal care, utilities and other needs, Social Services Law § 131-a; PX. 89-30, it is provided as a statewide unitary sum for all of these expenses. In fact, as Dr. Welsh acknowledges, the supposed breakdown that the State defendant relies upon "is not specified in law or regulation." PX. 89-30, at p. 2; Hickey Tr. 2604-05. Therefore, no such division of the basic grant is embodied in legislative or agency policy and arguments based on the supposed generosity of particular components are baseless.

Looked at as a whole, it is undisputed that the total value of the basic grant has plummeted since it was initially established in 1970. Plfs' Prop. Findings, at ¶¶ 254-56; Krueger Tr. 670-71. Thus, the State defendant's own Office of Program Policy Analysis and Development (OPPAD) concluded in 1988 that the items of need provided for in the basic grant cost 79 % more than the grant, even

taking into account food stamps. PX. 89-30, at p. 16. Since that time, the basic grant has only been increased 19%.[81] Indeed, the State defendant's reliance on the twenty year old Chesbro affidavit only highlights the fact that apart from the 1988 OPPAD Report, which found the basic grant to be seriously inadequate, it has not conducted any systematic reevaluation of the basic grant in over twenty years. See DX. O-130, at p. 1; Q-132, at p. 4; Plfs' Prop. Finding, at ¶ 262.

Because of this erosion, the percentages derived in PX. 89-30, at p. 2, from the Chesbro affidavit, have little meaning in light of contemporary costs. Any claimed generosity of the supposed "food portion" of the grant is desperately needed for other items intended to be provided for by the basic grant. For example, Dr. Welsh has calculated that based on the Chesbro affidavit, 3 percent of the basic grant was allocated to transportation expenses in 1969. PX. 89-30, at p. 2. Applied to the current basic grant of $238 for a family of three, the same percentage yields a total amount of $7.14 per month for the entire family for transportation -- in other words, one roundtrip journey on a subway or bus for each member of the household each month. ($238 x .03 = $7.14).[82]

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[81] The increase was 19 % of the "pre-add" allowance, or 15 % of the total nonshelter cash grant. Colfer Tr. 1281.

[82] Comparison of the 1969 amounts with current amounts reveals the dramatic erosion of the amounts for other needs encompassed in the basic grant. For example, under the Chesbro affidavit, 6 percent of the basic grant is earmarked for personal care items. If applied to the current grant this would total $14.28 ($238 x .06 = 14.28), an increase of only $3.54 over the 1969 amount of $10.74 for this need ($169 x .06 = 10.74). Under the formula derived from the Chesbro affidavit, currently only

Plainly, any "extra" food money under the 1969 breakdown must now necessarily be spent on transportation and other items which the basic grant is intended to pay for. See Krueger Tr. 678-80.

In light of the dramatic erosion of the value of the basic grant, and the absence of any legislative history showing that the 1969 breakdown was relied on in enacting subsequent grant increases, no conclusion can be drawn that the Legislature has any current expectation that 53% of the basic grant will be spent on food, as opposed to other items of need included in the grant. In fact, no evidence was presented that the 1969 breakdown was adhered to or considered in any way by the Legislature when it increased the basic grant in 1974 and 1990. See Krueger Tr. 733-34.[83]

$23.80 a month would be provided for household furnishings and operations ($238 x .10 = $23.8), an increase of only $5.90 over the 1969 amount of $17.90 ($179 x .10 = 17.90). See PX. 89-30, at p. 2 (listing components of original basic grant).

[83] In fact, there is no evidence that the Legislature was unaware of the food stamp program when the basic grant was originally established. The program was established by the Food Stamp Act of 1964, P.L. 88-525, and was slowly phased in and expanded for a number of years. See H.Rep. No. 91-1402, reprinted in 1970 U.S. Code Cong. & Admin. News 6025, 6027-28 (Aug. 10, 1970). Mr. Hickey testified that the Food Stamp program existed nationally and was in place as a demonstration project in New York State at the time the basic grant was established. Hickey Tr. 2523. In 1970, Congress expanded the program by authorizing appropriations of $1.75 billion in fiscal year 1971, and open ended appropriations thereafter. P.L. 91-671, Conf. Report, 91-1793, reprinted in 1970 U.S. Code Cong & Admin News 6051, 6053 (Dec. 22, 1970). Social Services Law § 131-a, which established the basic grant, was also originally enacted in 1970. 1970 Laws ch. 517.

In any event, the Food Stamp program had been fully established by 1974 when the Legislature raised the basic grant. It is clear that at that time, no funds in the basic grant were intended to be used for shelter purposes, since the State defendant's own regulations required that localities establish

The State defendant's argument that the grant was not reduced after implementation of the food stamp program, Def's Brief at p. 84, is factually incorrect. The basic grant was reduced by 10 percent from 1971 through 1974. 1971 Laws ch. 133 (lowering grant for a family of three from $179 to $161). When benefit levels were raised in 1974, they were only adjusted to reflect 1972 prices. See DX. P-131, at p. 2 (describing reduction of benefits); PX. 21-29, at p. 2. They remained set at 1972 price levels until 1990, when they were only modestly increased. If recipients received any additional benefit due to the creation of the food stamp program twenty years ago, that gain was long ago offset by a reduction in benefits which was never fully restored and by the rise in the cost of living over the past 20 years.

Lastly, the State defendant's argument hinges entirely upon the assumption that the "Thrifty Food Plan" reflects the true nutritional needs of families, because otherwise there is no basis for concluding that necessary food costs do not require the expenditure of the full 53% of the basic grant on food. Ms. Krueger offered uncontradicted testimony that the "Thrifty Food Plan" is not a fair measure of necessary expenditures on food in New York City. Plfs' Prop. Findings, at ¶ 272; Krueger Tr. 685-89, 735. See PX. 89-30, at p. 14 (OPPAD Report recommending basic need standard based on the "Low Cost Food Plan", rather than the "Thrifty Food Plan").

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shelter allowances adequate to enable all persons to obtain decent housing. 18 N.Y.C.R.R. § 352.3(a)(repealed 1975).

No evidence was presented that the Legislature has adopted the "Thrifty Food Plan" in any way. To the contrary, when the basic grant was originally established in 1970, it was based on the U.S.D.A. "Low Cost Food Plan", rather than the "Thrifty Food Plan". Krueger Tr. 690-91. In fact, the 1988 OPPAD Report views the "Low Cost Food Plan" as the "historical standard" in New York. PX. 89-30, at p. 14. If the calculations behind the original basic grant continue to have any validity, as the State defendant claims, then food needs must be determined with reference to the "Low Cost Food Plan," rather than the "Thrifty Food Plan." When the "Low Cost Food Plan" is considered, no "extra" money can be found in "the food component" of the basic grant. OPPAD itself has concluded that "[a]t the time the basic needs component was last updated, in 1974, the food portion of the basic needs component combined with food stamps was about equal to the U.S.D.A.'s "Low Cost Food Plan." Id., at p. 14.[84] Clearly, if there was no "surplus" money for food in 1974 after the full implementation of the Food Stamp program, there is certainly none today, 16 years later.[85]

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[84] The State defendant's attempt to cast Ms. Krueger as a radical because of her testimony that the "Thrifty Food Plan" is inadequate, Def's Brief at 141-42, is undercut by the fact that it also used the "Low Cost Food Plan" in its original derivation of the basic grant and by OPPAD's own decision that the "Thrifty Food Plan" should not be relied upon. The State defendant relies on a Congressional Report cited in the OPPAD Report, PX. 89-30, at p. 6, but it omits the fact that the Report only concluded that the "Thrifty Food Plan", "theoretically provides the basis of a nutritionally adequate diet." Id. (emphasis added). It found that many poor families do not in fact consume nutritionally adequate diets. Id.

[85] In a similar argument, the State defendant suggests that the home energy allowance ("HEA") and supplemental home energy

ii. State Defendant May Not Rely on a City Policy Regarding the Payment of Applicant Rental Arrears to Assert that 30% of the Basic Grant is Available to Pay Shelter Expenses

The State defendant also makes a misguided argument based on a rent arrears policy of the Human Resources Administration. See, e.g. Def's Brief at 44-45; 142. It states that "H.R.A. presumes" that an applicant for public assistance and rent arrears can use up to 30% of his or her basic grant for the payment of housing costs in excess of the shelter maximum. Def's Prop. Findings, at ¶ 165. Indeed, it goes so far as to calculate a chart, consisting of the shelter maximum plus 30% of the basic grant for each household size, which it asks the Court to substitute for the real shelter allowance schedule. Def's Prop. Findings, at ¶ 166. However, it is clear from an examination of DX. BG and BJ that H.R.A. has made no such presumption and has implemented this policy to ease documentation requirements for public assistance applicants. In any event, H.R.A.'s policy is irrelevant to this litigation because there is no evidence that it is based on any rational calculation

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allowance ("SHEA") can be spent on rent "when a family is not directly responsible for payment of energy costs." Def's Brief at 54, 84, 140. The State defendant, however, presented no evidence that a significant number of housed families do not have utility expenses such as gas and electric bills.

The HEA and the SHEA were established by the Legislature as energy grants, and are treated as exempt income for food stamp purposes on that basis. 7 U.S.C. § 2014(d)(11). Any suggestion that they are in reality rent grants conflicts with this Legislative designation and with the State defendant's own regulations. 18 N.Y.C.R.R. § 352.5(e)(2) (HEA and SHEA are considered misapplied when not spent on domestic energy costs, such as lights, cooking and hot water).

or that the State defendant has approved or relied on the policy in any way.

State defendant's exhibits BG and BJ concern payment of rent arrears to applicants for public assistance. Under State policy, arrears in excess of the shelter allowance may be paid for periods prior to receipt of public assistance if the applicant can show future ability to pay the rent. State defendant's exhibits BG and BJ show only that H.R.A. requires documentation of future ability to pay rent when the "excess" rent is greater than 30 percent of the "pre-add" allowance. They do not state that H.R.A. views payment of excess rent out of the basic grant to be appropriate. Instead, the exhibits reflect a policy that is clearly intended to help applicants by making rent arrears grants available when they otherwise might not be. Prior to its inception, the City's policy was to refuse to pay rental arrears in excess of the shelter maxima to applicants for public assistance. DX. BJ.

No evidence was presented to indicate that this H.R.A. policy represents a determination concerning the adequacy of the basic grant, rather than a policy of convenience to facilitate the payment of arrears without requiring burdensome or unobtainable documentation.[86] Second, no evidence was presented as to the basis for the 30 percent figure. Thus, even if it did establish the "presumption" that the State defendant claims, it would be entitled

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[86] Indeed, the fact that the State defendant could only label its chart "NYC Rents Not Requiring Documentation," Def's Prop. Findings, at ¶ 166, shows that it is pushing this argument beyond its breaking point.

to no weight.[87] Third, there is no evidence that the State defendant applies this policy. The two documents relied on by the State defendant are both City policy statements, DX. BG; DX. BJ, and no witness testified to the adoption of these policies by the State. In sum, the State defendant cannot elevate this City procedure to the status of a formal State determination that the basic grant provides excess funds to supplement an inadequate shelter allowance.

c. There is No Evidence That Public Assistance Recipients Receive Sufficient Funds Apart from their Grants to Make up for the Inadequacy of the Shelter Allowance

State defendant also claims that A.F.D.C. recipients have a great deal of money available to them apart from their public assistance grants. See Def's Brief at 57-59, 141. Although the State defendant cites a series of regulations that permit limited receipt of income, such as a portion of child support payments, and a portion of some earned income, it has made no showing that "many" households actually receive any income from these sources. In fact, it offers no evidence as to how many recipients actually receive any of these forms of income.

In any event, this income is irrelevant to this case. The Social Services Law requires that shelter allowances must be adequate to meet housing costs. Jiggetts v. Grinker, 75 N.Y.2d 411

[87] State defendant claims that HRA has had this policy "since at least 1979". Def's Prop. Findings at ¶ 163. If this is the case, the percentage is clearly arbitrary since it has not been adjusted to reflect increases in costs and changes in grant levels.

(1990). The State defendant cannot provide inadequate allowances on the assumption that other income is available.

Moreover, the Legislature has enacted complex rules for the budgeting of outside sources of income. In general, these sources are offset against the public assistance grant to reduce the allowances paid to recipients. Social Services Law § 131-a(1) provides that "[p]rovision for such persons, for all items of need, less any available income or resources which are not required to be disregarded, shall be made." (emphasis added). Where exceptions exist, they are created to further particular conduct, such as the payment of child support or work. Id., at § 131-a(8). The State defendant, however, cannot penalize recipients who do not have these sources of income by setting their grants at lower levels because other households may have them. Instead, the statutory scheme requires that the shelter allowance must bear a reasonable relation to the cost of housing so that households with no other income can obtain or retain housing.

Lastly, the State defendant relies on the fact that some public assistance recipients may have disabled family members who receive federal Supplemental Security Income (SSI) payments. Def's Prop. Findings, at ¶¶ 226-27. Because SSI is provided to meet the additional costs incurred due to disabilities, federal law requires that such income be disregarded in calculating eligibility for and the amount of A.F.D.C. benefits paid to other household members. 42 U.S.C. § 602(a)(24). Clearly, consideration of SSI income in

determining the amount of the shelter allowance would violate this provision.

VI. The State Defendant has Failed to Rebut Plaintiffs' Evidence Concerning the Individuals Receiving Relief in this Action

Plaintiffs have shown that the three public assistance recipients who testified and the eleven whose welfare case files were introduced by the State defendant had shelter allowances inadequate to pay their rents, and that they were all threatened with eviction as a result. See Plfs' Prop. Findings, at ¶¶ 280-381. Plaintiffs have also shown that as of March 12, 1991, 135 families were receiving interim relief in this action based on the fact that their rents exceed their shelter allowances and that they were threatened with eviction as a result. The State defendant has not rebutted these showings. In fact, the three recipients who testified -- Jacqueline Remy, Enid Diaz, and Mabel Irizarry -- are barely mentioned in the State defendant's papers.[88]

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[88] The State defendant accuses Ms. Diaz of extravagance for living in a three bedroom apartment with her four children. Def's Brief at 6. The State defendant's support for this accusation is simply a citation to a footnote in the Housing and Vacancy Report providing a method of translating household sizes into apartment sizes for the sake of comparison. Id. (citing PX. 70-209, at p. 90, n. *). No witness testified that it is extravagant for a five person household to live in a three bedroom apartment. To the contrary, Professor Stegman testified that three bedrooms is a reasonable apartment size for a household of five, Stegman Tr. 330-2; PX. 82-260, and the State defendant has reached the same conclusion. Plfs' Prop. Findings, at ¶ 139. In fact, placement of a five person household in a two bedroom apartment would constitute overcrowding under generally accepted standards, because there would be more than one person per room. PX. 70-209, at p. 138.

The State defendant's criticism of Ms. Remy is also without merit. The State defendant complains repeatedly about what it

With respect to the 135 families receiving Jiggetts relief as of March 12, 1991, the State defendant argues that PX. 92 is an unreliable document because H.R.A. did not verify the information in the underlying client case files and because it allegedly contains numerous errors. Def's Brief at 77. These criticisms do not withstand scrutiny.

There was no need for H.R.A. to compare the information on PX. 92 with the 135 individual case files. H.R.A. took the information directly from the WMS computer system -- the same system described by Denise Thomas, as "the computer system that keeps all the clients' information and generates benefits for the clients." Tr. 3020. Moreover, ignoring the fundamental principle of evidence that an attorney's questions are not evidence, the State relies upon counsel's questions as "proof" that PX. 92 is error-ridden. For example, counsel for the State asked the following question and received the following response:

Question Do you know that the attorney's letter with respect to the Murray family differs from the

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considers to be Ms. Remy's irresponsibility for using her basic grant to purchase food, clothing and other items as intended by the Legislature, instead of on rent. Def's Brief at 86, 139. Apart from the fact that Ms. Remy spends her money on items that the basic grant is intended to provide for, the State defendant has presented no factual predicate to support its conclusion that an expenditure of $90 to $100 each month on clothes for herself and her three growing children is excessive. Counsels' prejudices about how much money is appropriately spent on certain items cannot substitute for evidence.

Ms. Irizarry is not mentioned at all in the State defendant's papers.

$610 figure that you have in the chart [PX. 92]

Answer To the best of my knowledge, no.

Imbo Tr. 797. Based on this clear denial, the State defendant assumes the "truth" of the facts in the question and labels PX. 92 as containing error and as misleading. Def's Brief at 78 (citing Tr. 797); see also id. (citing to Tr. 799) (State defendant contends "error" in PX. 92 although the witness responded that, to best of his knowledge, it was true).

The State defendant also labels as "error" the fact that PX. 92 includes a number of households that currently have ongoing rents below the shelter maximum because they have received "Section 8" certificates. See, e.g., Def's Brief at 79 (citing Tr. 789); see also Plfs' Prop. Findings, at ¶¶ 330-338. As Mr. Imbo explained, however, in those instances families had accumulated rent arrears in excess of that shelter allowances prior to receipt of "Section 8" certificates. Imbo Tr. 789. Absent interim relief in this action, these families would have been evicted due to those arrears. In other instances, the State defendant creates "errors" by distorting the record. Compare Def's Prop. Findings, at ¶ 310 with discussion of Myriam Figueroa, infra, at pp. 100-01.

Finally, if the State defendant believed that PX. 92 was error-ridden or incomplete, it was free to offer additional evidence at trial.[89] The Court expressly invited the State

[89] Ironically, there are no discrepancies between PX. 92 and the eleven case files that the State defendant chose to introduce

defendant to put in any documents in its possession that showed discrepancies in PX. 92. Tr. 763-64. Having not taken full advantage of that opportunity, the State defendant cannot now complain that H.R.A.'s business record is not as the State defendant may have kept the information, or that the witness produced by H.R.A. pursuant to subpoena did not have personal knowledge of the underlying facts of every A.F.D.C. family that received Jiggetts relief.[90]

The State defendant only specifically discusses seven of the 11 individuals whose case files it introduced. Def's Brief at 79-83. It uses these individuals to assert two basic arguments. First, it argues that some of the families have, or at one time had, or should have had, additional income which could have been used to pay rent above the shelter allowance. Second, the State defendant argues that other families' rents are "in dispute" or are actually lower than the shelter allowance. A close examination of

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at trial. With respect to these hand-picked files, the State defendant distorts the record to make it appear that PX. 92 reflects an incorrect rent for Ms. Figueroa. See Def's Prop. Findings, at ¶ 312.

[90] Of course, plaintiffs do not concede that PX. 92 lacks any relevant information. As Mr. Blaustein testified, this HRA document contains the names of the AFDC families that the State Attorney General has approved for Jiggetts relief. Tr. 750. It also reflects the name of the income center handling the case, the case number, the Department of Social Services allowable level of rent, the actual rent, the amount of arrears paid and the date that the arrears were paid. In any event, the precise amounts of rent owed and the composition of the arrears do not go to the fundamental point for which PX. 92 was introduced, that all of these families had excess rent and were threatened with eviction absent relief through this case.

these assertions by the State defendant shows that they are full of distortions and outright misstatements of fact. Such an examination also reveals that the "extra income" that the State defendant relies upon so heavily in trying to argue against the hardships created by its inadequate shelter allowance is often tenuous or illusory and, when it exists at all, is usually specifically dedicated, by law or regulation, for purposes other than paying rent.

a. Roselaine Louis-Charles (DX. BR-6)[91]

The State defendant deals most extensively in its papers with Roselaine Louis-Charles. Def's Brief at 81-82. By understating her actual rental costs, it tries to create the impression that Ms. Louis-Charles should have been able to pay her rent in the past.[92] In addition, it repeatedly overstates her income. As detailed below, almost every claim made by the State defendant about Roselaine Louis-Charles is wrong.

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[91] In discussing the individual recipients' files, plaintiffs cite to the relevant documents in the exhibit designated at the beginning of each section.

By contrast, State defendant's references to the individuals' files are never specific as to the document allegedly providing support for its statements. In response to their proposed facts, plaintiffs have reviewed each file for any relevant documents. As indicated below, no documents exist in the record to support many of the State defendant's statements regarding these recipients.

[92] Ms. Louis-Charles' rent is $524.70/month, not the $469.20/month that is claimed. Compare DX. BR-6 (Letter of Judith Goldiner, Esq. dated January 16, 1991) and PX. 92 with Def's Brief at 82. In any event, both rents are well above the $337.00 shelter allowance for which she is eligible.

There is no support in the record for several of the State defendant's claims that Ms. Louis-Charles had extra income. For example, nothing in the record supports the claim that Ms. Louis-Charles received unemployment benefits while on public assistance. Def's Brief at 81. What her case file shows is that when she applied for public assistance in the fall of 1988 she was working and that this income was budgeted against her public assistance. WMS PA/FS Budget Summary dated September 14, 1988. Her case file also shows that when she lost her job in the spring of 1989, she reported this to H.R.A. and she was told she should apply for unemployment benefits. Notice to Applicant/Recipient, dated March 21, 1989. There is no evidence that she ever received such benefits.[93]

The record also does not support the State defendant's claim that Ms. Louis-Charles had a roommate who paid her $150.00/month from September 1988-December 1990. Def's Brief at 82. Instead, the record shows only that Ms. Louis-Charles submitted a letter dated September 11, 1988, from a Fernande Joseph stating that Ms. Joseph had begun renting a room the day before for $150.00/month. Ms. Joseph is not mentioned again in the record. The record therefore does not show how long Ms. Joseph remained in the apartment or whether she ever paid Ms. Louis-Charles the money she

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[93] Since the record does not support the claim that Ms. Louis-Charles even received unemployment benefits, it does not support the further claims made by the State defendant that she failed to report such benefits to HRA and was therefore subsequently recouped due to the alleged failure to report. Def's Brief at 81.

said she would pay. The record does make clear, however, that by June 1989 Ms. Louis-Charles did not have any means of paying her "excess" rent. History Sheet, dated June 21, 1989.

The State defendant's claim that Ms. Louis-Charles had a second roommate in January 1991 who paid her $171.00/month is similarly a distortion of the record. See Def's Brief at 82. The record shows only that Ms. Louis-Charles submitted a letter dated January 1990, from a Yolaine Francois, which promised to pay $171.00/month directly to Ms. Louis-Charles' landlord. The letter does not say that Ms. Francois was a roommate and there is no evidence that she ever made any payments on Ms. Louis-Charles' behalf.[94] There is no subsequent mention of Ms. Francois in the record. Moreover, the fact that Ms. Louis-Charles' landlord later obtained a judgment for these amounts belies any claim that Ms. Francois actually made payments to him. See Plfs' Prop. Findings, at ¶ 381.

The State defendant's claim that Ms. Louis-Charles lost a significant amount of income because of her delay in obtaining a Social Security number for her youngest child also does not withstand scrutiny. Def's Brief at 81. In fact, Ms. Louis Charles' youngest child was added to her public assistance budget in September 1990, within three months of his birth on June 23rd of that year. History Sheet, dated September 21, 1990. In March 1991,

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[94] State defendant assumes that a woman with four children should be expected to seek additional income by renting out a room in her New York City apartment, without evidence that the size of her apartment makes such a plan appropriate and feasible.

H.R.A. moved to remove the baby from the budget because he lacked a Social Security number. Because Ms. Louis-Charles immediately applied for the card, any loss of benefits would have therefore been minimal. History Sheet, dated March 12, 1991; Application for Social Security Card, dated March 7, 1991. The State defendant also attributes other potential income to Ms. Louis-Charles by complaining that if she had told H.R.A. who her baby's father was she might have received a $50.00 child support pass-through each month. Def's Brief at 81. There is no validity to this argument. H.R.A. was informed of the identity of the baby's father in March 1991, when Ms. Louis-Charles provided it with a copy of the baby's Social Security card application. Application for Social Security Card, dated March 7, 1991. Jean Guy Louis-Charles, who is identified on the Social Security card application as the baby's father, is Ms. Louis-Charles' estranged husband and the father of her three other children.[95] Id.; Eligibility Determination History Sheet, dated August 31, 1988; Marriage Certificate, dated April 26, 1978. Because there is no evidence in the record of any child support payments resulting from Mr. Louis-Charles' identification in 1988 as the father of the other children, it is unpersuasive to claim that the delayed identification of him as the father of her youngest child had any effect on her family's overall income.[96]

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[95] The State defendant is wrong when it states that Ms. Louis-Charles has five children. She has four. Compare Def's Brief at p. 81 with Recertification Form, dated July 11, 1990.

[96] In any event, as 18 N.Y.C.R.R. § 352.22(t) states,

> [t]he first $50 of any current support payments

Finally, the State defendant points to two special grants Ms. Louis-Charles received for specific purposes having nothing to do with rent and suggests that she should or could have paid her excess rent out of these monies. According to State defendant, Ms. Louis-Charles received a pregnancy allowance of $50.00/month "in 1989-90." Def's Brief at 81. In fact, she received that allowance only from February 1990 until the birth of her baby in June 1990. Notice of Special Public Assistance and/or Food Stamp Benefit, dated February 21, 1990; Budget Entry Supervisor Summary, dated April 11, 1990. Moreover, the pregnancy allowance is intended to help women meet additional needs due to pregnancy, not to pay excess rent. 18 N.Y.C.R.R. § 352.7(k). The State also implies that the restaurant allowance Ms. Louis-Charles received during the summer of 1990 could have been applied to the rent, but it fails to note that such allowances are provided by H.R.A. only when in its view the recipient incurs extra costs because he or she is unable to prepare meals at home. 18 N.Y.C.C.R. § 352.7(c). In this case, it was provided to Ms. Louis-Charles to offset the extra food costs incurred because she did not have a refrigerator. History Sheet, dated March 12, 1991.

> received in a month by a household ... shall be disregarded as income or resources in determining eligibility or degree of need.

(emphasis added).

It is inappropriate for the State defendant to argue that these funds should be considered in any determination of the adequacy of the shelter allowance when its own regulation directs that the first $50, which is the only portion that recipients receive, must be disregarded.

b. Clara Saleh (DX. BR-8)

The State defendant's claims that Clara Saleh had extra income and had other potential income are also without substance. For example, the State defendant asserts that "[a]t times, Ms. Saleh's sister has contributed $68.90 per month to help Ms. Saleh pay her rent." Def's Brief at p. 80. However, the only reference to this aid in the record is a letter dated July 18, 1990 from the sister, which promised to pay the excess rent through no more than the first half of October 1990, which was, at most, a period of three months. Letter from Edith Simon dated July 18, 1990. The State defendant is unable to show that even this meager assistance was ever actually provided to Ms. Saleh. In fact, the amounts that Ms. Simon was to pay for September and October were later included in the judgment obtained by Ms. Saleh's landlord. See Plfs' Prop. Findings, at ¶ 315.

The State defendant also claims that Ms. Saleh's 18 year old son "who is eligible for public assistance" lives with her, but has inexplicably not applied for benefits. Def's Brief at 80. Leaving aside how defendant's counsel has ascertained Ms. Saleh's son's eligibility in the absence of his application for benefits, the record shows that Ms. Saleh's son moved out of her household prior to April 1990, as he is not reported on any Recertification Form completed in April 1990 or later. See Recertification Forms, dated April 20, 1990, July 9, 1990, and January 10, 1991.[97]

[97] Even if Ms. Saleh's son had received public assistance when he lived in the household, the family's rent would still have exceeded their shelter allowance.

Moreover, Ms. Saleh was sued in housing court -- and consented to a final judgment -- for an amount comprised of rental arrears which began to accrue in September 1990, well after Mr. Saleh's son had left the household. Stipulation of Settlement, dated December 21, 1990; Letter of Jocelyne Martinez, Esq., dated January 4, 1991. Ms. Saleh's threatened eviction cannot be attributed to the fact that her son lived in the household during an earlier period.

c. Carmela Flores (DX. BR-13)

The State defendant claims that Carmela Flores' daughter, Teresa, "for a time...remained on the family's ADC budget as an 'essential person' although she was also employed and earned income." Def's Brief at 80. Plaintiffs' search of the documents contained in Ms. Flores' case file reveals no support for the claim that Teresa Flores was an "essential person". In any event, the State defendant has not explained why this would be significant if it were true. The income in question totalled only $388.00, which Teresa Flores earned during the fourth quarter of 1988 while a 17 year old full time high school student. New York City Cintrak Resource Report, dated April 22, 1989; Routing Control Sheet, dated July 19, 1989. The income of full time students may not be considered as income in the budgeting of a family's public assistance standard of need. 18 N.Y.C.R.R. 352.20(a).

In any event, the final judgment in Ms. Flores' housing court case was imposed because she owed $3,247. See Plfs' Prop. Findings, a4t ¶ 342. Clearly, an additional $388 would not have

prevented the threatened eviction. Similarly, Ms. Flores' loss of shelter allowance funds due to a sanction was not the cause of her rental arrears, since those lost funds comprise only a small portion of the total amount due.[98]

d. Sonia Rueda (DX. BR-9)

Contrary to State defendant's assertions, the documents introduced from Sonia Rueda's public assistance file do not show that her son earned income between June 1990 and January 1991. See Def's Brief at 81. Even if Ms. Rueda's son did earn income, agency regulations require that any such income be disregarded because he is a full time student under the age of 21. 18 N.Y.C.R.R. § 352.20(a). The State also misstates Ms. Rueda's rent, which increased in March 1991 to $376.64. Def's Brief at 81; Renewal Lease Form, dated July 25, 1989; Letter of Liz Shollenberger, Esq., dated February 15, 1991. The State defendant also emphasizes that Ms. Rueda has a disabled son who receives federal Supplemental Security Income ("S.S.I.") benefits. As noted above, supra at p. 87, because S.S.I. recipients have added expenses due to their disabilities, federal law prohibits the State defendant from taking this money into account in determining the amount of A.F.D.C. benefits Ms. Rueda is entitled to receive. 42 U.S.C. § 602(a)(24).

[98] Ms. Flores' removal from the family's budget due to sanctioning began during the second half of March 1990, and ended on November 8, 1990. OES Notice to IM to Initiate Sanction, dated March 15, 1990; Notice of Intent to Change Benefits, dated October 23, 1990. Therefore, the maximum amount of shelter allowance payments that were lost to the household was approximately $306 ((286-250) x 8.5).

e. Myriam Figueroa (DX. BR-14)

The State defendant continues to stubbornly assert that Ms. Figueroa's rent is actually lower than the shelter allowance of $286 for her family size. Def's Brief at 83. This claim is based on a lease that appears in her case file. It ignores PX. 164, which shows that Ms. Figueroa's rent overcharge claim was litigated before DHCR and decided adversely to her. The housing court refused to re-examine the overcharge issue. Id. As a result, a judgment was entered against her in housing court for amounts in excess of shelter allowance. Because Ms. Figueroa was threatened with eviction as a result of a final judgment comprised largely of excess rent, the State defendant consented to providing her relief in this action. See Plfs' Prop. Findings, at ¶¶ 345-46; PX. 92.

Ms. Figueroa's case file shows that, up until at least October 1990, her rent was $400. See Plfs' Prop. Findings, at ¶ 345 (citing documents). A subsequent rent increase to $427.00/month is also reflected in the documents from her case file. Budget Report dated February 27, 1991. Although it is unfortunate that Ms. Figueroa's rent increased sharply, it is nonetheless a reality which cannot be ignored if Ms. Figueroa and her family are to avoid eviction and homelessness.

f. Vilma Mitchell (DX. BR-12)

The State displays similar mock confusion on the question of Vilma Mitchell's rent. It states that Ms. Mitchell's rent is "in

dispute" because there are two leases in her case file with different rents and that a third, lower rent appears on PX. 92. Def's Brief at p. 83. In fact, PX. 161 shows that Ms. Mitchell's rent was also the subject of litigation and that the housing court determined that she should pay her landlord arrears based on a rent of $498.62/month, which is the same rent that appears on PX. 92. The State defendant's claim that Ms. Mitchell received interim relief in this action based on the highest of the three rents is wholly unsupported by the record and incomprehensible in light of the fact that the rent listed on PX. 92, which is H.R.A.'s record of preliminary relief paid in this matter through March 1990, is the lowest of the three rents.[99]

The State defendant's claim that Ms. Mitchell's case file shows that third parties made extensive contributions to Ms. Mitchell's rent in 1989 and 1990 is also incorrect. See Def's Brief at 83. The file shows that one friend loaned her money in August and September 1989 "to assist her in setting up her apartment," not for rent. Letter from Vilma Bowen, dated October 27, 1989. A second friend wrote that she had lent Ms. Mitchell $375.00 on October 26, 1989, for an unspecified purpose. Letter from Sabrina DeVare, dated October 30, 1989. There is also a letter in her case file from her brother, dated November 1989,

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[99] The relevance of the State defendant's argument is obscure as all of the three rents are well above Ms. Mitchell's shelter allowance of $286.00/mo. The two leases in her case file are for $575/mo. and $646.25/mo. The rent ordered by the housing court, $498.62, is still $212.62 more than the family's shelter allowance.

promising unspecified help in the future with her rent. Letter from T. Mitchell, dated November 1989. The record shows, however, that he failed to make payments on his sister's behalf. History Sheet, October 11, 1990. There is no record of Ms. Mitchell's receiving any assistance from third parties in 1990.[100] These letters by no means establish that Ms. Mitchell had sufficient resources to pay her rent. The fact that she was evicted demonstrates the opposite. History Sheet, dated October 24, 1990 (indicating that Ms. Mitchell was evicted).

g. Johnnie Mae Beal (DX. BR-1)

The State defendant is wrong when it attributes most of the $1,162.64 of arrears paid on Johnnie Mae Beal's behalf, as reflected on PX. 92, to correction of an improper sanction. Def's Brief at 82. The underpayment of her shelter allowance inaccurately referred to as a sanction had been corrected nearly two months

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[100] Throughout its papers, the State defendant assumes that the existence of a "third party", or donor, letter guarantees that aid in paying excess rent was actually forthcoming from the date of the letter through an indeterminate future. See, e.g., Def's Brief at 141. In fact, since those letters are not binding in any fashion, donors frequently do not follow through with their promises to pay. See DX. BR-6; BR-12.

The record also shows that when applying for rent arrears grants recipients are frequently pressured to obtain such letters to explain how they will pay their rent in the future. See Plfs Prop. Findings, at ¶¶ 321, 328, 366, 379, 380; DX. BJ, at App. I (form "Agreement By Third Party to Pay Excess Rent"). This duress may result in the submission of letters by parties who cannot realistically follow through with their promises to pay. See, e.g., Remy Tr. 28.

before the final stipulation in her housing court case. History Sheet, dated March 5, 1990.[101]

ARGUMENT

Point I

Plaintiffs have Established that the Commissioner's Shelter Allowance Schedule Violates Social Services Law § 350(1)(a)

The State defendant attempts to erect hurdles nowhere found in the statute or Court of Appeals' decision that it claims plaintiffs must clear. Def's Brief, at 118-19. In particular, the State defendant maintains that plaintiffs must show both that the shelter allowance does not bear a reasonable relationship to the cost of

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[101] In addition to the specific discussions of the seven case files referred to above, the State defendant provides string cites to entire case files to support a number of generalizations about public assistance families. Def's Brief, at 141. These citations are misleading. For example, the State defendant lists Estelle Betty (DX. BR-11) as an example of a recipient with earned income. Ms. Betty, however, was no longer earning income at the time she applied for public assistance and requested emergency assistance to pay her rent. See Plfs' Prop Findings, at ¶¶ 324-28.

The State defendant also asserts that Carmelia Andujar (DX. BR-3) and Lydia Oge (DX. BR-4) earned income. Both of these individuals, however, are not on their families' public assistance budgets because of their immigration status. They are entitled to earn a small amount of income for their own support that is not offset against their children's public assistance grants. A household with one A.F.D.C. recipient and one individual who is ineligible due to immigration reasons may earn up to half the A.F.D.C. grant for two, or $234.25 a month, without any impact on public assistance eligibility. PX. 175 (policy in effect until November 1990). There is no evidence that either Ms. Oge or Ms. Andujar have earned any money in excess of this limited amount. See DX. CE (showing Ms. Oge had a 1988 income of $1500).

housing, and that it forces large numbers of families into homelessness. Although plaintiffs have made both showings, it is clear that the Court of Appeals did not impose any such two part test.

Instead, the Court squarely held that allowances must bear a reasonable relationship to the cost of housing. 75 N.Y.2d at 415. While the Court stated that an allowance that forces large numbers of families into homelessness plainly does not pass muster, 75 N.Y.2d at 417, it never stated that any allowance, no matter how divorced from the actual cost of housing in New York City, satisfies the statutory standard, if families somehow manage to avoid homelessness.

In support of its argument, the State defendant claims that the statutory reference to "allowances," rather than "shelter allowances," means that it can provide lower shelter allowances and require that recipients pay rent with allowances provided to meet other needs. The Court of Appeals, however, has already rejected this argument by holding that the Commissioner must "establish shelter allowances that bear a reasonable relation to the cost of housing in New York City." 75 N.Y.2d at 415 (emphasis added).

This holding recognizes the fact that the statute places an affirmative duty on the Commissioner to ensure that allowances paid to A.F.D.C. families are adequate. Since allowances set by the State Commissioner are targeted for particular needs, the statute requires that allowances must be adequate to achieve the purpose for which they are provided.

Any other construction would make a muddle out of the statutory scheme for providing assistance to A.F.D.C. families. The scheme is based on the provision of a basic grant and grants for utilities which are set by the Legislature and separate grants set by the Commissioner for a few particular items of need, most importantly for rent. Social Services Law § 131-a. By claiming that he can set shelter allowances at levels that are below the cost of housing, the Commissioner is, in effect, arguing that he can commandeer funds from grants that the Legislature has determined are necessary for other items. This action clearly undercuts the requirement of adequacy and is contrary to the underlying purposes of the A.F.D.C. program, which is the protection of needy children. See Matter of Gunn v. Blum, 48 N.Y.2d 58, 63 (1979) ("paramount goal" of the A.F.D.C. program is to protect needy children). See generally, Jiggetts, 75 N.Y.2d, at 420 (statutory scheme must be construed in light of the purpose of the A.F.D.C. program).

In any event, the evidence at trial in this action established that even if amounts provided as grants for other purposes were to be considered, there is no surplus in the funds recipients receive for other needs that can be spent on rent without sacrificing basic necessities. To the contrary, the inadequacy of the shelter allowance contributes to food emergencies and other crises stemming from attempts by families to avoid homelessness. See Plfs' Prop. Findings, at ¶¶ 250-76. The evidence also showed that officials have never considered any portion of the basic grant to be

earmarked for shelter expenses, and that they never considered it appropriate to require that any such finds be so diverted. Id. at ¶¶ 264-66 & n. 32.

In its brief, the State defendant claims that plaintiffs are demanding that all recipients' full actual rents be paid. Def's Brief at 136-37. This characterization of plaintiffs' claim is false. Plaintiffs' claim has always been that the shelter allowance must bear a reasonable relation to the cost of housing. If the shelter allowance were based on such a calculation, then recipients with rents above the shelter allowance would have a reasonable chance of relocating to less expensive housing and the State defendant would be entitled to argue that recipients with rents above the shelter allowance have made a choice to pay rents above the shelter allowance or that some unique circumstance prevents them from moving. See Bernstein v. Toia, 43 N.Y.2d 437, 441-42 (1977).

But since the overwhelming evidence demonstrates that recipients with rents above the current shelter allowance cannot relocate to apartments within the shelter allowance, and that the State defendant has never made any determination that they can, the State defendant cannot argue that the inability of recipients to pay their rents is their own fault.[102]

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[102] The State defendant argues that Professor Stegman inappropriately focused on the cost of securing housing. Def's Brief at 132. Professor Stegman appropriately focused on this issue because it is undisputed that tens of thousands of families do not have apartments renting within the shelter allowance. Because the shelter allowance does not cover the rent of these families' current apartments, the critical issue is whether they

Point II

The State Defendant's Shelter Schedule Cannot be Sustained Based on Principles of Judicial Deference to Administrative Action

a. The State Defendant's Arguments Ignore the Statutory Mandate that Constrains the Agency's Authority to Choose Among Policies

The State defendant seeks to rely heavily on a deferential standard of review by this Court. Def's Brief, at 119, 124-27. The State defendant, however, misstates the applicable standard, and application of the correct standard does not support the conclusions that it asks the Court to draw.

The State defendant relies on the proposition that "administrative regulations must be sustained if they have a rational basis." Id., at 119-20 (citing Grossman v. Baumgartner, 17 N.Y.2d 345, 349 (1966)). This statement of the standard is far from complete. In fact, regulations are subject to review, not simply for rationality, but also for compliance with applicable statutory standards. See Matter of Jones v. Berman, 37 N.Y.2d 42, 53 (1975). Regulations that are otherwise rational are, nonetheless, invalid if they violate a statutory mandate or usurp authority not delegated by the Legislature. See Trump-Equitable Co. v. Gliedman, 62 N.Y.2d 539, 546-47 (1984) (regulations violated

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have a reasonable chance of securing affordable apartments. As Professor Stegman noted, Stegman Tr. 342-43, this issue would not be critical if the shelter allowance covered virtually all recipients' rents, as it once did. Colfer Tr. 1307. However, if the State defendant chooses to set a shelter allowance that does not cover the rents of large numbers of households, it must make a determination that these households have a reasonable chance of relocating.

statute); Mancini v. McLaughlin, 54 N.Y.2d 860, 862 (1981) ("Before a court can determine whether an agency acted reasonably in taking a particular action it must find that the agency had authority to act in the first instance"); Matter of Campagna v. Shaffer, 73 N.Y.2d 237, 242-43 (1989); Boreali v. Axelrod, 71 N.Y.2d 1, 11 (1987); Matter of Society of New York Hospitals v. Axelrod, 70 N.Y.2d 467, 474 (1987).

Many of the State defendant's arguments in support of the shelter allowance ignore this point and fail to come to grips with the fact that the Court of Appeals has found there to be a statutory standard mandating that shelter allowances must be adequate.

For example, the State defendant argues at great length that it has made a policy choice to create housing, rather than to raise the shelter allowance. As this Court has recognized, however, the Social Services Law does not vest discretion with the Commissioner to choose between providing adequate allowances and embarking on construction projects.[103]

Similarly, the State defendant maintains that it has the authority to provide A.F.D.C. families with inadequate allowances so that they will not be able to compete for housing with an

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[103] This Court agreed with plaintiffs that evidence offered by the State defendant about State housing programs is not relevant. Tr. 2335; 2675. The Court admitted the evidence, however, to enable the State defendant to have a full record. Tr. 2335; 2678. In any event, the State's claim that it is attempting to deal with homelessness by creating housing is at odds with its contention that ample housing is currently available.

undefined group that it calls "the working poor."[104] However, the purpose of the statutory requirement that shelter allowances be adequate is to enable A.F.D.C. families to compete for housing. The State Commissioner does not have the authority to decide that A.F.D.C. recipients should be denied a reasonable chance of obtaining housing because the Commissioner considers other households more worthy than A.F.D.C. families. Indeed, if the State defendant has established a shelter schedule based upon the premise that A.F.D.C. recipients should not be able to compete for housing, it is in violation of the statutory directive to the contrary.

The State defendant also argues that it has the power to provide inadequate shelter allowances as a "disincentive" to the receipt of public assistance. See Def's Brief at 130. The Social Services Law, however, seeks to protect needy families, not to punish them. It contains specific provisions that the Legislature has deemed appropriate to assist recipients in returning to the work force when possible, and provide them with incentives to do

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[104] It is far from clear that the "working poor" constitutes a group that is completely distinct from public assistance recipients. In fact, the "working poor" includes many individuals who are past or future recipients of public assistance. When the "working poor" lose jobs or suffer other disasters, public assistance is intended to provide them with a safety net. The inadequacy of the shelter allowance turns the loss of a job into a threatened period of homelessness which undercuts a family's ability to return to self-sufficiency. See Plfs' Prop. Findings, at ¶¶ 324-29 (facts relating to Estelle Betty); 330-38 (facts relating to Linda Green); 376-81 (facts relating to Roselaine Louis-Charles). Thus, the State defendant's attempt to characterize the situation as involving two groups pitted against each other is false.

so. The establishment of an inadequate shelter allowance schedule is not among these provisions.[105]

In sum, Social Services Law § 350(1)(a) does not give the State defendant discretion to provide inadequate allowances so that it can pursue other policies or goals. Accordingly, as the Court recognized at trial, these policy choices are irrelevant to this lawsuit. It is simply inappropriate to defer to the State defendant's policy choices when they conflict with those mandated by the Legislature.[106]

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[105] In particular, the Legislature has recently enacted the Job Opportunities and Basic Skills Training Program. Social Serv. L. §§ 330-41 (1991 supplement). This program is designed to "furnish[] education, training and employment opportunities, and necessary services in order to secure unsubsidized employment that will assist participants to achieve economic independence." Soc. Serv. L. § 331(1). Social services officials may require non-exempt A.F.D.C. recipients to participate in this program. Id. at § 332(2)(a). It requires the preparation of a written "employability plan" which sets forth the services that will be provided to the recipient and the activities in which the recipient will participate. Id., at § 335(2).

In addition to this program, the Social Services Law provides a number of other work incentives, including earned income disregards and deductions for child care and work expenses. Id., at § 131-a(8). A recipient who terminates or reduces employment without good cause loses these disregards. Id., at § 131-a(8)(b). The Legislature has also extended eligibility for medical assistance to families who terminate receipt of A.F.D.C. due to earned income. Id., at § 366(4)(a)(i-ii) (1991 Supplement).

[106] Plaintiffs do not, however, concede that any of these choices would be rational. It does not make sense to undertake the massive costs of creating housing, while withholding assistance necessary to enable recipients to retain housing that they currently have. The inadequacy of the shelter allowance contributes to the reduction in the supply of low income housing that hurts "the working poor" as well as public assistance recipients. It also results in increased cost expenditures on emergency shelter. The State defendant has admitted "[e]ach time a family seeks temporary shelter from defendants the fiscal cost

The Court of Appeals has long held that administrative agencies have no power to overrule the Legislature's policy choices as established by statute. In Matter of Campagna v. Shaffer, 73 N.Y.2d 237, 242-43 (1989), the Court underscored that "[a]gencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator." The Court found it "axiomatic" that

> an administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature. An agency cannot by its regulations effect its vision of societal policy choices . . . and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer.

Id. (citations omitted).

Indeed, even in the absence of a statutory mandate as exists in this case, administrative agencies do not have the plenary legislative power that the State defendant claims. As the Court of Appeals stated in Boreali v. Axelrod, 71 N.Y.2d 1, 11 (1987), an agency may not "improperly assume[] for itself '[t]he open-ended discretion to choose ends' . . . which characterizes the elected Legislature's role in our system of government." See Health

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is tremendous and far exceeds the amount that would have been necessary to avoid eviction." See Complaint & Answer, ¶ 4. Homelessness and other crises resulting from the inadequacy of the shelter allowance hinder the return of recipients to the work force.

The provision of adequate shelter allowances would not be some untried experiment. Quite the contrary, it was the norm until the State defendant permitted the schedule to erode in value. It did not result in homelessness among the "working poor," or massive defections from the workforce.

Insurance Ass'n v. Corcoran, 154 A.D.2d 61 (3d Dep't), aff'd on opinion below, 76 N.Y.2d 995 (1990).

The cases that the State defendant principally relies upon in support of its plea for deference are inapposite because they do not deal with judicial review of compliance with mandatory statutory standards and instead deal with matters that were found to be within the scope of the Legislature's delegation to the agency. These cases are simply irrelevant now that the Court of Appeals has found that Social Services Law § 350(1)(a) requires the establishment of a shelter allowance that bears a reasonable relation to the cost of housing. See Matter of Society of Surgeons v. Axelrod, 157 A.D.2d 54, 57 (3d Dep't 1990) (designation of disease as communicable not mandated by Public Health Law, therefore agency action only subject to review under arbitrary or capricious test), aff'd, 77 N.Y.2d 677 (1991); Matter of Donovan v. Bellacosa, 129 A.D.2d 152 (1st Dep't 1987) (no statutory claim raised in action challenging civil service classification as arbitrary and capricious); City of New York v. New St. Mark's Baths, 130 Misc.2d 911 (Sup. Ct. N.Y.Co. 1986) (challenge to classification of bath house as public nuisance failed because it did not violate statutory or constitutional rights).

The State defendant also continues to rely on cases that found matters to be nonjusticiable, without acknowledging the fact that the Court of Appeals has already held that this case presents a justiciable controversy. Thus, Matter of Ferrer v. Quinones, 132 A.D.2d 277 (1st Dep't 1987), quoted at length by the State

defendant, held that a challenge to the actions of the Chancellor of the Board of Education was not justiciable and that the statute plaintiffs sought to rely upon did not create a cause of action. See also Matter of New York State Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233 (1984) (dismissal of case as nonjusticiable).

b. The State Defendant's Plea For Deference Must Be Rejected Because the Agency Never Made a Determination that the Shelter Allowance is Adequate

The State defendant also asks the Court to defer to its shelter schedule on the ground that it has made a determination that the shelter allowance bears a reasonable relation to the cost of housing. Def's Brief at 124-25. The problem with this argument is that the Commissioner has never made any such determination. The Commissioner did not testify. No employee of the Department of Social Services who did testify stated that the shelter allowance is adequate or that it bears a reasonable relation to the cost of housing or that any such determination has been made by the agency.[107] Accordingly, the State defendant is not entitled to any deference on the question of the adequacy of the shelter schedule. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-13, 109 S.Ct. 468 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate").

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[107] It is not surprising that no determination of adequacy was made in view of the fact that until the Court of Appeals' decision in this case, the State defendant maintained that there is no such requirement.

In fact, State officials have recognized at every turn that the shelter allowance does not enable recipients to find housing, that it does not enable owners to cover the costs of providing housing and that the level of allowances contributes to homelessness in New York City. Far from proclaiming the shelter allowance schedule to be adequate or sufficient in any way, at the time the 1988 shelter schedule was implemented, the Department conceded that "the new rent schedules may still be below the actual cost of housing in New York City." PX. 26-41. Rather than denying the relationship between shelter allowances and homelessness, the Department admitted in the State Register that "insufficient shelter allowances help increase the homeless population and contribute to the reduction of suitable housing for public assistance recipients." PX. 38-67.

The Department's formal budget submissions also contradict the propositions to which it now asks the Court to defer. Thus, while the State defendant seeks deference to its claim that housing is readily available to public assistance recipients, its own administrative statement in its 1988-89 budget submission concluded that:

> The problem of homelessness continues to grow, primarily as a result of the lack of decent, affordable housing. The rapid increase in the numbers of homeless, both singles and families, has made it evident that the housing needs of greater numbers of public assistance recipients are not being met by either the private sector or publicly supported low income housing programs. . . . Despite an increase in the shelter allowance, public assistance recipients have been unable to purchase quality housing and are frequently forced to pay as much as 45 percent of their monthly grant

> for housing that is often substandard. Because of the lack of adequate resources and the lack of affordable housing many public assistance recipients are at risk of becoming homeless.

PX. 34-61.

While the State defendant now contests the point that the shelter allowance has eroded dramatically, its budget submission concerning the 1988 shelter allowance increase stated that "[a]s the allowances failed to keep pace with rising rents, more and more welfare recipients are finding it difficult or impossible to locate and maintain decent housing." PX. 23-33, at p. 110.

In proposing the 1988 shelter allowance increase, the Department never stated that its proposal would result in an adequate allowance. Instead, it only offered the unambitious claim that the proposed increase would "alleviate some of the shelter problems" discussed in its submission. Id. (emphasis added).[108]

The State defendant also asks the Court to defer to the views of those agency officials who were involved in setting the shelter allowance and who testified at trial. Yet if the Court were to defer to the views of these officials, it surely would be required to grant judgment to plaintiffs.

Thus, the State defendant relies on the testimony of William Shapiro, who was special assistant to the Deputy Commissioner for Income Maintenance, and it seeks deference to Mr. Shapiro's analysis. Def's Brief at 32-35. Mr. Shapiro, however, clearly

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[108] Even so, its proposed increase was cut in half by the Division of the Budget. Plfs' Prop. Findings, at ¶ 52.

considered the shelter allowance to be thoroughly inadequate and viewed the 1988 increase as insufficient. He wrote that:

> Adequate supplies of quality housing remain beyond the reach of many public assistance recipients, and the impending shelter ceiling increase will still leave a large gap between the rents demanded by the housing market and the amounts clients can afford to pay.

PX. 25-40. Indeed, Mr. Shapiro did not consider the Department's proposed increase, which was twice the increase approved by the Department of the Budget, to be sufficient, either. PX. 11-9 ("[E]ven our current proposal would be grossly inadequate to bring shelter allowances back into the ballpark of what is needed to give PA clients a fair chance of keeping afloat in the current housing market").

Mr. Shapiro also did not view the State defendant's methodology as calculated to result in a reasonable allowance schedule. He wrote that "[c]ontinuing to base public assistance shelter methodology on rents as paid risks perpetuating and compounding the difficulties clients face in securing adequate shelter." PX. 8-2, at p. 4; see PX. 28-44.

These statements are all the more compelling in view of the fact that Mr. Shapiro was not a renegade dissident in the Department. Instead, he was the principal official who worked on setting the 1988 shelter allowance at the Division of Income Maintenance, the unit that "chaired the process" of developing the new schedule. Shapiro Tr. 1531.

The State defendant also relies extensively on the testimony of Dr. James Welsh. Dr. Welsh, however, did not testify that he considers the shelter allowance to be adequate. In 1986, Dr. Welsh admitted that "it is important to recognize the basic inadequacy of the current schedule," and that a "serious deficit between the shelter maximum and prevailing rents" had developed since 1979. PX. 10-6, at p. 1.[109] Dr. Welsh also recognized that the 1988 shelter allowance increase did not fully address this problem. He admitted that even the proposed levels of increase would not "encourage landlords to maintain or rehabilitate buildings or . . . allow clients to compete for housing meeting HUD's quality standards." PX. 16-19, at p. 4.

In direct conflict with the State defendant's contentions, Dr. Welsh also concluded that public assistance recipients do not have the option of finding less expensive apartments. PX. 21-29, at p. 18 (Department Report, written by Dr. Welsh stating that public assistance recipients in New York City cannot "act[] more economically" in their choice of housing).

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[109] At trial, the State defendant attempted to distance Dr. Welsh from this statement, but Dr. Welsh could not recall what he meant by it at the time it was written. Welsh Tr. 1483-84. Dr. Welsh stated that PX. 10-6 served "a number of purposes, including a sort of internal advocacy role." Id. At his deposition, Dr. Welsh did not state that PX. 10-6 was an advocacy piece. He claimed that, while he did not fully remember the purpose of the document, "[i]t could have been a document accounting for the time that OPPAD staff was spending on various pieces of research or analysis." PX. 137-153, at pp. 96-98. In any event, Dr. Welsh stated that he would not have written anything in the document that he believed to be incorrect. Id., at p. 98.

Additionally, although the State defendant asks for deference to Dr. Welsh's testimony criticizing HUD fair market rents, he himself has frequently used HUD rents as a benchmark for comparison with the shelter allowance. See, e.g., PX. 10-6, at p. 3 (using HUD rents as a "defensible expedient" for "levels for which decent housing can be obtained in the market"). He has also written a report issued by the Department finding that HUD fair market rents are a "fair" measure of the cost of low income housing. PX. 21-29, at p. 12.

In direct conflict with the contentions of the State defendant in this case, Dr. Welsh and the agency's Office of Program Policy and Development (OPPAD) did not consider any portion of the basic public assistance grant as intended for rent. PX. 138-154, at pp. 237-38. He also conducted the Department's only formal study on the adequacy of the basic grant. The study concluded that the basic grant does not even provide amounts sufficient for the items for which it is intended, let alone provide a surplus that can be spent on rent. Plfs' Prop. Findings, at ¶ 262.[110]

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[110] Kenneth Relyea also testified about the setting of the 1988 shelter allowance. Although Mr. Relyea testified that "for a given amount of money" the percentile methodology was viewed as the "most equitable," he did not offer any justification for the percentile that was selected. Relyea Tr. 1682-84; PX. 139-155, at pp. 64-65 (deposition of Mr. Relyea stating that he did not know the reason why the 70th percentile was proposed). Mr. Relyea, an employee of the Department's Office of Budget Management, mainly worked on the fiscal analysis. Shapiro Tr. 1530-31; Relyea Tr. 1679.

The other Department employees who testified, Mark Lewis, Nancy Travers, James Hickey, and Denise Thomas, did not testify about the considerations that went into setting the shelter allowance.

Lastly, the State defendant asks the Court to defer to the testimony of William Colfer, an employee of the Division of the Budget. Mr. Colfer, however, undertook no substantive analysis of public assistance recipients' housing needs or the demands of the housing market. Plfs' Prop. Findings, at ¶¶ 51-58; Colfer Tr. 1401-02. Accordingly, he made no reasoned determination that the shelter allowance is adequate. Furthermore, as an employee in the Division of the Budget, he works for an agency that has no substantive expertise in the matter at issue. See Matter of Industrial Liaison Committee v. Williams, 72 N.Y.2d 137, 143-44 (1988) (deference only warranted on matters "within the particular and specialized expertise of the Department"). As explained above, there is no reason to defer to Mr. Colfer's budgetary judgments because there is no discretion to provide an inadequate shelter allowance for budgetary reasons.[111]

Seeking to avoid the fact that the Department of Social Services never made a determination that the shelter allowance is adequate, the State defendant relies on the testimony of its paid expert Randall Filer and argues that this case is essentially a

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[111] The testimony makes clear that Mr. Colfer and the Division of the Budget did not act as housing experts to determine the real need for an increase. Mr. Colfer testified that the employees in the Division of the Budget "viewed [their] responsibility in this process to insure that programmatic benefit was balanced by prudent fiscal concerns, and so we wanted to see if we could lower the cost of the shelter allowance increase while still maintaining a sizeable increase for recipients." Colfer Tr. 1320. He stated that the Department of Social Services' request was not accepted because the Division of the Budget "felt that there were competing expenditure requirements that could not have been fully met" if the proposal were adopted. Id. at 1336-37.

battle of the experts which the State must win simply because it is the State. The doctrine of deference to administrative agencies, however, is not so far reaching. Dr. Filer's testimony warrants no such deference because, at best, it constitutes post-hoc rationalization. Matter of Con Edison v. Public Service Commission, 63 N.Y.2d 424, 441 (1984); Georgetown Hospital, 488 U.S. at 212-13 (declining to give deference to agency's litigation position).

c. Even Applying Principles of Deference, the Shelter Allowance Schedule Is Arbitrary and Capricious

In any event, even putting aside the issue that the Department of Social Services has never found the shelter allowance to be adequate, the evidence establishes that the shelter allowance is arbitrary and capricious. Review of agency regulations for rationality is far more potent than the rubber stamp that the State defendant suggests. The Court of Appeals has cautioned that meaningful judicial review under the traditional standards "will help to insure that powerful regulatory officials conform to ordinary standards of documented and rational rule making. The courts should not be relegated to searching for and fashioning justifications for agency actions based on 'simple processes of elimination' at the appellate review stage." Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 169 (1991).

In Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 168 (1991), the Court of Appeals struck down a medicaid reimbursement schedule

promulgated by the Department of Health as "not based on a rational, documented, empirical determination." The Court found that the schedule at issue was the "result of negotiation, compromise and estimation" that is "not the equivalent of the requisite rationality." Id. The Court concluded that it is arbitrary for an agency to rely on unsubstantiated "theory and assumption" without appropriate "empirical documentation, assessment and evaluation." Id.

Similarly, as the Appellate Division held in Matter of V.R. Equities v. New York City Conciliation and Appeals Bd., 118 A.D.2d 459, 461 (1st Dep't 1986), an agency's action is arbitrary and capricious "when it is 'without sound basis in reason and generally taken without regard to the facts.'" Id. (citing Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231-232 (1974)); Matter of Hawley v. Cuomo, 46 N.Y.2d 990 (1979); Matter of Health Insurance Ass'n v. Corcoran, 154 A.D.2d 61, 70 (3d Dep't), aff'd on opinion below, 76 N.Y.2d 995 (1990) (agency action found irrational because findings were inadequate and lacked of factual basis). In V.R. Equities, the Appellate Division struck down an administrative agency's calculation of a base rent on the ground that it "was haphazard, careless and manifested a concern only for expediency rather than the soundness of the result." 118 A.D.2d at 461.[112]

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[112] These principles must be applied with particular rigor in the context of reviewing regulations that provide aid that is critical to the needy -- particularly regulations that are claimed to effectuate the Legislative mandate that shelter allowances be adequate so that children may be raised in homes. The Social Services Law and Article XVII of the State Constitution establish a firm policy of assisting the needy --

The State defendant's shelter allowance cannot survive review under these principles. The testimony concerning the method used to calculate the 1984 shelter allowance increase, which the State defendant emphasizes, was not simply a "disagreement" between Dr. Filer and Professor Stegman, which the Court is powerless to resolve. Instead, the evidence shows that the shelter allowance was set at an arbitrary percentage of the rents paid by public assistance recipients with no thought to how households above the cut off point would manage. The facts show that the agency simply did not consider this issue and it made no rational conclusion that the shelter allowance would be adequate for these families. Moreover, no one has suggested a rationale for implementing a schedule in 1984 that was based on 1981 data.[113] Professor Stegman simply pointed out these fundamental flaws.[114]

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particularly needy families with children. In promulgating regulations, the Commissioner must abide by these constitutional and legislative policies. See Matter of Jones v. Berman, 37 N.Y.2d 42, 52-53 (1975) ("the summary denial of [emergency] assistance without regard to . . . the actual destitute circumstances of the people intended to be protected by the Act, was both arbitrary and capricious").

[113] In its proposed findings of fact, the State defendant advances the facially deficient claim that the 1984 methodology "ensured that a substantial fraction of the target population would be able to find apartments at or below the shelter allowance." Def's Prop. Findings, at ¶ 259 (emphasis added).

[114] The State defendant's criticism that Professor Stegman did not read through all the memoranda and other papers that were part of the process of establishing the shelter allowance is absurd. Professor Stegman read the descriptions of the ultimate methodologies prepared by the officials involved in the process. Moreover, apart from the issue of whether public housing was excluded from the calculation in 1984, which Professor Stegman addressed on rebuttal, there is no claim that Professor Stegman misunderstood the methodology in any way. Any misunderstanding

The methodology used in setting the 1988 shelter allowance schedule was similarly flawed. The Department did not consider what would happen to those families with rents in excess of the shelter allowance, and it did not consider whether the shelter allowance would enable owners to cover the costs of providing housing. In fact, no official was able to testify as to why the 70th percentile of recipient rents was selected. This proposed increase was sliced in half for budgetary reasons, through a process of "negotiation [and] compromise" like that which was rejected by the Court of Appeals in Ass'n of Counties, 78 N.Y.2d at 168. Lastly, despite the fact that over three years has passed since the 1988 increase, no comprehensive review of the issue has been undertaken.[115]

The selection of arbitrary percentiles of rents that would be covered by the shelter allowance, the failure to consider what would become of tens of thousands of A.F.D.C. households who would continue to have rents in excess of the shelter allowance after each increase, the reliance on out of date rent data in 1984, and the failure to consider whether the shelter allowance enables

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regarding the inclusion of public housing in the calculation of the 1984 methodology stemmed from the inaccuracy of the State defendant's own document describing the method. Stegman Tr. 3379-83; PX. 19-26.

[115] Mr. Higgins' litigation-oriented evaluation does not constitute such a review because no evidence was offered that any pertinent decisionmaker credited his work in anyway. In any case, Mr. Higgins recommended substantial increases in the shelter allowance in New York City. See Plfs' Prop. Findings, at ¶ 72.

owners to cover the costs of providing housing all render the State defendant's methodology arbitrary and capricious.

Dr. Filer's post-hoc labelling of half of all public assistance families in non-dilapidated housing with rents in excess of the shelter allowance as "extreme outliers" with extraordinary tastes for expensive housing, Filer Tr. at 2048, does nothing to salvage the arbitrary nature of the methodology. The fact that the State defendant now says that the Commissioner determined "the minimum standard of housing in non-dilapidated low rental private housing in New York City and then set a shelter allowance schedule based upon rents for such housing" does not make it so. Def's Brief at 129. The truth is that he set the shelter allowance at a fraction of the cost that he identified.[116]

The State defendant's contention that ample housing is available to public assistance recipients is also flawed on its face. Even if Dr. Filer's testimony were given the benefit of

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[116] The State defendant argues that it is reasonable to set the shelter allowance based exclusively on the rents paid by public assistance recipients. Def's Brief at 128. This is true only if the overwhelming percentage of recipients have their rents covered. Otherwise, thousands of recipients will be unable to pay their rents without any determination having been made that their rents are unreasonably high in relation to the housing market. This has, in fact, been the case.

The State defendant relies on Mr. Relyea's statement that "for a given amount of money" the percentile approach was considered the most equitable way of allocating a shelter allowance increase. Relyea Tr. 1683. While plaintiffs do not take issue with this method as a means of distributing an inadequate increase fairly among the various counties, it does not assure that the shelter allowance bears a reasonable relation to the cost of housing in any of the counties.

deference, his analysis was "careless and haphazard" and provides no justification for the shelter schedule. His analysis of available apartments was heavily dependent upon counting apartments that are occupied as available. Dr. Filer's analysis of vacancies failed to take into account the large size of the New York City housing market and the infinitesimal vacancy rate for apartments renting at shelter allowance levels. Dr. Filer's own analysis of the costs of providing housing shows that even the least expensive building categories have costs that are well above the shelter allowance. Dr. Filer's estimate of the number of units with costs within the shelter allowance totals less than half of the number of public assistance recipients in private housing.

Point III

The Argument that the Legislature Set the Shelter Allowance Must be Rejected

The State defendant argues that the Legislature, rather than the Commissioner of Social Services, actually sets the level of the shelter allowance. This claim has already been rejected by the Court of Appeals. Analyzing the statutory scheme, the Court of Appeals concluded that the Legislature has entrusted the task of setting shelter allowances to the executive branch, subject to the mandatory standard set forth in Social Services Law §350(1)(a). Despite this clear holding, the State defendant continues to claim that the Legislature itself sets the allowance schedule. This is simply not the case.

Instead, the record shows that officials in the Department of Social Services and the State Division of the Budget derived the shelter schedule currently in effect. The schedule was ultimately issued as a regulation, not a legislative enactment. See PX. 134, at § I (pointing out that the shelter allowance can be increased by regulation rather than legislative enactment).

The State defendant's argument that executive branch officials cannot be held accountable because the shelter allowance costs money which must be appropriated by the Legislature proves too much. Courts routinely enforce statutory directives that involve the expenditure of money by the State. See, e.g., Ass'n of Counties v. Axelrod, 78 N.Y.2d 158 (1991). Moreover, the Court of Appeals was fully aware of this fact when it remanded this case. It concluded that whether or not the Legislature chooses to appropriate the necessary funds is a matter that is distinct from the Commissioner's obligation to establish an adequate schedule. 75 N.Y.2d at 417.[117]

The State defendant claims that it has been relieved of its obligation to promulgate an adequate schedule because its officials met with a number of legislators and because the issue was mentioned in the Governor's budget message. Def's Brief at 115-16. These contacts certainly do not create any implied repeal of Social Services Law § 350. The doctrine of implied repeal "is heavily disfavored in the law and may be resorted to only in the clearest

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[117] This issue was briefed before the Court of Appeals. Brief of the State Defendant at 12-13, 23-24. Reply Brief of Plaintiff-Appellants, at pp. 8-11.

of cases." Ball v. State of New York, 41 N.Y.2d 617, 622 (1977). It is sparingly applied only when a legislative enactment squarely conflicts with a prior law. Matter of New York State Cable Television Ass'n v. Public Service Comm'n, 87 A.D.2d 288, 291-92 (3rd Dep't 1982) (implied repeal will be found "only when repugnancy between the two statutes is plain").

Implied repeal is even more disfavored when the action that is claimed to constitute the act of repeal is an appropriations measure. See T.V.A. v. Hill, 437 U.S. 153, 190 (1978). As the Court of Appeals for the Second Circuit has explained, "[l]egislators are not required to check the background of each authorization before voting on an appropriations measure." E.E.O.C. v. CBS, Inc., 743 F.2d 969, 974 (2d Cir. 1984)

The facts in Ball, 41 N.Y.2d at 617, are illustrative. The claimant was chairman of the State Bingo Commission. An appropriations bill was passed that did not contain an express appropriation for his salary or the Commission. The State withheld his salary and began to dismantle the Commission. The Court found no implied repeal of the statute creating the Bingo Commission or providing a salary for its chairman. It ordered the claimant's salary to be paid out of another lump sum appropriation made by the Legislature.

Here, no conflicting legislative action has been presented. Under the statutory scheme the Legislature relies on the executive branch to promulgate an adequate allowance schedule and to request funds that are necessary. In fact, the Legislature has

appropriated all funds for the shelter allowance requested by the executive branch. There is no indication that it would not appropriate more money if necessary to fund an adequate shelter allowance.[118]

The State defendant relies on the fact that it has written reports to the Legislature over the years concerning the shelter allowance. However, the Court of Appeals has refused to find implied repeal based on legislative documents showing acquiescence in practices that deviate from a statutory standard. Shandaken v. State Board of Equalization and Assessment, 63 N.Y.2d 442, 447 (1984). The State defendant's claim of implied repeal is even less viable than the claim rejected in Shandaken. In Shandaken the Court of Appeals found that the existence of "various legislative documents from which it may be inferred that in the past there has been legislative acquiescence and perhaps approval of departure in practice from the statutory mandate" did not constitute a legislative enactment. 63 N.Y.2d at 447. The Court stated that if it was the intention of the Legislature to amend the statutory mandate, it was free to do so directly. Id. In this case, the

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[118] Furthermore, the budget does not contain a line item for shelter allowances, let alone shelter allowances for New York City A.F.D.C. recipients. PX. 37-66; DX. CK. Thus, it cannot be said that the Legislature has appropriated any fixed sum for shelter allowances, let alone that it established maximum allowances for A.F.D.C. families in New York City. Moreover, the amounts requested for income maintenance in the budget are clearly only estimations of what the programs will cost. Colfer Tr. 1275. Thus, for example, if more eligible people than anticipated apply for public assistance, they cannot simply be turned away. Instead, the executive can reallocate appropriated funds, within certain limitations, State Finance Law § 51, or may seek a supplemental appropriation.

claim for implied repeal is weaker because the State defendant relies on its own administrative documents rather than any documents prepared by the Legislature.

The State defendant also argues that the Department of Social Services cannot be held accountable because the Division of the Budget made the final determination regarding the 1988 shelter allowance increase. Def's Brief at 112, 114-16. This fact, however, does not relieve the Commissioner of the Department of Social Services of his responsibility under the statute. In its decision, the Court of Appeals acknowledged that the case involved the "failure of the executive branch of government to comply with directions of the legislative branch." 75 N.Y.2d at 415. Although the final schedule may be the product of interaction between different components of the executive branch, the statute places the obligation on the Commissioner of Social Services and he may be held accountable.[119]

Lastly, the State defendant claims that the obligation of the executive branch to present a balanced budget each year precludes compliance with the Social Services Law. If compliance with the Legislature's mandate requires additional funding, the executive branch must balance the budget in some other way, such as reducing

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119 The State defendant itself has recognized this fact. At the outset of this litigation, plaintiffs moved to join the Governor as a defendant. In response, the State defendant claimed "[t]here is no reason to believe, however, and plaintiff has suggested none, that the Governor's intervention would be necessary to cause State defendant Perales to give full relief if plaintiffs were to prevail herein." Memorandum of Law, at 15, dated April 6, 1987. Based on this assurance, the Court denied plaintiffs' motion. Order dated April 16, 1987.

expenditures on discretionary items, or proposing increases in revenues. Colfer Tr. 1274-76.

If the executive does not consider either of these alternatives to be sound public policy, its remedy it to convince the Legislature that the State should abandon its longstanding commitment to the provision of adequate allowances. The Legislature may well conclude that retention of the current law is the best policy and that when cost savings are considered, the provision of an adequate shelter allowance is not an expensive policy.[120] After all, the State defendant has admitted in this litigation that:

> Each time a family seeks temporary shelter . . . the fiscal cost is tremendous and far exceeds the amount that would have been necessary to avoid eviction. It costs the City and State thousands of dollars a month to provide emergency shelter to a single homeless family.

Complaint & Answer, ¶ 4.

The State Commissioner does not, however, have the authority to ignore unilaterally a legislative mandate because he disagrees with the Legislature's priorities. He cannot unilaterally decide to provide inadequate shelter allowances, any more than he can tell

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120 The State defendant's discussions of the amount of money that is spent on the shelter allowance and the costs of increases are invariably framed in terms of gross costs. Def's Prop. Findings, at ¶¶ 15, 22, 37, 112. These sums are all state-wide figures that include both Home Relief as well as A.F.D.C. expenditures. Additionally, the state share of shelter allowances paid to A.F.D.C. recipients is only 25 % of the total. Fully 50 % of the cost is borne by the federal government and the localities pay the remainder. See 42 U.S.C. § 603(a)(3)(D); Colfer Tr. 1291 (State pays 50% of nonfederal share).

eligible applicants for public assistance that they will not receive assistance, despite the statutory standards, because the Commissioner does not believe such payments would be fiscally prudent.

CONCLUSION

For the reasons set forth above, in Plaintiffs' Post-Trial Memorandum of Law, and in Plaintiffs' Proposed Findings of Fact, judgment should be granted for plaintiffs and the Court should order the relief requested.

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Respectfully Submitted,

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