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To be argued by
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NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

ROBERT CALLAHAN, et al.,
Plaintiffs-Respondents,
-against-
HUGH L. CAREY, as Governor of the State of
New York, et al.,
Defendants-Appellants.

LOUISE F. ELDREDGE, et al.,
Plaintiffs-Respondents,
-against-
EDWARD I. KOCH, as Mayor of the City of New
York, et al.,
Defendants-Appellants.

MUNICIPAL APPELLANTS' BRIEF

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MUNICIPAL APPELLANTS' BRIEF

PRELIMINARY STATEMENT

Municipal defendants (jointly, "the City") appeal from so much of an order of the Supreme Court, New York County (Gische, J.), entered February 22, 2012, as granted plaintiffs' motion "to the extent of declaring Procedure No. 12-400 of the New York City Department of Homeless Services ["Eligibility Procedure" or "Procedure"] a nullity" (R. 26)¹ as not having been promulgated in accord with Chapter 45 of the New York City

¹ Numbers in parentheses preceded by "R." refer to pages of the reproduced Record on Appeal.

Charter, the City Administrative Procedure Act ("CAPA") (see, R. 9-27).

The City contends that the Court erred in granting plaintiffs' motion. The Procedure sets forth the standards by which DHS is to determine the eligibility of individual applicants for temporary housing assistance ("THA"). Contrary to the conclusion of the Court below, it does not constitute a rule within the meaning and intent of CAPA because it invests significant discretion in agency decision makers. Utilizing the Procedure's guidelines, DHS investigates and evaluates each application for THA. The agency bases individual eligibility determinations on the totality of each applicant's circumstances, with an analysis of the applicant's situation in accord with all relevant factors.

As further demonstrated below, because the Procedure has no legal effect but is merely explanatory of existing State law, it falls within a stated exception to CAPA's definition of a rule. The Procedure is no more than DHS's restatement, interpretation, and explanation of State law and practice as comprehensively embodied in a State regulation and State administrative directives.

The order appealed from should be modified, and plaintiffs' motion should be denied in all respects.

(2)

As do the plaintiffs in these actions, the petitioner in an article 78 proceeding, *Council of the City of New York v. Department of Homeless Services*, index number 403154/11 (Sup. Ct. NY Co.), seeks to enjoin enforcement of the Procedure on the ground that it was required to be promulgated pursuant to CAPA. Like plaintiffs in these actions (R. 29-31), the article 78 petitioner moved by order to show cause to enjoin enforcement of the Procedure.

The Court below "consolidated for consideration, the Callahan motion and the Article 78 Proceeding, but only insofar as they both raise CAPA challenges to the [Procedure]" (R. 12; see, R. 210-11). Additionally, the Court "bifurcated the CAPA dispute" and considered it "separately" before it "reache[d] any substantive challenges to the [Procedure]" (*id.*).

In its order entered February 22, the Court below, in the article 78 proceeding, denied the cross-motion of the respondents (together, "DHS" [the City Department of Homeless Services]) to dismiss the petition and "directed" DHS to "interpose an answer" (R. 26). Following submission of the answer, the Court granted the petition in a final order from which DHS has appealed. In these actions, the Court below

granted plaintiffs' motion "to the extent of declaring [the] Procedure ... a nullity" (*id.*).²

QUESTION PRESENTED

Whether the Court below erred in concluding that the Eligibility Procedure, which vests significant discretion in agency decision makers and has no legal effect but is merely explanatory of existing State law, is a rule that must be issued pursuant to CAPA.

STATEMENT OF FACTS

The Underlying State Regulation (18 NYCRR § 352.35)

In January, 1996, the New York State Department of Social Services ("DOS")³ promulgated 18 NYCRR § 352.35 ("the Regulation"), that "governs the provision of temporary housing assistance to persons who are homeless" and "sets forth the requirements with which an individual ... who applies for temporary housing must comply in order to be eligible for [THA]"

² Simultaneously with the instant appeal, DHS is perfecting its appeal from the final order that granted the petition in the article 78 proceeding. As the Court below consolidated that proceeding and these actions for the purpose of determining the CAPA challenges to the Procedure, DHS's and the City's arguments in the two appeals are identical. The City requests that the two appeals be heard together by the same panel.

³ The Department of Social Services was subsequently renamed the Department of Family Assistance and divided into two autonomous offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance ("OTDA"), with the latter assuming responsibility for, *inter alia*, the homeless housing and assistance program and the homelessness prevention program. See L. 1997, ch. 436, § 122(a), (f).

(R. 234 [§ 352.35(a)]; see, R. 234-36). One such requirement is that applicants "cooperate in and complete" an assessment of their housing needs (R. 235 [§ 352.35(c)(1)]), which includes the availability of housing and the need for THA (R. 234 [§ 352.35(b)(1)]). An applicant's failure to comply with this and other requirements of the Regulation requires the denial of THA, unless such failure is due to the applicant's "physical or mental impairment" (R. 235 [§ 352.35(c)]).

Applicants for THA must cooperate in efforts "to determine available resources, and must apply for and use any benefits and resources that will reduce or eliminate the need for [THA]" (R. 236 [§ 352.35(f)]). THA must be denied if the applicant "has other housing available," or if s/he "is required to, but is not applying income and/or using available resources to reduce or eliminate the need for [THA]" (*id.* [§ 352.35(g)]).

Applicants found ineligible for shelter are entitled to an agency conference (18 NYCRR § 352.38[b]) and a State fair hearing to challenge denial of their application (R. 236 [§ 352.35(h)]).

This Court rejected a challenge to the Regulation by the Callahan and Eldredge plaintiffs. *Callahan v. Carey*, 307 AD2d 150 (1st Dept. 2003). Concluding that the Regulation was

"duly promulgated and is consistent with the consent decree"
(307 AD2d at 155),⁴ this Court said (*id.*, at 153):

"[D]efendants, as the public authorities to whose discretion the supervision and operation of these essential programs have been committed, are empowered to adopt regulations which 'are rationally related to the agency's legitimate rulemaking objective of assuring that temporary housing resources are not squandered on those having no real need of them and to the related, equally legitimate objective of attempting to reduce prospective reliance upon temporary housing provided at public expense[.]'"

State Administrative Directives

94 ADM-20

A year prior to the promulgation of 18 NYCRR § 352.35, DOS issued an Administrative Directive, 94 ADM-20, the purpose of which was "to advise social services districts ["districts"] ... of their responsibilities with respect to providing assistance to homeless person" (R. 239; see, R. 238-84). The admonitions that "individuals ... have primary responsibility for securing their own housing" (R. 241) and that there is "an obligation on the part of individuals ... to use available resources and to seek necessary assistance to avoid homelessness

⁴ In 1981, the City entered into a consent decree wherein it agreed that, upon specified conditions being met, it would "provide shelter and board to each homeless man who applies for it" (R. 65). *Callahan v. Carey*, index number 42582/79 (Sup. Ct. NY Co.) (see, R. 53-62). The protections embodied in the consent decree were thereafter extended to homeless adult women. See *Eldredge v. Koch*, 98 AD2d 675 (1st Dept. 1983).

whenever possible" (R. 242) are paramount among the issues addressed by the Directive. The Directive provides (R. 241-42):

"Social services districts are neither expected nor obligated to provide temporary housing assistance to persons otherwise capable of making their own housing arrangements. Physical or mental impairment that limits a person's ability to secure housing may necessitate the provision of assistance in appropriate cases. Absent such considerations, however, the individual ... requesting assistance must demonstrate that reasonable efforts have been made to secure housing and that no other housing can be accessed even on a temporary basis."

The Directive further provides that its requirements "reflect a recognition that temporary housing resources are not unlimited and that each district is permitted to establish processes for the provision of temporary housing assistance that affords it needed flexibility in structuring its temporary housing programs" (R. 242). The Directive's standards "make clear the obligations both of the district and of persons seeking temporary housing assistance" and thus "help to ensure the most appropriate and effective use of this costly yet critical benefit" (*id.*).

Regarding the responsibilities of all applicants for THA, the Directive provides, *inter alia* (R. 261):

"Each district must provide temporary housing assistance only to persons who can establish that they are without housing at the time assistance is requested and have

sought and cannot access any other housing even on a temporary basis."

In addition to requiring that applicants "must demonstrate by clear, convincing and credible evidence that they have actively sought and are unable to access any other temporary or permanent housing" (*id.*), the Directive mandates that they must "cooperate with the district's eligibility verification efforts by providing all information and documentation relevant to determining the applicant's eligibility" (*id.*).

While it describes the factors to be considered, the Directive, emphasizing the discretionary nature of the decision making process, provides that eligibility determinations are to be made "based upon the totality of the circumstances" (R. 261).

96 ADM-20⁵

Subsequent to the promulgation of 18 NYCRR § 352.35, DOS issued an Administrative Directive, 96 ADM-20, the purpose of which was to advise social service districts both of the enactment of the Regulation and "of procedures for reviewing and acting upon applications for THA by homeless ... individuals"

⁵ Due to an inadvertent oversight, the City did not annex 96 ADM-20 to its papers in opposition to plaintiffs' motion herein. However, the Directive is part of the record in the companion proceeding, *Matter of Council of the City of New York v. Department of Homeless Services*, Index No. 403154/11. It was, therefore, before the Court below when it considered the instant motion in conjunction with the motion to dismiss in the *Council* proceeding, consolidating the two "insofar as they both raise CAPA challenges to the [Procedure]" (R. 12) and issuing a single decision (see, *supra*, at 4n.2, and accompanying text).

(*Council R. 125*; see, *Council R. 124-47*). The Directive also "clearly defines the responsibilities of persons applying for and receiving THA, to ensure that THA is being provided only to persons who have no other available housing or the means to secure other housing" (*Council R. 125*).

In particular, the Directive requires a district to conduct an assessment "whenever an individual ... applies for or is receiving THA" (*Council R. 126*). An assessment is "an evaluation by the [district] of the individual's ... housing and housing-related public assistance and care needs" (*Council R. 127*). Applicants for THA "must cooperate in the completion of an assessment" (*id.*). THA must be denied if an applicant's failure to cooperate is not the result of "verified mental or physical incapacity" (*Council R. 127-28*).

An applicant "must actively seek housing other than temporary housing" (*Council R. 131*), and any income available to the applicant must be budgeted by the district "to reduce the need for public assistance, including the need for THA" (*Council R. 135*). THA must be denied if a district determines that an applicant "is required, but is not applying available income and/or resources to [his/her] share of the cost of THA" (*Council R. 136*)."

The Eligibility Procedure

DHS issued the Eligibility Procedure, effective November 14, 2011. During the previous nine months, DHS and OTDA (see, *supra*, at 4n.3) engaged in frequent discussions concerning almost every aspect of the Procedure. By letter dated November 2, 2011, OTDA advised DHS that it had "determined that [the Procedure] is not inconsistent with State law or regulation" (R. 287).⁶

"[C]onsistent with the purposes of [18 NYCRR § 352.35]," and in order "to execute the City's responsibilities as delineated in the *Callahan* Consent Decree,"⁷ DHS utilizes the Procedure "to determine whether an applicant for THA is an eligible homeless person" (R. 41). Such eligibility is predicated on "whether the applicant has a viable housing option where s/he can live even on a temporary basis and/or whether s/he possesses sufficient financial resources to secure such housing" (*id.*). That, in turn, is determined by DHS in each case upon an investigation of "the totality of the applicant's circumstances, with an analysis of each applicant's situation in accordance with all relevant factors" (R. 42). The Procedure enumerates the factors to be considered by DHS "[d]epending on

⁶ The Court below noted that the State had "expressly represented" that it was not taking a position on the question of the applicability of CAPA (R. 12).

⁷ See, *supra*, at 6n.4.

the applicant's stated reasons for seeking shelter" (R. 44; see, R. 44-47).

An applicant is "required to cooperate with DHS's eligibility process by providing all information and documentation necessary to determine the applicant's eligibility for THA" (R. 43). If necessary, DHS will assist the applicant in obtaining such information (*id.*). Absent a "valid reason" (*id.*), such as a "mental or physical impairment as assessed by a qualified mental health or medical professional" (R. 47), the "failure to produce documentation constitutes a failure to cooperate" (R. 43) that will result in the denial of THA (R. 43-44).

"An individual cannot elect to be homeless, for eligibility purposes, by not utilizing other resources to obtain housing" (R. 44). In this regard, "DHS shall investigate all residences where the individual has resided in the year prior to the date of the application for [THA]" (*id.*). DHS will determine whether any of the locations so identified "is an available housing option" (*id.*). DHS will also "conduct an investigation of each applicant's financial resources to determine whether the applicant has financial resources sufficient to obtain other housing" (R. 46).

Implementing the Procedure, DHS initiates its "eligibility process" (R. 43) by requiring an applicant for THA

initially to complete an application, which includes questions regarding prior living arrangements and how the applicant became homeless (*Council R. 321-22*).⁸ The applicant thereafter meets with an eligibility specialist who records information learned during an in-depth assessment of the applicant on an Eligibility Determination Questionnaire ("EDQ") (R. 47; *Council R. 323*). The EDQ is an important investigative tool designed to elicit information about why the applicant is seeking shelter and whether the applicant has any available housing options or sufficient resources to obtain alternative housing (*id.*). In addition, the EDQ also identifies individuals who may have information relevant to the applicant's need for shelter (*id.*).⁹

⁸ As noted (*supra*, at 3), DHS, in the companion article 78 proceeding, submitted an answer to the petition pursuant to the order of the Court below upon its denial of DHS's motion to dismiss (R. 26). We reference to that answer because the Court below consolidated these actions and the proceeding for the purpose of deciding the common CAPA issue (*supra*, at 3-4) and granted the petition in the proceeding for the reasons stated in the order appealed from in these actions. In the answer, DHS set forth a comprehensive description of how the Procedure's contemplated application and investigation processes (R. 47-48) work in practice (see, *Council R. 320-38*).

⁹ The EDQ contains questions regarding, *inter alia*, immediate family members; income; benefits; rental assistance; employment status; criminal history; veteran status; domestic violence; and, medical and/or substance abuse/chemical dependency issues confronting the applicant. The EDQ also contains questions concerning the applicant's housing during the preceding year, including the type of housing; length of stay; whether others occupied the residence and, if so, their relationship to the applicant; why the applicant left the residence; whether the applicant paid rent; whether s/he was on the lease; whether s/he

The EDQ thus provides a comprehensive picture of the unique circumstances impacting each applicant's individual housing situation. This allows the eligibility specialist both to tailor the investigation to the specific applicant and to weigh the variety of factors impacting the eligibility determination (*Council R. 324*).¹⁰

In reviewing previous locations where the applicant lived prior to seeking THA, the eligibility specialist will evaluate, based on the totality of the applicant's circumstances, whether the applicant can return to any of them. The specialist obtains information from, among other sources, information on the EDQ; interviews of relevant third parties, such as landlords and tenants at the prior location; and, information and documentation submitted by the applicant in support of his/ her application (*Council R. 330-31*). In this regard, the Procedure also provides a non-exhaustive list of factors to be considered, as applicable, when determining whether a particular housing option remains available to the

received notice or had been evicted; the physical layout of the residence and the number of occupants; and, whether the applicant or others residing at the location had any medical, child welfare or domestic violence issues that would preclude the residence as an available housing option (*Council R. 323-24*).

¹⁰ At the end of the application process, applicants are provided with a conditional shelter placement pending completion of the eligibility investigation and the issuance of an eligibility determination (*Council R. 322*).

applicant, including tenancy rights, lease restrictions, eviction, domestic violence, overcrowding, unsafe housing conditions, and health and safety (R. 44-46).

In accord with the requirements of the Eligibility Procedure (R. 48), the specialist submits his/her findings and recommendation to an eligibility supervisor for review. The supervisor may approve or disapprove the recommendation or may require the specialist to conduct additional investigation (*Council R. 335-36*).

Also pursuant to the Procedure (R. 49-50), an ineligibility determination will be reviewed by a DHS attorney at an agency conference if requested by an applicant. The applicant may be accompanied by a representative and may submit additional documentation. Upon his/her review of all of the evidence, the attorney may affirm or reverse the determination or may refer the matter to agency staff for further investigation (*Council R. 336-37*). Whether or not an agency conference is requested, an applicant determined to be ineligible may challenge the decision at a State fair hearing (R. 158; *Council R. 337*).¹¹

¹¹ There is no limitation on the number of times an applicant may re-apply for shelter, and applicants are entitled to an agency conference and State fair hearing upon denial of each application. Shelter reapplications may be made at any time, including the same day a prior application is denied (*Council R. 337*).

DECISION BELOW

The Court below concluded that the Procedure "was promulgated in violation of the public vetting process required by [CAPA]" (R. 11). Rejecting the argument that the Procedure "vests DHS with sufficient discretion to make decisions to fall outside the definition of a rule under CAPA" (R. 20), the Court said (R. 19-20):

"A plain reading of the [Procedure] makes it clear that it mandates certain results under certain circumstances. Contrary to the City's arguments, while DHS has certain discretion in weighing factors before making a finding of eligibility for temporary housing, that discretion is not unfettered. There are a considerable number of mandated outcomes which leave DHS with no discretion about whether to deny temporary housing. While in some cases there are exceptions to outcomes, the exceptions do not make [an] otherwise ... mandated outcome discretionary.... Because there are mandated outcomes in the Procedure, the court holds that it is a rule within the meaning of CAPA."

The Court also rejected the argument that the Procedure is not a rule inasmuch as it "has no legal effect because it ... implements the same legal obligations that are otherwise contained in existing law" (R. 21). The Procedure, the Court concluded, "is not simply a strict interpretation of the existing State Regulation or the State Administrative Directives, with a filling in of the interstices" (R. 22). Rather, the Procedure "imposes many new obligations on

applicants, with a concomitant creation and denial of substantive rights" (R. 22-23).

STATUTE INVOLVED

New York City Charter, Chapter 45 (City Administrative Procedure Act)

§ 1041(5)

"Rule" means the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency including an amendment, suspension, or repeal of any such statement or communication.

b. "Rule" shall not include any ... (ii) form, instruction, or statement or communication of general policy, which in itself has no legal effect but is merely explanatory[.]

§ 1043(a)

Authority. Each agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law. No agency shall adopt a rule except pursuant to this section.

ARGUMENT

THE COURT BELOW ERRED IN CONCLUDING THAT THE ELIGIBILITY PROCEDURE, WHICH VESTS SIGNIFICANT DISCRETION IN DECISION MAKERS AND HAS NO LEGAL EFFECT BUT IS MERELY EXPLANATORY OF EXISTING STATE LAW, IS A RULE THAT MUST BE ISSUED PURSUANT TO CAPA.

Because there is no dispute that the Procedure was not promulgated pursuant to CAPA (see, R. 367), the "controlling question" (*Matter of Cordero v. Corbisiero*, 80 NY2d 771, 772 [1992]) is whether the Court below correctly concluded that CAPA is applicable. The Court erred both because the Procedure is not a rule within the meaning and intent of CAPA, and because it falls within a stated exception to the definition of a rule. The final order appealed from, therefore, should be reversed.

(1)

The Procedure is not a rule because it invests significant discretion in decision makers.

"[O]nly a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation." *Matter of Roman Catholic Diocese of Albany v. New York State Department of*

Health, 66 NY2d 948, 951 (1985).¹² Contrary to the determination of the Court below, the Procedure is not a rule because it is not such a "statement or communication of general applicability" (Charter § 1041[5]), *i.e.*, "a rigid, numerical policy invariably applied across-the-board to all [applicants] without regard to individualized circumstances or mitigating factors." *Schwartfigure v. Hartnett*, 83 NY2d 296, 301 (1994); *see Matter of Homestead Funding Corporation v. State of New York Banking Department*, 95 AD3d 1410, 1412 (3d Dept. 2012)("Blanket requirements and fixed standards that are to be generally applied in the future, regardless of individual circumstances, are rules subject to [SAPA's] rule-making procedures[.]").

Rather, the Procedure establishes "guidelines ... for case-by-case analysis of the facts." *Matter of Dry Harbor Nursing Home and Health Related Facility v. Axelrod*, 137 AD2d 962, 964 (3d Dept.), *leave to appeal denied*, 73 NY2d 701 (1988). It invests DHS with "significant discretion" and "allow[s] for flexibility" (*Matter of New York City Transit Authority v. New*

¹² Both CAPA's definition of "rule" (Charter § 1041[5]) and the relevant exclusion (*id.*, § 1041[5][b][ii]) are essentially identical to cognate provisions of the State Administrative Procedure Act ("SAPA") (*see*, SAPA [56A McK. Con. Laws of NY] §§ 102[2][a][i], 102[2][b][iv]). The Charter Revision Commission described CAPA as being "all inclusive of what is in the state act" (R. 225). Upon such circumstances, case law interpreting SAPA is relevant in interpreting CAPA.

York State Department of Labor, 88 NY2d 225, 229 [1996]) in the determination of an applicant's eligibility for THA.

Even upon a cursory reading of the Procedure it is evident that discretionary decision making is at the very core of DHS's "eligibility process." The Procedure is the tool by which DHS "determine[s] whether an applicant for THA is an eligible homeless person" (R. 41). That determination, in turn, is "based on an assessment of whether the applicant has a viable housing option where s/he can live even on a temporary basis and/or whether s/he possesses sufficient financial resources to secure such housing" (*id.*). Determinations as to whether a housing option is "viable" and whether financial resources are "sufficient" are, ultimately, the product of discretionary decision making on the part of an eligibility specialist based on all of the circumstances.

Critically, the Procedure provides that DHS "will base its eligibility determination on the totality of the applicant's circumstances, with an analysis of each applicant's situation in accordance with all relevant factors" (R. 42). "[D]epending on the applicant's stated reasons for seeking shelter" (R. 44), DHS considers, *inter alia*, various available housing options (R. 44-46). Each step along the way in this regard is permeated with discretionary decision making.

For example, an applicant's "tenancy rights" makes him/her "ineligible, provided there is no imminent threat to health or safety" (R. 44), an assessment that necessarily must be made by DHS. Also, an applicant's claim that "a viable housing option" is not available "because it is overcrowded or unsafe" must be investigated by DHS, which will take into account, *inter alia*, "the conditions, the physical layout and the other occupants of the viable housing option" (R. 45). A claim that a viable housing option is not available due to "an immediate and significant threat to health or safety" is similarly investigated and assessed by DHS (R. 46). "Field investigations" of potential viable housing options are conducted at DHS's "discretion" (R. 48).

In all cases, DHS must also make case-by-case discretionary determinations as to "whether the applicant has financial resources sufficient to obtain other housing" (R. 46). In this regard, DHS both reviews financial records produced by an applicant (*id.*) and attempts to find "unreported assets through a review of ... available data sources" (R. 47).

If an evaluator is "unsure of what determination should be made," s/he "should consult with a supervisor" (R. 48). The findings of all investigations must be reviewed and approved by a DHS supervisor (*id.*). An applicant who is determined to be ineligible for THA is entitled to a DHS

conference before a DHS official who was not directly involved in making the original determination (R. 48-50). Following the conference, DHS "shall uphold the prior determination, render a new and different decision, or meet the applicant's need for temporary shelter while DHS investigates new information provided by the applicant during the conference" (R. 50). Finally, all applicants have the right to a "State Fair Hearing" (*id.*).

In sum, DHS's determination of an applicant's entitlement to THA is predicated upon an "assessment of individualized circumstances." *Matter of Taylor v. New York State Department of Correctional Services*, 248 AD2d 799, 800 (3d Dept. 1998)(An agency directive permitting the Department of Correctional Services to prohibit an employee from carrying a weapon off duty was "clearly not a rule since its application depend[ed] upon respondent's assessment of individualized circumstances which in this instance was petitioner's mental or emotional condition."). Because the Procedure's standards thus "encompass case-specific mitigating factors and vests the decisionmakers [*sic*] with significant discretion with which to independently exercise their professional judgment, the standards constitute not 'rules' but guidelines." *Matter of Medical Society of the State of New York v. Serio*, 100 NY2d 854, 868 (2003); see *Matter of Senior Care Services, Inc. v. New York*

State Department of Health, 46 AD3d 962, 964-65 (3d Dept. 2007); *Matter of Lue-Shing v. Travis*, 12 AD3d 802, 803-04 (3d Dept. 2004), *leave to appeal denied*, 4 NY3d 753 (2005)(State Board of Parole guidelines "for its use in making parole decisions" were "guidelines," not rules, as they required the Board to utilize "flexibility and discretion" in assessing "[m]itigating or aggravating factors'" that could "'result in decisions above or below the guidelines.'").¹³

To be sure, as noted by the Court below, the Procedure includes a number of fixed factors. An applicant's failure to provide "all information and documents necessary to determine ... eligibility ... constitutes a failure to cooperate" (R. 151). THA "must" be denied if such failure "is not due to a verified mental or physical incapacity" (R. 44). However, while the Court below deemed this to be a "mandated outcome" (R. 19), the fact is that the determination of incapacity is itself a case-by-case discretionary decision by a "qualified mental health or medical professional" (R. 47; see, R. 49 ["The role of the licensed social worker will be to assess the applicant and

¹³ As noted, DHS's answer in the article 78 proceeding details the real-world application of the Procedure, demonstrating DHS's interpretation of the Procedure as requiring a case-by-case evaluation process and informed discretionary decision making at every stage of the process (see, *Council R. 320-39; supra*, at 11-14).

render a determination whether the applicant is able to cooperate in the investigation."]).

Also, "[a]n individual cannot elect to be homeless, for eligibility purposes, by not utilizing other resources to obtain housing" (R. 44). The Procedure further provides that an applicant's "significant income or assets" must be used "to secure temporary housing while searching for a more permanent housing situation" (R. 46). Here, too, however, the determination is discretionary, since DHS personnel decide, following their investigation, "whether the applicant has financial resources sufficient to obtain other housing" (*id.*).

Contrary to the conclusion of the Court below, then, these aspects of the Procedure do not transform its discretionary guidelines into "per se rules or regulations." *Matter of Trustees of Masonic Hall and Asylum Fund v. Axelrod*, 174 AD2d 199, 205 (3d Dept. 1992). Rather, the Procedure "encompass[es] both fixed and variable factors unique" to an applicant to be considered by DHS when determining eligibility "on a case-by-case analysis." *Id.*, 174 AD2d at 204; see *New York City Transit Authority*, 88 NY2d at 229-30.

The Court below correctly noted that DHS's discretion in making eligibility determinations is "not unfettered" (R. 19). However, the discretionary, case-specific process by which such determinations are made does not, unlike the "change of

policy" at issue in *Matter of Singh v. Taxi and Limousine Commission*, 282 AD2d 368, 368 (1st Dept. 2001), "materially affect[] the rights of all [applicants] equally and without exception." In *Singh*, the Taxi and Limousine Commission, without complying with CAPA, had "shorten[ed] the grace period for renewal of an operator's license from six months to 30 days after the license expired." 282 AD2d at 368; *cf. also Cordero*, 80 NY2d at 772-72 (policy that applied to every jockey meeting stated conditions established a "mandatory procedure" that constituted a rule as defined by SAPA).

In this regard, the Procedure resembles, in relevant respects, the "penalty guideline provisions" at issue in *New York City Transit Authority*, 88 NY2d 225. While the guidelines "cap[ped]" the amount of penalties that could be assessed by State Labor Department inspectors for violation of the Labor Law, they further provided that "penalties 'may be assessed' in any amount up to the statutory limits." 88 NY2d 229. The factors to be considered were outlined in the guidelines, thus "vest[ing] inspectors with significant discretion, and allow[ing] for flexibility in the imposition of penalties, all with the view of imposing the appropriate sanction for the individual offense in the particular case." *Id.*

"Thus," the Court noted, "although the guidelines specif[ied] numerical formulas for calculating the ultimate

amount of the penalty," they "d[id] not dictate the result." 88 NY2d at 229-30. Rather, the Court said, "the ultimate amount of the penalty is dependent on inspectors' independent exercise of their professional judgment." 88 NY2d at 230. Upon such circumstances, the Court concluded that the guidelines were not rules that were required to be promulgated in accordance with SAPA.

So, too, in the instant matter. As fully reviewed herein, the Procedure provides for a case-by-case determination of eligibility that at every critical juncture calls for the exercise of reasoned discretion on the part of DHS. "'Choosing to take an action *** based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances[.]'" *Medical Society*, 100 NY2d at 869. The Court below thus erred in rejecting the argument that the Procedure "vests DHS with sufficient discretion to make decisions to fall outside the definition of a rule under CAPA" (R. 21)

(2)

The Procedure is not a rule because it has no legal effect but is merely explanatory of existing State law.

While "there is no clear bright line between a 'rule' or 'regulation' and an interpretative policy" (*Cubas v. Martinez*, 8 NY3d 611, 621 [2007]), the Court below erred in concluding that the Eligibility Procedure does not fall within CAPA's exclusion of agency action that is "merely explanatory." Charter § 1041(5)(b)(ii). Notwithstanding some minor additions, the Procedure is no more than DHS's restatement, interpretation, and explanation of State law embodied in 18 NYCRR § 352.35 and the Administrative Directives that both preceded and followed the Regulation.

State policy, embodied first in Administrative Directive 94 ADM-20, issued prior to the promulgation of section 352.35, provides that local social services districts are "neither expected nor obligated to provide temporary housing assistance unless it is clearly demonstrated that the person requesting assistance is faced with an immediate need for housing, has made reasonable efforts to secure housing and cannot access any other housing even on a temporary basis" (R. 260). The Directive further provides that THA applicants "must demonstrate by clear, convincing and credible evidence that they

have actively sought and are unable to access any other temporary or permanent housing, including housing in which they have previously resided and temporary accommodations provided by friends or relatives" (R. 261).

The Directive requires applicants to cooperate with a district's "eligibility verification efforts by providing all information and documentation relevant to determining the applicant's eligibility" (*id.*). The Directive further authorizes local districts "to establish processes for the provision of temporary housing assistance that affords [them] needed flexibility in structuring [their] temporary housing programs" (R. 242).

18 NYCRR § 352.35 provides the broad outline, elaborated upon by DOS's subsequent 1996 Directive, that "governs the provision of temporary housing assistance to persons who are homeless" (R. 234 [§ 352.35(a)]). The entirety of the process provided for in the Procedure, which "sets forth the standards by which DHS ... will determine whether individuals who apply for [THA] are eligible" (R. 41), repeats, or is directly derived from, the Regulation and Administrative Directives. Indeed, the Procedure makes a number of direct references to the Directives (see, R. 42, 43, 46, 49).

Thus, pursuant to the Procedure, DHS must "conduct a through review of the applicant's situation and available

housing resources" (R. 42). The Regulation provides for an assessment to be conducted by local districts (R. 235 [§ 352.35(c)(1)]), defined as "the evaluation of an [applicant's] housing and housing related public assistance and care needs" (R. 234 [§ 352.35(b)(1)]; see, *Council R. 126*). As do the Regulation (R. 235 [§ 352.35(c)]) and the Directives (R. 274; *Council R. 127*), the Procedure provides that "all applicants for THA are required to cooperate with DHS' eligibility process" (R. 43).

Also pursuant to the Procedure, an applicant must "utiliz[e] other resources to obtain housing" (R. 44). This is drawn directly from the State requirement that an applicant "must actively seek housing other than temporary housing" (R. 235 [§ 352.35(c)(3)]; see, R. 236 [§ 352.35(g) ("A social service district must deny ... [THA] if it determines that the [applicant] ... has other housing available[.]")]). The Procedure further directs DHS to "conduct an investigation of each applicant's financial resources to determine whether the applicant has financial resources sufficient to obtain other housing" (R. 46). An applicant is "expected to use ... income and/or assets to secure temporary housing while searching for a more permanent housing situation" (*id.*). The State imposes identical obligations (see, R. 236 [§ 352.35(f)]; *Council R. 135-36*).

The Court's reasoning in *Cubas*, 8 NY3d 611, is instructive. In that case, the State Department of Motor Vehicles ("DMV") did not issue a driver's license to an applicant who lacked a valid Social Security number unless the applicant could prove that s/he was not eligible for one. "[W]hile the requirement that each applicant must 'provide proof that he/she is not eligible for a social security number' [was] embodied in a formal regulation, the requirement that that 'proof' include DHS [Department of Homeland Security] documents [was] reflected only in an internal DMV memorandum." 8 NY3d at 620.

The plaintiffs challenged this DHS documentation requirement on the ground, *inter alia*, that it had not been promulgated in accord with SAPA. The Court rejected the plaintiffs' challenge, concluding that the imposition of this requirement fell within SAPA's exclusion of "'interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory [SAPA § 102(2)(b)(iv)].'" 8 NY3d at 621.

A preexisting regulation, the Court said, imposed the obligation on an applicant to prove that s/he was not eligible for a social security number. The challenged policy "merely specifies what proof is acceptable. The policy does not create or deny substantive rights of members of the public - i.e., it

does not provide that some people are eligible and some ineligible for driver's licenses - but sets forth the procedure for the agency to follow in deciding who meets a predetermined test for eligibility." 8 NY3d at 621. As was true of the documentation requirement at issue in *Cubas*, the Eligibility Procedure does not impose any "new obligation[s]." *Id.*

While, as noted by the Court below, the Procedure references "available housing options" not explicitly mentioned in the Regulation or Directives, it does not "craft[] a new aspect of the policy." *Homestead Funding Corporation*, 95 AD3d at 1413 (3d Dept. 2012). Rather, it is "a reasonable interpretation" (*Matter of Elcor Health Services, Inc. v. Novello*, 100 NY2d 273, 279 [2003]) of the State Regulation and Directives. It consists of "explanatory statements and technical instructions" for meeting the State requirements, and "standing alone [it is] without legal effect." *National Association of Independent Insurers v. State of New York*, 207 ADd2d 191, 204 (2d Dept. 1994), *aff'd*, 87 NY2d 950 (1997).

Notably, in concluding that CAPA's exclusion of agency action that is "merely explanatory" (Charter § 1041[5][b][ii]) "must be strictly limited to a statement or policy that strictly interprets an existing statute or just fills in ... the interstices," the Court below relied on the dissenting opinion in *Cubas* (R. 22). The Eligibility Procedure is a rule subject

to CAPA, the Court below determined, because it "is not simply a strict interpretation of the existing State Regulation or the State Administrative Directives, with a filling in of the interstices" (*id.*).

The *Cubas* majority, however, rejected the dissent's interpretation of the exclusion. As reviewed *supra*, the DMV policy challenged in *Cubas* fell within the SAPA exclusion, the majority said, because it did not "impose a new obligation" and it did not "create or deny substantive rights." As demonstrated, application of that test yields the conclusion that the Procedure falls squarely within CAPA's exclusion of policy "which in itself has no legal effect but is merely explanatory."

The Procedure is unlike the State Office of Mental Health ("OMH") policy regarding the restraining of patients in licensed facilities challenged in *Matter of SLS Residential, Inc. v New York State Office of Mental Health*, 67 AD3d 813 (2d Dept 2009), *leave to appeal denied*, 14 NY3d 713 (2010). In that case, the Court determined that OMH was engaged in rulemaking because it was "chang[ing]," not "merely interpreting," existing law and regulations "regarding restraints ... by redefining the term 'restraint' to include manual restraints." 67 AD3d at 816. The policy, the Court concluded, "essentially amends the Mental Hygiene Law." *Id.*

The facts of the present case point to a different outcome. The Procedure is simply an "interpretive statement" (*Matter of Pharmacists Society of State of New York, Inc. v. Pataki*, 58 AD3d 924, 926 [3d Dept.], *leave to appeal denied*, 12 NY3d 710 [2009]) of State law and practice as comprehensively set forth in the Regulation and the Administrative Directives. See *DeBonis v. Corbisiero*, 178 AD2d 183, 184 (1st Dept 1991), *leave to appeal denied*, 80 NY2d 753 (1992)(The respondent's memorandum "set[ting] forth general penalty guidelines" was not required to be promulgated in accordance with SAPA because "respondent's authority to impose appropriate penalties [was] statutory in origin.").

As the Eligibility Procedure thus falls within an explicit CAPA exclusion, the Court below erred in concluding that it "should have been promulgated as a rule" (R. 25). See *Matter of Elcor Health Services, Inc., v. Novello*, 100 NY2d 273 (2003)(Department of Health "clarification sheet" [at 277] that "require[ed] 'actual improvement' by a patient before a residential health care facility [could] receive reimbursement for restorative therapy" [at 276] was "a reasonable interpretation" [at 279] of the applicable regulation making reimbursement dependent on the "positive potential for improved functional status within a short and predictable period of

time'" [at 277], and thus did not require rulemaking under SAPA [at 279].).

CONCLUSION

**THE ORDER APPEALED FROM SHOULD BE
MODIFIED, AND PLAINTIFFS' MOTION
SHOULD BE DENIED IN ALL RESPECTS,
WITH COSTS.**

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August 30, 2012

Respectfully submitted,

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