To be Argued by:
JEFFREY P. METZLER

New York County Clerk's Index No. 403154/11

New York Supreme Court
Appellate Division—First Department

In the Matter of the Application of
THE COUNCIL OF THE CITY OF NEW YORK,

Petitioner-Respondent,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

THE DEPARTMENT OF HOMELESS SERVICES OF THE CITY OF NEW YORK and SETH DIAMOND, Commissioner for the Department of Homeless Services of the City of New York,

Respondents-Appellants.

BRIEF FOR THE COUNCIL OF THE CITY OF NEW YORK

ELIZABETH R. FINE
General Counsel
The Council of the City of New York
250 Broadway, 15th Floor
New York, New York 10007
(212) 788-7017
Attorney for Petitioner-Respondent

Of Counsel:
Jeffrey P. Metzler
Lauren G. Axelrod

October 10, 2012

PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

A. Background 3

B. Issuance of the Procedure 4

C. The Procedure 6

PROCEDURAL HISTORY 9

STATUTORY FRAMEWORK 12

ARGUMENT 16

POINT I 16

THE PROCEDURE IS VOID BECAUSE IT IS A RULE THAT WAS NOT PROMULGATED IN ACCORDANCE WITH CAPA 16

A. The Procedure Is A Rule Within the Plain Meaning of CAPA 16

B. The Exercise of Discretion in Making Individual Determinations Does Not Exempt the Procedure from the Rulemaking Process Because It Is Applicable to All Intake Facilities and All Applicants 17

C. The Procedure Does Not Give DHS Unfettered Discretion When Making Individual Determinations 28

POINT II 31

CAPA'S EXCEPTION FOR A STATEMENT WHICH IN ITSELF HAS NO LEGAL EFFECT BUT IS MERELY EXPLANATORY DOES NOT APPLY 31

A. The Procedure Would Have a Profound Effect on New Yorkers Seeking Shelter 33

B. State Regulations and Directives Do Not Require DHS to Implement the Procedure.. 37

CONCLUSION 41

TABLE OF AUTHORITIES

Page

Cases

10 Apartment Assocs., Inc., Matter of v. New York State Div. of Housing and Community Renewal,
240 A.D.2d 585 (2d Dep't 1997) 31

439 E. 88 Owners Corp., Matter of v. Tax Comm'n,
307 A.D.2d 203 (1st Dep't 2003)..30

1700 York Assocs. v. Kaskel,
182 Misc. 2d 586 (Civ. Ct. N.Y. County 1999)...................................15-16, 32

Abbott, Matter of v. Kelly,
145 A.D.2d 921 (4th Dep't 1988) 19

Alca Indus., Matter of v. Delaney,
92 N.Y.2d 775 (1999) 18, 30

Asmussen v. Comm'r, New Hampshire Dep't of Safety,
145 N.H. 578 (2000) 22 n.7

Bizarre, Inc., Matter of v. State Liquor Auth.,
29 A.D.2d 500 (1st Dep't 1968)..22

Carondelet Health Servs., Inc. v. Arizona Health Care Cost Containment Sys. Admin.,
182 Ariz. 221 (1994)...22 n.7

Cordero, Matter of v. Corbisiero,
80 N.Y.2d 771 (1992) 19-20

Cubas v. Martinez,
8 N.Y.3d 611 (2007) 36, 37

Dry Harbor Nursing Home, Matter of v. Axelrod,
137 A.D.2d 962 (3d Dep't 1988) 27

Elcor Health Servs., Matter of v. Novello,
100 N.Y.2d 273 (2003) 36, 36-37

H.D. Services, LLC, Matter of v. New York State Comptroller,
51 A.D.3d 1236 (3d Dep't 2008) 31

Hillis v. Dep't of Ecology,
131 Wash. 2d 373 (1997) 22 n.7

Home Care Ass'n of New York State, Inc., Matter of v. Dowling,
218 A.D.2d 126 (3d Dep't 1996) 20, 35

Homestead Funding Corp., Matter of v. New York Banking Dep't,
95 A.D.3d 1410 (3d Dep't 2012) 25

J.D. Posillico, Inc., Matter of v. Dep't of Transp.,
160 A.D.2d 1113 (3d Dep't 1990) 21-22

Jones, Matter of v. Smith,
64 N.Y.2d 1003 (1985) 15, 19, 21, 32, 35

Lue-Shing, Matter of v. Travis,
12 A.D.3d 802 (3d Dep't 2004) 26

Martin v. Dep't of Corr.,
424 Mich. 553 (1986) 22 n.7

Medical Soc'y, Matter of v. Serio,
100 N.Y.2d 854 (2003) 26

Metromedia, Inc. v. Director, Div. of Taxation,
97 N.J. 313 (1984) 22 n.7

New York City Transit Auth., Matter of v. New York State Dep't of Labor,
88 N.Y.2d 225 (1996) 26

New York County Lawyers' Ass'n, Matter of v. Bloomberg,
95 A.D.3d 92 (2012) 34-35

New York State Coalition of Public Employers, Matter of v. New York State Dep't of Labor,
60 N.Y.2d 789 (1983) 35, 36

People v. Cull,
10 N.Y.2d 123 (1961) 15, 18, 21, 35

People ex rel. Padilla v. Rodriguez,
145 A.D.2d 922 (3d Dep't 1988) 19

Pickus v. United States Bd. of Parole,
507 F.2d 1107 (D.C. Cir. 1974) 20

Riley v. County of Broome,
95 N.Y.2d 455 (2000) 31-32

Roman Catholic Diocese, Matter of v. New York State Dep't of Health,
109 A.D.2d 140 (3d Dep't 1985) 26

Schwartfigure, Matter of v. Hartnett,
83 N.Y.2d 296 (1994) 25

Senior Care Servs., Inc., Matter of v. New York State Dep't of Health,
46 A.D.3d 962 (3d Dep't 2007) 25

Singh, Matter of v. Taxi and Limousine Comm'n,
282 A.D.2d 368 (1st Dep't 2001) 27

Sound Distributing Corp. v. New York State Liquor Authority,
144 Misc. 2d 1 (Sup. Ct. Bronx County 1989) 21

Sun-Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n,
16 Or. App. 63 (1973) 22 n.7

Sunrise Manor Nursing Home, Matter of v. Axelrod,
135 A.D.2d 293 (3d Dep't 1988) 27

Taylor, Matter of v. New York State Dep't of Corr. Servs.,
248 A.D.2d 799 (3d Dep't 1998) 25

Trustees of the Masonic Hall, Matter of v. Axelrod,
174 A.D.2d 199 (1992) 27

Whiting v. Marine Midland Bank – Western,
80 Misc. 2d 871 (Sup. Ct. Cattaraugus County 1975) 21

Yaretsky v. Blum,
456 F. Supp. 653 (S.D.N.Y. 1978) 20-21

Statutes and Regulations

N.Y.C.R.R., Tit. 10, Ch. 2, Part 86 27

7 N.Y.C.R.R. §§ 252.3, 252.5, 252.7, 253.7, 253.9 19

18 N.Y.C.R.R. § 352.35 .... 11 n.4

N.Y. City Charter § 610-614 .... 13 n.6

N.Y. City Charter § 1041(2) 13 n.6

N.Y. City Charter § 1041(5) .... *passim*

N.Y. City Charter §§ 1041-1047 12

N.Y. City Charter § 1043 .... *passim*

N.Y. Laws of 1997, ch. 436, § 122(a), (f) 39 n.11

1 R.C.N.Y. § 15-04(d)(6) 23

3 R.C.N.Y. § 1130-01(d)(6) 23

6 R.C.N.Y. § 1-10(a) 23

12 R.C.N.Y. § 1-07(e)(i) 23

15 R.C.N.Y. § 16-07(b)(1) 23

15 R.C.N.Y. § 16-15(a) 23

15 R.C.N.Y. § 19-05(b)(2) 24

16 R.C.N.Y. § 3-02(m) 24

38 R.C.N.Y. § 13-01(f) 24-25

66 R.C.N.Y. § 11-82(e)(iii) 24

67 R.C.N.Y. § 6-33(b)(3)(iii) 24

Other Authorities

Hearing of Committee on General Welfare, New York City Council (Nov. 9, 2011) 3 n.2, 33 n.8

Mayor's Management Report (2012) 33 n.9

1 McKinney's Statutes § 97 32

1 McKinney's Statutes § 213 32

1 McKinney's Statutes § 240 .... 34 n.10

N.Y. Dep't of Social Services, Preventing Homelessness and Providing Assistance to Homeless Persons, 94 ADM-20 (Dec. 29, 1994) 11 n.5

N.Y. Dep't of Social Services, Responsibilities of Homeless Individuals and Families, 96 ADM-20 (Dec. 27, 1996) 11 n.5

2 N.Y. Jur. 2d Administrative Law § 12 (2011) 22 n.7

2 Report of the New York City Charter Revision Commission, December 1986- November 1988 .... 14, 16, 32

PRELIMINARY STATEMENT

In November 2011, with less than ten days' notice and no opportunity for public comment, the New York City Department of Homeless Services ("DHS") sought to implement Procedure No. 12-400 (the "Procedure), a new policy governing the intake and admission process for single adults seeking shelter. By DHS's own estimates, between 10% and 60% of women and men who would receive temporary housing assistance under DHS's current policies could be denied shelter under the new procedure. This is precisely the type of agency "action[] the city undertakes that affects the public," (R. 227) that must go through the rulemaking procedure set forth in the City Administrative Procedure Act ("CAPA").

DHS does not dispute that it failed to comply with CAPA, but argues that CAPA does not apply because the Procedure may involve the exercise of discretion in making individual intake assessments. However, this argument fails because the Procedure itself, which implements an intake assessment for the very first time, applies to all DHS intake facilities and all single adults seeking shelter without regard to individualized circumstances. Moreover, several elements of the Procedure are subject to rulemaking because they set standards that substantially alter, or in fact, can determine the result of future agency adjudication.

DHS's second argument – that the Procedure "has no legal effect, but is merely explanatory" – is not only oblivious to the profound effect the Procedure's implementation would have on the women and men who would be denied shelter under the new policy, but misreads the plain language of CAPA, ignores DHS's own practice and statements over the last 15 years, and misreads the statements and regulations issued by the New York State Office of Temporary and Disability Assistance.

QUESTIONS PRESENTED

1. Is an agency policy that applies to all intake facilities and all applicants for shelter without regard to individual circumstances and that mandates certain results under certain circumstances a "rule" under the City Administrative Procedure Act ("CAPA")?

Supreme Court answered in the affirmative.

2. Does CAPA's exception for a statement "which in itself has no legal effect but is merely explanatory" apply to an agency policy that would result in the denial of shelter to hundreds, if not thousands, of women and men based on an intake assessment and standards that have never before been applied?

Supreme Court answered in the negative.

STATEMENT OF FACTS

A. Background

The New York City Department of Homeless Services ("DHS") has never required its intake facilities to investigate whether single adult applicants for shelter have other available housing or the means to obtain other housing and has never before denied temporary housing assistance ("THA") to applicants on those bases. Nor have single adults seeking shelter in New York City ever been required to provide information or documentation regarding their prior housing arrangements or financial resources, let alone demonstrate by "clear and convincing" evidence that they are homeless. Indeed, DHS does not require single adults even to provide identification to qualify for shelter. (R. 50, 161-62, 278-79; S.R. 5).[1]

DHS does not dispute these facts and estimates that 10%, or perhaps even 60% of adults who currently receive THA would be denied shelter under Procedure No. 12-400 (the "Procedure") (R. 189-90).[2] DHS estimates that by denying shelter to these men and women, the agency would save approximately $4

---

[1] Citations to "R. __" are to the Record on Appeal. Citations to "S.R. __" are to the Supplemental Record on Appeal, filed by stipulation of the parties on September 11, 2012.

[2] See Hearing of Committee on General Welfare, New York City Council (Nov. 9, 2011) at 86-87 (available at http://legistar.council.nyc.gov/View.ashx?M=F&ID=1627093&GUID=C414E8A5-0BAB-4BB7-A6BD-148A1F8F44D2); see also (R. 178).

million annually (R. 189-90). For the first time since the City entered into the landmark 1981 consent decree in *Callahan v. Carey*, Index. No. 42582/79 (Sup. Ct. New York County) (R. 64-73), vulnerable homeless women and men could be turned back onto the streets, where they may suffer serious harm and even death from exposure to the elements.

B. Issuance of the Procedure

In 2011, DHS requested that the New York State Office of Temporary and Disability Assistance ("OTDA") approve its proposal to implement the Procedure (R. 51). On November 2, 2011, OTDA wrote to DHS stating:

> I am writing in response to your request for approval of the Department of Homeless Services' (DHS) Single Adults Eligibility Procedure (the "Procedure"). The Procedure sets forth the standards by which DHS Single Adult Intake facilities ("DHS") will determine whether individuals who apply for Temporary Housing Assistance ("THA") are eligible for temporary emergency shelter.
>
> The Office of Temporary and Disability Assistance ("OTDA") has reviewed the Procedure and determined that it is not inconsistent with State law or regulation.

(R. 165).

The following day, DHS issued the Procedure, with an effective date of November 14, 2011 (R. 167, 320).

On November 9, 2011, OTDA wrote a second letter to DHS stating:

> Any suggestion that the Office of Temporary and Disability Assistance ("OTDA") approved the New York City Department

> of Homeless Services ("DHS") proposed shelter eligibility procedure for single homeless adults is inaccurate. OTDA has not commented on the substantive merits of the proposed change, but instead determined that the proposal was not inconsistent with State law.
>
> Moreover, this office has serious concerns that DHS failed to submit this proposal to the New York Supreme Court for review. For over thirty years, such a review process has been DHS's practice when making a policy change relating to the *Callahan Consent Decree*. Given DHS's failure to share this policy with the Court, OTDA finds the November 14th implementation date – a mere ten days after the policy change was announced – to be completely unreasonable and is not supported by the State.

(R. 169) (footnote omitted).

DHS does not dispute that before it could implement the Procedure, it was required to obtain OTDA's "technical approval." (R. 187, 320). In testimony before the City Council, the Commissioner of DHS stated that the way "the relationship with the State works is the State issues regulations in the social services area and localities are free to design their programs within the limits of those regulations. So we believe that because they determined that this program, this procedure that we're going to implement, is consistent with the regulations, we could go forward." (R. 182-83).

There is also no dispute that in issuing the Procedure, DHS did not follow the procedures for rulemaking set forth in the City Administrative Procedure Act ("CAPA"). See Apps. Br. at 17 (citing R. 236).

C. The Procedure

The stated purpose of the Procedure is to "set[] forth the standards by which [DHS] will determine whether individuals who apply for Temporary Housing Assistance ("THA") are eligible for temporary emergency shelter…." (R. 149). Under the Procedure, all DHS intake facilities would be required to grant or deny THA to men and women seeking shelter "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." (R. 149).

The Procedure sets forth in detail how DHS would conduct investigations, the criteria that DHS would apply, the application and determination process, and the opportunities for review that would be provided to applicants who are denied THA. (R. 149-159).

With respect to investigations, the Procedure states that "DHS will investigate whether the applicant has other available housing or the means to obtain other housing." (R. 150). "[A]ll applicants for THA" would be required to cooperate with the investigation "by providing all information and documentation necessary to determine the applicant's eligibility for THA. If the applicant is unable to produce required documentation, s/he must explain the reason. Without a valid reason, failure to produce documentation constitutes a failure to cooperate."

(R. 151) A failure to cooperate will result in the denial of THA unless the individual suffers from "a verified mental or physical incapacity." (R. 151-52).

The Procedure also provides specific criteria that DHS will use to determine whether to grant or deny THA based on an applicant's available housing options or financial resources. For example, DHS would investigate all residences where the applicant resided in the year prior to applying for THA and could "propose additional actions, either on the part of the individual or primary tenant, to make the housing option suitable for the applicant to reside there on a temporary or permanent basis. Examples of such proposed actions include reconfiguring furniture or sleeping arrangements." (R. 152).

In addition, "[a] primary tenant's claim, oral or written, that the applicant can no longer reside in the viable housing option is not, by itself, sufficient to establish that the housing is no longer available…." (R. 152). In other words, if a friend or relative states than an applicant for THA can no longer stay at his or her apartment, DHS may nonetheless deem the friend or relative's apartment "available" and deny the applicant THA even if, as a practical matter, the applicant cannot sleep there.

The "Application and Eligibility Determination Process" detailed in the Procedure includes a requirement that applicants "complete a Temporary Housing Application … and an Intake or Eligibility Determination Questionnaire (EDQ)….

This application will also contain a release that the applicant must sign authorizing DHS to disclose and collect medical and other personal information in conducting its eligibility investigation." (R. 155). "Applicants who do not comply with the application process will be found ineligible based on non-cooperation, unless the reason for non-cooperation is mental or physical impairment as assessed by a qualified mental health or medical professional." (R. 155).

Under the Procedure, DHS staff would make a recommendation whether to grant or deny THA and a supervisor would review the recommendation for approval (R. 156). All applicants would be provided with written notification of DHS's determination and a description of the applicant's appeal rights (R. 156).

Applicants who are denied THA may request a DHS conference or a State Fair Hearing before an administrative law judge. "Applicants who request a Fair Hearing will not be granted THA while the hearing is pending." (R. 158).

Finally, applicants who are denied THA and re-apply would be subject to a "Re-Applicant Procedure." (R. 158). Under this procedure, a re-applicant who was denied THA initially because of an available housing resource will not be given shelter unless he or she asserts new facts establishing that (1) the re-applicant is a victim of domestic violence and the alleged perpetrator of the violence presents a clear and ongoing threat, or (2) the re-applicant or primary tenant has been evicted. (R. 158).

PROCEDURAL HISTORY

On November 10, 2011, Plaintiffs in *Callahan v. Carey*, Index. No. 42582/79 (Sup. Ct. New York County) moved by order to show cause why, among other things, the City defendants should not be (a) enjoined from implementing the procedures set forth in the Procedure pursuant to the Final Judgment by Consent in *Callahan v. Carey*; (b) enjoined from failing to provide shelter to any class member seeking shelter on the basis of the criteria set forth in the Procedure, unless and until the court modifies the consent decree; or (c) enjoined from implementing the Procedure unless and until they comply with CAPA. (R. 209-11).

On December 7, 2011, the Council brought a separate Article 78 Petition against DHS and its Commissioner seeking an order (a) declaring the Procedure void because it was promulgated in violation of Chapter 45 of the New York City Charter, the City Administrative Procedure Act ("CAPA") and (b) enjoining DHS from adopting, implementing or enforcing the Procedure pending compliance with CAPA. (R. 46-58).

Supreme Court (Hon. Judith J. Gische, J.S.C.), consolidated the two proceedings for consideration of the CAPA challenges (R. 13) and issued a Decision and Order on February 21, 2012, declaring the Procedure void and

denying DHS's cross-motion to dismiss the Council's Article 78 Petition (R. 11-28). The court rejected DHS's argument that the Procedure was not a rule because it provides for the exercise of discretion:

> 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 a mandated outcome discretionary.

(R. 20-21).

The court also rejected DHS's claim that the Procedure was not generally applicable, holding that it was

> generally applicable to all people who apply for THA and must be utilized at all DHS intake facilities. Its applicability is not a suggestion or a request, it is an across the board requirement. The fact that there may [be] elements of discretion in connection with determinations on individual applications does not negate the [Procedure's] general applicability because the discretion does not involve simply disregarding the [Procedure.]

(R. 21-22).

Finally, the court rejected DHS's argument that the Procedure falls within CAPA's exception for a statement of "general policy, which in itself has no legal

effect but is merely explanatory."[3] The court noted that a "conclusion is easily drawn" that the Procedure, standing alone, "does have legal effect":

> The application of the new eligibility process has the effect of determining who gets THA pursuant to the consent decree and existing law. Public Statements by DHS Commissioner Seth Diamond confirm that the [Procedure] is expected to reduce the number of people who were previously being accommodated by the shelter system by about 10% (and possibly more), at a projected cost reduction of $4,000,000 per year.

(R. 23).

While acknowledging consistencies between the state regulation[4] and administrative directives[5] which address the provision of temporary housing assistance to homeless individuals and the Procedure, the court found that the Procedure "imposes many new obligations on applicants, with a concomitant creation and denial of substantive rights," identifying several with specificity (R. 23-25).

Moreover, the Regulation and Administrative Directives relied on by DHS "have been in place for no less than 15 years. The procedures set out in the [Procedure], however, are new. If the [Procedure] is merely a strict interpretation

---

[3] N.Y. City Charter § 1041(5)(b)(ii).
[4] See 18 N.Y.C.R.R. § 352.35 ("State Regulation").
[5] N.Y. Dep't of Social Services, Preventing Homelessness and Providing Assistance to Homeless Persons, 94 ADM-20 (Dec. 29, 1994) (R. 75-122); N.Y. Dep't of Social Services, Responsibilities of Homeless Individuals and Families, 96 ADM-20 (Dec. 27, 1996) (R. 124-147) ("State Administrative Directives").

of the State Regulation and State Administrative Directives, the procedures would have been in place for at least the last 15 years." (R. 25).

Finally, the court noted that "[t]he State does not join in the City's arguments. Notwithstanding that the City sought State approval for the [Procedure], the State would only represent that the [Procedure] is not inconsistent with state law." (R. 25) Thus, "[t]he State's position … does not support the City's argument that the [Procedure] is a strict interpretation of State law…." (R. 26).

On March 9, 2012, DHS submitted an Answer to the Council's Article 78 petition, (R. 310-342) which was amended by Stipulation on March 14. (S.R. 4). The parties agreed that the Answer did not introduce any issues that required further briefing and on March 14, 2012, the court issued a final order granting the Council's Petition for the reasons stated in its Decision and Order dated February 21, 2012 (R. 9).

STATUTORY FRAMEWORK

The City Administrative Procedure Act ("CAPA"), Chapter 45 of the New York City Charter (§§ 1041-1047), sets forth the process that every New York City

agency, including the Department of Homeless Services, must follow to adopt a rule.[6]

Charter § 1041(5) provides, in relevant part:

> "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.
>
> a. "Rule" shall include, but not be limited to, any statement or communication which prescribes … (vii) standards for the granting of loans or other benefits.
>
> 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….

Charter § 1043 sets forth the requirements for rulemaking, which include notice to the public and the City Council, review by the Law Department, and opportunity for public comment. "No agency shall adopt a rule except pursuant" to § 1043. Charter § 1043(a). Rules that "implement particular mandates or standards set forth in newly enacted federal, state, or local laws, regulations or other requirements with only minor, if any, exercise of agency discretion in interpreting such mandates or standards," are exempt from the requirement that the law department review and comment on the rule, but are subject to all other rulemaking requirements. See id. § 1043(d)(4)(iv).

---

[6] See Charter § 1041(2) (defining "agency" to include any officer or entity provided for in the Charter); id. §§ 610-614 (providing for Department of Homeless Services).

The drafters of CAPA explained that,

> [t]he term "general applicability" encompasses any statement or communication that applies similarly to members of a class, regardless of the number of members in any such class. It includes statements which are limited in their application to certain geographic locations, if they are general in their application. ***The definition is intended to be construed broadly to accommodate the act's basic objectives***.
>
> Paragraph a of subdivision 5 sets forth several examples of statements which are specifically included in the definition of a rule, without limiting the scope of the basic general definition. Statements of the type listed in this paragraph, therefore, are to be treated as rules for purposes of CAPA, ***without need to resort to the language of the general definition***. Since paragraph a is not a restriction on the breadth of the basic definition set forth in the opening statement of subdivision 5, any agency statement that would be a rule under the general definition is to be treated as such, whether or not it is similar in nature to any of the examples in paragraph a.
>
> Paragraph b of subdivision 5 lists statements which are not to be considered rules. They are therefore exempted from CAPA's rulemaking procedures …. These ***exclusions apply primarily to an agency's resource allocation, work force deployment, purely internal procedures and city employment-related matters****….* While these exceptions are not intended to provide an escape for agencies from their rulemaking responsibilities, they are intended to illustrate that certain agency acts are not, in essence, rules….

2 Report of the New York City Charter Revision Commission, December 1986-November 1988 (hereinafter "Report of Charter Revision Comm'n") at 86-87 (emphasis added); <u>see</u> (R. 227) ("We have basically tried to include within this new definition all of the standards for all of the various types of actions the city

undertakes that affects the public, except the standards for the employment of personnel….”).

In addition,

> [t]he requirement that the rules and regulations be filed serves to make them available to the public, to give the public notice thereof and provide a common and definite place where the exact content of such rules and regulations, including any changes, might be found [in] a central place where anyone may examine in that one place what the law or rule is that affects his particular interest.

Matter of Jones v. Smith, 64 N.Y.2d 1003, 1006 (1985) (internal quotation marks, modifications and citations omitted); see People v. Cull, 10 N.Y.2d 123, 128 (1961) (“[W]e are trying to place the information in one place, where anybody who seeks it shall be able to find it.” (internal quotation marks omitted)); id. at 129 (“We should not strive to read exceptions into the section or construe it so as to permit the official in charge of the bureau, commission or authority to avoid the necessity of filing by attaching the label ‘order’ or ‘statement of policy’ or some other term to what is essentially a rule or regulation.”); 1700 York Assocs. v. Kaskel, 182 Misc. 2d 586, 594 (Civ. Ct. N.Y. County 1999) (“CAPA’s definition of a rule is to be construed broadly to accommodate the act’s basic objectives. CAPA’s fundamental objective is to inform and gather input from the public on the development and promulgation of the myriad of City agency rules that affect New

Yorkers: to provide accountability and openness." (internal quotation marks and citations omitted)).

ARGUMENT

POINT I

THE PROCEDURE IS VOID BECAUSE IT IS A RULE THAT WAS NOT PROMULGATED IN ACCORDANCE WITH CAPA

A. The Procedure Is A Rule Within the Plain Meaning of CAPA

As an initial matter, the Procedure falls within one of the specific examples of rules enumerated in the Charter: "any statement or communication which prescribes … standards for the granting of … benefits." Charter § 1041(5)(a)(vii). By its own terms, the Procedure "***sets forth the standards*** by which [DHS] will determine whether individuals who apply for Temporary Housing Assistance ("THA") are eligible for temporary emergency shelter …." (R. 149 (emphasis added)). Thus, this Court need not even consider CAPA's general definition to determine conclusively that the Procedure is a rule. See Report of Charter Revision Comm'n, supra page 15, at 86 ("Statements of the types listed in this paragraph [5(a)], therefore, are to be treated as rules for purposes of CAPA, without need to resort to the language of the general definition."). Truly, this case can be resolved that simply.

Furthermore, the Procedure also falls clearly within CAPA's general definition of a "rule," which is "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…." Charter § 1041(5).

As Supreme Court correctly noted, the Procedure "is generally applicable to all people who apply for THA and must be utilized at all DHS intake facilities. Its applicability is not a suggestion or a request, it is an across the board requirement." (R. 21). In addition, the express purpose of the Procedure is to implement a new policy that would require all DHS intake facilities to conduct an investigation and deny shelter to any single adult who fails to demonstrate by clear and convincing evidence that she has no alternative housing or means to obtain alternative housing. And, the Procedure sets forth the procedural requirements that must be followed by all intake facilities and all applicants for shelter. Thus, the Procedure clearly falls within CAPA's definition of a "rule" and is subject to the rulemaking requirements set forth in Charter § 1043.

B. The Exercise of Discretion in Making Individual Determinations Does Not Exempt the Procedure from the Rulemaking Process Because It Is Applicable to All Intake Facilities and All Applicants

DHS argues that the Procedure is not a rule because it permits staff to exercise discretion when determining whether to grant THA to an individual

applicant. <u>See</u> Apps. Br. at 17-25. However, this argument misses the forest for the trees and ignores the fact that the Procedure itself applies to all intake facilities and all applicants for THA regardless of individual circumstances.

As the Court of Appeals has explained, there is a

> distinction between ad hoc decision making based on individual facts and circumstances, and rulemaking, meaning 'any kind of legislative or quasi-legislative norm or prescription which establishes a pattern or course of conduct for the future.' … Choosing to take an action or write a contract based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances. Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications.

<u>Matter of Alca Indus. v. Delaney</u>, 92 N.Y.2d 775, 778 (1999) (quoting <u>People v. Cull</u>, 10 N.Y.2d 123, 126 (1961)).

DHS's argument fails to recognize this distinction, confusing the decision that DHS might take with regard to an individual applicant for THA (which in some cases could involve the exercise of discretion by agency staff) with the implementation of the Procedure itself, which directs all single adult intake facilities, without regard to individual circumstances, to investigate whether an applicant has other available housing or the means to obtain housing, (R. 150), and requires "<u>all applicants</u> for THA … to cooperate with DHS' eligibility process by providing all information and documentation necessary…." (R. 151) (emphasis

added); see (R. 21) (holding that the Procedure "is generally applicable to all people who apply for THA and must be utilized at all DHS intake facilities. Its applicability is not a suggestion or a request, it is an across the board requirement.").

Dozens of cases illustrate this distinction and make clear that the inclusion of discretionary elements within a procedure does not exempt the procedure itself from the requirements of rulemaking. In Matter of Jones v. Smith, 64 N.Y.2d 1003 (1985), the Court of Appeals held that the prison disciplinary procedure was a "rule," notwithstanding the fact that it provides for broad discretion in making individual disciplinary determinations. See, e.g., 7 N.Y.C.R.R. §§ 252.7 & 253.9 (giving superintendent unfettered discretion to reduce penalties); id. §§ 252.5 & 253.7 (giving violation officer discretion as to penalty to impose); id. § 252.3 (allowing violation officer to "allow any evidence necessary to aid in his decision").

Similarly, the Appellate Division has held that standards for the conduct of parole rescission hearings were subject to SAPA because they were "procedural and substantive rules of general applicability," notwithstanding the wide discretion given to hearing officers with regard to individual determinations. See Matter of Abbott v. Kelly, 145 A.D.2d 921, 922 (4th Dep't 1988); accord People ex rel. Padilla v. Rodriguez, 145 A.D.2d 922 (3d Dep't 1988); see also Matter of Cordero

v. Corbisiero, 80 N.Y.2d 771, 772 (1992) (holding that policy which requires that a suspension for an infraction committed at the Saratoga racetrack be served at the Saratoga meet the following year was a "rule" notwithstanding fact that determination of underlying infraction involved discretion of track steward); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (holding that federal parole guidelines were "rule" even though "they provide no formula for parole determination").

In Matter of Home Care Ass'n of New York State, Inc. v. Dowling, 218 A.D.2d 126, 127-28 (3d Dep't 1996), the memorandum issued by the agency directed, among other things, that certified home health agencies ("CHHAs") conduct new fiscal assessments for recipients of home care services. Notwithstanding the fact that the new fiscal assessments required CHHAs to exercise substantial discretion in determining each individual's eligibility for home care services, the Third Department held that the directives were a rule, "since they set forth fixed general principles applicable to CHHAs that are to be applied without regard to individualized circumstances or mitigating factors." Id. at 128 (citation omitted).

In Yaretsky v. Blum, 456 F. Supp. 653 (S.D.N.Y. 1978), the court held that memoranda designed to assist health care facilities in determining the appropriate level of care placement for patients were "rules" notwithstanding the fact that the

assignment of numerical values to a patient's condition required "the application of professional medical judgment." Id. at 656; see id. at 657 (noting that "in a case closely on point, it was held that department standards setting forth the admission procedures to state mental hospitals are 'rules' which must be filed with the Secretary of State" (citing Whiting v. Marine Midland Bank – Western, 80 Misc. 2d 871 (Sup. Ct. Cattaraugus County 1975))).

And in Sound Distributing Corp. v. New York State Liquor Authority, 144 Misc. 2d 1 (Sup. Ct. Bronx County 1989), the court held that a resolution delegating authority to a licensing board "which apparently exercises … discretion to grant or deny such a permit," id. at 3, "is obviously a 'rule' covered by [SAPA]," id. at 6. The court stated that "[c]learly the creation of an inferior tribunal to which apparently all licensing discretion of the agency is granted establishes a course of conduct," and is therefore a "rule." Id. at 6 (citing inter alia People v. Cull, 10 N.Y.2d at 126 and Matter of Jones v. Smith, 64 N.Y.2d at 1005-06). "The inclusion of internal management matters in a rule which must be filed does not make the rest of the rule exempt from publication." Sound Distributing Corp., 144 Misc. 2d at 6; see Matter of J.D. Posillico, Inc. v. Dep't of Transp., 160 A.D.2d 1113 (3d Dep't 1990) (holding that review procedures which required "clear and convincing proof" that a contract bidder made an unintentional mistake or that loss of profits would cause "irreparable financial damage" were subject to

SAPA); Matter of Bizarre, Inc. v. State Liquor Auth., 29 A.D.2d 500, 502 (1st Dep't 1968) ("Certainly, a rule or regulation of such spacious scope delineating a deputy's power vis-a-vis the public, is well within the ambit of" the State Constitutional provision requiring a "rule" to be filed with the Secretary of State).[7]

Indeed, there are literally dozens, if not hundreds of examples in the Rules of the City of New York (not to mention the N.Y.C.R.R.) in which a rule, duly promulgated under CAPA, permits an agency to exercise discretion or consider the "totality of the circumstances" when making individual determinations. See, e.g.,

---

[7] Other jurisdictions that, like New York, based their administrative procedure acts on the Model SAPA, see 2 N.Y. Jur. 2d Administrative Law § 12 (2011), also consider policies that require complex or subjective decision making to be of "general applicability." See, e.g., Hillis v. Dep't of Ecology, 131 Wash. 2d 373 (1997) (policy whereby agency would not process any nonemergency water permit applications until, *inter alia*, the agency determined there was "sufficient" groundwater in an area, constituted a rule); Carondelet Health Servs., Inc. v. Arizona Health Care Cost Containment Sys. Admin., 182 Ariz. 221 (1994) (agency's method of determining hospital reimbursement amounts which involved "a complex calculation with subjective components" constituted a rule); Martin v. Dep't of Corr., 424 Mich. 553, 564 (1986) (prison misconduct regulations were subject to state APA, notwithstanding agency argument that "management of prison discipline requires flexibility in response to changing circumstances and the inventiveness of inmates"); Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 16 Or. App. 63 (1973) (agency should have formally promulgated standards by which it denied grocery store licenses upon the statutory grounds that there are "sufficient licensed premises in the locality" or that license "is not demanded by public interest or convenience"); see also Asmussen v. Comm'r, New Hampshire Dep't of Safety,145 N.H. 578, 592-93 (2000) (holding that agency instruction that hearing officers "ask questions of police officers to assist them in meeting their burden of proof" was a rule); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 333 (1984) ("It does not follow that, because the [agency head] has statutory discretion, the manner in which this discretion is exercised is not governed by the standards that determine whether rule-making or adjudication must be followed in a given case."). In Metromedia, the court emphasized the fundamental principle underlying the state APA: "When an agency's determination alters the *status quo*, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination." Id. at 330.

1 R.C.N.Y. § 15-04(d)(6) (applicants for DOB residential hotel certification must provide identified materials and "[a]ny other documentation deemed relevant by the borough superintendent, in his or her discretion" (emphasis added)); 3 R.C.N.Y. § 113-01(d)(6) ("In lieu of a written examination for a certificate of fitness, the [Fire] Department, in its discretion, may accept educational credentials or professional licenses or certifications that demonstrate the applicant's knowledge of, or proficiency in, the subject matter for which the certificate is required." (emphasis added)); 6 R.C.N.Y. § 1-10(a) ("Replacement licenses and plates are issued at the discretion of the Department [of Consumer Affairs]" (emphasis added)); 12 R.C.N.Y. § 1-07(e)(i) (any high bidder for a concession award "and, at the discretion of the concession manager, any other responsive prospective concessionaire, shall be required to complete the VENDEX questionnaires so as to assist the concession manager in making the determination of responsibility" (emphasis added)); 15 R.C.N.Y. § 16-07(b)(1) ("NYCDEP may, in its discretion, designate portions of, or entire City reservoirs and controlled lakes as Recreational Boating Areas. . . . NYCDEP may, at its discretion, add to or delete from the list of boats eligible for Recreational Boat Tags." (emphasis added)); 15 R.C.N.Y. § 16-15(a) ("NYCDEP may, in its discretion, temporarily limit or forbid access to any or all City Properties at any time and from time to time as may be necessary for Water Supply security, for public safety or resource protection" (emphasis added));

15 R.C.N.Y. § 19-05(b)(2) ("The Commissioner, in his discretion, may issue wastewater discharge permits and may impose such terms and conditions [as] he deems necessary to protect the sewer system or the treatment processes thereof or to protect the public health or welfare." (emphasis added)); 16 R.C.N.Y. § 3-02(m) (Department of Sanitation reserves the right to suspend permits to collect or dispose of certain solid waste "when the Commissioner, or his/her designee, in the exercise of his or her reasonable discretion, has reasonable cause to find that the holder of the permit has violated the terms" of any of applicable rules, regulations, or conditions (emphasis added)); 67 R.C.N.Y. § 6-33(b)(3)(iii) (Commissioner of the Department of Information Technology and Telecommunications "acting at his or her discretion, may award or deny such application [for a permit to install a public pay telephone] based upon a determination that such action is in the best interests of the City." (emphasis added)); 66 R.C.N.Y. § 11-82(e)(iii) (SBS "will consider any relevant evidence" in assessing whether an applicant for certification as an Emerging Business Enterprise has experienced negative impact on business advancement because of social disadvantage and will determine whether "the totality of circumstances shows disadvantage" (emphasis added)); 38 R.C.N.Y. § 13-01(f) (disapproval of applicants for Special Patrolman designation "shall be based upon a review of the circumstances of previous arrests, employment records,

mental history, reports of misconduct reflecting on character as referred to above, and any other pertinent records or information." (emphasis added)).

By contrast, all of the cases cited by DHS fall into one of three categories, none of which support the argument that the Procedure is not a rule, see Apps. Br. at 17-25.

The first group of cases actually undermine DHS's argument as they hold that the agency was required to go through the rulemaking process, see Matter of Schwartfigure v. Hartnett, 83 N.Y.2d 296 (1994); Matter of Homestead Funding Corp. v. New York Banking Dep't, 95 A.D.3d 1410, 1412 (3d Dep't 2012).

The second category of cases cited by DHS are inapposite because the agency retained discretion as to how and whether the policy itself would be applied. See Matter of Senior Care Servs., Inc. v. New York State Dep't of Health, 46 A.D.3d 962 (3d Dep't 2007) (holding that general policy disfavoring mail order delivery was not a rule because it was only applied where individual circumstance warranted); Matter of Taylor v. New York State Dep't of Corr. Servs., 248 A.D.2d 799, 800 (3d Dep't 1998) (holding that directive was not a rule because "its application depends upon respondent's assessment of individualized circumstances" and directive "only concerns respondent's internal management and does not directly or significantly affect the public."). By contrast, the applicability of the Procedure does not depend on individual circumstances; the

Procedure, by its terms, applies to all intake facilities and all applicants for shelter (R. 21-22, 149).

The third category of cases cited by DHS involve challenges to the implementation of policies and procedures that had already gone through the rulemaking process. See Matter of Medical Soc'y v. Serio, 100 N.Y.2d 854, 868 (2003) ("Here, the actual 'rule' – that late filing must be excused upon a showing of 'clear and reasonable justification' for the delay – has been duly promulgated by the Superintendent and adopted and published in compliance with the Constitution and State Administrative Procedure Act."); Matter of New York City Transit Auth. v. New York State Dep't of Labor, 88 N.Y.2d 225, 228 (1996) (assessment of penalties for violations of duly promulgated regulations); Matter of Roman Catholic Diocese v. New York State Dep't of Health, 109 A.D.2d 140, 147 (3d Dep't 1985) (Levine, J., dissenting) (citing 10 N.Y.C.R.R. § 709.1, the regulation governing certificate of need determinations, which list the factors that agency determination "shall include, but not be limited to"), rev'd 66 N.Y.2d 948 (1985) (adopting reasoning of dissent); Matter of Lue-Shing v. Travis, 12 A.D.3d 802, 803 (3d Dep't 2004) ("[P]etitioner appeals, arguing only that the manner in which the Board applies the 9 N.Y.C.R.R. 8001.3 guidelines violates" the state constitutional requirement that a rule be filed with the secretary of state).

The two Department of Health reimbursement cases DHS cites, Matter of Trustees of the Masonic Hall v. Axelrod, 174 A.D.2d 199 (1992) and Matter of Dry Harbor Nursing Home v. Axelrod, 137 A.D.2d 962 (3d Dep't 1988) also fall within this category because DOH has promulgated detailed regulations pertaining to the procedure for determining reimbursement rates, see N.Y.C.R.R., Tit. 10, Ch. 2, Part 86. What was at issue in those cases was whether the existing rules, which permitted discretion, needed to be amended or supplemented to incorporate guidelines for how such discretion should be exercised. Cf. Matter of Sunrise Manor Nursing Home v. Axelrod, 135 A.D.2d 293 (3d Dep't 1988) (holding that DOH guideline excluding new categories of labor expenses was "rule"); Matter of Singh v. Taxi and Limousine Comm'n, 282 A.D.2d 368 (1st Dep't 2001) (holding that change in TLC policy reducing grace period was void for failure to comply with CAPA).

Thus, the question in this third category of cases was the manner in which the agency exercised its discretion pursuant to duly promulgated rules, not whether the rules themselves (which allowed for the exercise of discretion) were subject to the rulemaking procedure. Apparently the agencies in those cases had little doubt that the underlying procedure itself was subject to the rulemaking requirements.

C. The Procedure Does Not Give DHS Unfettered Discretion When Making Individual Determinations

Even if, *arguendo*, DHS could avoid CAPA's rulemaking requirements by including discretionary language in the policies it implements, the Procedure would still be subject to CAPA because it includes several provisions which would "substantially alter or, in fact, … determine the result of future agency adjudications," see Matter of Alca Indus. v. Delaney, 92 N.Y.2d 775, 778 (1999), and "prescribe[] the procedural requirements of an agency" in each case, see Charter § 1041(5)(ii).

As Supreme Court found,

> 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 a mandated outcome discretionary.

(R. 20).

Specifically, Supreme Court noted that under the Procedure, "all applicants for THA are required to cooperate with DHS's eligibility process by providing all information and documentation necessary," and that the failure to cooperate mandates denial of shelter. (see R. 151-52; R. 155 ("Applicants will complete a

Temporary Housing Application [that] will also contain a release that the applicant must sign authorizing DHS to disclose and collect medical and other personal information….”)). “While there is an exception if the applicant is suffering from a mental or physical impairment that affects his or her ability to cooperate, DHS is not free to simply disregard the mandated outcome where that applicant is not suffering from a mental or physical impairment.” (R. 21).

Similarly, the Procedure states that “[i]f an applicant has tenancy rights at any housing option, that residence will be deemed the viable housing option and the applicant will be found ineligible, provided there is no imminent threat to health or safety.” (R. 152). Again, while the Procedure includes an exception for cases involving an “imminent threat to health or safety,” DHS is not free to disregard the mandated outcome where there is no imminent threat.

In addition, the provision which states that “[a]ny single adult applicant with on-hand assets in excess of $2,000 must utilize his/her resources to reduce or eliminate his/her need for emergency shelter,” (R. 154 (emphasis added)) and the provision stating that applicants who request a State Fair Hearing to review adverse decisions “will not be granted THA while the hearing is pending” (R. 158 (emphasis added)) do not allow for the exercise of any discretion. Thus, even if the Procedure as a whole were not a rule (which it is), all of these elements of the Procedure would be subject to CAPA’s rulemaking requirements because they

would "substantially alter or, in fact, … determine the result of future agency adjudications." Alca Indus., 92 N.Y.2d at 778.

Furthermore, there are many elements of the Procedure that "prescribe[] the procedural requirements of an agency" without discretion. See Charter § 1041(5)(ii). For example, DHS "shall investigate all residences where [an] individual has resided" in the year before seeking shelter (R. 152 (emphasis added)). DHS "must provide all applicants with notification of DHS' determination" regarding shelter. (R. 156 (emphasis added)). If an applicant has left a housing option because of domestic violence, the City's Human Resources Administration – not DHS – "will" evaluate the credibility of the claim. (R. 153-54 (emphasis added).

Courts have held that similar procedures are "rules" under CAPA. In Matter of 439 E. 88 Owners Corp. v. Tax Comm'n, 307 A.D.2d 203, 203 (1st Dep't 2003), for example, this Court held that a New York City Tax Commission policy was a rule where property owners seeking a review of their property assessment were denied a review and their assessment was summarily confirmed if they refused to provide information required under the policy. This is closely analogous to the policy set forth in the Procedure whereby applicants who are not suffering from a physical or mental impairment will be denied shelter if they fail to "provid[e] all information and documentation" requested by DHS (R. 151),

including a release "authorizing DHS to disclose and collect medical and other personal information" (R. 155).

Matter of H.D. Services, LLC v. New York State Comptroller, 51 A.D.3d 1236, 1238 (3d Dep't 2008) (holding that agency's policy requiring applicants to produce notarized finder agreements was a "rule") and Matter of 10 Apartment Assocs., Inc. v. New York State Div. of Housing and Community Renewal, 240 A.D.2d 585, 586 (2d Dep't 1997) (holding that DHCR requirement that landlord own an apartment for two years before becoming eligible for a rent adjustment was a rule), are also on point.

POINT II

CAPA'S EXCEPTION FOR A STATEMENT WHICH IN ITSELF HAS NO LEGAL EFFECT BUT IS MERELY EXPLANATORY DOES NOT APPLY

DHS's second argument – that the Procedure falls within CAPA's exception for a statement "which in itself has no legal effect but is merely explanatory," Charter § 1041(5)(b) – ignores the profound and very real effects that the Procedure would have on the thousands of women and men who would be denied shelter if the Procedure is implemented, and misreads both CAPA and the State provisions on which DHS purports to rely.

When interpreting § 1041(5)(b), it is important to note that "[t]he primary consideration of courts in interpreting a statute is to ascertain and give effect to the

intention of the Legislature." Riley v. County of Broome, 95 N.Y.2d 455, 463 (2000) (internal quotation marks and citation omitted). "[A] statute … is to be construed as a whole, and … all parts of an act are to be read and construed together to determine the legislative intent," and "[e]xceptions must be strictly construed in order that the major policy underlying the legislation itself is not defeated." 1 McKinney's Statutes §§ 97, 213 (footnotes and citations omitted).

The intention of the Charter Commission that drafted CAPA was that it "be construed broadly to accommodate the act's basic objectives," "to inform and gather input from the public on the development and promulgation of the myriad of City agency rules that affect New Yorkers…." 1700 York Assocs v. Kaskel, 182 Misc. 2d 586, 594 (Civ. Ct. N.Y. County 1999 (citing Report of Charter Revision Comm'n, supra page 15, at 86)); see (R. 227) ("We have basically tried to include within this new definition ***all of the standards for all of the various types of actions the city undertakes that affects the public***, except the standards for the employment of personnel…." (emphasis added)); see also Matter of Jones v. Smith, 64 N.Y.2d 1003, 1006 (1985) ("The requirement that the rules and regulations be filed serves to make them available to the public, to give the public notice thereof and provide a common and definite place … where anyone may examine in that one place what the law or rule is that affects his particular interest." (internal quotation marks, modifications and citations omitted)).

A. The Procedure Would Have a Profound Effect on New Yorkers Seeking Shelter

Commissioner Diamond testified at a City Council Hearing that the Procedure could affect up to 60% of the women and men seeking shelter,[8] and that an estimated ten percent of those who receive shelter under current policy would be denied THA (R. 190).[9] A woman or man seeking shelter in New York City today is not subject to any "eligibility investigation" and DHS does not deny shelter to any applicant who fails to produce documentary evidence of homelessness. (R. 50, 52, 161-62, 278; S.R. 5). The notion that a policy that would have such a significant impact on the lives of so many New Yorkers, has "no legal effect, but is merely explanatory" defies the plain meaning of CAPA and the clear intent of the law.

DHS argues that the Procedure is exempt from CAPA's rulemaking requirements because "[n]otwithstanding some minor additions, the Procedure is no more than DHS's restatement, interpretation, and explanation of State law…" Apps. Br. at 26. However, this argument incorrectly conflates a statement that implements a legal mandate with a statement "which in itself has no legal effect

---

[8] Hearing of Committee on General Welfare, New York City Council (Nov. 9, 2011) at 86-87 (available at http://legistar.council.nyc.gov/View.ashx?M=F&ID=1627093&GUID=C414E8A5-0BAB-4BB7-A6BD-148A1F8F44D2); see also (R. 178).

[9] Nearly 18,000 single adults entered the DHS shelter system in Fiscal Year 2012. See Mayor's Management Report (2012) at 101 (available at http://www.nyc.gov/html/ops/downloads/pdf/mmr0912/dhs.pdf).

but is merely explanatory." Under CAPA, these concepts are distinct, with only the latter being exempt from the full rulemaking process.

Charter § 1043(d)(4) states that review by the law department and the mayor's office, "shall not apply to rules that: … (iv) implement particular mandates or standards set forth in newly enacted federal, state, or local laws, regulations, or other requirements with only minor, if any, exercise of agency discretion in interpreting such mandates or standards." By implication, such rules *are* subject to the other rulemaking requirements – e.g., notice and the opportunity for public comment.[10] Indeed, CAPA's general definition of a rule includes a statement that "implements or applies law…." Charter § 1041(5)(i). Thus, far from *excluding* procedures that implement legal mandates from rulemaking, the plain language of CAPA expressly *includes* them.

Under DHS's construction of CAPA, by contrast, any policy adopted by a city agency pursuant to a mandate in state law, regulation, or administrative directive would have "no legal effect" and therefore be exempt from rulemaking. But this is clearly wrong as it would render § 1043(d)(4)(iv) meaningless. See, e.g., Matter of New York County Lawyers' Ass'n v. Bloomberg, 95 A.D.3d 92, 101 (2012) ("A construction resulting in the nullification of one part of the statute by

---

[10] See 1 McKinney's Statutes § 240 (Expression of One Thing as Excluding Others).

another is impermissible and a construction rendering statutory language superfluous is to be avoided." (internal quotation marks, citations, and modifications omitted)). Thus, even assuming, *arguendo*, that DHS is correct that the Procedure merely implements the State Regulation and Administrative Directives and that DHS exercised "only minor, if any, … discretion in interpreting such mandates or standards," Charter § 1043(d)(4)(iv), the Procedure would still be a "rule" under CAPA and subject to all of the notice and comment requirements set forth in Charter § 1043. See Matter of Home Care Ass'n of New York State, Inc. v. Dowling, 218 A.D.2d 126, 129 (3d Dep't 1996) (holding that an agency directive issued pursuant to a legal mandate still had "legal effect" and was subject to rulemaking procedure).

DHS fails to identify even a single case in which a court holds that a City agency was exempt from CAPA because it acted pursuant to State law or rule, let alone an administrative directive. Such a holding would not only be unprecedented and contrary to the plain language of CAPA, but would also contravene the objective of providing "a central place where anyone may examine in that one place what the law or rule is that affects his particular interest." Matter of Jones v. Smith, 64 N.Y.2d at 1006 (citing People v. Cull, 10 N.Y.2d 123, 126 (1961); Matter of New York State Coalition of Public Employers v. New York State Dep't of Labor, 60 N.Y.2d 789, 791 (1983)).

In effect, DHS's position is that this objective would be satisfied without following the rulemaking process, notwithstanding the fact that the "law or rule … that affects" a person's eligibility for shelter in New York City could not be found in either the R.C.N.Y., or indeed even the N.Y.C.R.R., but in an unpublished document issued by DHS purportedly in reliance on an unpublished administrative directive issued by OTDA. This falls well short of the standard of accountability and openness courts have applied to agency policies. See New York State Coalition of Public Employers, 60 N.Y.2d at 791 (holding the objective of providing a common definite place where rules can be found was not met where even a duly promulgated rule incorporated by reference rules issued by different level of government).

The principal cases on which DHS relies, Cubas v. Martinez, 8 N.Y.3d 611 (2007), and Matter of Elcor Health Servs. v. Novello, 100 N.Y.2d 273 (2003), are inapposite. In those cases, the statement at issue was an explanation by an agency of the agency's own duly promulgated regulation. See Cubas, 8 N.Y.3d at 621 (holding that agency requirement "does not impose a new obligation on applicants for driver's licenses. The obligation to supply 'proof that [the applicant] is not eligible for a social security number' is imposed by a preexisting regulation, 15 NYCRR 3.9 (a)."); Elcor, 100 N.Y.2d at 276 ("The primary question presented by this appeal is whether deference should be afforded to the Department of Health's

interpretation of 10 NYCRR 86-2.30 (i) (27)"). This differs substantially from DHS's defense of the Procedure, which rests primarily on an administrative directive that was issued by a different agency at a different level of government, did not go through the rulemaking process and is not available to the public as part of either state or city rules.

Moreover, unlike the underlying requirements at issue in Cubas and Elcor, one of the central requirements that would be imposed by the Procedure – that applicants demonstrate by clear and convincing proof that they have no alternative housing or means – has never been applied by DHS in practice. Thus, whereas the policy being challenged in Cubas "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," Cubas, 8 N.Y.3d at 621, the Procedure ***would*** deny substantive rights to members of the public – i.e., it would deny shelter to men and women who, at least in practice, are not required today to provide any proof of homelessness.

B. State Regulations and Directives Do Not Require DHS to Implement the Procedure

Even if CAPA's language and the case law did not contradict DHS's reading of the Charter to exempt any statement issued pursuant to a state requirement, the

Procedure would be still be subject to rulemaking because it is not required by the State Regulation and Administrative Directives cited by DHS.

Perhaps the strongest evidence of this is the fact that the State Regulation and Directives on which DHS relies are more than 15 years old, and yet it is undisputed that DHS has never before implemented anything like the Procedure for single adults (R. 50, 52, 161-62, 278; S.R. 5). As Supreme Court noted, "If the [Procedure] is merely a strict interpretation of the State Regulation and Administrative Directives, the procedures would have been in place for at least the last 15 years." (R. 25).

Even setting aside DHS's fifteen years of inaction, its statements immediately prior to this litigation also demonstrate that it did not believe it was *required* to implement the Procedure, only that it was *permitted* to do so. Commissioner Diamond testified to the Council that the way "the relationship with the State works is the State issues regulations in the social services area and localities are free to design their programs within the limits of those regulations. So we believe that because they determined that this program, this procedure that we're going to implement, is consistent with the regulations, we could go forward." (R. 182-83). Furthermore, it would make little sense for DHS to seek approval from the State to merely explain what the State had long required, yet Commissioner Diamond conceded that DHS "absolutely" needed "technical

approval" from the State before it could implement the Procedure (R. 187). And indeed, even the Procedure itself does not state that it implements a State *requirement*, merely that it "is *consistent* with the purposes underlying the Regulation" (R. 149) (emphasis added).

In addition, statements from OTDA, the successor to the State agency which issued the regulation and directives on which DHS relies,[11] make clear that the State did not believe DHS was *required* to implement the Procedure, only that the Procedure was not *inconsistent* with State law. On November 9, 2011, OTDA wrote to DHS:

> Any suggestion that the Office of Temporary and Disability Assistance ("OTDA") approved the New York City Department of Homeless Services ("DHS") proposed shelter eligibility procedure for single homeless adults is inaccurate. OTDA has not commented on the substantive merits of the proposed change, but instead determined that the proposal was not inconsistent with State law.
>
> Moreover, this office has serious concerns that DHS failed to submit this proposal to the New York Supreme Court for review. For over thirty years, such a review process has been DHS's practice when making a policy change relating to the *Callahan Consent Decree*. Given DHS's failure to share this policy with the Court, OTDA finds the November 14th implementation date – a mere ten days after the policy change was announced – to be completely unreasonable and is not supported by the State.

(R. 169) (footnote omitted).

---

[11] OTDA assumed responsibility for the functions of the former Department of Social Services concerning shelters for adults in 1997. See N.Y. Laws of 1997, ch. 436, § 122(a), (f).

Finally, as Supreme Court found, the Procedure "imposes many new obligations on applicants" that are not in the State Regulation or Administrative Directives. (R. 23-24). For example, the court noted that neither the State Regulations nor the Administrative Directives mandate that an applicant for THA sign a release for private information, yet the Procedure states that any woman or man who seeks shelter "will complete" an application that "will also contain a release that the applicant must sign authorizing DHS to disclose and collect medical and other personal information…" (R.25; see R. 155). And neither the State Regulations nor the Administrative Directives contain the directive found in the Procedure that "tenancy rights at any housing option … will be deemed the viable housing option and the applicant will be found ineligible, provided there is no imminent threat to health or safety." (R. 25; see R. 152).

CONCLUSION

For the foregoing reasons, the March 16, 2012 Order of Supreme Court, New York County (Gische, J.) granting Petitioner-Respondent's Article 78 petition should be affirmed in its entirety and the appeal by Respondents-Appellants' dismissed.

Dated: New York, New York
October 10, 2012

/s/ Jeffrey P. Metzler

Jeffrey P. Metzler
Chief of Litigation
The Council of the City of New York
250 Broadway, 15th Floor
New York, New York 10007
(212) 788-9131
jmetzler@council.nyc.gov
Attorney for Petitioner-Respondent

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR Section 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman
Point Size: 14
Line Spacing: Double

Word Count: The total number of words in the body of this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this Statement, per Microsoft Word Count, is 8,872.

Dated: New York, New York
October 10, 2012

/s/ Jeffrey P. Metzler

Jeffrey P. Metzler
Chief of Litigation
The Council of the City of New York
250 Broadway, 15th Floor
New York, New York 10007
(212) 788-9131
jmetzler@council.nyc.gov
Attorney for Petitioner-Respondent