May 29, 2020

Hon. Sheila J. Poole, Commissioner
New York State Office of Children and Family Services
52 Washington Street
Rensselaer, New York 12144

Re: Proposed Host Family Homes Regulations (18 NYCRR § 444.1 et seq.)

Dear Commissioner Poole:

On behalf of the American Bar Association (ABA), which is the largest voluntary association of lawyers and legal professionals in the world, I write to express opposition to the Proposed Rule on Host Family Homes issued by the New York Office of Children and Family Services (OCFS) because it does not serve children’s or parents’ rights under the law.

The ABA’s members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, as well as judges, prosecutors, defense attorneys and public defenders, legislators, and law professors and law students. For over a century, the ABA has advocated for the ethical and effective representation of all clients and the rule of law. For the last 40 years, the ABA has incorporated a focus on child welfare law through the ABA Center on Children and the Law. With this focus, the ABA has adopted through its House of Delegates numerous policy resolutions that emphasize the importance of respecting child and parent rights to family integrity¹, access to legal counsel in child welfare cases², education stability in foster care³, and support for kin caregivers¹.

The Proposed Rule in 18 NYCRR § 444.1 would allow:

temporary placement of a child in an approved host family home by a host family home agency following the execution of an agreement by the child’s parent with the host family

¹ See ABA House of Delegates Resolution 118 2019A
https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf (emphasizing that children and parents have legal rights to family integrity and family unity).

² https://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.pdf and https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (emphasizing that children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues).

https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf (these standards promote quality representation and uniformity of practice throughout the country for parents’ attorneys in child abuse and neglect cases).

³https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/education_accessforhomel essfosteryouth/ (supporting federal legislative and administrative action to assure uninterrupted educational access for children and youth in foster care, to increase school continuity, and to ensure appropriate education services are provided for both children in general and special education.)
home agency authorizing such placement, in accordance with the provisions of this Part. Such care shall be provided by the host family home at no cost to the host family home agency or to a local department of social services.

Using “host homes” puts children in “quasi-foster care,” meaning it is done without statutory or procedural protections. A “host family home agency” would be a nonprofit corporation with the authority to place out children. The children who are placed are not public foster children in the legal custody of a local department of services. This Proposed Rule creates significant problems:

Lack of executive and judicial branch oversight
In New York State, there exist state statutory provisions mandating placement with an authorized agency. Placement with host homes would not receive oversight by either the court or the child welfare agency, thus operating outside of legal structures. The Proposed Rule, although appearing to support the well-being of the family, instead bypasses the system that was established to apply policies and procedures under proper judicial oversight and legal representation to protect and improve outcomes for families.

Lack of access to counsel
High-quality representation is imperative to assure that children do not enter or linger in foster care or, as in this proposal, its unregulated equivalent, and to protect parents and children and their rights.

Although there is no court involvement under the Proposed Rule, it still conflicts with the goal of having high quality representation. The Proposed Rule provides parents with the right to consult with an attorney prior to the execution of the host family home agreement, however, it neglects to articulate a specified protocol for further attorney involvement for the parent. The Proposed Rule also ignores any rights and protections that the child may assert on his or her own behalf during the out-of-home placement process. Hallmarks of high-quality representation for children include understanding the child’s wishes, strengths, needs, and resources. They ensure the child has an opportunity to participate in decision making and they promote advocating for the child’s access to education and community supports. The Proposed Rule neither ensures the child’s participation in any aspect of the host home placement process nor the child’s access to those supports. The Rule also avoids development of a method of dispute resolution or an avenue to terminate the agreement.

Education instability
Educational support is critical. Children in foster care have federally codified rights to educational stability in the Fostering Connections to Success and Increasing Adoptions Act which went into effect in 2008 and the Every Student Succeeds Act from 2015. Placement in a host family home may be done with a host family that lives outside the child’s school zone. The child has no protection from being forced to change his or her school. The Proposed Rule does not devise a procedure that ensures the child’s right to educational stability and remain in his or her school of origin. Although the Proposed Rule states that education must be addressed in the host family agreement, there is no method to address conflicts.

Reduced reliance on kin caregivers and stable placements
Using host homes undercuts family stability and negatively impacts the utilization of informal kinship care and the ability of both parents and children to assert their individual rights to due process. Further, these placements create an inability for the child welfare agency to assess the welfare of the children who would be placed with these host families.
Placing children with their relatives or unrelated persons with significant relationships to the child or family is an avenue to maintain that connectivity. This is reflected in our policy on Family Integrity that “urges, state, local, territorial, and tribal authorities to ensure family connectedness is safely maintained and supported with parents and kin during the pendency of the child welfare case if children cannot safely remain with their parents or other primary caregivers and must enter the custody of a state or tribe.” In its Information Memorandum issued on April 29, 2020, the Children’s Bureau, discussed relationships and human connectedness and prescribed how those components contribute to well-being of both parents and children and prescribed how foster care practice can ensure that it occurs. The Children’s Bureau recommends that child welfare agencies and courts thoroughly explore existing familial relationships and maternal and paternal relatives as possible placements, place children with relatives or fictive kin when placement is necessary and make all reasonable efforts to keep siblings together unless it is unsafe for any sibling. It goes on to recommend that children remain in their communities and in their schools where they are connected to their classmates and their teachers.

Despite the Proposed Rule requirement that visitation and contact provisions with parents and relatives be addressed in the host family agreement, it minimizes the importance of family connection as evidenced by its design that lacks the use of informal kinship care. Although, the Proposed Rule does not incorporate state intrusion in the families it proposes to serve, the potential result is far worse. It proposes not only an indefinite separation of the child from his or her parents or primary caregiver, it is silent as to placement with relatives or fictive kin. Relatives are not considered as possible host family resources. This is contrary to the Fostering Connections Act mandating that States use due diligence to identify and provide notice to all adult grandparents or other adult relatives of the child within 30 days of removal from the parent or parents.

Conclusion
For the reasons just stated, the ABA opposes the Proposed Rule on Host Family Homes in New York. Child welfare involvement is among the most serious of state interventions into the rights of a family. Federal and state laws are in place to protect the family and protect their rights throughout the process. Adopting a law that will sanction the use of host family homes impedes the exercise of the rights that are afforded to both parents and children under well-established laws, regulations and policies and puts children at potentially greater risk in unregulated homes.

Thank you for considering these views. If you have any questions, please contact Governmental Affairs Legislative Counsel David Eppstein at 202-662-1766, David.Eppstein@americanbar.org.

Sincerely,

Judy Perry Martinez