

Assessment of Public Comment

This assessment responds to comments received by the Office of Children and Family Services (OCFS) on proposed regulations adding Part 444 of Title 18 of the New York State of Codes, Rules and Regulations. The Notice of Proposed Rule Making was published in the State Register issued on July 7, 2021.

OCFS received 85 comments, during the public comment period, which ended on August 21, 2021. Comments were received from: New York State Unified Court System - Family Court Advisory and Rules Committee, New York State Permanent Judicial Commission on Justice for Children, New York State Kinship Navigator, New York State Bar Association, Unified Court System of New York City Family Court, Statewide Committee on Attorneys for Children, New York State Unified Court System – Commission on Parental Legal Representation, Chief Defenders Association of New York, New York State Defenders Association, Inc., Rise, Redlich Horwitz Foundation, Lawyers for Children, Legal Services of Hudson Valley, The Legal Aid Society Juvenile Rights, and a joint response from the Brooklyn Defender Services, the Bronx Defenders, the Center for Family Representation, and the Neighborhood Defender Services of Harlem, the New York City Administration for Children’s Services, Safe Families for Children, Restore, AVAIL, Mont Lawn City Camp and Summer Camp, Women in Need, Inc., Hope for New York, volunteers currently involved in host family home programs in other states, parents, persons interesting in volunteering in a host family home program in New York, staff and members from houses of worship, a small business owner, a former Alaska State Senator, a public school teacher, and a licensed practicing family physician. Many included comments on more than one provision of the proposed regulations. Comments were reviewed and considered by OCFS and addressed in this assessment.

This summary will provide an overview of the comments and OCFS responses. In this assessment, OCFS has combined similar comments from numerous commenters for the purpose of the assessment, and response thereto. The consolidated comments and OCFS responses are grouped in categories into the following topic areas: the need for this type of community-based preventive services, concern with creation of a “quasi-foster care system”, legal representation of the child and parent, youth voice, court oversight, application of section 5-1551 of the General Obligations Law (GOL), compliance with the federal Indian Child Welfare Act, application of section 384-a of the Social Services Law (SSL) voluntary placement agreements, fiscal impact,

conflict with state statutes, kinship and sibling placements issues, program monitoring, educational stability, visitation, non-custodial parent issues, services to the parents and child, child's rights, disproportionate impact on poor families of color, financial responsibility for care, host family home agency/child contacts, interstate placements, extension of placement, reunification of child with parent, serving LGBTQA+ youth, adequacy of host family and staff training and additional public input.

OCFS received comments from individuals and community groups who strongly supported the revised proposed regulations and who referenced the success of similar host family home programs in other states. Comments were received from persons residing in New York in support of the revised proposed regulations noting the need for the program or the willingness to volunteer as a host family home. Commenters in favor of the revised proposed regulations noted that this primary prevention model is greatly needed in New York State as a resource to parents who have limited child care options and social networks and who, in some cases, have no immediate family able or willing to provide child care assistance. OCFS concurs that these families are at risk of being involuntarily separated through the current child welfare system. The host family home model retains parental decision making and provides meaningful relationships for the family that will sustain and strengthen them after the crisis, noting that some host family home families provide mentoring for parents after the child is back with the parent. The revised proposed regulations serve to fill a void which currently exists. OCFS maintains that the significant revisions made to the previous version of the proposed regulations more closely align them with a primary prevention model that is supported by the federal Family First Prevention Services Act, namely helping families up stream so they are not reliant on services through the child welfare system. *OCFS is not changing the revised proposed regulations in response to these comments.*

Several commenters objected to the revised proposed regulations on the ground that the revised proposed regulations created a quasi-foster care system. OCFS disagrees with this comment. The revised proposed regulations specifically state that the parent or guardian who enters into a host family home arrangement retains legal custody of the child. The decision to enter into a host family home arrangement is informed and voluntary. Parents are afforded the opportunity to meet host family home families and decide which family can best help them. Placement is time-limited and the revised proposed regulations contain standards that protect the right of the parent or guardian to terminate the arrangement at any time and to have the child returned. The revised proposed regulations mandate that the person in parent relation specify that the parent has the right to revoke the designation at any time and for the child to be immediately returned to the

parent. The intent of the revised proposed regulations is not to build a quasi-foster care system, but rather the revised proposed regulations are intended to provide a primary prevention community-based program that affords parents the opportunity to engage with an OCFS-approved host family home agency for the purpose of identifying volunteer host family home families who are willing and able to care for a child, especially for those parents who do not have relatives or friends who can assist in caring for their child even when notified of such help is needed. Children are not being removed from their home or placed by New York State, a local department of social services or a host family home agency. *OCFS is not changing the revised proposed regulations in response to this comment.*

Several commenters objected to the revised proposed regulations because there is no guarantee that the parent or guardian entering into a host family home arrangement will be represented by counsel and because the child involved is not assigned counsel. OCFS maintains that the revised proposed regulations adequately address the issue of legal representation of the parent or guardian by the regulatory requirements that the parent or guardian be advised of their right to counsel and the provision of information regarding the availability of free or low-cost legal services. OCFS would note that the standards in the revised proposed regulations relating to parental/guardian legal representation exceed the statutory requirements currently in place for a designation of person in parental relation (Article 15-A of the GOL). Regarding legal representation of the child, as referenced above, the host family home arrangement is not a foster care placement. The host family home arrangement is based on the designation of a person in parental relation which currently does not require or authorize the appointment of legal counsel for the child. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters expressed concern that the revised proposed regulations do not adequately afford youth involved in the host family home arrangement with a voice. In response to the initial public comment period, OCFS revised the proposed regulations to provide that youth 14 years of age or older must be consulted with by the host family home agency regarding the initial and any subsequent extensions of a host family home arrangement. This standard exceeds the current requirements for a designation of person in parental relation and exceeds the requirements for the execution of a voluntary surrender pursuant to section 384 of the SSL or a voluntary placement agreement pursuant to section 384-a of the SSL. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters objected to the revised proposed regulations because they do not require court oversight of the host family home arrangement. Respectfully, OCFS is without the statutory

authority to require by regulation that courts oversee such arrangements. The arrangements contemplated by the revised proposed regulations are supported through a designation of a person in parental relation which, in accordance with Article 15-A of the GOL, also does not authorize or require court oversight. The decision by a parent or guardian to voluntarily enter into a host family home arrangement is also supported by the right of a parent or guardian to place out a child for the purpose of providing care (see sections 371(12) and 374(2) of the SSL). Such right is not conditioned on prior court approval or oversight. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters objected to the use of the person in parental relation set forth in Article 15-A of the GOL as a component of the host family home program. The objection included that Article 15-A of the GOL was never intended to apply to host family home arrangements and only contemplated placement with relatives. Another comment was that references to the person in parental arrangements are inapposite and that OCFS lacked the legal authority to promulgate the host family home regulations. OCFS disagrees with these comments. There is no express limitation in Article 15-A of the GOL that restricts the use of the person in parental relation to relatives. Such an interpretation would have the impact of precluding arrangements with non-relatives such as fictive kin. In addition, such interpretation would deprive the right of a parent or guardian to exercise the statutory right to arrange for the care of their child, as granted by sections 371(12) and 374(2) of the SSL. OCFS respectfully maintains that it possesses the necessary statutory authority to promulgate the revised proposed regulations in accordance with sections 20, 34 and 460-a of the SSL. *OCFS is not changing the revised proposed regulations in response to these comments.*

One commenter asserted that the revised proposed regulations fail to comply with the notification requirements of the federal Indian Child Welfare Act (25 USC §1901 et seq.) [ICWA]. OCFS disagrees. The arrangements contemplated by the revised proposed regulations do not fall within any of the four categories of placements set forth in the definition of a child custody proceedings [25 USC §1903(1)] that would subject host family homes to ICWA standards. A host family home arrangement is not a termination of parental rights, pre-adoptive placement or an adoptive placement. It is not a foster care placement because, aside from the host family home arrangement not being an action removing a child from a parent, the parent or guardian in a host family home arrangement can have the child returned upon demand. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters were critical of the revised proposed regulations because New York currently has statutory mechanisms for parents and guardians to voluntarily place their child into foster care. OCFS recognizes that section 384-a of the SSL authorizes a parent to transfer legal custody to a local department of social services. That is foster care. At a point, such a placement requires court approval for the return of the child. The parent has no authority to approve the caregiver. The revised proposed regulations establish a parental rights approach affording a parent ability to make an informed and voluntary decision regarding the temporary care of their child and agreeing to the specific host family home caregiver. *OCFS is not changing the revised proposed regulation in response to this comment.*

One commenter stated that the revised proposed regulations would have significant fiscal implications to the state because the revised proposed regulations authorize placement only until age 18. The commenter stated that foster children are often not able to live on their own at age 18 requiring the receipt of assistance or continuation in foster care. OCFS' response is that the host family home program is not foster care. Arrangements in host homes are intended to be temporary, which often does not occur in foster care. OCFS also believes that the vast majority of the children who would benefit from a host family home arrangement will be younger children who remain the financial responsibility of their parent or guardian under Article 5 of the FCA. *OCFS is not changing the proposed regulations in response to this comment.*

Some commenters claimed that the revised proposed regulations were out of harmony with current state statutes and legislative intent relating to placement of children in foster homes and with authorized agencies. In addition, that there was no statutory authority for the removal of a child and possibly multiple extensions of placement without the offering of services to prevent removal or enable the child to return home. OCFS disagrees with this analysis. Host home arrangements are not foster care. Unlike foster care, the parent or guardian retains legal custody when a child is placed in a host home. The entering into the host family home arrangement and its termination are left to the parent or guardian. Arrangements made by the parent in a host family home are consistent with the rights of parents under the SSL and the GOL. *OCFS is not changing the revised proposed regulations in response to these comments*

Some commenters expressed concerns that the revised proposed regulations do not adequately reflect foster care provisions applicable to kinship preferences and sibling placements. OCFS' response is that, unlike foster care, the parent is the decision maker regarding who will care for the parent's child, whether kin or not, and whether siblings will be cared for together in a host

family home. Such rights are consistent with the authority granted to the parent in Article 15-A of the GOL. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter expressed concern that OCFS should not be the agency responsible for monitoring host home programs as it is too much intrusion in a private matter, while other commenters questioned the level of monitoring by OCFS. In accordance with section 460-a of the SSL, OCFS is responsible for the approval of entities seeking to operate a host family home program placing out children. In accordance with sections 371(10) and 460-c of the SSL, OCFS has the authority and responsibility to monitor host family home agencies. In accordance with such oversight and monitoring authority, OCFS will review host family home in same manner as other approved and licensed child welfare programs, as well as assess its effectiveness in helping all families. For example, should OCFS receive a complaint, standard operating practice is for OCFS to contact the complainant, the applicable agency and other relevant parties regarding the complaint. *OCFS is not changing the revised proposed regulations in response to these comments.*

Some commenters raised concerns regarding the educational stability of a child placed in a host family home. OCFS' response is that the revised proposed regulations require that when considering a potential host family home, the host family home agency must take into consideration the child's exiting educational setting and the proximity of such setting to the potential host family home. The revised proposed regulations state that the child has the right to participate in an educational program in accordance with existing law. In addition, the subject of the education of the child is one of the required subjects, terms and conditions of the person in parental relation executed by the host family home agency and the parent or guardian. As such, the custodial parent or guardian has ultimate decision making over the subject of educational stability which a parent or guardian in a foster care or a FCA 1017 placement does not. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters raised concerns that the revised proposed regulations did not adequately address visitation and parent time issue, including the circumstances and frequency of visitation. OCFS' response is that the revised proposed regulations require that when considering a potential host family home, the host family home agency must take into consideration the proximity of such host family home to the parent in order that the parent/child visitation plan may be carried out. In addition, the revised proposed regulations require that the designation of parental relation must address the visitation and contact rights of the child and the child's parent and other relatives while the child is cared for in the host family home. The revised proposed regulations prohibit

deprivation of visitation as punishment. They also require the host family home agency inform the host family home of the plans for visitation, including probable location. Again, the parent, unlike in a foster care placement, retains ultimate decision making relating the issue of visitation. *OCFS is not changing the revised proposed regulation in response to this comment.*

Some commenters raised concerns that the revised proposed regulations did not adequately address the issue of “non-custodial parents” OCFS’ response is that the revised proposed regulations require that prior to the execution of the designation of person in parental relation, the host family home agency must make a diligent effort to notify any parent with legal custody of the child or the child’s legal guardian, as identified by the parent with legal custody seeking the assistance of the host home agency. OCFS would point out that the current standards in Article 15-A of the GOL do not address this issue. However, OCFS understands the need to secure a clear understanding and appreciation of the standing and rights of parents. In that regard, OCFS will address this subject in more detail in a future release to the field. *OCFS is not changing the revised proposed regulation in response to this comment.*

Some commenters expressed concerns that the revised proposed regulations do not adequately address the provision of services to the parent or the child. OCFS’ response is that the revised proposed regulations require the host family home agency at the time a parent is considering the option of a host family home and following the execution of the designation of in parental relation to provide information and referral services to the parent that includes community social services resources designed to address the needs of the family. The children in question are not in the legal custody of a local department of social services. It is the parent who has the decision-making authority to seek services, including preventive services which, absent a court order, are voluntary. OCFS recognizes the importance of this subject and the adequacy of such notification. OCFS will address this subject at the time an entity seeks OCFS approval to operate a host family home agency and will review compliance as part of the OCFS monitoring function. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter objected to the revised proposed regulations on the ground that they did not provide guarantees afforded children in all other out-of-home care relating to school stability, proximity to their home, provision of medical care, practice of religion, right to participate in normal activities, and other rights. OCFS disagrees with this comment. The revised proposed regulations expressly address the child’s right to practice his or her religion. In addition, the host family home must recognize and respect the religious wishes of the parent of the child and endeavor to protect and preserve their religious faith, including making provisions for the child to attend religious

services. The revised proposed regulations also expressly mandate that each child in a host family home has the right to enjoy freedom of cultural and ethnic practices, including language expression and religion. The revised proposed regulations require when considering a potential host family home that the host family home agency must take into consideration the proximity of the potential host family home to the child's parent. The subject of educational stability is addressed above. The revised proposed regulations require the host family home to allow the child to mingle freely and on an equal footing with other children in the family and community and to share both pleasures and responsibilities. Regarding health care, the parent must provide the necessary consent for medical care for the child as required by the Public Health Law. Children in a host family home arrangement are in fact provided with rights very similar to those afforded children in foster homes. Such rights extend beyond those available to children in court ordered FCA 1017 placements. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter objected to the revised proposed regulations on the basis that the host home model perpetrates the idea that poor families of color need the help of volunteer parents who reside outside of their communities to raise their children. OCFS disagrees that the revised proposed regulations have such a purpose or intent. As noted above, the host family home model is intended as a voluntary program providing temporary care for children. The parent retains legal custody of the child and can demand the return of the child at any time. The host family home agency must offer, to the extent possible, host family home options located in the community in which the parent and child reside. If the parent is not satisfied with the options offered by the host family home agency but is aware of a person, including a relative in their own community who would care for the child, nothing in the revised proposed regulations prevents the parent from entering into a designation of person in parental relation with that person outside of the host family home model. Clearly, the issue of potential adverse impact on poor families of color is always of a deep concern to OCFS. OCFS will monitor this issue in relation to the initial approval of host family home programs and their ongoing operations. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters expressed concern that the revised proposed regulations were not clear regarding who has financial responsibility for the child who is cared for in a host family home placement. OCFS disagrees with this comment. The revised proposed regulations expressly state that financial responsibility does not transfer to the host family home when the child is placed in that home. The entering into the designation of person in parental relation does not transfer

financial responsibility established by section 413 of the FCA from the parent to the host family home. The revised proposed regulations require that the designation of person in parental relation must specify the financial arrangements for the care of the child as agreed between the parent and host family home. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter expressed concern over the frequency, substance and documentation of the contacts by the host family home agency with the child while the child is cared for in the host family home. OCFS would point out that the frequency of the contacts required by the revised proposed regulations reflect the standards applicable to foster children placed in foster homes pursuant to 18 NYCRR 441.21. The revised proposed regulations require that such contacts address the safety of the child, reaction to separation from the child's parent and adjustment of the child in the host home. As part of OCFS approval of a host family home agency, the host family home agency has an ongoing responsibility to monitor compliance with host family home standards by the host family home. The host family home agency will be required to document such interactions. OCFS will verify compliance in its approval process of any host family home applicant and ongoing monitoring of the host family home program. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter expressed concern that there is no assurance in the revised proposed regulations that no child could be placed with a host family home out of state, that such a placement either would be or could be subject to the Interstate Compact on the Placement of Children and that there would then be no assurance that the host family home in the other state would satisfy New York host family home standards. OCFS' response is that while the current Article 15-A of the GOL does not preclude a parent from executing a designation of person in the person in parental relation with a person in another state, it is highly unlikely such an arrangement would be made under the revised proposed regulations for several reasons. As noted previously, the revised proposed regulations set forth standards relating to the issues of providing arrangement options in the child's community, proximity of the child to the parent and taking into consideration the continuation of the child is his or her existing school. As stated previously, the parent is the final decision maker in the arrangement decision process. As such, the parent could refuse any proposed out-of-state host family home arrangement. Regarding the ICPC, should it apply, pursuant to Article V of the ICPC (section 374-a of the SSL), New York retains jurisdiction over any issues relating to custody of the child. Finally, unless a host family home is able to satisfy the standards set forth in the revised proposed regulations, that applicant may not be

approved, and no child may be cared for in that home. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter expressed concern that the revised proposed regulations authorized unlimited extensions of placement without supportive services or entitlement to counsel. OCFS' response is the ability of the parent or guardian to extend the designation of person in parental relation in the revised proposed regulations is consistent with the current standards set forth in Article 15-A of the GOL. That being said, it remains OCFS' expectation that arrangements in a host family home will be temporary to enable the parent or guardian to address the issue or issues that have required such an arrangement. While the child is in the host family home arrangement, the host family home agency has an ongoing responsibility to provide information and referral services to the parent upon request. At any time in the placement, the parent is free to apply for services, including preventive services. OCFS has addressed the appointment of counsel issue above. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters had concerns that the revised proposed regulations inadequately addressed the subject of parent/child reunification, including not informing the parent of a court process to secure return of the child. OCFS' position is that regulatory notification of a court process is not necessary as the revised proposed regulations require the immediate return of the child to the parent upon revocation of the designation of person in parental relation. In addition, section 5-1554 of the GOL addresses how the parent may revoke the designation of person in parental relation. Absent a court order authorizing not returning the child, the failure by the host family home or host family home agency to comply with the revocation and return of the child to the legal custodian would expose the host family home or host family home agency to civil and potentially criminal liability. However, as part of the host family home approval process, OCFS will require the host family home agency to provide any parent or guardian executing the designation of person in parental relation a contact number at OCFS for the purpose of filing a complaint in regard to the failure of compliance with the provisions of the revised proposed regulations, including the issue of revocation of the designation of person in parental relation and the return of the child. *OCFS is not changing the revised proposed regulations in response to this comment.*

Some commenters recommended that OCFS obtain additional input from the public and potentially impacted families. OCFS' response is that the revised proposed regulations have completed two full rounds of public comment. OCFS held a phone forum inviting interested groups who represent broad based constituencies. *OCFS is not adopting this recommendation.*

One commenter expressed concern with how the host family home program will affirm LGBTQAI+ youth who may be served by a host family home program. The revised proposed regulations expressly prohibit any discrimination or harassment of any child served by a host family home agency on the basis of sex, sexual orientation, or gender identity or expression. *OCFS is not changing the revised proposed regulations in response to this comment.*

One commenter expressed concern that while the revised proposed regulations require training of host families, they did not establish a minimum amount of such training and did not address training of host family home agency staff. OCFS will monitor the quality and depth of host family home training as part of its approval and oversight of the host family home agency. Regarding training of host family home agency staff, there are currently no training mandate of staff of agencies providing preventive services. *OCFS is not changing the revised proposed regulations in response to these comments.*