To be Argued by:
WILLIAM C. SILVERMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of

Case No.: CV-23-2341

LAWYERS FOR CHILDREN, THE LEGAL AID SOCIETY and LEGAL AID BUREAU OF BUFFALO, INC.,

Petitioners-Appellants,

– against –

THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES and SHEILA J. POOLE, in her Official Capacity as the Commissioner of The New York State Office of Children and Family Services,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

Sometimes parents or guardians who are temporarily unable to care for their children because of a sudden illness or other family crisis have no one who can step in to assist. To address this need, the State of New York established through statute a voluntary foster-care system that aids those parents and provides care for their children. The governing statutes mandate that children who are voluntarily placed by their parents into foster care be provided with several essential protections, including judicial oversight and a right to counsel. The statutes also require that the State provide those families with preventive and supportive services to enable the child to remain safely at home when feasible, and to return home as quickly as possible. In addition, they require the State to ensure that voluntarily placed children are in safe and appropriate homes, prioritize their placement with kin, restrict their out-of-state placement, and expedite their return to their families.

In December 2021, however, Respondents-Respondents New York State Office of Children and Family Services ("OCFS") and Sheila J. Poole, in her official capacity as Commissioner of OCFS (collectively, "Respondents"), promulgated regulations creating, without statutory authority, a parallel system of voluntary placement of children into "Host Homes" devoid of statutorily mandated and essential safeguards, including judicial oversight and required independent legal representation of children (the "Host Homes Regulations"). In effect, the State has

attempted to turn back the clock to a time when vulnerable children were simply shipped off to strangers with little or no protection or judicial oversight and the State was insulated from responsibility for the outcome.

Through an Article 78 Petition, Appellants—who represent children in voluntary foster-care placements under current law—sought an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, unlawful, and arbitrary and capricious. The Supreme Court's Decision and Order below dismissing the Petition is the subject of this appeal.

The lower court acknowledged that the Host Homes program was intended to "circumvent" the existing child welfare system but nevertheless upheld the program and dismissed this action. That was clear error. The Host Homes program not only lacks legislative authority but also completely upends the State's statutory scheme for voluntarily placing children into the homes of strangers overseen and regulated by Respondents. The concept of separation of powers "requires that the legislature make the critical, primary policy decisions, while the executive branch's responsibility is to implement those policies."[1] Respondents exceeded their administrative authority in promulgating the Host Homes Regulations and accordingly, those regulations should be vacated.

[1]*LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259-60 (2018) (citation omitted).

The Host Homes Regulations effectively establish a shadow foster-care system, which OCFS touted as a "bold, new initiative" that it claimed "will support families without involving the child welfare system."[2] This new system, overseen by OCFS, establishes the requirements necessary for agencies to be approved by OCFS to place children in "host homes," the requirements for how those homes are selected, and the duties and responsibilities of both the agencies and the host homes, including the treatment of children, recordkeeping, and the procedures and consequences for revocation of a host home. These requirements also include monthly contacts by the agencies to check up on the children.

Despite the great similarity to voluntary foster care, the Host Homes program would strip away the core protections the Legislature, in its policy-making capacity, has afforded children and parents under the existing statutory framework governing voluntary placement. Unlike the existing voluntary foster-care system, the Host Homes program does not require the agency to provide supportive or preventive services to parents to avert placing children out of their homes or otherwise make efforts to reunify families. There is no requirement that the agency first attempt to place children with kin before placing them with strangers. There is no required

[2] *The New York State Office of Children and Family Services Announces Adoption of Host Family Home Regulations*, OFF. OF CHILD. & FAM. SERVS. (Dec. 13, 2021), https://ocfs.ny.gov/main/news/article.php?idx=2314.

court approval or court oversight of the placement and no appointment of counsel to either children or their parents. Children may be sent to live out of state without any of the vetting or oversight of the child's placement that is required by the Interstate Compact on the Placement of Children ("ICPC") when a child in foster care is placed outside of New York. Indeed, under Host Homes, children separated from their families—who otherwise would be represented by Appellants or other court-appointed attorneys—would have no legal recourse whatsoever. In short, the Host Home program is simply the voluntary foster-care system stripped of the protections the Legislature deemed necessary to protect children and preserve families.

The lower court held that OCFS's authority to promulgate the Host Homes Regulations could be found in its long history of regulatory authority in the areas of foster care, preventive services, adoption, and protective services. However, none of those provisions actually authorize OCFS to create Host Homes, which establishes a new system for placing children with strangers. Host Homes is not a foster care, preventive or protective service, or adoption program. OCFS has repeatedly touted that Host Homes is designed to avoid foster care. Indeed, families who are the subject of a child protective services case are specifically excluded from participating in Host Homes. Furthermore, Host Homes, which creates a mechanism for removing children from their homes, is the very opposite of a preventive service, which is designed to prevent the removal of children. Finally, a program meant to

facilitate temporary out-of-home placements is the very opposite of adoption, which is the permanent placement of a child with a new family.

The lower court further relied on the fact that parents always have retained the right to place their children with others outside of the home. But Host Homes is a *State-run* child placement system, in which State-authorized agencies, not parents, identify homes and oversee them. Moreover, the lower court's reliance upon the Designation of a Person in Parental Relation under Title 15-A of the General Obligations Law ("GOL") as authorizing this new system is a gross misapplication of the law as it was created and intended to be used by the Legislature.

With Host Homes, Respondents ignore their statutory responsibility as clearly defined by the Legislature to protect children being placed with State assistance outside of their homes, opting instead for a new, shadow system operating contrary to law, outside the view of courts and counsel. OCFS substituted its own policy judgments for those of the Legislature and wrote on a "clean slate" by creating, without legislative authority or guidance, regulations that are out of harmony and indeed in conflict with an existing statutory scheme. Accordingly, the lower court's decision should be reversed, and this Court should enter an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, unlawful, and arbitrary and capricious.

QUESTIONS PRESENTED

1. Did OCFS act without legislative authority, in violation of lawful procedure and in an abuse of discretion, when it created the Host Homes program?

Yes. The lower court erroneously held that Respondents had the authority to "circumvent" the foster care system through the Host Homes Regulations, which provide for children to be placed in homes with strangers under the auspices of an authorized agency — as happens in the foster-care system — but without any of the protections the Legislature has afforded to children and parents in the foster-care system, including appointment of counsel, judicial oversight, and the provision of supportive and preventive services.

2. Did OCFS act arbitrarily and capriciously by promulgating the Host Homes Regulations because they are inconsistent with existing law?

Yes. The lower court erroneously held that the Host Home Regulations were a reasonable exercise of OCFS's authority because they simply provided parents with another out-of-home placement option, ignoring the inconsistencies between the Regulations and the current statutory system governing voluntary placements.

STATEMENT OF FACTS

I. The Statutory Framework for Voluntary Placement in New York.

New York's Social Services Law outlines the procedures to be followed when parents are temporarily unable to care for their children and seek to place them in a

home identified by an authorized agency. Social Services Law § 384-a(1) provides that "[t]he care and custody of a child may be transferred by a parent or guardian, and the care of a child may be transferred by any person to whom a parent has entrusted the care of the child, to an authorized agency by a written instrument in accordance with the provisions of this section." In 1999, the New York State Legislature recognized the importance of legal representation for these children and mandated the appointment of independent counsel for every child who is voluntarily placed out of the home under the Social Services Law. These transfers of care and custody by a parent—called a "voluntary placement"—come with multiple specific safeguards designed to ensure that the child is placed with strangers only when necessary and that the child is returned home or placed in another permanent living arrangement as quickly as possible.

First, prior to accepting a voluntary placement, the social services official must provide preventive services to the family whenever it is reasonable to believe that those services will enable the child to remain at home. N.Y. SOC. SERV. LAW ("SSL") §§ 398(1)(a), 409-a(1)(a)(i).

Second, when placement is necessary, the statutes prioritize placement with the child's kin. The agency must attempt to locate any other parent, relatives, or family friends and inform them of the opportunity to have the child reside with them, rather than with strangers. *Id*. § 384-a(1-a). Additionally, siblings must be placed

together unless it would not be in their best interests. *Id*. § 384-a(1-a)(b). Children in foster care who are not placed together or afforded regular visitation and communication with their siblings may seek court intervention to request placement, visitation, or communication with their siblings. *Id.* § 358-a(11)(b), (c); N.Y. FAM. CT. ACT ("FCA") § 1089(d)(2)(viii)(I).

Third, the parent is entitled to receive supportive services (including preventive services) to facilitate reunification of the family and to a fair hearing if the authorized agency fails to provide them. SSL §§ 384-a(2)(c)(iv), (vii), 358-a(1).

Fourth, a court must approve any voluntary placement expected to last more than 30 days. *Id.* § 358-a(1). To approve such a placement, a court must determine that:

(1) "the placement of the child is in the best interest of the child, that it would be contrary to the welfare of the child to continue in his or her own home," and that "the best interests and welfare of the child would be promoted by removal of the child from such home" (*id.* § 358-a(1)(a), (3)(a));

(2) "where appropriate, reasonable efforts were made prior to the placement of the child into foster care to prevent or eliminate the need for removal of the child from his or her home and that prior to the initiation of the court proceeding required to be held by this subdivision, reasonable efforts were

made to make it possible for the child to return safely home" (*id.* § 358-a(1));

(3) the parent who executed the written instrument under SSL § 384-a did so "knowingly and voluntarily and because he or she would be unable to make adequate provision for the care, maintenance and supervision of such child in his or her home" (*id.* § 358-a(3)); and

(4) all requirements of SSL § 384-a have been satisfied (*id.* § 358-a(1), (3)).

Fifth, court oversight does not end upon approval of the voluntary placement but rather continues so long as the child remains out of the home. At least eight months after the child's initial placement and every six months thereafter, the Family Court must conduct a Permanency Hearing to monitor the child's welfare and to determine what "permanency plan" would be most appropriate for the child (*i.e.*, returning to parents, having their kin appointed as their guardian, adoption, etc.). FCA § 1089(d)(2)(iii), (iv). The purpose of the Permanency Hearing is "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives." *Id.* § 1086.

Sixth, throughout the initial proceedings and subsequent Permanency Hearings, both the parent and the child are entitled to their own counsel. *Id.* §§ 249(a), 262(a), 1090(a), (b); SSL § 358-a(6). Furthermore, during Permanency Hearings, both the parent and child are entitled to raise concerns regarding the

child's well-being in the foster home, whether reasonable efforts were made by the placing agency to facilitate the child's goal of reunification with their parent(s), and whether siblings are placed together or adequately visiting and communicating with each other. SSL § 358-a(3)(a); FCA § 1089.

Seventh, the agency has an ongoing obligation to assist the family so that reunification can occur as soon as possible. To that end, the order approving a voluntary placement and the order at the conclusion of each Permanency Hearing may include conditions requiring the implementation of a specific plan of action by the social services official to exercise diligent efforts toward the child's discharge from care. SSL § 358-a(3)(e); FCA § 1089(d)(2)(iii).

Eighth, New York statutes place strict limitations on when a child who has been placed with an authorized agency can be sent to a home outside of New York State. SSL § 374-a. When these requirements are met, New York courts retain jurisdiction over the child, and the placement must comply with the ICPC. *Id.*

In sum, these statutory protections were enacted to address specific, concrete, and demonstrable safety and permanency concerns that the Legislature identified and that arise when children are placed outside of parental care with strangers.

II. The Host Homes Regulations.

Through the Host Homes Regulations, OCFS seeks to create a new voluntary placement system without legislative authority and without the protections required

by law that ensure the ongoing safety of children and the prompt reunification with their families. The Host Homes program mirrors the existing voluntary foster-care system in numerous ways. The program creates a scheme whereby children can be voluntarily placed in the homes of strangers identified by and under the auspices of a Host Homes agency in accordance with regulations promulgated by OCFS. Like the regulations governing voluntary foster-care placements, the Host Homes Regulations detail the duties and responsibilities of the host family, including notifying the agency of any incidents that may affect the child's adjustment, health, safety, or well-being;[3] the qualifications for approval of a host family; the requirements to be met in a home study before placement of a child;[4] the agency's obligation to supervise the home; the procedures and consequences for revocation of approval of a host family home; the physical conditions of homes;[5] the forms of discipline that may be used;[6] the way children must be treated;[7] the requirement of monthly contacts by the agencies overseeing the homes;[8] and the records that must be kept by the agency overseeing the homes.[9]

[3] Compare 18 N.Y.C.R.R. § 444.13(a)(10) with 18 N.Y.C.R.R. § 443.3(b)(10).
[4] Compare 18 N.Y.C.R.R. § 444.15 with 18 N.Y.C.R.R. § 443.2(c).
[5] Compare 18 N.Y.C.R.R. § 444.16 with 18 N.Y.C.R.R. § 443.3(a).
[6] Compare 18 N.Y.C.R.R. § 444.8 with 18 N.Y.C.R.R. § 441.9.
[7] Compare 18 N.Y.C.R.R. § 444.13 with 18 N.Y.C.R.R. § 443.3.
[8] Compare 18 N.Y.C.R.R. § 444.17(b)(2) with 18 N.Y.C.R.R. § 441.21(c)(2).
[9] Compare 18 N.Y.C.R.R. § 444.15(d) with 18 N.Y.C.R.R. § 443.2(f).

However, missing from the Host Homes Regulations are the protections for parents and children required for voluntary placements under the Social Services Law and the Family Court Act. Among other things, the Host Homes Regulations do ***not*** require the following:

- Children to be appointed independent legal counsel, despite the fact that counsel provides a critical voice for the child by helping to identify kin who might be able to care for them; ensuring that the child has regular visitation and communication with parents and siblings; ensuring that all of their medical, educational, and mental health needs are being met; and raising any concerns regarding the safety and appropriateness of the child's placement.
- Court approval for placements expected to last longer than 30 days, including approval based on judicial findings that a Host Homes stay would be in the best interest of the child or that the parent voluntarily placed the child with a Host Home, knowing all of their rights and obligations.
- Judicial oversight of any kind.
- Prioritization of placement with kin rather than strangers.
- The retention of sibling groups together.

- The agency to provide supportive or preventive services to families and otherwise make efforts to reunify families.
- Any restrictions on placing children out of state, even despite the ICPC.

Critically, OCFS seeks to evade the provision of these statutorily-mandated protections to children and families through a novel and improper use of Title 15-A of the General Obligations Law. While the statutes governing New York's foster-care system require *an authorized agency* to enter into a written instrument with the parent that includes specific protections and required judicial oversight, SSL § 384-a, the Host Homes Regulations seek to skirt these requirements by making the agency merely a middleman or broker. Under the Host Homes program, agencies facilitate parents' execution of a Designation of Person in Parental Relation, "in accordance with" General Obligations Law § 5-1551, placing the child directly with the host family. 18 N.Y.C.R.R. § 444.5(b). As a result, the agency, in an unlawful attempt to insulate itself from its statutorily mandated responsibilities to children and parents, is not a party to any written instrument with the parent.

In establishing this shadow voluntary foster-care system, the State seeks to continue to facilitate the voluntary placement of children outside of their homes, while avoiding any of the services, oversight, or accountability provided for in the statutes governing the voluntary foster-care system.

III. Appellants Provide Statutorily Mandated Representation for Children in Voluntary Placement Proceedings.

A. Lawyers For Children.

Appellant Lawyers For Children ("LFC") was founded for the purpose of providing legal representation to indigent children in civil proceedings. The New York State Office of Court Administration ("OCA") initially contracted with LFC in 1983-84 to determine whether exercising the court's discretion to assign counsel to children who were voluntarily placed in foster care helped children return home quickly or, when return home was not possible, helped to speed the time in which they were placed in another permanent living arrangement. (R. 19–20 at ¶ 8; R. 97–98 at ¶ 4). Since 1999, when appointment of counsel to all children who were voluntarily placed in foster care became mandatory, LFC has been assigned to represent the children in all voluntary foster care cases filed in New York City, unless the representation is prohibited due to a conflict of interest or the child has previously been represented by another attorney who agreed to continue the representation. In fiscal year 2021 alone, LFC attorneys appeared in well over 1,000 legal proceedings regarding voluntarily placed children. In the last 10 years, LFC has represented over 10,000 children who were the subject of voluntary foster care proceedings. (R. 19–20 at ¶ 8; R. 98 at ¶¶ 6–8). LFC is assigned to represent the child as soon as a petition for approval of the voluntary placement is filed in Family Court. That representation continues until the child is discharged from foster care.

Every child represented by LFC is assigned both an attorney and an LFC social worker to protect their rights, advance their safety, and give voice to their needs and wishes. (R. 19–20 at ¶ 8; R. 99–100 at ¶¶ 9–13).

B. The Legal Aid Society.

Appellant The Legal Aid Society ("Legal Aid") is a not-for-profit organization providing free legal services to low-income individuals and families. Its Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before New York City Family Courts in voluntary placements and other proceedings affecting children's rights and welfare. (R. 20–21 at ¶ 9; R. 112–13 at ¶¶ 2-3). Pursuant to a contract between Legal Aid and OCA, Legal Aid is assigned through New York City's Family Courts to represent the majority of children and youth placed into foster care or released to family members under supervision of the New York City Administration for Children's Services. In recent years, Juvenile Rights staff, which includes lawyers, social workers, paralegals, and investigators, have been assigned to represent approximately 600 children each year who are the subject of Voluntary Placement Agreements executed in accordance with SSL § 358-a. Juvenile Rights staff appear at all stages of court proceedings, including Permanency Hearings, which ensures monitoring of the child's well-being, safety, and permanency, as well as the child's wishes and interests, for the

full length of time the child is out of the home. (R. 20–21 at ¶ 9; R. 113–14 at ¶¶ 4–7).

C. Legal Aid Bureau of Buffalo, Inc.

Appellant Legal Aid Bureau of Buffalo, Inc. ("Legal Aid of Buffalo") represents the vast majority of children in child welfare, juvenile justice, and related matters in Erie County Family Court. Indeed, for nearly 60 years, Legal Aid of Buffalo has represented tens of thousands of vulnerable children in the urban center of Buffalo as well as those scattered throughout suburban and rural communities within Erie County. (R. 21 at ¶ 10; R. 90–91 at ¶¶ 3, 6). Pursuant to a contract with OCA, Legal Aid of Buffalo receives funding to represent children in child welfare matters and is the sole institutional legal services provider to receive such funding in Erie County. Legal Aid of Buffalo is routinely appointed to represent children in voluntary placement proceedings in Family Court and appears at all stages of those proceedings, including Permanency Hearings. In addition to legal representation, social work, and education advocacy, staff members respond to the needs of children and families in crisis and help them access services. (R. 21 at ¶ 10; R. 91–93 at ¶¶ 6-10).

IV. The History of the Host Homes Regulations Reflects Their Impropriety and Widespread Public Opposition to Their Promulgation.

A. Safe Families for Children Lobbies to Pass Regulations Authorizing Their "Host Homes" Program.

Safe Families for Children ("SFC") operates chapters around the country to connect families with volunteers who agree to provide homes for children whose parents are unable to care for them. SFC first sought approval to act as an authorized agency in New York in 2016. (R. 28–29 at ¶ 27). In June 2018, Laura Galt, the New York City Director of SFC, met with then-OCFS Commissioner Sheila Poole. Afterward, Ms. Galt sent an email to an attorney at OCFS, writing, "We are thrilled that the Commissioner is supportive of our model and taking the next steps to figure out the legal part of things." (R. 29 at ¶ 29; R. 227).

By mid-fall 2018, OCFS was in communication with SFC regarding New York's approval for its program to place children with volunteers outside of the foster-care system. (R. 29 at ¶ 30). Thereafter, on January 29, 2020, OCFS published proposed regulations to establish a Host Family Homes program.[10] Through these proposed regulations, OCFS attempted to facilitate the voluntary placement of children into a parallel system of foster care of its own creation. OCFS would allow approved Host Homes agencies to place children into homes that those agencies had vetted under the rules set by and under the supervision of OCFS—as

[10] 42 N.Y. Reg. 1 (Jan. 29, 2020).

they did for children who were voluntarily placed in foster care—but without any of the statutory protections required for voluntary foster-care placement.[11] (R. 30 at ¶ 31). Indeed, by Respondents' own admission, the Regulations at issue are specifically intended to bypass existing law governing voluntary foster-care placements, including the right to appointment of counsel. In March 2020, Ms. Galt emailed OCFS with the following inquiry: "The child lawyers are still saying that parents should use voluntaries and I'm wondering if parents actually use them for respite." The OCFS official responded, "Yes parents do use them, but why should they have to." (R. 30 at ¶ 33; R. 739).

B. OCFS Receives Widespread Opposition to OCFS's Proposed "Host Homes" Regulations.

The initial proposed regulations received 137 comments. This response came from a broad set of established organizations, family court judges, child welfare commissioners, foster-care providers, academics, and advocates for children and parents. They asserted that the proposed regulations would violate the rights of children and parents (including their right to counsel and to be heard in court) and were inconsistent with New York laws that govern foster care, favor placement of children with kin over strangers, and require agencies to provide preventive services

[11] 18 N.Y.C.R.R. §§ 444.1-444.15.

and to undertake efforts to unify families. (R. 31 at ¶¶ 35–36; R. 818–1084; R. 1253-56).

C. OCFS Proposes Revised Regulations.

OCFS published revised "Host Homes" regulations on July 7, 2021 (the "Revised Regulations"), inviting a second round of public comment. The Revised Regulations included changes in response to criticism that the initial proposed regulations created a "quasi foster care system" without important protections given to parents and children through foster care —including the right to receive services and to be appointed counsel. The Revised Regulations stated that the Host Family Homes agency "*may* provide additional services to the family" (but did not require any such additional services), that "the agency must have policies and procedures in place to assist parents in making informed decisions," including that parents are informed "that they have legal rights," and that children over the age of 14 should be consulted about the placement. (R. 32 at ¶¶ 37–38 (emphasis added); R. 1253-56). The Revised Regulations, however, did not provide either the parent or child with an opportunity to be heard through assignment of and advocacy by counsel.[12]

The revised regulations included several changes intended to distinguish Host Homes from foster care, notably further eroding safety protections for children placed in the program. OCFS removed the prohibition on placing a child outside

[12] *See generally* 18 N.Y.C.R.R. §§ 444.1–444.19.

New York State without complying with the ICPC (as would be required in a foster-care placement)—increasing the risk that children would be placed beyond the jurisdiction of New York courts. OCFS also changed the word "casework" to "contact" when referring to an agency's visits to check on the child in a Host Home—further diluting the agency's obligations to provide services and assistance to the family. (R. 32 at ¶ 39).[13]

Significantly, in response to criticism that the earlier proposal's provision for parents to execute a "host family home placement agreement" placing their children with the Host Family Homes agency violated the statutory provisions on placing children in the care of an authorized agency outside of the foster care system, the Revised Regulations provided for parents to sign a Designation of a Person in Parental Relation, giving authority for the child's care directly to the host family identified and overseen by the agency, rather than to the agency itself. (R. 32-33 at ¶ 40; R. 1253-56).[14]

D. OCFS Adopts Its Revised "Host Homes" Regulations Despite Widespread and Continuing Public Opposition.

During the comment period for the Revised Regulations, OCFS received 85 comments from a broad swath of the public.[15] Once again, members of the public

[13] *Id*. § 444.17.
[14] *Id*. § 444.5.
[15] OCFS received comments in opposition from, among others, New York State Unified Court System (Family Court Advisory and Rules Committee and Statewide Committee on Attorneys for

criticized OCFS's attempt to create a shadow foster-care system, pointing to the lack of legal representation for both children and parents, lack of judicial oversight, permissive attitude toward interstate placements, and failure to prioritize placement with kin and family reunification. (R. 1085-252; R. 1257-67). Despite the voluminous objections to the Revised Regulations, OCFS did not make any additional changes and adopted them as final on December 8, 2021. (R. 33 at ¶ 41).

V. This Article 78 Proceeding.

This Article 78 proceeding sought an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, unlawful, and arbitrary and capricious, pursuant to CPLR § 7803. The Petition details how OCFS acted without legislative authority or guidance, how it wrote on a "clean slate" and substituted its own policy judgment for that of the legislature, and how the Regulations are out of harmony and, indeed, in conflict with an existing statutory scheme. (R. 17–57).

VI. Respondents' Motion to Dismiss and Decision to Implement Host Homes.

On May 24, 2022, Respondents filed a Motion to Dismiss under CPLR § 3211(a)(3) in lieu of an answer, arguing that Appellants did not have standing to

Children), New York State Permanent Judicial Commission on Justice for Children, the Brooklyn Defender Services, Chief Defenders Association of New York, Legal Services of the Hudson Valley, New York State Bar Association (Committee on Children and the Law), New York State Defenders Association, New York State Kinship Navigator, and the Redlich Horwitz Foundation. (R. 1161–65; R. 1200-02; R. 1167–68; R. 1246-48; R. 1193-99; R. 1220–21; R. 1206–09; R. 1187–89; R. 1145–48; R. 1190–92).

bring this action. (R. 1290–303). The lower court held argument on June 27, 2022. (R. 1371 at ¶¶ 5–6).

On October 20, 2022, counsel for Respondents informed counsel for Appellants that SFC had "recently" filed an application with OCFS to be authorized to place children under the Host Homes program. The same day, Counsel for Appellants asked if OCFS would be willing to put the application on hold pending the litigation. (R. 1371 at ¶ 7). Up until that point, Appellants had been advised that there were no applications. (*Id.* at ¶ 4). On October 27, 2022, Counsel for Respondents replied that OCFS would not "voluntarily agree to hold off on processing" SFC's application. (*Id.* at ¶ 8).

Upon learning that Respondents would not voluntarily agree to hold off on processing Host Homes program applications, Appellants filed a motion for a temporary restraining order and preliminary injunction. (R. 1337–91). Respondents replied that it was unknown when the application would be adjudicated, that "upon information and belief" it would take at least four weeks, and that, even if approved, it would take additional time for children to be accepted into the program. (R. 1335–36).

The lower court declined to sign the order to show cause and on November 18, 2022, granted Respondents' Motion to Dismiss for lack of standing. (R. 1392).

VII. Appellants' Appeal and Injunctive Relief.

On December 6, 2022, Appellants filed a Notice of Appeal with this Court. Appellants then moved this Court for a preliminary injunction to enjoin Respondents from taking any action to implement and/or operate the Host Homes program pending determination of the appeal. On February 2, 2023, this Court entered an order granting the motion for a preliminary injunction. On July 6, 2023, this Court reversed the lower court, finding that Appellants had sufficiently alleged that they have standing to challenge the Host Homes Regulations.

VIII. The Lower Court's Second Dismissal of the Petition.

Following this Court's decision on the issue of standing, the parties again appeared before the lower court. On September 6, 2023, Respondents submitted a Verified Answer, an affidavit in support of the Answer with exhibits, and a memorandum in opposition to the Petition and in support of the Answer. (R. 1393-553). On October 25, 2023, the lower court held oral argument. On November 30, 2023, the lower court dismissed the Petition pursuant to CPLR § 3211(a)(7) on the grounds that the Petition failed to state a cause of action. (R. 6-14). Although the lower court referred to a motion to dismiss in its decision, Respondents had not made such a motion but did include a reference to CPLR § 3211(a)(7) in their answer. The lower court, as it noted, decided the Petition "on the merits." (R. 7).

In rejecting the claim that OCFS improperly exercised legislative authority in promulgating the Host Homes program, the lower court held "that all four *Boreali* factors weigh in favor of OCFS, and that the Host Family Homes regulations have a rational basis and are not arbitrary and capricious." (R. 13). The court based its decision on "broad authority granted to [OCFS] by the legislature," pointing specifically to the areas of foster care, preventive services, adoption services, and child protective services. (R. 9-11). The court further found that OCFS created Host Homes to "circumvent" the statutory foster-care system, but "did not engage in 'value judgments'" and did not make "difficult and complex choices . . . between broad policy goals." (R. 10). Of importance to the court, the Host Homes Regulations did not impose "any new obligations on parents," but simply provided them with another option to place their children outside of the home. (R. 10-11). At no point did the court address the ways in which the Host Homes program conflicts with the existing statutory framework governing voluntary placements, such as the lack of appointed counsel, judicial oversight, or provision of services. The lower court simply stated, without any basis in the record, that "children can still be represented by an attorney from [Appellants'] organizations." (R. 11). In addition, the lower court found that OCFS exercised special expertise in balancing "the costs associated with placing children into foster care" and that "[b]y allowing parents the

option to circumvent foster care placement during such emergency situations, this ultimately reduces the burden on the foster care system." (R. 10).

LEGAL STANDARD

Petitioners may bring an Article 78 proceeding to annul agency regulations that were "made in violation of lawful procedure," "affected by an error of law," "arbitrary and capricious," or "an abuse of discretion." N.Y. C.P.L.R. § 7803(3).

Agency action undertaken without legislative authority is considered to have been made in violation of lawful procedure and is an abuse of discretion. *Id*. § 7803(2)-(3); *Fairchild Corp. v. Boardman*, 56 A.D.3d 778, 779–80 (2d Dep't 2008). An agency cannot rely on its enabling statute "as a basis for drafting a code embodying its own assessment of what public policy ought to be [because] it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9, 13 (1987) (enjoining respondent NYC Board of Health from enforcing ban on large sodas where agency acted in excess of its statutory authority); *see also N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 110 A.D.3d 1, 7 (1st Dep't 2013) ("administrative agencies may only effect policy mandated by statute and cannot exercise sweeping power to create whatever rule they deem necessary"), *aff'd*, 23 N.Y.3d 681 (2014).

ARGUMENT

I. OCFS Exceeded Its Regulatory Authority and Engaged in Impermissible Policymaking.

The Host Homes Regulations must be annulled because, in promulgating them, OCFS crossed the "line between administrative rule-making and legislative policy-making" under New York law. *Boreali*, 71 N.Y.2d at 11. Following *Boreali*, New York courts consider four factors to determine whether an agency impermissibly exercises legislative rather than regulatory authority:

> (1) [W]hether the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation[].

LeadingAge N.Y., Inc., 32 N.Y.3d at 260-61 (second, third and fourth alterations in original) (citing *NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 179-90 (2016); *Boreali*, 71 N.Y.2d at 12–14). These factors are not "rigidly applied," and "respondents may not counter petitioners' argument merely by showing that one *Boreali* factor does not obtain." *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental*

Hygiene, 23 N.Y.3d 681, 696–97 (2014). Instead, courts "treat the circumstances as overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed [the] line." *Id.*

The lower court misapplied each of these factors in reviewing the Host Homes Regulations.

A. Factor One: OCFS Acted Outside of Its Legislatively Delegated Policy Goals.

The first *Boreali* factor asks whether OCFS "built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs" such that it was "acting solely on [its] own ideas of sound public policy" and, therefore, "outside of its proper sphere of authority." *Boreali*, 71 N.Y.2d at 12. The lower court concluded that "OCFS did not engage in 'value judgments,'" make "difficult and complex" policy choices, or attempt "to resolve social problems." (R. 10). That is flatly contradicted, however, by Respondents themselves, who stated in their papers before the lower court that Host Homes would advance "OCFS's race equity agenda, recognizing that families of color are disproportionately represented in the child welfare system."[16] While pursuing racial equity is laudable, Respondents clearly acted outside of their proper sphere of authority.[17] Indeed, Respondents' own stated goal with the Host

[16] R. 1412 at ¶ 26.

[17] As explained below, the Host Homes program, in fact, defies that purported goal by removing essential safeguards meant by the Legislature to protect vulnerable families and children.

Homes program is to "transform" the foster-care system *they* oversee by creating an entirely new system for voluntary foster care "without invasive and unnecessary engagement of the child welfare and court systems."[18] Far from distinguishing these statements revealing OCFS's imposition of its own goals, the lower court embraced them, finding that the Host Homes program was meant to "circumvent foster care placement" and, by extension, the legal protections inherent in the foster-care system. (R. 9-10). OCFS's blatant attempt to bypass the will of the Legislature, which created the statutory framework for the foster-care system, clearly crosses the line set forth in *Boreali*. As the Court of Appeals noted, "[a]ny *Boreali* analysis should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.'" *Statewide Coal.*, 23 N.Y.3d at 697 (citation omitted); *see also LeadingAge N.Y., Inc.* 32 N.Y.3d at 269 (regulation imposing cap on executive compensation reflects "a choice between competing public policy interests, rather than mere implementation of the legislature's chosen goal").

One key indicator of agency overreach is where a regulation centers on "administratively created exemptions rather than on rules that promote the

[18] R. 1406-07, 1410 at ¶¶ 7, 10, 19.

legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values." *Boreali*, 71 N.Y.2d at 12; *see also NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 181 (agency cannot "construct[] a regulatory scheme laden with exceptions based solely upon economic and social concerns" (citation omitted)).

At its core, the Host Homes program is a glaring, administratively crafted exemption to New York's statutorily created voluntary foster-care system. A clear illustration of Respondents' encroachment upon legislative decision-making is their attempt to create an end-run around Social Services Law § 358-a(1), which requires court approval for any voluntary placement of a child outside the home expected to last more than 30 days. The Legislature's decision to set 30 days as the point at which voluntary placements require court approval and the corresponding appointment of counsel for both parent and child reflects the Legislature's choice after balancing competing policy considerations. By creating a new State-run system governing out-of-home placements where there is *no* requirement for court approval and *no* appointment of counsel, Respondents are, in effect, improperly attempting to amend the Social Services Law, thereby nullifying the Legislature's policy decision to provide court oversight and legal representation to ensure the safety of children who are placed with strangers.

Moreover, in noting that without Host Homes, parents "would need to go through family court to regain custody after the emergency situation was over" (R. 9-10), the lower court evinces a misunderstanding of the law governing foster care and, in doing so, exposes a key aspect of OCFS's improper attempt to substitute its own policymaking for that of the Legislature. In fact, under current law, the agency is obligated to return a child voluntarily placed in foster care on the previously agreed-upon date, with no court appearance or order required. SSL § 384-a(2)(a). If the parent requests the child's return before that date, the agency is likewise required to return the child upon the parent's request—again, with no court order or appearance required. *Id.* Similarly, when the parent signs an indefinite placement, the child must be returned within 20 days of the parent's written demand to the agency for the child's return. *Id.* If, for any reason, the child is not returned, the parent, through their previously assigned counsel, can file a motion to enforce the terms of the agreement in the court where the placement was approved.

In contrast, the Host Homes program provides no protection for the parent when a Host Family or agency refuses to return the child. The parent, who does not have the benefit of appointed counsel, must bear the burden of commencing a court proceeding for a writ of *habeas corpus* to return the child. The parent may then be embroiled in a custody battle with the host family. Needless to say, these challenges would only be heightened if the child is placed out of state, as the Host Homes

program would allow. Under current law, when a child who has been voluntarily placed in foster care is placed in a home outside of New York State, the New York family court retains jurisdiction over the child so that any dispute regarding the child's placement or custody is heard in this state. SSL § 374-a art. V. The Host Homes program, however, provides no such protection for children or parents. If a child is placed out of state for six months or longer, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") may force a parent who seeks return of their child to commence a proceeding in another state—a prospect that may be nearly impossible for a parent with limited resources, as is the likely case for a parent turning to Host Homes. UCCJEA § 102(7); N.Y. DOM. REL. LAW § 76. The Legislature grappled with these difficult issues and arrived at the current statutory system, which furthers its vitally important policy goals of protecting vulnerable children and families. The Host Homes Regulations would upend this statutory scheme and upset the balance set by the Legislature.

Another significant example of encroachment on the Legislature's policy-making authority is the attempt by OCFS to eviscerate the State's obligation to provide preventive services to parents in crisis. Under current law, social services officials must provide preventive services to a parent prior to accepting a voluntary placement outside the home whenever it is reasonable to believe that those services

would enable the child to remain at home.[19] The Legislature recognized the significant trauma involved in separating children from their homes and thus prioritized the provision of services in an effort to prevent such separation, and, in the event of such an out-of-home placement, to ensure that the child is returned as quickly as possible. Indeed, there is an extensive body of research documenting the harm to children who are placed out of their homes.[20] *See Martin A. v. Gross*, 153 A.D.2d 812, 817 (1st Dep't 1989) (where defendants failed to provide preventive services, as required by law, the court recognized "the irreparable injury of needless separation of families"). In contrast, under Host Homes, families are provided only referral lists of potential preventive service providers, rather than actual services, which, given the scarcity of resources available to families, cannot reasonably be considered equivalent.[21] Thus, Respondents once again, in effect, are improperly attempting to amend the statutory scheme by substituting their own policy decisions for those of the Legislature, which has *required* Respondents to provide not just "lists" but actual services to families in crisis.[22]

[19] SSL §§ 398(1)(a), 409-a(1)(a)(i).

[20] R. 1584–90 at ¶¶ 8–27; R. 1576-77 at ¶ 8.

[21] R. 1591–93 at ¶¶ 31–36; R. 1576 at ¶ 7.

[22] In light of this obvious attempt to shirk their obligation to provide preventive services, it is particularly disingenuous for Respondents to claim, as they did before the lower court, that the Host Homes program is a preventive service. (R. 1410 at ¶ 19).

Providing only referral lists is just one of several components of the Host Homes program that appear to be designed to cut costs for OCFS. Indeed, Respondents specifically tout the fact that Host Homes will operate without "unnecessarily burdening the child welfare system," and the lower court specifically found that OCFS "balanced the costs associated with placing children into foster care" and that diverting children into Host Homes "ultimately reduces the burden on the foster care system."[23] In both *Boreali* and *Statewide Coalition*, however, the Court of Appeals found that an administrative agency's consideration of economic burden constituted an inappropriate attempt to choose between competing policy goals. *Boreali*, 71 N.Y.2d at 12; *Statewide Coal.*, 23 N.Y.3d at 697–98; *see also Ahmed v. City of New York*, 129 A.D.3d 435, 440 (1st Dep't 2015) (Taxi and Limousine Commission exceeded its authority in attempting to establish a "cost-effective structure for promoting driver health"); *Health Ins. Ass'n of Am. v. Corcoran*, 154 A.D.2d 61, 73 (3d Dep't 1990) (in considering the claimed "drastic social, economic and psychological impact," State Superintendent of Insurance exceeded legislative authority in promulgating rules banning insurers from considering HIV status), *aff'd*, 76 N.Y.2d 995 (1990). The same is true here. OCFS is improperly attempting, through regulation, to reduce its own financial burden in

[23] R. 1413 at ¶ 28; R. 10.

administering the foster-care system by evading statutory requirements and is thus clearly operating outside of its proper sphere of authority.

The lower court further relied on the fact that the Host Homes Regulations do not "force any new obligations on parents." (R. 10). Whether true or false, that assertion is completely beside the point. At issue here is improper policymaking by OCFS. Respondents promulgated these Regulations without the Legislature's direction or guidance; instead, they unilaterally sought a way to obtain the functional equivalent of voluntary foster care *without* the guardrails or judicial oversight that the Legislature has mandated whenever the State becomes involved in the separation of children from their parents. Notably, at no point did the lower court even address the loss of statutory protections for children and parents under the Host Home Regulations. The Host Homes program thus fails to satisfy the first *Boreali* factor and is unlawful because it reflects "a choice between competing public policy interests, rather than mere implementation of the legislature's chosen goal." *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 269; *see also Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 612 (2018) (question is whether the agency engaged in a "balancing of competing special interests that fell within the legislative domain.").

The lower court thus erred in applying the first *Boreali* factor.

B. Factor Two: OCFS Created Its Own Rules Without Legislative Guidance.

The second factor asks whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. Stated another way, agencies have the "flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation" but may not devise "an entirely new rule" that "reflects a new policy choice." *Statewide Coal.*, 23 N.Y.3d at 699–700 (citation omitted). Moreover, a talismanic invocation of broad agency power does not justify a "new policy choice" by the agency, as its powers are limited to "an auxiliary selection of means to an end" identified by the Legislature. *Id.* at 700; *cf. Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 224 (2017) (upholding regulation regarding re-licensure of recidivist drunk drivers where Legislature had "created a statutory scheme aimed at addressing the problem of drunk driving and, more specifically, the problem of recidivist drunk drivers").

1. *The Host Homes Regulations Exceed OCFS's Mandate.*

In upholding the Host Homes Regulations, the lower court pointed to general regulatory authority granted to Respondents by the Legislature with respect to foster care, preventive services, adoption, and child protective services. (R. 10-11). None of those statutory provisions, however, authorizes OCFS to create the Host Homes program, which reflects a *new* State-run system for placing children with strangers.

In fact, OCFS clearly attempts to distinguish Host Homes from foster care. (R. 1254 ("The intent of the proposed regulations is not and will not be to create a new form of foster care.")). Furthermore, this program is the very opposite of preventive services, which are designed to prevent children's removal from their homes or speed their return home from an out-of-home placement. Indeed, the Host Homes Regulations actually eliminate the obligation for Respondents to provide preventive services and work with families to reunify quickly, as well as the requirements of court oversight and appointment of counsel to ensure that an out-of-home placement is necessary. SSL §§ 384-a(2), 358-a(1); FCA § 1090(a). Additionally, the purportedly temporary nature of Host Homes placements and lack of formalization by a court also distinguish those placements from adoptive placements. Moreover, families who are the subject of a child protective investigation are specifically exempt from participating in Host Homes.[24] Accordingly, Host Homes are not foster homes, preventive services, adoptive placements, or child welfare programs, and thus OCFS's authority to regulate those areas does authorize it to create the Host Homes program.

The lower court also claimed that if an "agency has a long history of regulation" in a particular subject area, "there can be no serious claim that the agency

[24] 18 N.Y.C.R.R. § 444.5.

is writing on a clean slate." (R. 10). That assertion is simply incorrect as a matter of law. In *Statewide Coalition,* for example, the Court of Appeals invalidated New York City regulations restricting sugary beverages despite a broad statutory mandate that included regulating "activities affecting public health in the city." 23 N.Y.3d at 694 (citations omitted). The Court found that "[d]evising an entirely new rule" was "not an auxiliary selection of means to an end; it reflects a new policy choice." *Id.* at 700. Consistent with *Statewide Coalition*, the statutory provisions relied upon by the lower court here do not empower OCFS to create, through regulation, a voluntary foster-care system by another name with less oversight than the foster-care statutes themselves demand. *See id*. at 700; *Boreali,* 71 N.Y.2d at 6-7 (despite "broad grant of authority" concerning public health, the agency "overstepped . . . its lawfully delegated authority" by promulgating smoking regulations); *see also Ellicott Grp., LLC v. State of N.Y. Exec. Dep't Off. of Gen. Servs.*, 85 A.D.3d 48, 54 (4th Dep't 2011) (New York Executive Department Office of General Services "usurped the role of the Legislature in making its policy decision that prevailing wages should be paid" even though "statute authorizes the Commissioner. . .to lease buildings and office space for state agencies 'upon such terms and conditions as he or she deems most advantageous to the state'"); *Parents for Educ. & Religious Liberty in Schs. v. Young*, 79 Misc. 3d 454, 469 (Sup. Ct. Albany Cnty. 2023) (regulations went "above and beyond" authority conferred by enabling legislation).

Without statutory authority, OCFS lacked necessary legislative guidance for the Host Homes Regulations. Indeed, OCFS revised the Host Homes Regulations following the initial comment period in response to criticism that agencies are not legislatively authorized to place children with strangers outside of the voluntary foster-care system. The revised Regulations require that the parent sign a Designation of Person in Parental Relation under Title 15-A of the General Obligations Law, thereby placing the child directly with the host family, rather than with the host agency. (R. 1255). That, however, is a distinction without a difference. Whether the signed contract names the host family or host agency, children are being placed in a home with strangers identified and overseen by the host agency in compliance with regulations set by OCFS. Moreover, as explained below (at pp. 45-48), the lower court's reliance upon Title 15-A of the General Obligations Law as somehow authorizing the Host Homes program was clear error.

This lack of statutory authority is apparent from the text of Social Services Law § 374, which is titled "Authority to place out or board out children" and is immediately followed by provisions concerning specific types of out-of-home placements—but notably, does *not* include the Host Homes program. Each of these statutorily authorized placements has corresponding regulations, thereby leaving Host Homes as the only placement choice that was not statutorily created. This is in stark contrast to cases like *National Restaurant Association v. New York City*

Department of Health & Mental Hygiene, where the Court recognized that the Department of Health and Mental Hygiene had a history of adopting similar rules regulating restaurants "without specific legislative guidance" and that, accordingly, the agency was "not writing on a clean slate in the sense that it ha[d] always regulated" in such a manner. 148 A.D.3d 169, 177 (1st Dep't 2017) (citation omitted). Here, where out-of-home placement choices for children are delineated by statute and OCFS historically has looked to statute when promulgating regulations in this area, the failure to do so here shows that OCFS exceeded its statutory authority.

As additional authority for the Host Homes program, the lower court erroneously relied on SSL § 374(2), which provides that only an "authorized agency shall place out or board out any child" but that nothing shall "restrict or limit the right of a parent . . . to place out or board out a child." That section simply reaffirms the existing rights of parents to place their own children outside of their homes. Nowhere, however, does it authorize a new *State-run* voluntary foster-care system to facilitate such out-of-home placements. OCFS's claim that parents would be placing their children into Host Homes on their own and that the State is not "involved in any way" is simply false.[25] Under the Regulations, it is the State-approved agency—not the parent—that identifies the Host Home (just as the

[25] R. 1547.

authorized agency identifies a foster home in a voluntary placement) and sets extensive parameters for the operation of those homes.[26]

Indeed, OCFS is seeking here to reach the same result as a voluntary placement. Under the Host Homes program, children are voluntarily placed in the homes of strangers under the auspices of an agency in accordance with regulations promulgated by OCFS. Like the regulations governing voluntary placements, the Host Homes Regulations detail the duties and responsibilities of the host family; the qualifications for approval of a host family; the requirements to be met in a home study before placement of a child; the agency's obligation to supervise the home; the procedures and consequences for revocation of approval of a host family home; the physical conditions of homes; the forms of discipline that may be used; the way children must be treated; the requirement that the agency provide notification of any incidents that may affect the child's adjustment, health, safety, or well-being; the requirement of monthly contacts by the agencies overseeing the homes; and the records that must be kept by the agency overseeing the homes.[27]

As in *Statewide Coalition*, the Host Homes Regulations embody not a choice of means to an end but rather an entirely new end not contemplated by the Legislature—a shadow foster-care system devoid of the protections afforded to

[26] 18 N.Y.C.R.R. § 444.5(b).

[27] 18 N.Y.C.R.R. §§ 444, *et seq*.

children and parents in voluntary placement situations. It is an attempt to create an end run around the system created by the Legislature. Although regulations may go beyond the text of the statute, they may do so only "as long as they are in harmony with the statute's over-all purpose." *Goodwin v. Perales*, 88 N.Y.2d 383, 395 (1996). As detailed below, however, the Host Homes Regulations are in conflict with the existing statutory scheme's purpose because, as acknowledged by the lower court, they are intended to "circumvent" the statutorily prescribed channels for providing a specific kind of assistance—namely, voluntary placement into foster care under SSL § 384-a. The Regulations go beyond interstitial rulemaking to create policy not only out of whole cloth but also in conflict with existing statutes. The Regulations were therefore adopted in excess of OCFS's authority and should be annulled for that reason alone.

2. *The Host Homes Program is Inconsistent with the Existing Statutory Framework for Voluntary Foster Care.*

The lower court emphasized that the Host Homes program simply provides "an additional, voluntary option for placing the children outside of the home . . . without needing to go through the process of foster care." (R. 11). However, that would be at the expense of the protections and services deemed vital by the Legislature to ensure that children are not unnecessarily removed from their homes and that they receive services necessary for their prompt and safe reunification with their families. Nowhere does the lower court address the many ways in which the

Host Homes program directly conflicts with the existing statutory framework governing voluntary placements. New York has an intricate statutory scheme for the care and protection of children whose parents are unable to properly care for them, including means to voluntarily place children with families who can care for them. When families are in crisis, the Commissioner of Social Services must, in the first instance, offer preventive services to help keep the family together.[28] If a child must be separated from their parents, the existing framework requires an attempt to place the child with relatives or family friends and for siblings to be placed together when it is in their best interest.[29] Under the existing framework, children may only be placed out of state under strict conditions, including approval of the placement under the ICPC, with New York courts retaining jurisdiction over any child placed out of state.[30]

The statutory scheme also specifies the procedure for the acceptance and judicial review of voluntary placements. If the placement is expected to last more than 30 days, the Commissioner of the local department of social services ("LDSS") is required to file a petition for Family Court approval of the placement, the child is entitled to periodic judicial review of the placement, and both parent and child are

[28] SSL §§ 398(1)(a), 409-a(1)(a).

[29] 18 N.Y.C.R.R. § 430.10(b)(2); FCA § 1017(1)(a); SSL § 384-a(1-a), (1-b).

[30] SSL § 374-a.

assigned counsel. Regardless of the duration, the LDSS and/or the voluntary foster-care provider agency must provide services to the child and parent to facilitate reunification of the family.[31]

Here, OCFS is attempting to create a separate State-run process by which parents can voluntarily place their children out of the home with strangers but without judicial oversight or *any* of the safeguards mentioned above. Indeed, under Host Homes placements, children would have no opportunity to appear in court or have their voices heard, contrary to the protections afforded to children in out-of-home placements under existing law. The statutory emphasis on providing services to keep families together and restricting out-of-state placement would be lost. Host Homes does not even include a requirement, as there is under current law, that a non-custodial parent be informed of the decision to place the child, much less provide a procedure for their participation in any part of the process.[32] Such a scheme harkens back to a tragic time of "orphan trains," when children from families in poverty and crisis were placed into the hands of charitable organizations, only to be sent out of state to live with strangers, without appropriate safeguards, including appointment of counsel and judicial oversight.[33]

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[31] SSL § 358-a; FCA §§ 249(a), 262, 1016, 1089, 1090(a).

[32] R. 1577 at ¶ 9.

[33] *See, e.g.,* Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3 (2009).

The lower court claims that under Host Homes "children can still be represented by an attorney from petitioner's organization." (R. 11). That is preposterous. The Host Homes Regulations do not provide children or parents with appointment of counsel. Their requirement that the agency merely provide the parent a list of free or low-cost legal services falls woefully short of the statutory entitlement to appointment of independent counsel for both parent and child. In requiring appointment of counsel, the Legislature recognized the important role played by the attorney for the child in expressing the child's wishes, informing the court whether the child is safe, and advocating for services to help them adjust to placement outside their home and facilitate return to their family. The lower court does not explain how children (especially young or indigent children) would go about securing counsel on their own. And even if a child could somehow engage counsel, the Host Homes program does not provide any judicial oversight or legal recourse for children.

The lower court further erred in failing to appreciate that the inconsistencies between the Host Homes program and current law touch on issues of critical importance to the Legislature, *i.e.*, the safety and security of vulnerable families and children. Indeed, the lack of protections and safeguards described above, especially the lack of appointment of counsel, is extremely harmful to the population represented by Appellants. Their clients in voluntary placement proceedings are

low-income children, often in crisis and in great need of social services. Under the Host Homes program, these children would have no voice in their placement out of their homes and no legal recourse to object or mandate needed services at any point. The Regulations undermine not only children's rights but also parental rights by failing to provide them with free preventive and supportive services or an appointed lawyer.[34] Furthermore, families of color, who disproportionately reside in under-resourced communities, would bear the brunt of this unlawful regulatory scheme.[35]

3. *OCFS Cannot Rely on a "Designation of Person in Parental Relation" to Circumvent the Protections of SSL § 384-a.*

The lower court failed to address OCFS's improper use of the General Obligations Law to circumvent its statutory obligations. The premise of the Host Homes Regulations is that a parent may place a child directly with a host home by executing a Designation of Person in Parental Relation under General Obligations Law § 5-1551. Specifically, the Regulations provide that a child may not be cared for in a host home unless the parent "has executed a designation of 'person in parental relation' in accordance with Title 15-A of Article 5 of the General Obligations Law" that names the host family "as the child's caregiver." 18 N.Y.C.R.R. § 444.5(b).

[34] R. 1574-77 at ¶¶ 4-8.
[35] *See* R. 90-123.

This "designation" is the legal linchpin of the Host Homes Regulations. The Regulations define "parent," "host family home agency," "host family care," and "host family home program" in terms of those considering designating a person in parental relation and those who may be designated. *Id*. § 444.2(a), (c), (d), (f). Placement of a child in a host home cannot occur without this designation. *Id.* § 444.5(b). Additionally, revocation of this designation by the parent purportedly terminates the host home care immediately. *Id.* §§ 444.5(h)(5), 444.18(a)(1).

The lower court, however, failed to recognize that Title 15-A does not permit a designation for this purpose. It merely authorizes a parent of a minor child to "designate another person as a person in parental relation to such minor or incapacitated person *pursuant to*" four specific statutes:

(1) Public Health Law § 2164, which concerns child immunizations;

(2) Public Health Law § 2504, which concerns the provision of medical, dental, health, and hospital services to a child;

(3) Education Law § 2, which defines "parental relation" for purposes of the Education Law; and

(4) Education Law § 3212, which concerns compulsory education.

GOL § 5-1551 (emphasis added).

Title 15-A was added to the General Obligations Law in 2005 to assist grandparents and other caregivers who might have difficulty raising a child in the

absence of parents. Specifically, it provided a mechanism for those caregivers to obtain medical and educational services for the child without having to go to court to obtain legal custody. The Sponsor's Legislative Memorandum explains: "Under current law it can be difficult for grandparents or other caregivers, who do not have legal custody of the children in their care, to sign relevant consent forms for educational or health care services. The number of grandparents and other non-parent caregivers has risen dramatically over the last fifteen years." The Memorandum concludes that the "proposed legislation would ease these difficulties for the caregivers, and allow the children to get school services and health care in a timely fashion." Sponsor's Mem., Bill Jacket, S. 3216, Ch. 119 (N.Y. 2005). Further, Title 15-A has been amended only once, to permit the limited designations for up to 12 months rather than the prior limit of six months—a change, according to the Legislative Memorandum, to address the reality of "kinship caregiving." 2018 McKinney's Sess. Law News of N.Y., ch. 80 at A. 7905-A (June 27, 2018).

Accordingly, Title 15-A provides for the limited transfer of specific, enumerated decisions to address difficulties faced by grandparents and other kinship caregivers. It was never intended to facilitate, and does not authorize, the transfer of full authority for the care of children to strangers under the oversight of a State-sponsored placement program. The lower court committed a critical error of law by enabling OCFS to legislate a new application of the General Obligations Law that

plainly exceeds its narrow authority. Further, Respondents' attempt to use the General Obligations Law to avoid the requirements and protections of the Social Services Law and Family Court Act, as detailed above, conflicts with the clear mandate of the New York Legislature.

C. Factor Three: Legislative Activity in This Area Indicates That the Legislature Does Not Wish to Establish a Host Homes Program.

The third *Boreali* factor addresses "whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve." *NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 183 (citation omitted). In fact, less than a month before OCFS published its revised Regulations, Assemblyman Andrew Hevesi introduced Assembly Bill A8090-2021, which would have allowed parents to make "alternative living arrangements" for children at substantial risk of abuse, whereby the parents name a relative or other person to care temporarily for their child. This legislation never made it out of committee. The bill was subsequently introduced in the Senate as Senate Bill S08148-2022 but failed to advance in that house, as well. Although the bills were reintroduced in the 2023-24 legislative session (Assembly Bill A4383 and Senate Bill S5029), they have not moved out of committee in either house, demonstrating the Legislature's clear distaste for creating a statutory Host Homes program.

The lower court was correct in describing this as a "limited legislative action" but erred in not weighing this factor in favor of Appellants. (R. 11). The Legislature

considered but did not exhibit any appetite to change the established statutory scheme in favor of an alternative "voluntary placement" system. As in *Statewide Coalition*, "[h]ere, inaction on the part of the state legislature . . . simply constitutes additional evidence that the [regulation] amounted to making new policy, rather than carrying out preexisting legislative policy." 23 N.Y.3d at 700.

D. Factor Four: Where an Agency Exceeds Its Authority, Expertise Is Irrelevant.

The fourth *Boreali* factor considers whether the agency has special expertise in the area. *Boreali*, 71 N.Y.2d at 13–14. The lower court erred in considering this factor because where, as here, an agency exceeded its statutory authority, the question of expertise is no longer a material factor. *See, e.g.*, *Statewide Coal.*, 23 N.Y.3d at 700–01 ("In light of *Boreali*'s central theme that an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than finds means to an end chosen by the legislature, we need not . . . address the fourth *Boreali* factor[.]").

At any rate, the record does not support the lower court's finding that any special expertise was involved in developing the Host Homes Regulations. A national organization approached OCFS with the idea for the Host Homes program, explaining to OCFS that "[w]e are thrilled that the Commissioner is supportive of our model and taking the next steps to figure out the legal part of things." (R. 29 at ¶ 29; R. 227). OCFS claims to have consulted with others, conducted internal

deliberation, and received "extensive comments from myriad sources," but that, at best, only informs their decision-making process. (R. 1548). It does not indicate whether creating the Host Homes program required any special expertise or technical competence.

II. OCFS Acted Arbitrarily and Capriciously by Promulgating Regulations Inconsistent with Existing Law.

A court will also strike down a regulation under Article 78 if it determines that the regulation "was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. § 7803(3). Administrative action is "arbitrary" when it "is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). Courts therefore "must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case," *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 96 (1999), and when a regulation "is 'out of harmony' with an applicable statute, the statute must prevail." *Weiss v. City of New York*, 95 N.Y.2d 1, 5 (2000) (citation omitted).

Regulations may be out of harmony with existing law where they "disregard definitions made by legislative bodies under the guise of 'interpreting' regulations." *N.Y.C. Pedicab Owners' Ass'n v. N.Y.C. Dep't of Consumer Affairs*, 61 A.D.3d 558, 559 (1st Dep't 2009). Furthermore, even where a statute allows agency discretion to promulgate regulations, such rules may still be out of harmony if they venture too far beyond the statute. *See Gilligan v. Stone*, 20 A.D.3d 697, 699–700 (3d Dep't

2005) (finding that a statute empowering the agency to promulgate rules to withhold employee advances did not confer authority to abolish such payments entirely).

On the other hand, "the law does not foreclose all agency regulations going beyond the text of the statute . . . as long as they are in harmony with the statute's over-all purpose." *Goodwin*, 88 N.Y.2d at 395. In *Goodwin*, the Court held that where the law conferred upon the Department of Social Services ("DSS") "the power to establish 'rules, regulations and policies to carry out its powers and duties under this chapter,'" DSS was permitted to adopt rules requiring documents to establish eligibility for funds. *Id.* (citation omitted). This action was permitted because it was incumbent upon DSS to administer the program "[a]s a practical matter," and "[t]he particular documentation required to establish eligibility—rarely a topic covered in statutes—is . . . relegated to the agency's sound discretion." *Id*. In *Cubas v. Martinez*, 8 N.Y.3d 611, 621 (2007), the Court of Appeals upheld a regulation requiring documentation from driver license applicants because it did "not create or deny substantive rights . . . but sets forth the procedure for the agency to follow in deciding who meets a predetermined test for eligibility." The Host Homes program, in contrast, rather than being necessary to implement a program authorized by law, creates an entirely new program that is unrelated to any statutorily authorized program, and, at the same time, strips children and parents of the substantive rights granted to them by existing law.

In finding a rational basis for the Host Homes Regulations based on OCFS's "broad authority" to create "an additional option for child placement," the lower court committed reversible error. The Host Homes Regulations, unlike the rules in *Goodwin* or *Cubas*, reach far beyond the mechanics of administering a statutory program and the goals of OCFS's enabling statutes. As explained above, the Regulations create an extrajudicial system of family separation, in which neither children nor parents are entitled to the appointment of counsel or other critical statutory protections. This system is at odds with existing statutory processes, seeks to absolve OCFS from its legal obligation to provide services to prevent family separation and foster reunification, fails to provide any court oversight, and relies on an interpretation of "person in parental relation" that alters its legislative purpose. In conflict with existing law, the Regulations modify substantive rights and procedures and are thus arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower court's decision and annul the Host Homes program, together with such other relief as the Court may deem just and proper.

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