
New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of

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

Case No.:
CV-23-2341

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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

In announcing Host Homes, Respondents trumpeted the program as a “bold, new initiative” that “will support families without involving the child welfare system.”¹ Respondents boasted to the lower court that Host Homes would “transform and modernize New York State’s child welfare system” by creating an entirely new system for out-of-home care by strangers “without invasive and unnecessary engagement of the child welfare and court systems.” (R. 1407; 1410). And in its order dismissing this Article 78 action, the lower court, in turn, concluded that “[b]y allowing parents the option to circumvent foster care placement . . . this ultimately reduces the burden on the foster care system.” (R.10).

Tellingly, Respondents do not address, much less defend, that portion of the lower court’s decision or even refer to their earlier statements touting the transformational nature of the new program. Instead, embracing a “nothing to see here” appellate strategy, they attempt to spin the Host Homes program as simply an extension of existing child welfare policy, “merely fill[ing] in the details of the temporary care regime” while “break[ing] no new ground.” (Br. at 3, 32). The Host Homes program, however, flies in the face of the detailed statutory scheme enacted

¹ *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> (last visited Sept. 9, 2024).

by the Legislature for voluntarily placing children into homes overseen and regulated by Respondents. In promulgating the Host Homes Regulations, Respondents exceeded their administrative authority and improperly substituted their own policy preferences for those of the Legislature. Accordingly, those Regulations should be vacated.

The New York State Legislature has enacted statutes to provide an array of critical support and protection for families when parents are unable to care for their children and need to place them temporarily in the homes of strangers. These safeguards include judicial oversight, a right to counsel for children and parents, prioritizing placement with kin, restrictions on out-of-state placements, and mandated services designed to prevent family separation and expedite reunification. Through the Host Homes program, OCFS has created, without statutory authority, a parallel State-run system of voluntary placement of children that bypasses these statutorily mandated safeguards.

The lower court did not address the many ways in which the Host Homes program directly conflicts with the existing detailed statutory framework governing voluntary placements. Respondents acknowledge the statutory safeguards provided in voluntary foster-care placements but argue that they do not apply to the Host Homes program because parents who temporarily place their children with Host Homes do not relinquish legal custody of their children, unlike parents who

voluntarily place their children in foster care. That distinction is baseless. In fact, parents preserve greater custodial rights under voluntary placements than they do under Host Homes. In any event, determining whether OCFS's program is a legitimate exercise of authority does not rest on the extent to which parents cede or retain decision-making authority. It is undisputed that both the statutory scheme for voluntary placements and the Host Homes program attempt to address the *same* problem of helping families in crisis who need temporary help. Under well-established law, OCFS's attempt to substitute its own policy judgment for that of the Legislature with respect to how that problem should be addressed is entirely inappropriate.

Respondents also falsely claim that Host Homes is distinct from the voluntary placement framework approved by the Legislature because parents place their children directly with the host family, rather than with the authorized agency. However, Host Homes is a *State-run* child placement system, in which State-authorized agencies, not parents, identify, vet, and oversee the homes according to OCFS regulations and under OCFS oversight. As this Court has recognized, the safeguards put in place by the Legislature as part of the voluntary foster-care system are intended to prevent children from languishing outside of their homes indefinitely. Without those safeguards in place, however, nothing would prevent children from

languishing indefinitely with strangers under the Host Homes program. That is irreconcilable with the existing statutory scheme governing voluntary placements.

Respondents search far and wide to justify a statutory basis for the Host Homes program. The general statutory provisions Respondents cite, however, 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. In a further attempt to justify their clear administrative overreach, Respondents seek to characterize Host Homes as a form of “respite care” authorized as a “preventive” service. In fact, under Host Homes, Respondents would evade their legal obligation to provide preventive services to children and parents, undermining the clear mandate of New York law. Nor does the Host Homes program meet the required standards for a respite program.

Here, OCFS acted without legislative authority or guidance; it wrote on a “clean slate” and substituted its own policy judgments for that of the Legislature; and the Regulations 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.

ARGUMENT

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

A. Factor 1: OCFS Acted Outside of Its Legislatively Delegated Authority.

(i) OCFS Improperly Attempted to Substitute Its Own Program for a Comprehensive Statutory Scheme Enacted by the Legislature.

Addressing the first *Boreali* factor, Respondents claim that in promulgating Host Homes, they “did not make any complex value judgment untethered to the Legislature’s policy goals.” (Br. at 25). In fact, they impermissibly made a complex value judgment about how the goal of providing temporary care for families in need should be achieved. In the process, Respondents rejected and bypassed the Legislature’s policy goal to confer and protect key rights of parents and children. Respondents’ statements before the lower court make clear that their goal through Host Homes was to “transform” the foster-care system they oversee by creating an entirely new system for care by strangers “without invasive and unnecessary engagement of the child welfare and court systems.” (R. 1407; 1410). Thus, Respondents clearly acted outside of their legislatively delegated authority by creating a new program that places children with strangers without any of the safeguards deemed necessary by the Legislature to protect families needing assistance. Indeed, the lower court specifically held that the Host Homes Regulations were meant to “circumvent foster care placement” and, by extension,

the legal protections that the Legislature incorporated into the foster-care system. (R. 9–10). Circumventing the legislatively created voluntary foster-care system clearly runs afoul of *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.’” *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 697 (2014) (citation omitted); *see also LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 269 (2018) (regulation imposing cap on executive compensation reflects “a choice between competing public policy interests, rather than mere implementation of the legislature’s chosen goal”). The Legislature already has set forth a statutory scheme, replete with resources and protections reflecting its key policy values, to address the needs of families in crisis who lack someone to care for their children. It is not for OCFS administrators to resolve that problem by creating a competing placement program for parents in need.

OCFS is attempting to insert its own solution to a specific problem that the Legislature already has addressed in detail. Both Host Homes and voluntary foster-care placements are temporary arrangements intended to help families through crisis. N.Y. SOC. SERV. LAW (“SSL”) § 384-a(2)(a); *see, e.g., In re Joshua A.*, 289 A.D.2d 763, 764 (3d Dep’t 2001) (“[t]he statute is intended to ‘provide temporary assistance

to parents who are experiencing some difficulty with the custody of the child’ rather than as a means of permanently denying a parent custody of the child”) (citations omitted). But only the voluntary placement system was properly enacted by elected officials.

Respondents acknowledge that the Host Homes program was developed “to assist parents in need,” who do not “have the social support network to care for their children in a time of crisis,” and that families require “a framework for facilitating arrangements between parents and ‘host’ families.” (Br. at 1). That, however, is the very *same* problem the Legislature addressed through voluntary foster-care placements. The clear statutory scheme to assist those families—including a framework with important protections for both the parent and child—precludes OCFS from substituting its own policy considerations in the creation of an alternative program for placing the same universe of children with strangers. 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 as well as all the other protections reflect a series of choices after balancing competing policy considerations. By creating a new State-run system governing out-of-home placements that ignores these guardrails and judicial oversight that the Legislature has mandated whenever the State becomes involved in the separation of

children from their parents, Respondents are, in effect, improperly attempting to amend the Social Services Law and Family Court Act.

(ii) OCFS’s Argument That It Has Authority to Implement Host Homes Because a Parent Placing the Child Retains Legal Custody is Baseless.

Respondents claim that the “foster-care laws on which petitioners rely simply do not apply when parents temporarily place their children with another family for the sole purpose of providing care, without a loss of legal custody.” (Br. at 23). The Host Homes program, Respondents argue, is not “subject to the numerous safeguards that apply to voluntary foster-care placements” because it does not entail “losing legal custody, *i.e.*, the right to make fundamental decisions about their children’s upbringing.” (Br. at 1, 22). This argument is simply wrong. It belies the true form and substance of the Host Homes Regulations. OCFS has established a regulatory scheme that *requires* parents to cede key parental decision-making authority to the host home family as the vehicle and predicate to make and sustain a Host Homes placement. Thus, OCFS delimits the rights and interests of parents and children far more than voluntary placements do.

A Host Home placement, by OCFS design, constitutes a change in the physical residence of a child to the home of a stranger, potentially for an extended period of time, without court oversight. The sole prescribed vehicle to effect the Host Homes placement is the parental designation form, through which the parent

cedes parental authority to the host family in matters integral to the parenting of children. That decision-making is the hallmark of legal custody.² A designation of a person in parental relation pursuant to General Obligations Law (“GOL”) § 5-1551 is designed and executed for the specific purpose of ceding parental authority to make decisions pursuant to Public Health Law (“PHL”) § 2164 (immunizations), PHL § 2504 (provision of medical, dental, health, and hospital services to a child), and Education Law §§ 2 and 3212 (authorizing educational decisions). Respondents’ claim that parents do not give up their right to make fundamental decisions about their children’s upbringing under its Host Homes scheme is thus patently false.

So too is their argument that parents yield greater fundamental rights to make decisions about their children in a voluntary foster-care placement. In fact, a parent who voluntarily places their child in foster care retains greater rights to make fundamental decisions than the parent who places their child in the Host Homes program. Under 18 N.Y.C.R.R. § 441.22(d), prior to accepting a child into foster care on a voluntary placement, “authorization in writing must be requested from the child’s parent or guardian for routine medical and/or psychological assessments,

² See, e.g., *Candice W. v. Gary Y.*, 187 A.D.3d. 426, 426 (3d Dep’t 2020) (“The Referee properly ruled out joint legal custody in light of the evidence that the parties were unable to effectively communicate concerning the child’s educational, medical and other needs, which prevented them from consistently and effectively engaging in joint decision making.”).

immunizations and medical treatment, and for emergency medical or surgical care in the event that the parent or guardian cannot be located at the time such care becomes necessary.” Absent such authorization, parents retain that authority (unlike parents of children who are involuntarily placed); under 8 N.Y.C.R.R. § 200.5(b)(6), parents retain the right to make special education decisions for their children in foster care; and under SSL § 373 and N.Y. Fam. Ct. Act (“FCA”) § 116(g), parents retain control of the religious upbringing of their children in foster care. Accordingly, the distinction Respondents try to make based on the purported relinquishment of “legal custody” in voluntary foster-care placements is baseless. Whether Respondents had the authority to create the Host Homes program does not rest on the degree to which parents cede or retain decision-making authority.

(iii) Host Homes Is Not a “Preventive Service” Sanctioned by the Legislature.

Respondents further argue that the Host Homes Regulations “implement” the legislative policy of providing preventive services. (Br. at 27). That is incorrect. Host Homes is the very opposite of preventive services, which are rehabilitative and supportive services designed to prevent children’s removal from their homes or speed their return home from an out-of-home placement. SSL §§ 409; 409-a(1)(a). Under the Host Homes Regulations, in contrast to current law, the agency has no obligation to provide preventive services prior to placing the child with strangers. SSL §§ 384-a(2), 358-a(1). And, unlike voluntary placements, Respondents are not

obligated to offer services to assist the family as part of the Host Homes program. FCA §1089(d)(1)(viii)(A). In short, the Host Homes program does nothing to *prevent* the impairment or disruption of a family but instead facilitates the placement of children with strangers through a new State-run system that lacks critically important protections mandated by the Legislature. Respondents' position rests on the flawed premise that avoiding any involvement with the voluntary foster-care system constitutes a "preventive service," even if it means the child is placed indefinitely with strangers through the Host Homes program.

Similarly, Respondents' attempt to spin Host Homes as "respite care" and thus within the definition of "preventive services" is improper. Under SSL § 409-a(5)(f), respite care is "the temporary care and supervision of a child to relieve parents or other persons legally responsible for the care of such child where immediate relief is needed to maintain or restore family functioning." This statutory provision, which contemplates "immediate relief" as part of an effort to keep a family intact, is narrowly defined through regulation. Temporary care is meant to apply only in certain limited circumstances such as when "a parent is suddenly hospitalized" or is "participating in a substance abuse detoxification program." 18 N.Y.C.R.R. § 435.3(a)(3) & (5). Moreover, consistent with the statutory language, the regulations impose strict time limitations. Absent "extraordinary circumstances," respite care may only be provided up to a maximum of seven weeks per child, per year. 18

N.Y.C.R.R. § 435.5(c). The Host Homes program runs afoul of both the statute and implementing regulations because it is far broader in scope, is not limited to “immediate relief,” and allows a child’s placement to last *indefinitely* provided that the placement is renewed by the parent every six months. The Host Homes program, as a matter of law, does not qualify as “respite care.” 18 N.Y.C.R.R. § 444.5.

(iv) OCFS Inappropriately Considered the Economic Burden of Providing Foster Care When It Created the Host Homes Program.

Eliminating the provision of preventive services required by statute is one of several components of the Host Homes program that appear to be designed to cut costs for OCFS, thereby indicating that OCFS acted beyond its legislatively delegated authority. Respondents argue that there “is no support for that baseless claim.” (Br. at 30). It was Respondents, however, who touted the fact before the lower court that Host Homes will operate without “unnecessarily burdening the child welfare system.” (R. 1413). Moreover, the lower court specifically found that “[w]hen creating the Host Family Homes program, OCFS balanced the costs associated with placing children into foster care during such situations.” (R. 10). In both *Boreali* and *Statewide Coalition*, the Court of Appeals found that consideration of economic burden was part of an inappropriate attempt by the administrative agencies to choose between competing policy goals. *Boreali v. Axelrod*, 71 N.Y.2d 1, 12 (1987); *N.Y. Statewide Coal.*, 23 N.Y.3d at 697-98. There can be no ignoring

the fact that the Host Homes program, unlike voluntary foster care, provides temporary care for children at no cost to the State. While OCFS must bear a significant portion of the monthly rate paid to foster parents, the administrative costs of overseeing a foster home, the cost of preventive and rehabilitative services for parents of voluntarily placed children, and the cost of medical care for children who are placed in foster care, OCFS assumes none of these responsibilities for a child placed in a Host Home.

With the creation of Host Homes, Respondents are balancing competing policy choices and improperly attempting to substitute their own judgment for that of the Legislature. The Host Homes program 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.

B. Factor 2: OCFS Created Its Own Rules Without Legislative Guidance.

(i) The Host Homes Regulations Exceed OCFS’s Mandate.

In defending their authority to create the Host Homes program, Respondents point to general regulatory authority granted to them by the Legislature under Social Services Law sections 17, 20, and 34. (Br. at 25). Those provisions enable Respondents to “determine the policies and principles upon which public assistance, services and care shall be provided” but also make clear that Respondents must act

“within the limits hereinafter prescribed in this chapter” and “in accordance with law.” SSL §§ 17(a); 34(3)(f). None of those provisions authorizes OCFS to create the Host Homes program. As in *Statewide Coalition*, the general statutory provisions that Respondents cite do not empower OCFS to create, through regulation, a voluntary foster-care placement system by another name with less oversight than the foster-care statutes themselves demand. See *N.Y. Statewide Coal.*, 23 N.Y.3d at 694 (regulation restricting sugary beverages invalidated despite broad statutory mandate that included regulating “activities affecting public health in the city.” (citation omitted)); see also *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); *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’” (citation omitted)); *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 any statutory basis for the Host Homes program, Respondents argue that the statutory safeguards and restrictions for placing out a child do not apply to Host Homes because it is the parent and not the agency who is doing the placement. They rely 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.³ Nowhere, however, does it authorize a new State-run voluntary child placement system. The notion that under Host Homes the parents are placing out children is a complete fiction. Under the Regulations, it is the agency—not the parents—that identifies the Host Home, vets the home, and oversees the home in accordance with OCFS regulations (just as the authorized agency identifies, vets, and oversees a foster home in a voluntary foster-care placement).⁴ Tellingly, Respondents contradict themselves as they rely on SSL § 371(10)(a) in their assertion that Host Homes agencies “must be authorized by OCFS to place out children for the purpose of providing care.” SSL § 371(10)(a); Br. at 21; *see also* Br. at 26, 32. Thus, even

³ In arguing that parents have the right to place their children with others subject to fewer restrictions, Respondents are incorrect that parents may place their children directly with adoptive parents without court approval. (Br. at 7). No adoption is legal without court approval, but even before the child is placed, the home must be certified by the Court in a private placement adoption. N.Y. DOM. REL. LAW § 115(1)(b).

⁴ 18 N.Y.C.R.R. § 444.5(b).

according to Respondents, the Host Homes agencies are truly doing the placing, rather than the parents, who are not independently involved in the host family identification process. Respondents' position is one of form over substance as even they concede that under Host Homes, the agencies "assist parents in need" by "facilitat[ing] temporary care." (Br. at 32).

Indeed, OCFS is seeking here to reach the same result as a voluntary placement. Under Host Homes, 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.⁵

⁵ 18 N.Y.C.R.R. §§ 444, *et seq.*

Without statutory authority, OCFS lacked necessary legislative guidance for the Host Homes Regulations. Significantly, 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 attempt to circumvent the law by requiring the parent to 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. Whether OCFS has the authority to create a new State-run system of child placement does not rest on this legal sleight of hand.

In search of authority, Respondents also point to OCFS's "long history of regulating the placement of children." (Br. 34). That argument, in fact, undermines their position because each of the examples they cite (*i.e.*, foster family boarding homes, agency-run boarding homes, and group homes) are all grounded in 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. Notably, the statute 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. 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—especially since there is a detailed statutory scheme already in place governing voluntary placements—demonstrates that OCFS exceeded its statutory authority. *Cf. Nat’l Rest. Ass’n v. N.Y.C. Dep’t of Health & Mental Hygiene*, 148 A.D.3d 169, 177 (1st Dep’t 2017) (where the agency had a history of adopting similar rules regulating restaurants “without specific legislative guidance,” the agency was “not writing on a clean slate in the sense that it ha[d] always regulated” in such a manner (citation omitted)).

Equally unavailing is Respondents’ reliance on OCFS’s power of “approval, visitation [and] supervision” with respect to authorized agencies under SSL § 371(10)(a). (Br. at 32). That authority, which applies to voluntary foster-care placements, does not enable OCFS to create a new system of voluntary placement. Far from it. Nor do the statutory provisions governing preventive services. As explained above, the Host Homes program—given the potentially indefinite duration of a Host Home placement and the elimination of preventive and supportive services—is not a “preventive service” and does not qualify under the law as “respite care.”

Respondents' reliance on *Garcia v. New York City Department of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018), and *Greater New York Taxi Ass'n v. New York City Taxi & Limousine Commission*, 25 N.Y.3d 600 (2015), is misplaced. (Br. at 34–35). In *Garcia*, the legislature specifically delegated to the Board of Health the power to regulate vaccinations. 31 N.Y.3d at 613. There is no such delegation here over the creation of a new State-run voluntary placement program. Similarly, in *Greater New York Taxi*, the City Council specifically granted the Taxi and Limousine Commission authority to enact the rules at issue regulating taxis. 25 N.Y.3d at 607. In contrast, OCFS here wrote on a clean slate in excess of its statutory authority.

(ii) Host Homes Regulations Are Inconsistent with Existing Law.

Respondents argue that Host Homes is not an end-run around voluntary foster-care placements but simply, as the lower court found, “an additional, voluntary option for placing the children.” (Br. at 29; R. 11). That option, however, would come 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, if removed, they receive the support necessary for their prompt and safe reunification with their families. The lower court did not even address the many ways in which the Host Homes program directly conflicts with the existing statutory framework governing voluntary placements.

Respondents take a different approach than the lower court by acknowledging the statutory “safeguards” that exist for voluntary foster-care placements but arguing that the Host Homes program operates in “different spheres” and that Host Homes placements “are not subject to the procedural safeguards.” (Br. at 23, 26). There is no basis to conclude that the Host Homes program somehow operates in a different sphere than voluntary foster-care placements. As explained above, both Host Homes and voluntary foster-care placements are intended to address the same problem: helping families in crisis find a temporary placement option. In *Ford v. Annucci*, 189 A.D.3d 2070, 2071 (4th Dep’t 2020), a case relied upon by Respondents, the Court found that two separate procedural protections for inmates in disciplinary hearings (one statutory and one regulatory) were “complementary, operate in different spheres, and exist in complete harmony.” The opposite is true here. OCFS is operating in the same sphere as the statutory scheme by creating, through regulation, a voluntary foster-care system by another name completely out of harmony with what the statutes themselves demand.

Respondents attempt to distinguish Host Homes placements as being for the “sole purpose of providing care, without a loss of legal custody.” (Br. at 23). As explained above, however, that is a false distinction. Legal custody entails the authority to make important decisions regarding the child. Under both systems, parents cede certain decision-making for the duration of the placement, but the

parents of children who are placed in voluntary foster care retain greater decision-making authority regarding their children's education and medical care than the parent of children who are placed in Host Homes.

As explained in Appellants' Opening Brief, 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 recruited, vetted, and overseen by an authorized agency. This involves the provision of services for families in crisis to avoid or reduce separation,⁶ an attempt to place the child with relatives or family friends including a preference for siblings to be placed with siblings,⁷ and limitations on placement out of state.⁸ The statutory scheme also specifies the procedure for the acceptance and judicial review of voluntary placements lasting more than 30 days, including the appointment of counsel for parent and child. Regardless of the duration, the agency must provide services to the child and parent to facilitate reunification.⁹

In promulgating the Host Homes program, OCFS is attempting to create a separate process by which parents can voluntarily place their children out of the home with strangers but without judicial oversight or *any* of the safeguards

⁶ SSL §§ 398(1)(a), 409-a(1)(a).

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

⁸ SSL § 374-a.

⁹ SSL § 358-a; FCA §§ 249(a), 262, 1016, 1089, 1090(a).

mentioned above. As described in detail by Professor Merrill Sobie in his *Amicus* Brief, the State, in effect, is attempting 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. Fundamentally, the Host Homes program throws off the Legislative balance that had been set over many years. (*Amicus Br.* at 3-14).

Of significance, both the lower court and Respondents in their brief focus exclusively on the purported value of providing *parents* with another placement option. Not only do they minimize important safeguards like services and the appointment of counsel intended to protect parents, but they also completely ignore the importance of these safeguards from the child's perspective. Providing services to keep families together and restricting out-of-state placement are vitally important for the safety and security of children but would be lost under the Host Homes program. Moreover, under Host Homes, children would have no opportunity to appear in court or have their voices heard, contrary to existing law, even though their placement into a Host Home could be *indefinite* (provided the placement is renewed by parents every six months). As this Court recognized, the purpose of these safeguards is to “minimize the chance of children languishing in foster care.” *Lawyers for Child. v. N.Y. State Off. of Child. & Fam. Servs.*, 218 A.D.3d 913, 913 (3d Dep't 2023). Without such safeguards, there would be nothing to minimize the

chance of children languishing instead with strangers through Host Home placements. That result cannot be reconciled with the existing statutory scheme. *See Juarez v. N.Y. State Off. of Victim Servs.*, 36 N.Y.3d 485, 495 (2021) (to be valid regulation may not “contradict[] the public policy embodied in the statutory scheme”); *Acevedo v. N.Y. State Dep’t of Motor Vehicles*, 29 N.Y.3d 202, 221 (2017) (“an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose”).

(iii) A “Designation of Person in Parental Relation” Cannot Be Used to Circumvent the Protections of the Social Services Law.

Respondents acknowledge that GOL §§ 5-1551-1555, which enacted standards for a parent to designate a person in parental relation, does not authorize the Host Homes program but rather serves as “the vehicle by which parents approve a host family care arrangement.” (Br. at 37). Respondents further concede that Title 15-A was added to the GOL in 2005 to assist grandparents and other caregivers who might have difficulty raising a child in the absence of parents by providing a mechanism for those caregivers to obtain medical and educational services for the child without having to go to court.¹⁰ (Br. at 11).

¹⁰ Sponsor’s Mem., Bill Jacket, S. 3216, ch. 119 (N.Y. 2005).

Title 15-A provides for the limited transfer of specific, enumerated decisions to address difficulties faced by grandparents and other caregivers.¹¹ It was never intended to facilitate and does not authorize the transfer of authority for the care of children to *strangers* under the oversight of a State-run placement program. Thus, the attempt here to use the General Obligations Law to avoid the requirements and protections of the Social Services Law and the Family Court Act, as detailed above, conflicts with the clear mandate of the New York Legislature.

C. Factor 3: Legislative Activity in This Area Indicates That the Legislature Does Not Wish to Establish a Host Homes Program.

The third *Boreali* factor inquires “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. v. N.Y. State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 183 (2016) (citation omitted). The parties agree that less than a month before OCFS published its revised Regulations, Assemblyman Hevesi introduced AB A8090, 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. The Legislature considered but did not exhibit any appetite to change the established statutory scheme in favor of an alternative “voluntary placement”

¹¹ GOL § 5-1551.

system. Accordingly, this factor weighs in favor of Appellants. *See N.Y. Statewide Coal.*, 23 N.Y.3d at 700 (“Here, 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.”).

Prof. Merrill Sobie’s *Amicus* Brief further illustrates the Legislature’s deliberate intent to move away from an informal voluntary placement system with no court oversight or other safeguards, much like Host Homes, to the current day system, based in statute, which guarantees important safeguards and protections to children and parents. (*Amicus Br.* at 3–14).

D. Factor 4: Where an Agency Exceeds Its Authority, Expertise is Irrelevant.

Where, as here, an agency exceeded its statutory authority, a court need not address the fourth *Boreali* factor, which considers whether the regulation required expertise. *N.Y. Statewide Coal.*, 23 N.Y.3d at 700–01. Even if this factor were considered, however, it would be of no consequence. Respondents point to their internal deliberations and consultations with officials from other states that had implemented allegedly similar programs. (*Br.* at 39). They do not demonstrate how creating the Host Homes program required any special expertise or technical competence. Ironically, OCFS’s expertise in this area derives from running the voluntary foster-care system—the system created by the Legislature that they now seek to circumvent.

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

Respondents argue that the Host Homes Regulations “rationally promote the welfare of children.” (Br. at 40). There is nothing in the record, however, indicating that the Regulations would protect children. The program, in fact, does away with the very safeguards enacted by the Legislature to benefit children whose parents are unable to care for them. Respondents acted arbitrarily and capriciously because, as described above, they acted outside of their legislatively delegated authority and substituted their own policy judgment for that of the Legislature.

In defending the Regulations’ purpose, Respondents misstate the law in several respects. They, again, incorrectly claim that a voluntary foster-care placement requires the “transfer of legal custody” and “concomitant loss to parents of the rights to choose where or with whom their children are placed and to make medical and educational decisions on their children’s behalf.” (*Id.* at 41). As explained above, parents utilizing voluntary placements retain greater decision-making than those who place their children through the Host Homes program, including the rights to make medical and educational decisions (which are specifically transferred to the host family in the signing of a Designation of a Person in Parental Relation under the General Obligations Law). Moreover, in terms of a parent’s choice over the placement, unlike the Host Homes Regulations, the foster-care statutes prioritize placement with kin, requiring the agency to attempt to locate

any other parent, relative, or family friends and inform them of the opportunity to have the child reside with them, rather than with strangers. SSL § 384-a(1-a). Eliminating that requirement (not to mention the limitations on out-of-state placement) cannot reasonably be viewed as promoting child welfare.

Respondents further argue that Host Homes is somehow superior because it does not subject the parent to mandatory casework visits to the parent's home. Eliminating that requirement also cannot reasonably be viewed as promoting child welfare. It is worth noting that by the Respondents' own logic there would still be casework visits under Host Homes to the extent, as they claim, the Host Homes program is "a form of respite care." (Br. at 33). When a parent receives respite services, the agency must make casework contacts just as they would for a child receiving preventive services or foster care. 18 N.Y.C.R.R. §§ 435.9(b), 441.21(b)(2). As explained above, however, the Host Homes Program does not, in fact, qualify as "respite services."

Finally, Respondents argue that it was a rational exercise of OCFS authority to create a placement alternative where, unlike voluntary foster care, Family Court approval would not be needed before returning a child home after eight or more months. (Br. at 41). This argument ignores and obscures several important facts that highlight precisely how irrational this exercise of authority actually is. First, during the first eight months of a voluntary placement, the agency is required to

return the child upon the parent's request. Second, when a parent has ceded care of their child for eight months or more, it is appropriate to require that there be an independent assessment of whether it would be in the child's best interest to be returned to the parent and whether they would be at risk of harm if returned to the parent. Third, if, for any reason, the child is not returned to the parent from voluntary foster care, the parent, through their previously appointed counsel, can file a motion for judicial relief in the court where the placement was approved. As explained in Respondents' Opening Brief (at 30–31), the Host Homes program provides no protection for the parent when a host family or agency refuses to return the child. SSL § 384-a(2)(a).

Courts “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) (statute empowering the agency to promulgate rules to withhold employee advances did not confer authority to abolish such payments entirely).

The Host Homes Regulations reach far beyond the mechanics of administering a statutory program and far beyond the goals of OCFS’s enabling statutes. The Regulations create an extrajudicial system of family separation, which denies children and parents the appointment of counsel, is at odds with the existing statutory process, seeks to absolve OCFS from providing services to prevent family separation, fails to provide any court oversight, and relies on an interpretation of “person in parental relation” that alters its legislative purpose. The Regulations modify substantive rights and procedures in conflict with existing law 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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