

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

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

Petitioners,

-against-

NEW YORK STATE OFFICE OF CHILDREN AND
FAMILY SERVICES, and SHEILA J. POOLE, in her
official capacity as Commissioner of New York State
Office of Children and Family Services,

Respondents.

Index No. _____

VERIFIED PETITION

**ORAL ARGUMENT
REQUESTED**

Petitioners, Lawyers For Children, The Legal Aid Society, and Legal Aid Bureau of Buffalo, Inc., by and through their attorneys, Proskauer Rose LLP, allege as follows:

PRELIMINARY STATEMENT

1. New York State has long had a statutory framework with comprehensive procedural safeguards for children and families when parents or guardians feel unable to care for their own children. This Article 78 action is brought by three legal service organizations that represent children and ensure that their voices are heard in legal proceedings, including in circumstances when they are voluntarily placed into foster care by their parents or caregivers. At issue here are regulations promulgated by the Office of Children and Family Services (“OCFS”) that create, without statutory authority, a parallel, extrajudicial system of voluntary placement of children into “Host Homes” devoid of mandated safeguards.

2. OCFS’s Host Homes program fails to guarantee children and parents the assistance of counsel or any of the other protections built into the existing statutory framework.

Indeed, under Host Homes, children separated from their families—who otherwise would be represented by Petitioners or comparable organizations—would have no means to express themselves or any legal recourse whatsoever. As a result, children and families will suffer avoidable separation and trauma.

3. This past December, in announcing the adoption of the regulations at issue here, OCFS touted a “bold, new initiative” that it claimed “will support families without involving the child welfare system.”¹ But instead the regulations establish a shadow foster care system, detailing the requirements necessary for agencies to be authorized by OCFS to place children in “host homes,” how those homes are selected, and the duties and responsibilities of both the agencies and the host homes, including the treatment of children, record keeping, and the procedures and consequences for revocation of a host home. This shadow system, which is overseen by OCFS, includes monthly contacts by the agencies to check up on the children.

4. Despite the great similarity to foster care, the Host Homes program would strip away the core protections afforded children and parents under the current statutory framework governing voluntary placement. These protections hold OCFS and authorized private agencies accountable for the decision to take a child into placement, the care/treatment of the child while in placement, and the services provided to help the family reunify as quickly as possible. But unlike existing law, 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 court approval or court

¹ *The New York State Office of Children and Family Services Announces Adoption of Host Family Home Regulations*, OFFICE OF CHILDREN AND FAMILY SERVICES (Dec. 13, 2021), <https://ocfs.ny.gov/main/news/article.php?idx=2314> (last visited April 3, 2022).

oversight of the placement and no appointment of counsel. As a result, it is possible that children will languish in their Host Homes placement indefinitely. Children even 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.

5. Moreover, using the Designation of a Person in Parental Relation under Title 15-A of the General Obligations Law as the mechanism for parents to transfer authority for the care of their children to strangers under the oversight of an authorized agency is a gross misapplication of the law as it was created and intended to be used by the Legislature.

6. Here, OCFS has 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, this Article 78 petition seeks an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, as unlawful, and as arbitrary and capricious.

VENUE

7. Pursuant to C.P.L.R. 7804(b) and 506(b), venue in this proceeding lies in Rensselaer County, the judicial district where the Respondents took the action challenged here and where Respondents' office is located.

PARTIES

A. Petitioners

8. Petitioner Lawyers For Children ("LFC") is an organization that was founded nearly 40 years ago 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 as a pilot project in the 1983-84 fiscal year. LFC engaged in the project in order to demonstrate that 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 children achieved permanency through termination of parental rights and adoption. In 1999, appointment of counsel to all children who were voluntarily placed in foster care became mandatory. Since then, pursuant to a contract between LFC and OCA, 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. LFC also represents children in abuse and neglect proceedings, permanency hearings, proceedings for termination of parental rights, adoption, custody, guardianship and visitation matters, and juvenile delinquency cases. Every child that LFC represents 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.

9. Petitioner The Legal Aid Society ("Legal Aid") is the United States' oldest and largest private not-for-profit organization, providing free legal services to low-income individuals and families for over 140 years. Its more than 1,100 attorneys represent clients throughout New York City in over 300,000 matters annually. The Legal Aid Society is comprised of three practice areas—the Criminal Defense Practice, Civil Practice, and Juvenile Rights Practice. The Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Courts in abuse, neglect, juvenile delinquency, voluntary placements, and other proceedings affecting children's rights and welfare. Pursuant to a contract between The Legal Aid Society and OCA, The Legal Aid

Society 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 ("ACS"). The Legal Aid Society receives these assignments whether a child's placement is a result of a removal requested by ACS or a Voluntary Placement Agreement executed in accordance with Social Services Law § 358-a. In recent years, Juvenile Rights staff have represented approximately 34,000 children each year. 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.

10. Petitioner 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. Legal Aid of Buffalo represents thousands of children in the urban center of Buffalo and many more children scattered throughout suburban and rural communities within Erie County. Legal Aid of Buffalo is appointed to represent children on voluntary placement petitions in Family Court. Legal Aid of Buffalo appears at all stages of court proceedings, including permanency hearings.

B. Respondents

11. Respondent New York State Office of Children and Family Services ("OCFS") is a New York State agency constituted under New York Executive Law § 500. OCFS is charged with developing "policies and plans for improving the administration of division facilities and the delivery of services" pursuant to New York Social Services Law. N.Y. EXEC. LAW § 501(1). Such services include entering into contracts "with any person, firm, corporation, not-for-profit corporation, authorized agency" as defined by New York Social Services Law § 371. N.Y.

EXEC. LAW § 501(6). OCFS, through its employees, promulgated the regulations at issue in this case. OCFS is a body within the meaning of Article 78 of the C.P.L.R. OCFS maintains its office at 52 Washington Street, Rensselaer, New York 12144.

12. Respondent Sheila J. Poole is Commissioner of OCFS. Pursuant to New York Executive Law § 500, Respondent Poole is charged with promulgating, adopting, amending, or rescinding rules and regulations necessary to carry out the responsibilities of OCFS. Respondent Poole is an officer within the meaning of Article 78 of the C.P.L.R. Respondent Poole maintains an office at 52 Washington Street, Rensselaer, New York 12144. Respondent Poole is sued in her official capacity as Commissioner of OCFS.

FACTS

A. The Statutory Framework for Voluntary Placement in New York

13. The New York 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.”² Such transfers of care and custody by a parent—called a “voluntary placement”—come with specific safeguards designed to avoid placement, prevent coercion, and ensure that a child is placed with strangers only when absolutely necessary and that the child leaves foster care as quickly as possible.

² An “authorized agency” is defined by New York Social Services Law § 371(10)(a) as “[a]ny agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the office of children and family services or which shall submit and consent to the approval, visitation, inspection and supervision of such office as to any and all acts in relation to the welfare of children performed or to be performed under this title. . .” NEW YORK SOC. SERV. LAW § 371(10)(A).

14. *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).

15. *Second*, when placement is necessary, the statutes prioritize placement with 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 communication with their siblings may move for an order regarding placement or communication. *Id.* §§ 358-a(11)(b), (c); FAM. CT. ACT (“FCA”) §1089(d)(2)(viii)(I). Parents who sign a voluntary placement agreement have the right to visit their children and to determine with the agency the terms and frequency of visitation. SSL § 384-a(2)(c)(iv). The laws and regulations governing voluntary foster care contain provisions that aim to reduce the trauma of placing children with strangers. For example, the choice of a foster care placement must take into account the appropriateness of the child’s existing educational setting and the proximity of that setting to the child’s placement. When it is in the child’s best interest to continue to be enrolled in the same school in which the child was enrolled prior to placement, the agency must coordinate with school authorities to ensure that the child remains in that school. 18 N.Y.C.R.R. § 430.11(c)(1)(i). Furthermore, children in foster care may not be placed outside of New York without approval through the ICPC. SSL § 374-a.

16. *Third*, the parent is entitled to receive supportive services (including preventive services) to facilitate reunification, and to a hearing if the authorized agency fails to provide those services. SSL §§ 384-a(2), 358-a(1).

17. *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), (3));
- (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 [*e.g.*, placing the child with kin] 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 executed the written instrument under SSL § 384-a “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), a(3)).

18. *Fifth*, court oversight does not end upon approval of the voluntary placement but rather continues so long as the child remains placed 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, living with kin, 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.

19. *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). The child's attorney is uniquely positioned to provide the court with information regarding whether the child feels safe at home, to advocate for the provision of services and supports identified by the child in order to help the child return home or adjust to foster care, to express the child's wishes with regard to placement, and to advocate for an alternative plan when appropriate. The Legislature has placed such a value on hearing the child's voice in the proceedings that children over the age of 10 have the right to participate in their permanency hearings. FCA § 1090-a(a)(2). Regardless of a child's age, the permanency hearing must include an age-appropriate consultation with the child. FCA § 1089(d).

20. *Seventh*, the agency has an ongoing obligation to engage in permanency planning and assist the family so that reunification can occur as soon as possible. Prior to each permanency hearing taking place in court, the agency is required to facilitate a Permanency Conference, which must include, among others, agency personnel who are working with the family, an administrator or other person not responsible for the case management or delivery of services to that case, the child over the age of 10, members of the case planning team chosen by a child over the age of 14, the parents, key services providers, the attorney for the child, and

anybody else identified by the parent.³ To that end, the order approving a voluntary placement and the order at the conclusion of the permanency hearing may also 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).

21. *Eighth*, New York statutes place strict limitations on when a child placed with an authorized agency can be sent to a foster home outside of New York State. SSL § 374-a. Even then, New York courts retain jurisdiction over the child, and the placement must comply with the ICPC. *Id.*

22. In addition to the requirement that all voluntary placements be approved by the Family Court, New York statutes and regulations provide mechanisms for administrative and judicial review to enforce the rights of children in foster care and their parents, as well as the obligations of the agency overseeing the child's placement. For example, parents may request a hearing if the agency fails to permit them to visit or to provide them or the child preventive and other supportive services. 18 N.Y.C.R.R. § 431.11.

B. The Host Homes Regulations

23. On January 29, 2020, OCFS published proposed regulations in a Notice of Proposed Rulemaking with respect to the Host Homes program in the New York State Register. Specifically, OCFS proposed amending 18 N.Y.C.R.R. § 442.1 to add definitions pertinent to the Host Homes program and proposed creating new sections 444.2 through 442.15 to establish standards for the approval and administration of host family homes.⁴

³ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 ("ASFA"), Social Security Act § 475(5)(E), 42 U.S.C. § 675(5)(E); 18 N.Y.C.R.R. §430.12(c)(2); FCA § 1089(d)(2)(vii)(G). *See also*, 18 N.Y.C.R.R. §§ 428.5, 428.6 & 430.11; Off. Of Child. & Fam. Servs., 00 OCFS INF-5, Informational Letter on ASFA Safety and Permanency (Sept. 6, 2000), https://ocfs.ny.gov/main/policies/external/ocfs_2000/INFs/00-OCFS-INF-05%20ASFA%20Safety%20and%20Permanency.pdf; N.Y.C. ADMIN. OF CHILD.'S SERVS., POLICY AND PROCEDURE #2013/03, PERMANENCY PLANNING (Apr. 5, 2013), <https://www1.nyc.gov/assets/acs/policies/init/2013/B.pdf>.

⁴ 42 N.Y. Reg. 1 (Jan. 29, 2020).

24. Through the Host Homes Regulations, OCFS seeks to reach the same result as a voluntary placement but without the protections required by law. The program creates a scheme whereby children can be voluntarily placed in the homes of strangers 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; the qualifications for approval of a host family;⁵ the requirements to be met in a home study before placement of a child;⁶ 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;⁷ the forms of discipline that may be used;⁸ the way children must be treated;⁹ the requirement that the agency provide notification of any incidents that may affect the child's adjustment, health, safety, or well-being;¹⁰ the requirement of monthly contacts by the agencies overseeing the homes;¹¹ and the records that must be kept by the agency overseeing the homes.¹²

25. But 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:

- Children to be appointed independent legal counsel.

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. § 444.15 with 18 N.Y.C.R.R. § 443.2(c).

⁷ Compare 18 N.Y.C.R.R. § 444.16 with 18 N.Y.C.R.R. § 443.3(a).

⁸ Compare 18 N.Y.C.R.R. § 444.8 with 18 N.Y.C.R.R. § 441.9.

⁹ Compare 18 N.Y.C.R.R. § 444.13 with 18 N.Y.C.R.R. § 443.3.

¹⁰ Compare 18 N.Y.C.R.R. § 444.13(a)(10) with 18 N.Y.C.R.R. § 443.3(b)(10).

¹¹ Compare 18 N.Y.C.R.R. § 444.17(b)(2) with 18 N.Y.C.R.R. § 441.21(c)(2).

¹² Compare 18 N.Y.C.R.R. § 444.15(d) with 18 N.Y.C.R.R. § 443.2(f).

- Court approval for placements longer than 30 days, let alone approval based on judicial findings that a Host Homes stay would be in the best interest of the child or that the parent knowingly and voluntarily placed the child with a Host Home.
- Judicial oversight of any kind or after any period of time.
- First priority placement with kin rather than strangers.
- 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.

26. Critically, the Host Homes Regulations attempt to avoid those protections through a novel (and for the reasons noted below, unlawful) 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 many specific protections and required judicial oversight, as set forth in SSL § 384-a, the Host Homes Regulations do not. The Host Homes program seeks to skirt these requirements by making an agency merely a middleman or broker; parents seeking to place their children in a “host home” execute a Designation of Person in Parental Relation, placing the child directly with the host family “in accordance with” General Obligations Law § 5-1551. 18 N.Y.C.R.R. § 444.5(b). Accordingly, the agency itself is not a party to any written instrument with the parent.

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

1. *Safe Families for Children Lobbies to Pass Regulations Legally Authorizing Its “Host Homes” Program.*

27. Safe Families for Children (“SFC”) is a national faith-based agency that 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.¹³ SFC first sought approval to act as an authorized agency in New York in 2016.

28. On or about February 2, 2017, SFC sought OCFS approval for authority “to provide volunteers to mentor families in need or in crisis situations.”¹⁴ In response to the application to operate as an authorized agency in New York State, OCFS advised SFC that OCFS approval would not be required for the agency to provide volunteers to mentor families in need or in crisis situations. However, OCFS cautioned, “Under no circumstances may the corporation ‘place out’ or ‘board out’ children in New York State as these terms are defined under section 371 of the Social Services [Law] without the prior written approval of OCFS, and under no circumstances may the corporation otherwise care for children or arrange for the residential care of children in New York State without the prior written approval of OCFS.”¹⁵

29. In June 2018, Laura Galt, the NYC Director of SFC, met with Commissioner Poole. Afterwards, Laura Galt sent an email to Cassandra Kelleher-Donnaruma, an attorney in the OCFS Bureau of Legislation & Intergovernmental Affairs, 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.”¹⁶

30. 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. For example, on October 18, 2018, Ms. Galt wrote to Ms. Hallock, “Hi Renee, It was so encouraging

¹³ *How Safe Families Works*, SAFE FAMILIES FOR CHILDREN, <https://safe-families.org/about/how-safe-families-works/> (last visited Mar. 24, 2022).

¹⁴ February 17, 2017 letter from Leslie Robinson (OCFS) to David Bea, Esq. Affirmation of William C. Silverman, dated April 4, 2022 (“Silverman Aff.”) Ex. 1, at 5.

¹⁵ February 17, 2017 letter from Leslie Robinson (OCFS) to David Bea, Esq. Silverman Aff. Ex. 1, at 8.

¹⁶ E-mail from Laura Galt to Cassandra Kelleher-Donnaruma (June 15, 2018, 09:07 a.m.). Silverman Aff. Ex. 1, at 101.

to hear from you today. Thank you for reaching out and for your support of getting our hosting program up and running as soon as possible.”¹⁷

31. Thereafter, on January 29, 2020, OCFS published proposed regulations to establish a Host Family Homes program.¹⁸ Through these Regulations, OCFS attempted to facilitate the voluntary placement of children into a new parallel system of foster care of its own creation. OCFS would allow Host Homes agencies to place children into homes that those agencies had vetted under the rules set by and under the supervision of OCFS but without any of the statutory protections required for voluntary foster care placement.¹⁹

2. *OCFS Receives Widespread Opposition to Proposed “Host Homes” Regulations.*

32. Pursuant to the Administrative Procedure Act § 202, the Proposed Regulations were open to public comment until March 30, 2020 (60 days after publication of the notice).

33. On March 23, 2020, Ms. Galt emailed Ms. Hallock, “The child lawyers are still saying that parents should use voluntaries and I’m wondering if parents actually use them for respite.”²⁰ Ms. Hallock responded, “Yes parents do use them, but why should they have to.”²¹ Four days later, as the end of the comment period approached, Ms. Galt further wrote: “A lot of people are trying to decide whether to put in comments in opposition today before the comment period ends unless they hear of an extension date. Can OCFS post that extension date so that

¹⁷ E-mail from Laura Galt to Renee Hallock (Oct. 18, 2018, 5:44 p.m.). Silverman Aff. Ex. 1, at 552.

¹⁸ E-mails primarily between Laura Galt, NYC Director of SFC, and Cassandra Kelleher-Donnaruma, an attorney in the OCFS Bureau of Legislation & Intergovernmental Affairs, show that OCFS representatives reached out for information from SFC around May 2018. E-mail from Cassandra Kelleher-Donnaruma to Laura Galt (May 30, 2018, 03:36 p.m.). Silverman Aff. Ex. 1, at 320–21. Galt and others at SFC worked to answer OCFS’s questions and provide an overview of the program between May and July 2018. *See, e.g.*, e-mail from Ms. Galt to Ms. Kelleher-Donnaruma (June 15, 2018, 09:08 a.m.), *id.* at 550. Thereafter, OCFS drafted regulations that would permit operation of a Host Family Homes program within New York’s pre-existing statutory framework. *See* 42 N.Y. Reg. 1 (Jan. 29, 2020).

¹⁹ 18 N.Y.C.R.R. §§ 444.1–444.15.

²⁰ E-mail from Laura Galt to Renee Hallock (Mar. 23, 2020, 7:47 a.m.), Silverman Aff. Ex. 1, at 613.

²¹ E-mail from Renee Hallock to Laura Galt (Mar. 24, 2020, 10:55 a.m.), *id.*

these negative comments can be held off and I can try to address the people on the fence?”²²

That same day the public comment period was extended to June 2020.

34. In June 2020, OCFS held a virtual roundtable for people who had expressed opposition to the proposed regulations. Seeking input on the plan to hold that forum, Ms. Hallock wrote to Ms. Galt, “The goal of the roundtable is to let them know we heard their concerns, and are looking to have them assist us in revising the regulations so that they are clearly a preventive service. How does that sound?”²³

35. The initial proposed regulations received 137 comments.²⁴ This response included a broad set of established organizations, family court judges, child welfare commissioners, foster care providers, academics, and advocates for children and parents who submitted comments asserting 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 governing foster care, favoring placement of children with kin over strangers, and requiring agencies to provide preventive services and to undertake efforts to unify families.²⁵

36. Those in opposition pointed out that the Proposed Regulations would create a quasi-foster care system, but without any of the judicial oversight or legal representation that both children and parents are afforded in the actual foster care system. They also pointed out that children would not have a say in where they are placed, in contrast to the current foster care system.²⁶

²² E-mail from Laura Galt to Renee Hallock (Mar. 27, 2020, 1:15 p.m.), *id.* at 619.

²³ E-mail from Renee Hallock to Laura Galt (May 27, 2020, 9:51 a.m.), *Id.* at 639.

²⁴ *See Silverman Aff. Ex.*, at 2.

²⁵ *See generally id.*

²⁶ *See generally id.*

3. *OCFS Proposes Revised Regulations.*

37. On July 7, 2021, OCFS published a Notice of Revised Rule Making in the New York State Register (Vol. XLIII, issue 27) with revised regulations (“Revised Regulations”) and invited public comment through August 21, 2021.²⁷

38. The Revised Regulations stated that the Host Family Homes agency “may provide additional services to the family,” that “the agency must have policies and procedures in place to assist parents in making informed decisions and that they have legal rights,” and that children over the age of 14 should be consulted about the placement—but did not provide them with an opportunity to be heard themselves or through assignment of and advocacy by independent counsel.²⁸

39. In addition, OCFS removed the prohibition on placing a child outside New York State without complying with the ICPC—a development that would place children beyond the jurisdiction of New York courts. OCFS also changed the word “casework” to “contact” when referring to an agency’s host home visits to check on the child—further diluting the agency’s obligations to provide services and assistance to the family.²⁹

40. While the earlier proposal provided for parents to execute a “host family home placement agreement,” placing their children with the Host Family Homes agency (similar to an agreement voluntarily placing a child in foster care), the Revised Regulations provide for the

²⁷ OCFS’s regulatory Notice of Adoption of the Revised Regulations, including the agency’s assessment of public comment, is available at the OCFS Legislation and Regulation webpage: OFF. OF CHILD. & FAM. SERVS., FINAL ADOPTION REGULATIONS, <https://ocfs.ny.gov/main/legal/regulatory/final/> (last visited Apr. 3, 2022); OCFS’s assessment of public comment is specifically here: OFF. OF CHILD. & FAM. SERVS., OCFS.NOA.444, ASSESSMENT OF PUBLIC COMMENT, <https://ocfs.ny.gov/main/legal/Regulatory/final/OCFS.NOA.444/OCFS.NOA.444-Assessment.pdf>.

²⁸ See generally 18 N.Y.C.R.R. §§ 444.1–444.19.

²⁹ *Id.* § 444.17.

parents to sign a Designation of a Person in Parental Relation, giving authority for the child's care directly to the host family, rather than the agency.³⁰

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

41. During the comment period for the Revised Regulations, OCFS received 85 comments from a broad swath of the public.³¹ Once again, members of the public 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 family reunification. Despite the voluminous objections to the Revised Regulations, OCFS did not make any additional changes and adopted them as final. *See generally* Silverman Aff. Ex. 5 (OCFS noting after every summary of a particular comment or criticism that "OCFS is not changing the revised proposed regulations in response to this comment").

42. On December 8, 2021, Notice of Adoption was published in the New York State Register Vol. XLIII Issue 49, thus promulgating the Host Homes program.

LEGAL STANDARD FOR ARTICLE 78 RELIEF

43. 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).

³⁰ *Id.* § 444.5.

³¹ OCFS received comments in opposition from, among others, the New York State Unified Court System (Family Court Advisory and Rules Committee and Statewide Committee on Attorneys for Children), the Honorable Anne-Marie Jolly, Chair of the Statewide Committee on Attorneys for Children, New York State Permanent Judicial Commission on Justice for Children, New York State Bar Association, New York State Kinship Navigator, New York State Defenders Association, Redlich Horwitz Foundation, Chief Defenders Association of New York, Legal Services of the Hudson Valley, and Brooklyn Defender Services. *See* Silverman Aff. Ex. 3 at 77-81, 116-18, 83-87, 122-25, 61-64, 103-05, 106-08, 109-115, 136-37, and 162-64.

44. 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 Hispanic Chambers of Comm. 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).

45. Agency action is also arbitrary and capricious if it was made “without a sound basis in reason and generally without regard to the facts.” *Nestle Waters N. Am., Inc. v. City of N.Y.*, 121 A.D.3d 124, 127 (1st Dep’t 2014); *accord Pell v Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974).

GROUNDINGS FOR ARTICLE 78 RELIEF

I. OCFS Committed a Critical Error of Law By Relying on a “Designation of Person in Parental Relation” to Circumvent the Protections of SSL § 384-a.

46. 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 (“GOL”) § 5-1551. Specifically, the regulations provide that a child may not be cared for in a host home unless the parent “agrees” and “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).

47. 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 immediately terminates the host home care. *Id.* §§ 444.5(h)(5), 444.18(a)(1). It is clear that the Host Homes Regulations cannot exist without a designation of “person in parental relation” in accordance with Title 15-A of Article 5 of the General Obligations Law (“Title 15-A”).

48. But Title 15-A does not permit a designation for this purpose. It specifies that a parent of a minor child “may 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).

49. 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: “[U]nder 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 Memo concludes that the “proposed legislation would ease these difficulties for the caregivers, and allow the children to get school services and healthcare in a timely fashion.”³² 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).

50. The limits of Title 15-A have been widely understood. In a letter supporting the 2018 amendment, the New York Public Welfare Association (“NYPWA”), the professional association of local social services districts, explained that the Designation of a Person in Parental Relation was an important tool when a parent “cannot care for a child for a short period of time, but *family or friends* can care for the child safely.”³³ (emphasis added).

51. Supporters of the 2018 amendment included a diverse coalition representing academia, child welfare administrations, legal advocacy organizations serving parents, attorneys for children, foster care provider agencies, community-based service providers, policy analysts, and organizations representing grandparents and other kin. Urging enactment of the bill, they wrote:

When parents must temporarily ask kin to provide care, the General Obligation Law permits a parental designation of a caregiver who then

³² Sponsor’s Mem., Bill Jacket, S. 3216, ch. 119 (N.Y. 2005), attached hereto as Silverman Aff. Ex. 7 at 2-3.

³³ Silverman Aff. Ex. 6 at 10.

can make most decisions related to schooling and medical care. *Such designations allow a grandparent, other relative, or a close family friend to make routine decisions* for children for up to six months.

(emphasis added).³⁴

52. Accordingly, Title 15-A provides for the limited transfer of specific, enumerated decisions to address difficulties faced by grandparents and other caregivers. But 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-sponsored placement program. OCFS committed a critical error of law by attempting to legislate a new application of the General Obligations Law that plainly exceeds its 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 below, conflicts with the clear mandate of the New York Legislature.

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

53. The Host Homes Regulations must be annulled because OCFS crossed the “line between administrative rule-making and legislative policy-making” under New York law. *See Boreali*, 71 N.Y.2d at 11.

54. 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 acted within its legislatively delegated policy goals; (2) whether the agency was merely filling in the details of broad legislation describing the overall policies to be implemented, as opposed to “[writing] on a clean slate” without the benefit of legislative guidance; (3) whether the legislature had repeatedly tried but failed to adopt legislation in this area; and (4) whether the agency has special expertise in the area.

³⁴ *Id.* at 11.

Allen v. N.Y. State Dep't of Motor Vehicles, 45 Misc. 3d 475, 500 (Sup. Ct. Albany Cty. 2014) (second alteration in original), *aff'd sub nom. Joy v. N.Y. State Dep't of Motor Vehicles*, 133 A.D.3d 1167 (3d Dep't 2015). These factors are not “rigidly applied,” and “respondents may not counter petitioners’ argument merely by showing that one *Boreali* factor does not obtain.” *Statewide Coal.*, 23 N.Y.3d at 696–97. Instead, courts “treat the circumstances as overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed [the] line.” *Id.* at 696.

55. Each of these factors shows OCFS crossed the line by adopting the Host Homes Regulations.

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

56. The first 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. One key indicator of agency overreach is where a regulation centers on “administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values.” *Id.*; *see also NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 181 (2016) (agency cannot “construct[] a regulatory scheme laden with exceptions based solely upon economic and social concerns” (citation omitted)). In each instance, the question is whether the agency chose between competing public policies and thereby engaged in a “balancing of competing special interests that fell within the legislative domain.” *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 612 (2018). Here, OCFS plainly overstepped into the legislative realm.

57. At its core, the Host Homes program is a glaring, administratively crafted exemption to New York’s statutory foster care system. OCFS did not promulgate these regulations at the Legislature’s behest or due to an intervening change in law, but instead sought a way to obtain the functional equivalent of foster care without the guardrails or judicial oversight the Legislature mandates when the State becomes involved with the separation of children from their parents. OCFS may well be concerned that the families interested in the Host Homes program “are at risk of being involuntarily separated through the current child welfare system” and seek to avoid having more families “rel[y] on services through the child welfare system.”³⁵ But it is the judgment of the Legislature, by statute, that before children can be placed in the homes of strangers, significant protections and oversight are necessary. OCFS cannot circumvent the existing system by regulation. Accordingly, the Host Homes Regulations must be annulled.

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

58. The second factor asks whether the agency “did not merely fill in the details of broad [enabling] legislation describing the over-all policies to be implemented” but rather “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.” *Boreali*, 71 N.Y.2d at 13. Put another way, agencies may not depart from or exceed the scope of their charter or enabling code provisions without going “beyond interstitial rule-making and into the realm of legislating.” *Dutchess/Putnam Rest. & Tavern Ass’n, Inc. v. Putnam Cty. Dep’t of Health*, 178 F. Supp. 2d 396, 404 (S.D.N.Y. 2001). 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 a means to an end” identified by

³⁵ Silverman Aff. Ex. 5, at 2.

the Legislature. *Statewide Coal.*, 23 N.Y.3d at 700 (invalidating Board of Health regulation concerning sugary beverages despite broad mandate to promote public health); *cf. Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 224 (2017) (upholding regulation 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”).

59. This factor requires annulling the Host Homes Regulations for four reasons. *First*, OCFS exceeded the mandate of its enabling legislation by promulgating those regulations. *Second*, the regulations represent a significant departure from New York’s existing statutory framework for foster care, including voluntary placement. *Third*, the regulations are inconsistent with the Legislature-mandated protections for parents and children where the State becomes involved in their separation, in particular the child’s right to independent legal counsel. *Fourth*, the Legislature did not direct or provide guidance for OCFS to promulgate a shadow foster care system.

1. *The Host Homes Regulations Exceed OCFS’ Mandate.*

60. OCFS asserts that “it possesses the necessary statutory authority to promulgate the . . . regulations in accordance with sections 20, 34 and 460-a of the [Social Services Law].”³⁶ However, as in *Statewide Coalition*, these general statutory provisions do not empower OCFS to create a comprehensive new approach to foster care in New York.

61. The Social Services Law does not authorize OCFS to circumvent New York’s foster care system with a new host homes system. Section 20 of the Social Services Law merely describes the general powers and duties of the Department and State Board of Social Welfare.

³⁶ *Id.* at 4.

Likewise, Section 34 describes the general powers and duties of the Commissioner of Social Services. Section 460-a concerns certificates of incorporation for entities that provide care to at-risk children. None of these provisions authorizes OCFS to create voluntary foster care by another name, through regulations, with less oversight than the foster care statutes themselves demand. Further, OCFS's apparent suggestion that its ability to approve certificates of incorporation translates into the power to authorize approved corporations to care for children however it sees fit is not only wrong but also turns the relationship between the Legislature and agencies on its head.

62. OCFS states that the Regulations' "Legislative objectives" are to "establish regulatory standards to address the authority for a voluntary authorized agency to arrange for the free care of a child in a family other than that of the child's parent, step-parent, grandparent, brother, sister, uncle, aunt or legal guardian and not for adoption, as authorized by section 374 of the SSL."³⁷ Under "Needs and Benefits," OCFS focused on the latter, largely describing what the Regulations would do, and alluded to only one putative need: "The proposed regulations would afford parents the ability to obtain short-term care for their children without the need to place the child in public foster care."³⁸ These objectives, however, constitute a substantial departure from the statutes OCFS cites for its authority as noted above.

63. Like *Statewide Coalition*, the Host Homes Regulations embody not a choice of means but an entirely new end not contemplated 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,

³⁷ 43 N.Y. Reg. 7 (July 7, 2021).

³⁸ *Id.*

however, the Host Homes Regulations are in conflict with the existing statutory scheme's purpose because they circumvent the statutorily prescribed channels for providing a specific kind of assistance—namely, voluntary placement into foster care under SSL § 384-a. Because the Regulations go beyond interstitial rulemaking to create policy not only out of whole cloth but that also conflicts with the aims of existing statutes, they were adopted in excess of OCFS's authority.

2. *The Host Home Program Departs From the Existing Statutory Framework for Foster Care.*

64. The Host Homes Regulations fly in the face of New York's established statutory scheme to care for children who have been separated from their parents and to provide multiple protections to children and parents throughout the course of the child's placement outside the home.

65. 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. In general, the New York State Constitution and statutes place responsibility for the care of children in need squarely in the hands of the Commissioner of Social Services/OCFS.³⁹ Furthermore, pursuant to both New York State and Federal Law, when families are in crisis, the Commissioner of Social Services must, in the first instance, offer preventive services to help keep the family together.⁴⁰ When children cannot be cared for at home, statutes provide for parents to voluntarily place their children in foster care with the

³⁹ N.Y. CONST. art. XVII, § 1.; SSL §§ 395, 398(1)(c).

⁴⁰ SSL §§ 398(1)(a), 409-a(1)(a); *See also* Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 ("FFPSA").

Commissioner of Social Services, who may delegate day-to-day oversight of the child’s placement to an authorized agency.⁴¹

66. Likewise, the statutory scheme has long provided for parents to voluntarily place their children with strangers through an authorized agency—but only where numerous protections for children and parents, including a right to counsel and judicial oversight and provision of supportive services, are also in place.⁴² 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 with siblings if in their best interest.⁴³ Under the existing framework, children may only be placed out of state under strict conditions, and when they are, New York courts retain jurisdiction over the child and the movement requires approval through the ICPC. SSL § 374-a.

67. The statutory scheme also specifies the procedure for the acceptance and judicial review of voluntary placements.⁴⁴ The statutes are carefully constructed to “ensure that the parent knowingly and voluntarily placed the child, that services were offered to the family to prevent the child’s placement, and that all appropriate family resources were explored in order to prevent the child’s placement with strangers.”⁴⁵

⁴¹ SSL §§ 384-a, 358-a; FCA art. 10-A.

⁴² SSL §§ 384-a, 358-a.

⁴³ 18 N.Y.C.R.R. § 430.10(b)(2); FCA § 1017(1)(a); SSL § 384-a(1-a)(b). Additionally, Congress enacted the Family First Prevention Services Act in 2018, which implemented reforms aimed at keeping children with their families, including supporting kinship caregivers by providing federal funding for “evidence-based Kinship Navigator programs” to connect kinship caregivers to a variety of services and supports so that children may remain in their care. *See About the Law*, FAMILYFIRSTACT.ORG, <https://FamilyFirstAct.Org/about-law> (last visited Apr. 3, 2022); *see also*, FFPSA. Finally, OCFS’s own Administrative Directives mandate that when a child must be separated from his or her parents, LSSDs must commence a “Kin-First Firewall Practice.” OFF. OF CHILD. & FAM. SERVS., 20-OCFS-ADM-18, ADMINISTRATIVE DIRECTIVE (Oct. 14, 2020), https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Focfs.ny.gov%2Fmain%2Fpolicies%2Fexternal%2Focfs_2020%2FADM%2F20-OCFS-ADM-18.docx&wdOrigin=BROWSELINK.

⁴⁴ SSL §§ 384-a, 358-a.

⁴⁵ N.Y. STATE BAR ASS’N, COM. ON CHILD. & L., COMMENTS ON PROPOSED AMENDMENT OF 18 N.Y.C.R.R. § 444.1 AND ADDITION OF 18 N.Y.C.R.R. §§ 444.2-444.15 RELATING TO HOST FAMILY HOMES (Aug. 13, 2021) (Silverman Aff., Ex. 3, at 123).

68. Under SSL § 384-a, parents may execute a voluntary placement agreement giving temporary custody of their children to the Commissioner of the local social services district (“LSSD”). Under the statutes and regulations governing placement with the Commissioner, the LSSD and/or the voluntary foster care provider agency must also provide services to child and parent in an effort to avoid the placement and to allow the child to return home as quickly as possible. Foster parents are also given financial and casework support. If the placement is expected to last more than 30 days, LSSD is required to file a petition for Family Court approval of the placement, the court must conduct regular judicial review of the placement, and the child must be assigned an attorney.⁴⁶

69. Here, OCFS seeks to create a new State-sponsored program to “voluntarily” place children that avoids all of those protections. The regulations 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 mentioned above. Indeed, children would have no opportunity to appear in Court at any point and have their voices heard. OCFS bills this as an alternative to help families avoid entanglement with the foster care system—but at the expense of the protections that ensure children are not unnecessarily removed or kept from their homes.

3. *Host Family Home Regulations Are Inconsistent with Existing Law Regarding a Parent’s Right to Counsel and Children’s Right to Counsel and to Be Heard in Court.*

70. The Host Homes Regulations are also inconsistent with existing law in a critical respect: unlike the established statutory system, these regulations do not require that children and parents have independent legal counsel throughout the placement.

⁴⁶ SSL § 358-a; FCA § 1089.

71. The existing statutes governing the voluntary placement of children include a right to counsel for both children and parents involved in out-of-home placements. The Family Court Act promises children lawyers whether they are displaced from homes voluntarily or involuntarily.⁴⁷ Parents are also statutorily entitled to counsel upon their first court appearance.⁴⁸

72. By contrast, the Host Family Homes Regulations do not provide children or parents with appointment of counsel. While they require that the agency provide the parent a list of available free or low-cost legal services for the parent and child, this provision falls woefully short of the entitlement to appointment of independent counsel for each mandated by statute. In mandating appointment of counsel, the Legislature has 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 facilitating return to their families.

73. The lack of protections and safeguards described above, including especially the lack of appointment of counsel, is extremely harmful to the vulnerable population represented by Petitioners. Their clients in voluntary placement proceedings are low-income children, often in crisis and in great need of social services, which need not be provided to them in Host Homes as they would in voluntary foster care.⁴⁹ Significantly, 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 negative effect of these regulations on the rights of families and children is even more intolerable when considering the fact that the child

⁴⁷ FCA §§ 249(a), 1016, 1090(a).

⁴⁸ *Id.* § 262.

⁴⁹ See Affirmation of Karen Freedman, dated April 4, 2022 (“K. Freedman Aff.”); Affirmation of Lisa Freeman, dated March 31, 2022 (“L. Freeman Aff.”); affidavit of Judith M. Gerber, dated April 5, 2022 (“Gerber Aff.”).

welfare system in New York has a disproportionate impact on families of color, who would thus bear the brunt of the unlawful Host Homes regulatory scheme.

4. *The Legislature Did Not Provide Statutory Guidance for Establishing a Host Family Homes Program.*

74. The argument that OCFS wrote on a blank slate in devising the Host Homes Regulations is bolstered by the fact that while comparable out-of-home placement programs are explicitly provided for in statute, the Host Homes Regulations lack the specific statutory support on which similar regulations have historically relied.

75. OCFS claims that the Regulations are “authorized by section 374 of the SSL.”⁵⁰ Section 374, which is part of Title I (“Care and Protection of Children”), is titled “Authority to Place Out or Board Children.” It is immediately followed by provisions concerning various types of specific out-of-home placements: the ICPC (§ 374-a) and Authority to Operate Agency Boarding Home (§ 374-B), Group Homes (§ 374-C), Public Institutions for Children (§ 374-D), and to Place Out or Board Out Children with Therapeutic Foster Parents (§ 374-E). These placement types are reflected in the regulations immediately before and after the new Host Homes Regulations, where every named placement entity is also specifically mentioned in the statute.

76. In other words, it is evident from Section 374 itself that the Host Homes Regulations are the only placement choice that was *not* statutorily created. This is in stark contrast to cases like *Nat’l Rest. Ass’n v. N.Y.C. Dep’t of Health & Mental Hygiene*, 148 A.D.3d 169 (1st Dep’t 2017), where the court recognized that the Department of Health and Mental Hygiene had a history of adopting similar rules without specific legislative guidance to hold that the Department was “not writing on a clean slate in the sense that it ha[d] always regulated” in

⁵⁰ 43 N.Y. Reg. 7 (July 7, 2021).

such a manner. *Id.* at 243. Here, where OCFS has historically looked to statute to prescribe placement entities for children, its choice not to do so indicates that it has written on a clean slate in excess of its statutory authority.

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

77. The third *Boreali* factor looks to whether the Legislature has considered acting on the subject issue, because when the “[L]egislature has unsuccessfully tried to reach agreement on the issue, [it] would indicate that the matter is a policy consideration for the elected body to resolve.” *See NYC C.L.A.S.H.*, 27 N.Y.3d at 180. If the Legislature’s own activity in a policy area fails to indicate agreement on how to implement a particular social policy, the administrative agency cannot plausibly argue that its rule simply executes the legislative consensus.

78. The Legislature has not exhibited any appetite to change the established statutory scheme in favor of an alternative “voluntary placement” system. Less than a month before OCFS published its Revised Regulations, Assemblyman Andrew Hevesi introduced AB A8090,⁵¹ which would have allowed parents to make “alternative living arrangements” for their children, whereby the parents name a relative or other person to care temporarily for their child. The legislation never made it out of committee.

79. This unsuccessful effort to create a new voluntary placement program indicates a lack of legislative interest in adding to the existing framework for voluntary placements.

⁵¹ Sponsor’s Mem., Bill Jacket, Assemb. 8090, Reg. Sess. (N.Y. 2021), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08090&term=2021&Summary=Y&Text=Y

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

80. The fourth factor considers whether the agency has special expertise in the area. *Boreali*, 71 N.Y.2d at 13–14. Where, as here, an agency exceeded its statutory authority, a court need not address this 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”). Even if the Court were to consider this factor, there is no suggestion any special expertise was involved in the development of the Host Homes Regulations.

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

81. A court will also strike down a regulation under Article 78 if “a determination . . . 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*, 34 N.Y.2d at 231. 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).

82. 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, Inc. 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).

83. 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 was permitted because it was incumbent upon the agency 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 upheld regulations 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.”

84. 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, that is at odds with existing SSL processes, seeks to absolve OCFS from providing services and support 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.

NO PRIOR APPLICATIONS

85. No prior application for this or any similar relief has been made in any court.

STANDING

86. Petitioners have suffered injury-in-fact as a result of the Host Homes Regulations that would interfere with and harm both their organizational missions and their contractual rights to represent children in foster care proceedings.

87. A central part of Petitioners' mission is to represent children in foster care proceedings, including voluntary placements. Petitioners play the vital role of ensuring that these children's voices are heard, and specifically train their attorneys and staff to represent children for this purpose. *See, e.g.*, K. Freedman Aff. at ¶¶ 4–10; L. Freeman Aff. at ¶ 5; Gerber Aff. at ¶¶ 6–7. Moreover, Petitioners are appointed in these cases pursuant to contracts. *See* K. Freedman Aff. at ¶¶ 5, 24–27; L. Freeman Aff. at ¶¶ 4–8; Gerber Aff. at ¶¶ 8, 12–14.

88. However, under the Host Homes program, Petitioners would not be able to fulfill their mission or contractual rights and obligations to represent children who are being placed out of their homes through voluntary placements. *See* L. Freeman Aff. at ¶¶ 16–28; Gerber Aff. at ¶¶ 8, 14–15. As explained above, the Host Homes program is the functional equivalent of a foster care system but is extrajudicial without any of the safeguards under existing law governing voluntary placement, including the appointment of counsel. Accordingly, Petitioners will have no ability to represent or even identify those children diverted by OCFS into their shadow foster care system.

89. In addition, Petitioners have third-party standing on behalf of the children they would have represented but for the unlawful Host Homes program. If Petitioners are not granted standing in this case, these children will have no party advocating for their interests in court, and

no recourse whatsoever to challenge the unlawful Host Homes program. As explained *supra*, children are not afforded legal representation through the Host Homes program, and have no recourse to raise objections if their rights are infringed. Furthermore, as children, they are unable to seek out and retain legal representation before, during, or after their involvement with this program, as they would be if they were involved in a voluntary placement through the foster care system. *See Grant v. Cuomo*, 130 A.D.2d 154, 159 (1st Dep’t 1987) (“[W]e cannot ignore the obvious fact that if organizations of this kind are denied standing, the practical effect would be to exempt from judicial review the failure of the defendants, here conceded, to comply with their statutory obligations.”), *aff’d*, 73 N.Y.2d 820 (1988).

90. The harms that come to children who are separated from their parents have been well-documented.⁵² In order to reduce that harm, New York statutes require that the Department of Social Services make efforts to prevent the removal of children from their parents before taking them into foster care, and that all possible relatives and other adults with whom the child has a positive relationship be explored before placing children with strangers. It is also the reason why the Legislature has required that meaningful visitation be arranged between the child, parent, and siblings, and that the Department of Social Services make efforts to reunify the

⁵² *See, e.g., Trauma Caused by Separation of Children from Parents* (ABA Jan. 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/trauma-caused-by-separation-of-children-from-parents/> (January 2020); Colleen Kraft, MD, American Academy of Pediatrics Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf> (“[s]eparating children from their parents contradicts everything we stand for as pediatricians—protecting and promoting children’s health.”); Letter from Jessica Henderson Daniel, American Psychological Association President, and Arthur C. Evans, Jr., Chief Executive Officer, President Donald J. Trump (June 14, 2018), <http://www.apa.org/advocacy/immigration/separating-families-letter.pdf>. (“[d]ecades of psychological research have determined that it is in the best interest of the child and the family to keep families together.”); Karen Jones-Mason, Kazuko Y. Behrens, & Naomi I. Gribneau Bahm, *The Psychobiological consequences of child separation at the border: Lessons from research on attachment and emotion regulation*, 23 ATTACHMENT & HUMAN DEV. 1, 2 (2021) (“... even mild separations from the parent trigger a stress response and offer some insight into the toxic impact on children of separation from parents.”)

family as quickly as possible. In eliminating these requirements, the Host Homes Regulations threaten to do grave harm to children.

91. Additionally, the Host Homes Regulations provide no limit on the length of time or number of extensions for each placement and never provides for court intervention or oversight. While the Family Court must approve any voluntary placement expected to last more than 30 days,⁵³ children are at risk of languishing in the shadow foster care system created by the Host Homes program.

92. The Host Homes Regulations further pose a risk of harm to older youth by depriving them of the statutory protections of the Family Court Act and Social Services Law designed to ensure that they do not become homeless upon reaching adulthood, including the provisions that allow them to remain in placement until age 21 and requiring that they be provided with services to prepare them for adulthood.

93. The Host Homes Regulations pose additional risk of harm to youth who may be placed with strangers out of New York State without the statutory protections provided by the Interstate Compact on the Placement of Children, SSL § 374-a.

94. Thus, Petitioners have standing to sue to annul the Host Homes Regulations.

TIMELY FILING OF THIS ARTICLE 78 PROCEEDING

95. This case is timely filed, in accordance with C.P.L.R. §§ 7804(c) and 214.

FIRST CAUSE OF ACTION Article 78 Relief

96. Petitioners repeat and reallege, as if set forth fully herein, the allegations contained in paragraphs 1-95.

⁵³ SSL§ 358-a(1).

97. Under C.P.L.R. § 7803(2), this Court can review whether an agency “proceeded, is proceeding, or is about to proceed without or in excess of jurisdiction.” N.Y. C.P.L.R. § 7803(2).

98. Under C.P.L.R. § 7806, this Court can “direct or prohibit specified action by the respondent.” N.Y. C.P.L.R. § 7806.

99. In drafting, adopting, and promulgating the Host Homes Regulations, Respondents have proceeded and continue to proceed without and/or in excess of their jurisdiction. The regulations were promulgated in contravention and usurpation of Legislative authority, as the Respondents appropriated powers for themselves that the Legislature did not authorize them to hold.

100. Therefore, the Court should rule in favor of Petitioners, annul, vacate, and set aside the Host Homes Regulations.

SECOND CAUSE OF ACTION
Article 78 Relief

101. Petitioners repeat and reallege, as if set forth fully herein, the allegations contained in paragraphs 1-100.

102. Under C.P.L.R. § 7803(3), this Court can review final agency regulations and annul them if they are “affected by an error of law,” “arbitrary and capricious,” or “an abuse of discretion.” N.Y. C.P.L.R. § 7803(3).

103. Under C.P.L.R. § 7806, this Court can “direct or prohibit specified action by the respondent.” N.Y. C.P.L.R. § 7806.

104. Here, the Host Homes Regulations that were drafted, adopted, and promulgated by OCFS in contravention and usurpation of Legislative authority are affected by an error of law, are arbitrary and capricious, and represent an abuse of discretion.

105. Therefore, the Court should rule in favor of Petitioners and annul the Host Homes program.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for judgment:

1. Annulling, vacating and setting aside the Host Homes Regulations promulgated by Respondents; and
2. Granting Petitioners all other relief as this Court deems just and proper.

Respectfully Submitted,

Dated: April 5, 2022
New York, New York

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Karen Freedman, being duly sworn, states that she has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, she believes them to be true.



Sworn to and subscribed before me
this 4th day of April, 2022



Notary Public

MARITZA MATEO
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01MA6259518
Qualified in King County
Commission Expires April 16, 2024

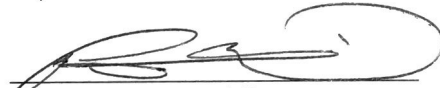
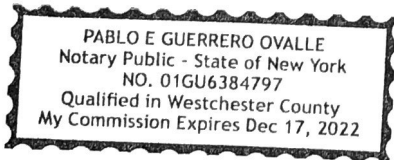
VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Lisa Freeman, being duly sworn, states that she has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, she believes them to be true.



Sworn to and subscribed before me
this 4th day of April, 2022


Notary Public

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Judith M. Gerber, being duly sworn, states that she has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, she believes them to be true.



Sworn to and subscribed before me
this 5th day of April, 2022



Notary Public

MELINDA J GULLO NOTARY PUBLIC STATE OF NEW YORK QUALIFIED IN THE COUNTY OF ERIE LIC. # 02GU6248327 MY COMMISSION EXPIRES 9/19/2023
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