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Appellate Division, Third Department Docket CV-23-2341  
Supreme Court, Rensselaer County Index EF2022-271346

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**STATE OF NEW YORK  
COURT OF APPEALS**

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In the Matter of

Lawyers for Children, The Legal Aid Society, and Legal Aid Bureau  
of Buffalo, Inc.,

*Petitioners-Appellants,*

-against-

The New York Office of Children and Family Services and Sheila J.  
Poole, in her Official Capacity as Commission of New York State  
Office of Children and Family Services,

*Respondents-Respondents,*

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**BRIEF OF THE COLUMBIA LAW SCHOOL FAMILY DEFENSE  
CLINIC, NEIGHBORHOOD DEFENDER SERVICE, THE ALLIANCE  
FOR CHILDREN'S RIGHTS, THE BRONX DEFENDERS, JUST  
MAKING A CHANGE FOR FAMILIES, MOTHER'S OUTREACH  
CENTER, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,  
NATIONAL CENTER FOR YOUTH LAW, NYC FAMILY POLICY  
PROJECT, NEW YORK STATE DEFENDERS ASSOCIATION,  
PARENTAL RIGHTS FOUNDATION, PUBLIC COUNSEL, AND RISE  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS**

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## **Question Presented**

Whether the Host Family Homes regulation, which creates a new pathway for child protective services agencies to separate parents and children without due process, was a valid exercise of the Office of Children and Family Services' authority.

## **Summary of Argument**

Hidden foster care refers to a range of practices through which a local child protective services (CPS) agency pressures a parent to acquiesce to a change in a child's physical custody without Family Court involvement. To the detriment of New York families and without authorization from the Legislature, the Host Family Homes program expands hidden foster care in the state.

Hidden foster care is a coercive practice that strips parents and children of procedural rights and leads to unnecessary family separations. Targeting families when they are most vulnerable, hidden foster care deals lasting damage to parents and children in New York and across the country.

The Host Family Homes regulation would create a new form of hidden foster care. The regulation entails CPS agencies effectively sending children to live with strangers outside of Family Court. In establishing Host Family Homes by regulation, the Office of Children and Family Services (OCFS) acclaimed the program's supposedly voluntary nature and exempted families with an open CPS

investigation from participating—presumably to ensure that CPS involvement would not lead to coercive family separations that are the hallmark of hidden foster care. But the regulation contains a massive loophole: it permits children in families subject to “differential response” CPS interventions—which includes thousands of families across New York each year—and in families with recently closed CPS investigations to be sent to live in host homes. The regulation thus permits CPS to coerce countless parents into giving up physical custody of their children. And the program lacks important procedural protections, most notably the right to counsel for both parents and children facing prolonged separation from each other.

Because the Host Family Homes regulation provides a new path for CPS to separate families and the Legislature has not authorized OCFS to make this dramatic change, this Court should annul the Host Family Homes regulation.

### **I. Hidden Foster Care Harms Parents And Children**

Hidden foster care includes various practices through which local CPS agencies alter a child’s physical custody without family court involvement (*see* Casey Family Programs, Issue Brief: Strong Families: How is the practice of hidden foster care inconsistent with federal policy and harmful to children and families 1 [2023], available at [https://www.casey.org/media/23.07-QFF-SF-Hidden-Foster-Care\\_fnl.pdf](https://www.casey.org/media/23.07-QFF-SF-Hidden-Foster-Care_fnl.pdf) [accessed 23 Oct. 2025]). Also termed “shadow foster

care,” these systems “circumvent[] legal safeguards” and “bypass[] th[e] essential process of checks and balances” that have long been thought necessary when an agency separates a child from their parents (*id.* at 1; *id.* at 3).

Hidden foster care typically begins in the same way as formal foster care proceedings: a CPS agency investigates a parent for alleged neglectful or abusive behavior. When an agency believes a child faces an unacceptable risk of harm, it can lawfully take one of three actions: file a petition in family court to intervene, work with the family without separating them, or close the case. Hidden foster care systems provide the agency with another option: avoid the regular procedures created by state legislatures to govern CPS-initiated separation and coerce the parent, through the explicit or implicit threat of a formal proceeding, to give up temporary physical custody of their child. CPS agencies pursue this fourth option both when the investigation identified safety risks supporting removal and when the investigation did not identify safety risks that would support removal (Casey Family Programs, Issue Brief at 1-2). In both situations, the agency urges the parent to send their child to live with someone else, at least temporarily, and warns that if the parent refuses the agency may remove the child and bring the family to court. Parents receiving this ultimatum face a massive “power differential” and often are not aware of their options or rights (*id.* at 2; Annie E. Casey Foundation (AECF), *New Insights on State Kinship Diversion Policies* 3 [2024], available at

<https://assets.aecf.org/m/resourcedoc/Report-kinshipcarediversion-2024.pdf>

[accessed Oct. 21, 2025]). Having just experienced a potentially “traumatizing and stressful” investigation, and without meaningful access to counsel to advise them of the credibility of the agency’s threat or negotiate alternative solutions, the parent acquiesces (Casey Family Programs at 3; Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stan. L. Rev.* 841, 877, 902 [2020]). Thus, hidden foster care and formal foster care also end in the same place: with a child separated from their family.

While hidden foster care—which happens outside the oversight of courts—may be convenient for the agency, it is devastating for families. Hidden foster care is not voluntary but coercive. It separates parents and children unnecessarily—imposing the same harms of separation on children that this Court has long recognized in the formal foster care system, and it lacks procedural protections (*cf.* *Nicholson v Scoppetta*, 3 NY3d 357, 375 [2004]). Given such harmful consequences and divergence from established statutory and constitutional procedures, this Court should refuse to sanction programs that enable and expand hidden foster care.

#### **A. Hidden Foster Care Is Coercive**

Operating under a façade of voluntariness, hidden foster care is inherently coercive. Faced with CPS’s threat that if they do not give up temporary custody of

their child they will face a family court proceeding that could result in permanent removal, parents feel that they have no option and acquiesce to temporary separation from their child. Contrary to Respondents' arguments, such processes are far different than a parent acting on their own accord, without CPS intervention, to "temporarily arrange for others to care for their children" (brief for respondents, at 9). In one case, a parent affirmatively seeks temporary assistance; in hidden foster care, a CPS agency coerces temporary separation through the threat of greater intervention.

Any threat of separating a parent from their child is coercive, and it is especially so when CPS is involved. Parents face such threats on their own doorsteps, often after an invasive—and sometimes traumatizing—search of their homes and investigation into intimate aspects of their lives. Respondents admit that they intend to use the Host Family Homes program when parents and children are "in times of crisis," times in which parents are particularly vulnerable (brief for respondents, at 14; *see also* Casey Family Programs at 3). When responding to such situations, agency officials often demand parents make a quick decision, refusing to give parents time to fully consider what their options are. (*e.g.*, *Croft v Westmoreland County Children and Youth Servs.*, 103 F3d 1123, 1124-25 [3d Cir 1997] [demanding a father "immediately" leave his home or his child would be removed "that very night"]; *Hogan v Cherokee County*, 519 F Supp 3d 263, 274

[WD NC 2021] [informing a father that “he had 24 hours to get back” from the hospital where he was caring for his wife to execute the transfer of physical custody]). Additionally, in such moments, parents are typically without access to counsel and may not understand their rights (*see* Gupta-Kagan at 877, 902; AECF 2024 Report at 3). Parents in these situations are also more likely to be poor, lack access to higher education, and be from minority groups, exacerbating their vulnerability (*cf. Santosky v Kramer*, 455 US 745, 753 [1982] [describing demographics of families subject to CPS agency intervention]). Meanwhile, the state—with its power to separate families, sometimes forever—sits on the other side of the threat. Through hidden foster care, CPS leverages this imbalance of power and knowledge, a process that is far different from a parent affirmatively and voluntarily seeking temporary care. With CPS involved and without additional due process checks, the parent-child separations that result are inherently coercive.

New York, along with many other states, admits that agency officials—not parents—control such agreements. In a nationwide study on hidden foster care, the Annie E. Casey Foundation (AECF)—a national foundation dedicated to improving the lives of children and families—asked state officials who made the “final decision” about the temporary and supposedly voluntary placement of children in outside of family courts (AECF 2024 Report at 5). Fourteen states,

including New York, responded that “[a]gency officials,” not parents, make the final determination (*id.*; Annie E. Casey Foundation, *Family Ties: Analysis From a State-by-State Survey of Kinship Care Policies* 6 [2024], available at <https://assets.aecf.org/m/resourcedoc/Report-kinshipcarediversion-datatables-2024.pdf> [accessed Oct. 21, 2025]). One way in which CPS officials do this in New York is through the use of a “safety plan” (*see* Off. of Child. & Fam. Servs., Admin. Directive No. 25-OCFS-ADM-06, Safety Planning and Case Closing in Child Protective Services Investigations [2025]). Under such a plan, and before an investigation has been completed, CPS may require parents to submit to “the controlling intervention of the use of a safety resource, such as relatives, friends, neighbors, clergy, or other individuals in the community”—in other words, give up temporary physical custody of their child to a kinship or known caregiver (*see id.* at 3). If a parent declines to participate in this plan, “CPS *must* assess whether . . . to initiate a family court petition” (*id.* at 4 [emphasis added]). Local agency officials in New York, therefore, are presenting parents with an ultimatum prior to the completion of any investigation: comply with these demands or risk even greater intervention.

Multiple courts have recognized the coercion built into temporary placement programs, at times reprimanding agencies for inappropriately characterizing such processes as voluntary. The leading case, from the U.S. Court of Appeals for the

Third Circuit, is *Croft v Westmoreland County Children and Youth Services* (103 F3d at 1123). There, the local CPS agency received a call alleging that Henry Croft was abusing his daughter Chynna (103 F3d at 1124). During the agency’s investigation, Croft, his wife, and Chynna all denied all allegations in separate interviews (*id.*). Despite the lack of evidence of abuse, the state’s caseworker gave Croft “an ultimatum”: he could either leave the home, or the state “would remove Chynna from the home that very night and place her in foster care” (*id.* at 1124-25). Facing such a “dilemma,” Croft left the home (*id.* at 1125). Croft subsequently sued for a violation of his substantive due process rights to parent his child (*id.*). The state claimed that his decision to leave was “voluntary” (*id.* at 1125 n 1). The Third Circuit vehemently rejected that argument: “The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was *blatantly coercive*. The attempt to color his decision [as voluntary] is not well taken” (*id.* [emphasis added]).

Other courts have also recognized the ways in which CPS agencies use coercion to interfere in familial life. In *Holliday v Leigh*, a local CPS agency investigated Maureen Holliday after it received a report that her child had a small bite mark on her backside (2020 WL 3217666, \*1, [ED Ky, June 15, 2020, No. 2:17-CV-113WOBCJS]). After investigating the bite mark, the caseworker presented Holliday with a plan that limited Holliday’s contact with her daughter

and told Holliday that “if [Holliday] did not sign the Plan then [the caseworker] would take AH into immediate custody” (*id.*). Facing such a threat and without counsel, Holliday signed the plan (*id.* at \*2). After months of limited contact with her daughter and regular state interference in their lives, the agency concluded that there was no finding of any abuse (*id.* at \*3-5). Holliday sued for a violation of her constitutional rights (*id.* at \*1). In allowing Holliday’s claims to proceed, the court noted that CPS “put Holliday in the position where she felt that she had no reasonable alternative but to sign the Plan and comply with its restrictions” (*id.* at \*7). The court called out the imbalance of power, noting that CPS “coerced Holliday into signing a Plan that immediately disrupted her life” (*id.*).

Courts across the country have joined the *Holliday* and *Croft* courts in finding CPS action to be coercive (*e.g.*, *Hernandez ex rel. Hernandez v Foster*, 657 F3d 463, 482 [7th Cir 2011]; *id.* at 487 [noting that “a threat that parents cannot see their child unless they agree to something is extremely coercive” when discussing a coerced safety plan]; *Stein v Depke*, 2023 WL 6038407, \*3 [D Ariz., Sept. 15, 2023, No. CV-20-00102-TUC-JCH] [noting the local agency employed “coercive tactics” to remove a child from his parents’ care] *on reconsideration in part* 2023 WL 7221893 [D Ariz., Nov. 2, 2023, No. CV-20-00102-TUC-JCH], *appeal dismissed* 2024 WL 4581329, \*1 [9th Cir, Apr. 26, 2025, No. 23-2875]; *Schulkers v Kammer*, 955 F3d 520, 528-31 [6th Cir 2020] [upholding a district

court’s finding that the plaintiffs had presented a triable issue as to whether the CPS plan they were subjected to was “involuntary”).

State agency studies also reveal hidden foster care’s inherent coercion. The Nebraska Foster Care Review Office study of Nebraska’s use of “Approved Informal Living Arrangements” (AILA) listed coercion as a key concern with the system. AILA involved “non-court voluntary case[s]” in which a parent “places their child(ren) with a relative or a friend” in lieu of court proceedings or orders (Foster Care Review Office, *The Nebraska Foster Care Review Office Quarterly Report 7* [2019]). The Review Office concluded:

“One of the most concerning and prominent issues that transpires while reviewing AILA cases is the lack of real cooperation by parents in many of the cases, calling into question their voluntary nature. . . . [I]n many cases the parents do not welcome the assistance and rather reluctantly agree to participate when faced with the alternative, which is the looming possibility of a court filing” (*id.* at 9).

AECF noted the same concern in its nationwide study on hidden foster care, reporting that “some parents and kinship caregivers are coerced or forced into these arrangements without receiving adequate information about the implications of what is happening or their options or rights” (AECF 2024 Report at 3). These studies confirm what parents, courts, scholars, and practitioners have noted for years: hidden foster care is not voluntary. It is coercive (*e.g.*, AECF 2024 Report

at 5 [“[T]here is troubling potential for child welfare agencies to coerce both parents and relatives into diversion arrangements . . . .”]; Casey Family Programs at 3 [“[H]idden foster care introduces the potential for coercion . . . .” [emphasis omitted]]; Gupta-Kagan at 861; Diane Redleaf, *They Took the Kids Last Night: How the Child Protection System Puts Families at Risk* 190 [2018] [noting that parents are “coerced into accepting safety plan separations”]).

### **B. Hidden Foster Care Unnecessarily Separates Families**

The inherent coercion in hidden foster care leads to devastating substantive effects on families. There are many instances illustrating how hidden foster care leads to unnecessary parent-child separations.

Brian Hogan and his daughter H experienced these harmful effects from a hidden foster care scheme in North Carolina (*Hogan*, 519 F Supp 3d at 263 [WD NC 2021]). After Hogan left H in a neighbor’s care to be with his wife in the hospital after she experienced a medical emergency, the local CPS agency received a report of concerns with H’s hygiene (*id.* at 274). The local agency demanded that Hogan immediately return home and execute a voluntary placement agreement to temporarily place H with family. If he did not sign the voluntary agreement, he may “never see” H again (*id.* at 274-75). Without the opportunity to consult with counsel, Hogan signed the agreement, sending H to live with his father (*id.*). Only

after obtaining counsel in December 2017—over a year after the state had removed H from Hogan’s care—did Hogan regain custody of H (*id.*).

Hogan subsequently filed suit for the variety of ways in which the local agency had violated his and H’s rights (519 F Supp 3d at 276-92). The suit revealed that “[n]one of the facts” from the investigation demonstrated that the agency had the evidence to remove H or keep father and daughter apart (*id.* at 281; Kate Martin, *Verdict: Federal Jury Awards Millions to Daughter, Father Separated by Cherokee County DSS*, Carolina Pub. Press [May 13, 2021] available at <https://carolinapublicpress.org/45565/verdict-federal-jury-awards-millions-to-daughter-father-separated-by-cherokee-county-dss/> [accessed Oct. 21, 2025]). The hidden foster care system had separated a family for over a year on evidence that, if presented through the normal family court system, would not have sufficed to separate them for even a day (*see* Martin).

Hogan’s case revealed a larger pattern of hidden foster care. Agency caseworkers testified that they used voluntary placement agreements precisely in cases in which they believed they “could not convince a judge to issue an [official] order” (Martin). A ProPublica article reports the same, noting that “[i]n shadow foster care . . . individual caseworkers or supervisors can choose to take children from their homes for reasons that would never hold up in court” (Lizzie Presser, “*They Took Us Away From Each Other*”: *Lost Inside America’s Shadow Foster*

*System*, ProPublica [Dec. 1, 2021] available at <https://www.propublica.org/article/they-took-us-away-from-each-other-lost-inside-americas-shadow-foster-system> [accessed Oct. 21, 2025]).

Similar fact patterns have been documented elsewhere. In *Schulkers v Kammer*, the Schulkers alleged that they were pressured to sign a safety plan that included intense surveillance and investigation of the family for two months “under the belief that if they did not agree . . . all the children in their house would be removed” (955 F3d at 528-31). The Sixth Circuit held that such a coercive plan would violate the Schulkers’ procedural and substantive due process rights (*id.* at 549).

Hidden foster care’s due process violations and lack of oversight exacerbate racial disparities. It has been established that “[r]acial disparities are particularly pronounced” during the “initial stages of a case” (Gupta-Kagan at 877). Therefore, when caseworkers and agencies are given discretion to suggest a removal through hidden foster care prior to all the facts being aired in court, biases “infect decisions” (*id.*). And because hidden foster care lacks due process checks and balances, those infected decisions are especially difficult to prevent or correct (*id.*). Hidden foster care, therefore, not only risks unnecessary family separations but also risks increased racial disparities in an already racially biased system (*see Matter of Sapphire W.*, 237 AD3d 41, 51 [2nd Dept 2025] [noting “the

disproportionate involvement of Black and Hispanic children in the child welfare system” citing Testimony of David A. Hansell, N.Y. City Council, Comm. on General Welfare, Oct. 28, 2020, at 6]).

Such unnecessary separations can last for extended periods of time. “The informal arrangements can last weeks, months, or years” (Presser). This results from the lack of required visitation and reunification efforts that are supposed to accompany a removal that took place in family court (*see* Gupta-Kagan at 979). An American Bar Association article on hidden foster care noted this concern: in hidden foster care systems, “caregivers are not given support to navigate visitation between a child and parent or a plan (or support) for reunification” (Angela Schwartz & Catherine E. Krebs, *Addressing Hidden Foster Care: The Human Impact and Ideas for Solutions*, ABA [Mar. 31, 2020]). One caregiver who had agreed to temporarily care for her daughter’s child through a voluntary agreement stated: “There was no support for [my daughter] to reunify. My daughter felt like if she had been given the opportunity to reunify, she would have reunified” (*id.*).

These harms demonstrate the real, substantive impacts that hidden foster care, and its built-in coercion, has on parents and children. These systems lead to unjustified and prolonged separations, the harms of which cannot be understated (*see* Melissa Friedman & Daniella Rohr, *Reducing Family Separations*, 123 Colum. L. Rev. F. 52, 59 [2023] [noting “stress and trauma” as two “effects of

removal” on children]; Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Families*, 102 Marq. L. Rev. 1161, 1165-70 [2019] [discussing “the traumatic impact of removal on families”]; Children’s Rights Litigation Committee, ABA, *Trauma Caused by the Separation of Children From Parents* at 6-18 [2019] [collecting research and case law that documents the harms removal has on families]). Hogan, having experienced these devastating consequences firsthand, hopes for an end to hidden foster care, saying: “I hope no other family goes through what my family went through, me and my daughter” (*see* Martin).

### **C. Hidden Foster Care Strips Parents Of Important Procedural Protections**

Exacerbating the harms of hidden foster care is the lack of basic procedural protections in such systems. This lack of protections raises serious statutory and constitutional concerns. Hidden foster care moves decisions about separation—and therefore decisions affecting parents’ and children’s fundamental liberty interests—out of the courtroom, stripping parents and children of important procedural protections like right to counsel and judicial oversight. “[Hidden foster care] is a legally undomesticated process through which state agencies effectuate a change of custody for thousands of children with little, if any, meaningful due process. State agencies thus coerce a surrender of fundamental constitutional rights with no lawyers or legal checks” (Gupta-Kagan at 844).

John Mattingly, the former Commissioner of New York City’s Administration for Children’s Services, raised similar concerns about the lack of procedural protections that exist in hidden foster care programs. He wrote: “Should the court not always be involved in a removal decision? Should not the family have the same rights . . . ? Doesn’t the child have the same rights to counsel, to timely permanence . . . as does a child in unrelated foster care?” (Annie E. Casey Foundation, *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families, and Child Welfare Agencies* 15 [2013], available at <https://assets.aecf.org/m/resourcedoc/KinshipDiversionDebate.pdf> [accessed December 22, 2025]).

Professor Merrill Sobie raised this concern about the Host Family Homes program, a program which Part II will show is a form of hidden foster care (Professor Merrill Sobie, brief for amicus curiae in support of petitioners-appellants<sup>1</sup>, *Matter of Lawyers for Children v New York State Off. of Children & Family Servs.*, 240 AD3d 78 [2025], available at 2024 WL 5340824). He writes that “the Host Homes Regulations strip away” important statutory procedural protections that New York fought for decades to put in place (*id.* at 8). While the New York family court system is far from perfect, it has long included procedural protections for parents and children, such as “judicial oversight, the right to

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<sup>1</sup> Hereafter, “Sobie Br.”

counsel, the availability of social services, the prioritization of kinship placements, and the continuous focus on reunification” (*id.*). By stripping these protections, Sobie writes, Host Family Homes threatens to “reverse the contemporary statutory protective scheme and constitute[s] a legal throw back to a former failed era” (*id.* at 14). Respondents agree the Host Family Homes program has less procedural safeguards than similar programs (brief for respondents. at 38, 46-47, 61 [noting “the absence of those safeguards”]).

The elimination of these procedural protections raises constitutional due process concerns. Parents and children share reciprocal constitutional rights to remaining together and keeping their family integrity intact (*Duchesne v Sugarman*, 566 F2d 817, 825 [2d Cir 1977]). This substantive right has long been accompanied by statutory and constitutional procedural due process rights. Under the United States Constitution, parents have the right to a “hearing on [their] fitness as a parent before” any removal of a child (*Stanley v Illinois*, 405 US 645, 649 [1972]). Under New York law, there is a right to court-appointed counsel for any indigent parent facing the removal of their child (*Matter of Ella B.*, 30 NY2d 352, 356-58 [1972]; *see also* Family Ct Act § 262) and for any children facing separation from their parents (Family Ct Act §§ 249; 1016). Additionally, a parent has a right to a hearing in which the state agency must show “imminent risk to the child’s life or health” to justify continued removal of a child from a parent’s care

prior to any finding of neglect or abuse (*see* Family Ct Act §§ 1027 [b] [1]; 1028 [a]). Hidden foster care practices include none of these procedural protections despite implicating the same fundamental liberty interests: parents’ and children’s rights to family integrity.

This lack of due process is a key feature of New York hidden foster care. In *Stumpf v Cooley*, after receiving a report of alleged neglect, state agents opened an investigation into Nicholas Bates Stumpf (2024 WL 1443647, \*1 [WD NY Apr. 3, 2024, No. 6:21-CV-06248 EAW]). Upon conclusion of the investigation, the agents told Stumpf that he must either “bring [his] children to a family member’s home” or “the children would be removed by the police and placed into a foster home” (*id.*). Forced to make a quick decision without counsel, Stumpf brought his children to their maternal great-grandfather’s home (*id.*) The next day, Stumpf contacted an attorney who told him that he could pick his children back up, given that there were no court orders changing the physical custody of the children (*id.* at \*2). Stumpf picked up his children (*id.*). Almost immediately, government agents appeared at Stumpf’s door, telling him that he was not to have custody of his children, and commanding him to sign a “document against his will” to give up temporary physical custody of his children (*id.* at \*2-3). Stumpf subsequently sued the government agents for a violation of his constitutional rights (*id.*). The court noted that the alleged facts adequately formed the basis for a procedural due

process claim (*id.* at \*3). This example demonstrates how local CPS agents use hidden foster care to unnecessarily separate children from their parents, raising constitutional issues in the process.

These due process concerns have been noted in multiple jurisdictions. In *Croft*, the Third Circuit noted “the policy of removing the suspected parent from the family home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue” (*Croft*, 103 F3d at 1125 n 3). In a study on hidden foster care in California, researchers noted the same:

“[A]s a matter of due process, action by the state to facilitate a change of the child’s physical custody ‘should trigger a right of parents to obtain legal counsel (appointed if necessary) to advise them of their rights and negotiate appropriate plans with CPS agencies.’ Without representation, ‘[s]tate agencies infringe on parents’ and children’s fundamental right to family integrity with few meaningful due process checks’” (Alliance for Children’s Rights, *The Human Impact of Bypassing Foster Care for At-Risk Children* at 19 [2020] available at <https://allianceforchildrensrights.org/wp-content/uploads/HFC-Report-Update.pdf> [accessed Oct. 21, 2025]).

Hidden foster care erases procedural protections that have long been thought important—indeed mandatory—to protect the substantive rights of parents and children. As a result, hidden foster care leads to unnecessary and harmful family separation and raises serious constitutional concerns.

## **II. Host Family Homes Expand Hidden Foster Care In New York**

The Host Family Homes program exacerbates hidden foster care in New York. Under this regulation, CPS can coerce parents into giving up their children to strangers for up to one year (*see* 18 NYCRR 444.5 [h] [1]). OCFS, recognizing the potential for this coercion, sought to prevent any Host Homes placement during an open agency investigation (*see id.* 444.5 [c]). And Respondents emphasize “the program’s intended lack of involvement of the child welfare and court systems” under the regulation (brief for respondents at 38 [quoting *Matter of Lawyers for Children*, 240 AD3d 78, 87 [3rd Dep’t 2025]]; *see also* brief for respondents at 69-70). But the regulation left glaring loopholes: CPS can coerce family separations for the thousands of New York families facing intervention via “differential response” (a process which does not involve an investigation) and immediately after an investigation is closed (*see* 18 NYCRR 444.5 [c]). Further, the regulation strips parents and children of their right to counsel when facing separation in Family Court.

### **A. Differential Response Subjects Families To Agency Supervision And Coercion**

Existing statutes and regulations in New York enable CPS to exercise coercive control over families outside of agency investigations or Family Court cases.

## **1. CPS Supervises Families In Differential Response Without Court Involvement**

In 2007, seeking to provide alternatives to Family Court intervention, the New York Legislature amended the New York Social Services Law to include a new means of responding to allegations of neglect known as “differential response” (Social Services Law § 427-a, as added by L 2007 ch 452, § 2). Recognizing that parents in Family Court proceedings “are thrust into an environment that is both adversarial and defensive,” the Legislature aimed to “allow[] [child services] agencies to differentiate their response to reports of child abuse and neglect . . . in lower risk cases . . . without requiring a formal determination that abuse or maltreatment has occurred” (Assembly Mem in Support, Bill Jacket, L 2007, ch 452).

As amended in 2011, the statute authorizes OCFS to approve applications from local CPS agencies to implement differential response programs. (Social Services Law § 427-a [2]). The law instructs approved CPS agencies to “identify those reports which are initially eligible to be included in [a] family assessment and services track,” which provides “an alternative means of addressing certain matters otherwise investigated as allegations of child abuse or neglect” (*id.* at [1], [4] [b]). A “family assessment” case is thus distinguished from a CPS investigation.

In 2014, OCFS issued a regulation governing local CPS agencies' differential response programs (18 NYCRR 432.13). Titled "Family Assessment Response" (FAR), the regulation clarifies that this new form of family supervision is extensive and continuous: "In family assessment response, there is an ongoing assessment of the safety of children without a determination of whether the report of alleged abuse or maltreatment should be" formally investigated (*id.* § [a] [1]). FAR caseworkers are instructed to "continually monitor[] the presence or emergence of safety threats . . . until the family assessment response case is closed" (*id.* at [d] [1], [d] [4]).

Tens of thousands of New York families across at least 30 counties are now subject to FAR cases annually (*Family Assessment Response*, Office of Children and Family Services, <https://ocfs.ny.gov/programs/cps/assessment-response.php> [accessed Oct. 24, 2025] [listing 30 counties with approved programs]). From 2020 to 2024, FAR cases doubled statewide, in terms of both the number of cases—from roughly 8,500 to nearly 18,000—and the percentage of all statewide child services cases filed on the FAR track—from roughly 6% to 12% (Office of Children and Family Services, 2024 Monitoring and Analysis Profiles With Selected Trend Data: 2020-2024 at 4 [2024], available at <https://ocfs.ny.gov/reports/maps/counties/New%20York%20State.pdf> [accessed Oct. 24, 2025]). In New York City, the Administration for Children's Services

(ACS) has implemented a version of FAR called Collaborative Assessment, Response, Engagement & Support (CARES) (*The Collaborative Assessment, Response, Engagement & Support (CARES) Approach*, ACS, available at <https://nyc.gov/site/acs/child-welfare/cares.page> [accessed Oct. 24, 2025]).

CARES cases have more than doubled in the 2020s, from around 4,000 cases in 2021 to 10,000 cases in 2023 (*Explainer: Where to Find Data on Investigations in NYC*, NYC Family Policy Project [Feb. 25, 2024], available at <https://familypolicynyc.org/explainer/investigations2024> [accessed Oct. 21, 2025]). In 2024, the number of CARES cases jumped further to 11,275, nearly 22% of all ACS cases (ACS, Child Protection Cases by Community District [2024], available at <https://www.nyc.gov/assets/acs/pdf/data-analysis/2024/investigations-and-cares-cases-by-district.pdf> [accessed Oct. 21, 2025]).

CARES caseworkers routinely supervise and surveil families for a period equivalent to CPS investigations. Data show that CARES cases typically last until the end of the standard 60-day window under OCFS regulation (NYC Family Policy Project; *see also* 18 NYCRR 432.13 [e] [3] [v]). That 60-day timeline is the same length as a formal CPS investigation (18 NYCRR 432.2 [b] [3] [iv]).

## **2. This Informal Supervision Enables Coercion Of Families**

Both FAR and CARES purport to leave parents with agency. OCFS instructs FAR caseworkers to give parents enough information “to make an informed decision about whether to accept participation in the family assessment response track” (18 NYCRR 432.13 [c] [3]). Similarly, ACS explains that CARES caseworkers “work in *partnership* with families to address problems that could affect child safety” (*Cares Approach*). Despite this stated goal, FAR and CARES cases permit tremendous intervention into families’ lives. Once a family has an open case, CPS gains leverage to pressure parents.

That leverage comes from a CPS agency’s power to shift a family to an investigation track at any point. Caseworkers have seven days to watch the family and decide whether they think an investigation is necessary (18 NYCRR 432.13 [d]; Office of Children and Family Services, New York State Child Protective Services Manual<sup>2</sup>, ch 5, § C-2 [2025]). After seven days, CPS can still move families to the formal investigation track if a caseworker has “reasonable cause” to believe a parent is either abusing their child, or neglecting them and “not cooperating” with child services (18 NYCRR 432.13 [c] [5] [ii] [a]).

Undermining the program’s supposedly voluntary approach, OCFS even instructs FAR caseworkers that “[i]f the family refuses to cooperate and [CPS] has

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<sup>2</sup> Hereafter, OCFS Manual.

not had an opportunity to assess whether or not there is evidence of the maltreatment specified in the report, the allegations in the *original* report can be considered sufficient evidence of maltreatment” to close the FAR case and open a formal investigation (OCFS Manual, ch. 5, § G-1). Investigations similarly loom over CARES: “If, while working with a family, a CARES [caseworker] has serious concerns about the immediate safety of a child, ACS will switch to an investigative approach” (CARES Approach).

## **B. Host Family Homes Are Hidden Foster Care**

The power imbalance inherent in FAR cases coupled with the differential response loophole in the Host Family Homes regulation leads to one inescapable conclusion: the regulation creates another form of hidden foster care in New York. And it does so without legislative authorization or important due process protections for parents and children’s shared right to family integrity.

### **1. Host Family Homes Enable Coercive Family Separations Without Court Involvement**

New York is the first state to implement a Host Family Homes program by regulation, as opposed to by legislation (*Matter of Lawyers for Children*, 240 AD3d at 93-94 [3rd Dept 2025] [Pritzker, J., dissenting]). The program has several aims (*see* 18 NYCRR 444.2 [f]). The provision at issue here professes to kick in only “when a parent has determined that he/she is temporarily unable to care for their child” (*id.*). Touted as “a way to avert the need for more formal child welfare

intervention,” it allows a parent to “designat[e] . . . a ‘person in parental relation’ to allow a host family to care for his or her child” (*id.*). A longstanding pathway under New York law, the “person in parental relation” designation was enacted by the Legislature to allow parents to designate temporary caregivers when a parent is incapacitated (*see* General Obligations Law § 5-1551).

On the face of the Host Family Homes regulation, the choice to designate a person in parental relation must be voluntary (*see* 18 NYCRR 444.5 [b]).

Recognizing that it was charting new waters, OCFS padded the regulation with a mandate for “policies and procedures . . . to adequately provide” that parents do not agree to place their children in a Host Family Home “as a result of coercion” (18 NYCRR 444.11 [a]).

Apparently also recognizing the risk that the regulation could facilitate hidden foster care placements when families face CPS involvement, OCFS included a provision barring parents with an “open investigation of a report of suspected child abuse or maltreatment or of an open indicated case of child abuse or maltreatment” from designating someone as a person in parental relation and sending their child to a Host Family Home (18 NYCRR 444.5 [c]). That makes sense, as the stated purpose of the program is to help parents who decide on their own that they cannot care for their child (18 NYCRR 444.2 [f]). And, for all the reasons explained in Part I, an open child services investigation or indicated case

poses the risk of agencies coercing parents into unnecessary separations from their children.

Notably, however, the regulation leaves a tremendous loophole. It does not bar parents with an open FAR/CARES case, or recently closed investigation, from designating a person in parental relation. According to the regulation, only a parent with an “open investigation . . . or . . . an open indicated case” is ineligible (18 NYCRR 444.5 [c]).

Far from “temporarily supporting a family when a parent has determined that he/she is temporarily unable to care for their child,” then, the Host Family Homes program allows CPS to funnel children into hidden foster care when a caseworker determines, in Respondents’ words, that parents are “muddl[ing] through a crisis.” (brief for respondents, at 41; see also 18 NYCRR 444.2 [f]). For parents with an open investigation, CPS can close the investigation if the parent “agrees” to designate a person in a parental relation and send their child to a Host Family Home (18 NYCRR 444.5 [b]). For parents with an open FAR/CARES case, CPS can tell parents that the only way to avoid an open investigation track is if they do the same.

Despite promising to avoid “coercion,” the Host Family Homes regulation offers no protection against these coercive practices (18 NYCRR 444.11 [a]).

Instead, its structure allows CPS agencies to pressure families into a new form of hidden foster care: coerced placements with strangers in Host Family Homes (*id.*).

## **2. The Host Homes Regulation Would Permit An Even More Invasive Form Of Hidden Foster Care**

While many concerns exist with hidden foster care, as discussed in Part I, it has one important feature that is generally positive: when hidden foster care separates parents and children, children typically go to live with kinship caregivers. The Host Family Homes regulation’s definitions, however, make no mention of a kinship relationship in defining host family homes (18 NYCRR 444.2). The regulation would thus permit an even more invasive form of the practice: hidden foster care that coerces parents to placements with *non-kinship* substitute caretakers—the “host homes” caretakers.

## **3. Host Family Homes Lack Procedural Protections Of Court-Sanctioned Separations**

The Host Family Homes regulation purports to give parents several procedural rights. But like with its promise to avoid coercion, the regulation falls short, leaving parents and children without procedural protections against unnecessary separations.

First, the regulation strips parents of their right to counsel. More than fifty years ago, this Court ruled in *Matter of Ella B.* that parents who are accused of abuse or neglect in Family Court and cannot afford a lawyer are entitled to have

one appointed under the Due Process Clause of the New York Constitution. (30 NY2d at 356-58). An attorney is a cornerstone procedural right for parents facing the loss of custody over their children. “A parent’s concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right,” this Court wrote in *Ella B.*, “to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer” (*id.* at 356). Similarly, the legislature has provided children with a right to counsel when they are placed in voluntary foster care through the approved statutory process and when facing removal from their parents (Family Ct Act §§ 249, 1016).

The Host Family Homes regulation replaces parents’ absolute right to counsel with a mostly meaningless right to try to obtain counsel. Among the “policies and procedures” to avoid coercing parents, the regulation requires that parents be informed “where [they] may obtain free or low-cost legal representation” (18 NYCRR 444.11 [a] [2]). It does not require that parents actually have an attorney, free or otherwise, before they designate a “person in parental relation” to take physical custody of their child (*id.*). Nor does it guarantee that the attorneys referred to parents will actually be able to represent them. In these circumstances, if a parent is not appointed a lawyer, they will not have one. There is simply no system to provide free counsel to all of the

potentially thousands of affected parents. And even if a parent could eventually secure counsel, a caseworker who decides that a child might be better off in a Host Family Home will not wait for a parent without means to find a free attorney to challenge their recommendation.

Second, children can be separated from their parents through Host Family Homes for far longer than through voluntary placements in foster care. A typical CPS investigation or FAR/CARES case lasts for 60 days (*see* 18 NYCRR 432.2 [b] [3] [iv] [investigation]; 18 NYCRR 432.2 [e] [3] [v] [concerning FAR]). If parents on either track “agree” to place their children with strangers in foster care, New York law permits these voluntary foster care placements for a mere 30 days before a Family Court must sign off (Social Services Law § 358-a). By contrast, the Host Family Homes regulation permits children to stay with strangers in approved homes without Family Court approval for up to a year (*see* 18 NYCRR 444.5 [h] [1]).

## **Conclusion**

OCFS exceeded its authority in promulgating the Host Family Homes regulation. The regulation creates a dramatic new pathway for CPS to separate tens of thousands of New York families, and it does so with no legislative consideration of such a massive change to child welfare law. Further, the regulation strips away important procedural protections, depriving parents and

children of their right to counsel in family court and permitting stranger placements without family court involvement for far longer than contemplated by New York law. That outcome is bad for families and could not have been intended by the Legislature. This Court should annul the Host Family Homes regulation, refusing to sanction a program that was promulgated unlawfully and will result in such devastating consequences.

Dated: January 5, 2026  
New York, NY



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## PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 NYCRR) § 500.1(j), Michael Weinstein, an attorney for the Proposed *Amici Curiae*, hereby affirms that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

According to the word count feature of the word processing program used to prepare this brief, this brief contains 6, 954 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or other addendum, which complies with the limitations stated in § 500.13(c)(1).

Dated: January 5, 2026  
New York, NY

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), the Neighborhood Defender Service, Parental Rights Foundation, Mother's Outreach Center, The Bronx Defenders, Just Making a Change for Families, National Association of Counsel for Children, Public Counsel, National Center for Youth Law, The Alliance for Children's Rights, New York State Defenders Association, and Rise disclose that they are non-profit organizations with no parents, subsidiaries, or affiliates. The Columbia Law School Family Defense Clinic is part of Morningside Heights Legal Services, Inc., a non-profit legal services organization affiliated with Columbia University School of Law. The NYC Family Policy Project is a partner project of the Fund for the City of New York, which was established by the Ford Foundation with the mandate to improve the quality of life for New Yorkers.

Dated: January 5, 2025  
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**STATE OF NEW YORK  
COURT OF APPEALS**

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In the matter of

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

Petitioners-Appellants,

*-against-*

THE NEW YORK 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-Respondents.

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STATE OF NEW YORK        )  
  )  
COUNTY OF NEW YORK    )

Docket: APL-2025-00081

Appellate Division, Third  
Department Docket  
CV-23-2341

Supreme Court, Rensselaer  
County Index  
EF2022-271346

**AFFIRMATION OF  
SERVICE FOR NOTICE  
OF MOTION FOR LEAVE  
TO FILE AS AMICI  
CURIAE IN SUPPORT OF  
PETITIONERS-APPELLANTS**

I, Michael Weinstein, an individual licensed to practice law in the State of New York, under the penalty of perjury, affirm as follows:

1. I am an attorney for the Proposed *Amici Curiae* in the above-captioned action. I am fully familiar with the facts of this case. I am over eighteen years of age, and am employed by the Neighborhood Defender Service of Harlem, 317 Lenox Ave, New York NY 10027, as a Strategic Litigation Staff Attorney.
2. I served two true copy, by First Class Mail, of the *Brief in Support of Amici Curiae* along with all attachments required by rules of procedure on the

following named individuals:

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I affirm this 22nd day of February, 2026, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: February 22, 2026  
New York, NY



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