APL-2025-00081

Rensselaer County Clerk's Index No. EF2022-271346
Appellate Division-Third Department Case No. CV-23-2341

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

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

Petitioners-Appellants,

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-Respondents.

BRIEF FOR *AMICUS CURIAE* PROFESSOR MERRIL SOBIE IN SUPPORT OF PETITIONERS-APPELLANTS

Eric D. Lawson
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
(212) 336-4067
elawson@mofo.com

Counsel for Amicus Curiae
Professor Merril Sobie

PHP (212) 719-0990
appeals@phpny.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

Other Authorities

INTERESTS OF *AMICUS CURIAE*

Professor Sobie is a Professor of Law Emeritus at the Elisabeth Haub School of Law at Pace University. He researches and teaches courses on family law, juvenile justice, and children and the law, has published the official *McKinney's Practice Commentaries* to the Family Court Act and the Domestic Relations Law, and has written two books and numerous articles on related subject matters. Professor Sobie also co-authored the New York State Bar Association study "Law Guardians in New York State – A Study of the Legal Representation of Children," drafted the official Bar Association Standards and Commentaries for Representing Children, and drafted the New York Juvenile Delinquency Code.

Professor Sobie has long been recognized as a distinguished leader in the field of family law. He is the recipient of two awards from the New York State Bar Association for his important contributions to family and children's law, including a special lifetime achievement award for his decades of work in the field and the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare. He is the official commentator for the Family Court Act and has served as the chairperson of the New York State Bar Association Committee on Children and the Law and as Executive Officer of the New York City Family Court.

While Professor Sobie does not have a direct personal interest in this litigation, he has dedicated much of his professional career to the study of New York

family law and children's rights. He has an academic interest in explaining the historical context for the modern voluntary foster care system and detailing the harm that the Office of Children and Family Services' ("OCFS") Host Family Homes regulations (the "Host Homes Regulations"), part 444 of Title 18 of the New York Codes, Rules and Regulations, pose to children and families. His goal is to bring to this matter historical expertise that will help to inform the Court's decision in resolving this appeal.

PRELIMINARY STATEMENT

When the Supreme Court of Rensselaer County—and subsequently the Appellate Division, Third Department—upheld the Host Homes Regulations, they overlooked and undermined decades of statutory reforms aimed at protecting the rights and interests of children and their families in New York's voluntary foster care placement system. They ignored OCFS's overreach in implementing changes that lacked legislative mandate and allowed regulations that threaten to turn back decades of progress. These decisions should be reversed. In the words of Justice Pritzker's dissent, "OCFS has gone rogue." *Laws. for Child. v. New York State Off. of Child. & Fam. Servs*., 240 A.D.3d 78, 104 (3d Dep't 2025) (Pritzker, J., dissenting).

As Justice Pritzker of the Third Department further noted in his dissent,[1] the

[1] Justice Ceresia also concurred in the dissent.

Host Homes Regulations abandon reforms to the foster care system and leave children vulnerable. *See id.* at 92–93, 104. As he aptly explained, "not only do the Host Family Home regulations lack legislative mandate, they dispense with the hard-fought, constitutionally grounded due process rights of children who have no say as to their fate, no counsel, no permanency hearings, no judicial oversight at all and are trapped in an administrative mousetrap with no way out." *Id.* at 104. The dangers of dispensing with those protections are enormous.

The Third Department dissent is not alone in its criticism of the Host Homes Regulations. In both rounds of comments, opposition to these regulations was overwhelming from established organizations, including the New York State Unified Court System – Statewide Advisory Committee on Attorneys for Children, New York State Office of Court Administration – Family Court Advisory and Rules Committee, three separate committees of the New York State Bar Association, American Bar Association, New York State Defenders Association, New York State Permanent Judicial Commission on Justice for Children, Legal Aid Society of New York City – Juvenile Rights, United Family Advocates, Lawyers for Children, Legal Service of NYC, Children's Law Center, and the New York State Kinship Navigator. *See id.* at 94–95.[2] The comments from these reputable organizations "largely

[2] Justice Pritzker also pointed out that, "had OCFS proposed the Host Family Home program by way of legislation, the litany of issues raised by these many stakeholders opposing the program

criticized the regulations as creating a 'shadow foster care system' but without the protections statutorily provided to children in foster care and their parents such as judicial oversight, the right to counsel, the consideration of alternatives to placement and the provision of appropriate services." *Id.* at 95.

These organizations have the weight of history behind them. Since the 1960s, the New York legislature and judiciary have been committed to reforming and improving New York's historical informal foster care system—a system in which there was virtually no judicial supervision, no support services for parents, and no legal representation for children and their families. During the reform period, advocates fought for, among other things, the introduction of rehabilitative and restorative measures for reuniting families, priority for kinship placements, publicly funded services for children and their parents, foster parent compensation, and the right to legal representation. *See* Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 752 (2006) (hereinafter "*The Child Client*"). The combination of these protections resulted in monumentally positive impacts on the foster care system and the children it serves. Many reforms were codified in New York Social Services Laws, including § 384-a(1) and others in the Family Court Act. By sidestepping and disregarding

render questionable the likelihood of the passage of such legislation in its current iteration." *Id.* at 94 n.5.

this statutory scheme, the Host Home Regulations reverse these hard-won protections for children and families.

As a scholar in the field of New York family law, Professor Sobie respectfully urges this Court to strike down the Host Homes Regulations. Upholding the regulations would bring New York back to an era when families and children had significantly fewer rights and were far more vulnerable to abuse. Without the oversight and protections of New York's modern statutory scheme, the Host Homes Regulations fundamentally change the State's system of child placement to the detriment of New York's families and their children.

ARGUMENT

I. THE HISTORICAL PARADIGM FOR OUT-OF-HOME CHILD CARE IN NEW YORK LACKED PROTECTIONS FOR CHILDREN AND FAMILIES.

In the late nineteenth and early twentieth centuries, New York's foster care system was defined by the absence of judicial and state oversight, whether children were placed voluntarily or by judicial decree. Neither children nor their parents had access to counsel, and the absence of reunification services meant families faced serious hardships, if not impossible hurdles, in seeking the return of their child to their home. The lack of services, oversight, and accountability left New York's families and children extremely vulnerable to exploitation.

The child protective system originated in the late nineteenth century,

essentially as one component of the post-Civil War reform era. The pre-contemporary era was predicated upon ostensibly voluntary temporary or permanent placements by parents or, alternatively, summary court judgments (strikingly, parents lacked the right to a hearing or an appeal). For nearly a century, the system was virtually devoid of judicial oversight, legal representation, or basic due process rights.

In 1884, the New York Legislature passed a law entitled "An act to revise and consolidate the statutes of the state relating to the custody and care of indigent and pauper children by orphan asylums and other charitable institutions," which abolished the ancient system of housing needy, neglected, and abandoned children in poor houses. 1884 N.Y. Laws ch. 438. Simultaneously, the practice of "binding out" or "contracting" children to private employers, where they performed paid menial labor in order to reimburse public and private childcare agencies, was abolished. *See* 1884 N.Y. Laws ch. 470. By then, the abuses of the largely medieval system had been documented, and the progressive "child saver" movement had been inaugurated. *See The Child Client* at 748.

This reform was an enormous step forward for children. However, New York counties—who then and now are financially responsible for children who have been placed—lost the revenue from "board out" or contracted child labor. Consequently, to avoid the costs of residential or foster care, counties resorted to informally placing

children with families who were unreimbursed but may have wished to help and perhaps eventually adopt the child. In 1897, a committee appointed by the New York State Board of Charities to investigate child-placing methods issued a scathing report, concluding in part: "In many counties, placing the child in any home obtainable, where it will cease to be a county charge, seems to be the main consideration." David M. Schneider & Albert Deutsch, *The History of Public Welfare in New York State: 1867–1940*, 165 (1941). The committee found that the driving motivation to save money resulted in a system that disadvantaged children and families, including by failing to establish a visitation system, and, in many cases, lacked "even the most elementary data on the background and disposition of the placed-out children." *Id.* at 164. The 1897 report's conclusion may reflect the motivation behind the Host Homes Regulations, which similarly replaces foster care obligations and expenses with unpaid informal placement devoid of reimbursement or services.

Slightly earlier, in 1877, the first child protective act was enacted. 1877 N.Y. Laws ch. 428. Titled an "Act for the Protection of Children, and to Prevent and Punish Certain Wrongs to Children," the legislation authorized the placement of children predicated on broadly defined neglect, including, among other grounds, children who were "found begging or receiving or gathering alms" or who were "destitute." *Id.* Parental malfeasance or the lack thereof was irrelevant, and

preventive services were absent. *Id.* Children were placed pursuant to a summary judicial procedure with no due process safeguards and no right to appeal. Grounds included children with no "proper guardianship or visible means of subsistence," a generalized, albeit more contemporary, basis for parental neglect. *Id*.

In the absence of appellate process, challenges to placements and efforts to return children home were initiated by innovative attorneys who filed *habeas corpus* petitions. The argument that an alleged unlawful loss of parental custody could be addressed via *habeas corpus* succeeded, precipitating several cases, including the 1887 Court of Appeals decision, *People ex rel. Van Riper v. New York Catholic Protectory*, 106 N.Y. 604 (1887). In that case, the Court determined that "it must appear that the child was abandoned and neglected, by the fault of the parents or custodians, to justify taking it from their custody, on the ground of abandonment, or improper exposure or neglect." *Id.* at 609. The child, an adolescent girl, had been summarily placed with the New York Catholic Protectory when she was found in the presence of an alleged "prostitute"; she had innocently asked the woman to help her find the way home after she became confused in Union Square Park. *Id.* at 607–08.[3] One decade later, the Court of Appeals held that a parent who had for good

[3] Today, *habeas corpus* may be invoked to initiate a custody proceeding, although almost every action is commenced by filing a petition pursuant to § 70 of the Domestic Relations Law or article 6 of the Family Court Act. N.Y. Dom. Rel. Law § 70 (McKinney 2025); N.Y. Fam. Ct. Act art. 6 (2025).

reason lost custody and control could successfully petition the court for a restoration of custody upon a showing that he or she had been rehabilitated. *See In re Knowack*, 158 N.Y. 482, 488 (1899). Accordingly, the Court established the rule of continuing jurisdiction, which empowered the Court to review cases in which children were removed from their homes and decide whether they should be returned to the custody of their parents. *See id.* at 487–88.

Throughout the child protective history, "voluntary" foster placements have been permitted in the absence of parental neglect or abuse. In fact, until the late twentieth century, ostensible "voluntary" placements far exceeded judicial determinations. Neither parents nor their children were represented in those placements. Judges were uninvolved, and there was a paucity of governmental supervision over the system. Although legally available, only rarely did a parent resort to *habeas corpus* or otherwise rely on the nineteenth century Court of Appeals precedents. Only minimal state oversight had been achieved by the establishment of the State Board of Charities, the late nineteenth century predecessor of OCFS. *See, e.g.*, 1875 N.Y. Laws ch. 140; 1875 N.Y. Laws ch. 173.

Until the reforms of the late twentieth century, parents who wanted to remove their children from a voluntary foster care placement were forced to navigate an informal system without counsel and with few material regulations or procedures. Devoid of any major statutory or judicial accountability measures, New York's

informal foster care paradigm throughout the late nineteenth and early twentieth centuries left children and families with little protection and many barriers to reunification. The Host Home Regulations risk bringing these dangerous practices back. It is vital that this Court intervenes to strike down these regulations which place children at risk.

II. STATUTORY REFORMS IN THE LATE TWENTIETH CENTURY ADDRESSED AND CURED MANY FLAWS WITH NEW YORK'S HISTORICAL FOSTER CARE PROGRAM.

In the late twentieth century, the New York Legislature transformed the State's voluntary foster care system through a series of statutory reforms. The new laws and judicial mandates were designed to protect the rights and best interests of children and families. Through the introduction of judicial oversight, the right to counsel, the availability of social services, the prioritization of kinship placements, and the continuous focus on reunification, New York created a foster care system that protected the safety and wellbeing of children and respected the rights of their parents. These core protections are what the Host Homes Regulations now strip away, reversing decades of progress.

Commencing in the 1970s and continuing in the present century, the New York Legislature enacted a series of statutes that reformed the historic system and govern any circumstance in which a child is relocated from his or her home through the auspices of a public or private social service agency (*e.g.*, a County Department

of Social Services). The statutes apply regardless of whether the governmental guided relocation is designated as a "placement," "custody," or neither. Judicial review is required (except for placements which do not exceed 30 days), parents and their children are represented, courts determine specific conditions and services, the government must exert reasonable efforts toward reunification, and periodic permanency hearings are required.

The lack of judicial oversight and due process standards was first partially remedied by the 1971 enactment of former Social Services Laws § 392. 1971 N.Y. Soc. Serv. Law ("SSL") § 392. The legislation, introduced by what was then known as the Legislative Commission on Child Welfare, mandated periodic court reviews of all cases where the child had been in voluntary placement for at least 24 months. *Id.* At that time, Professor Sobie was Executive Officer of the New York City Family Court and hence responsible for implementing the novel statute. (The backlog of cases where the child or children had been in voluntary placement for a greater period than 18 months was huge.) The lack of services or help for the child and family was manifest; children had resided in a foster home or, more likely, in a series of homes for many years in the absence of planning or parental rehabilitation services. Fortunately, countless children who had been long neglected by indefinite foster care, frequently in several short-term foster homes, achieved permanency pursuant to Section 392 through adoption or family reunification. Section 392 was

later replaced by the 2005 permanency legislation (the "Permanency Act"), which requires periodic judicial review whenever a child is not residing in his or her home. *See* N.Y. Fam. Ct. Act ("FCA") §§ 1086-1090-a (McKinney 2025). The Permanency Act has been irrationally disregarded by the Host Homes Regulations.

Largely based upon the Legislature's experience with Section 392 and the necessity of judicial oversight, in 1973 the Legislature enacted current Social Services Law § 358-a, which requires court approval for any voluntary placement of a child (*i.e.*, the relocation of a child under the auspices of a governmental agency) for a period greater than 30 days. *See* SSL § 358-a (McKinney 2025). Mandatory court review and approval, with parental and child representation, virtually eliminated the then-prevalent practice of pressuring or intimidating the parental consent required for a "voluntary" placement. A commensurate increase in Article 10 petitions occurred (most voluntary placements had been predicated on parental abuse or neglect). Again, Professor Sobie was the official responsible for implementation in New York City and witnessed the great advantages of judicial review with parties represented by counsel. The new procedures provided an effective check to unfettered social service agency control. Foster care agencies could no longer place children indefinitely in the absence of legal representation and judicial oversight.

The court's authority to order rehabilitative parental services, services for the

child, or permanency via adoption or family reunification was not unchallenged. *In re Jerry D.* was the initial decision interpreting the purpose behind § 358-a. 448 N.Y.S.2d 955 (Fam. Ct. 1982). In that case, Judge Nanette Dembitz outlined in a lengthy opinion the court's authority and the need for permanency and reunification services. *See id.* at 956 ("Considering the unanimous belief that early settlement in a permanent home is beneficial for child development, as well as for adoptive parents, the delays are detrimental from a child—and family welfare—standpoint."). The court determined that, rather than limiting assessments of whether a child should be kept in foster care "to the circumstance that triggered his entry into foster care some months before the section 358-a hearing," courts must also review a child's needs and wellbeing throughout their time in foster care and at the time of the hearing to determine whether returning a child home is feasible. *Id.* at 961.

The only exception to the Section 358-a requirement of court review is when the child is likely to remain in his or her temporary or foster home for less than 30 days. *See* SSL § 358-a. The exception, which has never been amended, is intended to avoid judicial proceedings when a child is placed by Social Services in a brief emergency situation. For example, perhaps the parent has been hospitalized for a short period and someone needs to care for the child during the interim, or a relative is willing to assume care for the child but needs a few weeks or a month (less than 30 days) to organize or relocate.

The Section 358-a exception is an available alternative for many potential placements under the Host Homes Regulations. There may be a sound argument to legislatively extend the 30-day exception to, say, 60 days. OCFS could have sought an amendment to Section 358-a but apparently decided on a far different non-statutory approach. The distinction is that, unlike the Host Homes Regulations, even when a placement or relocation is expected to last for less than 30 days, the current statutory scheme requires the agency to provide the parent with rehabilitative services to avoid the placement and to make any placement as short as possible; prioritizes kinship placements; and requires foster care compensation during the brief duration. Of perhaps greater significance, children and their parents are represented by counsel after 30 days. The Host Homes Regulations clearly circumvent and conflict with the existing statutory scheme by abandoning the crucial protections that define New York's modern day foster care system.

Today, a parent may also at any time seek his or her child's return by filing a motion in Family Court pursuant to Sections 1061 or 1062 of the Family Court Act or § 358-a(7) or 384-a(2)(a) of the New York Social Services Law. *See* FCA §§ 1061–62; SSL §§ 358-a(7), 384-a(2)(a). Both the parent and the child are entitled to legal representation in such proceedings. *See* FCA §§ 1016, 1033-b; SSL §§ 358-a(6), 384-a(2)(c)(i). Access to counsel in child protection cases, "ensur[es] the parents will have an attorney to aid them, not only in challenging the state's

evidence, but also in negotiating temporary or permanent arrangements with CPS agencies and in advocating for prompt reunifications." Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 877 (2020). Further, "due process checks in a court proceeding can provide a modest correction to racial and economic disparities within the child protection system and help limit the contribution of racial stereotypes or implicit or explicit biases to removal decisions." *Id*. Judicial involvement and legal representation—which are absent from the program created by the Host Homes Regulations—have been the law in New York's foster care system for over a half-century, regardless of whether the child has been voluntarily placed or committed upon a finding of neglect or abuse. Without an attorney or access to judicial proceedings, families will have a much harder time understanding their rights and navigating the foster care system, exacerbating the risk of returning to a time when parents were unjustly pressured into placing their child in out-of-home care.

The statutory reforms of the last 50 years have vastly improved New York's foster care system. The rights to counsel, social services, judicial oversight, priority placement with kin, and the retention of sibling groups together have created a system that prioritizes the rights and wellbeing of children. With a constant eye toward family reunification, these incredibly important protections constitute the bedrock of child welfare in New York's foster care system. To the detriment of New

York's families, the Host Homes Regulations, devoid of any such protections, severely undermine these vital and hard-won safeguards.

Rather than taking the logical step of strengthening the existing statutory scheme, such as by expanding the Section 358-a exception, the Host Homes Regulations create a disconnected system in which children are left vulnerable to fall through bureaucratic cracks unseen and unrepresented. Further, the Host Homes Regulations do not limit out of state placements.[4] When Host Homes Regulations' minimal 30-day "contacts" with a child inevitably do not go to plan, the proposed system provides no safety net. 18 N.Y.C.R.R. § 444.17. Children could be left alone in abusive environments, potentially out of state, with no oversight, no intervention, no access to medical care, and no way out. There will be no advocate for the child's interests, no counsel or rehabilitative services to help parents reunite with their children, and no judge to monitor for the child's safety and access to medical care.

III. THE HOST HOMES REGULATIONS UNDERMINE AND NEGATE STATUTORY PROTECTIONS FOR CHILDREN AND FAMILIES IN NEW YORK'S VOLUNTARY FOSTER CARE SYSTEM.

There is a lengthy legal history of children who, for valid reasons related to their safety and wellbeing, must leave their homes (for brief or lengthy periods of time) pursuant to governmental intervention, oversight, or assistance. In New York,

[4] *See* Lizzie Presser, *Child Advocates Sue New York over Proposed Shadow Foster Care System*, PROPUBLICA (Apr. 11, 2022), https://www.propublica.org/article/child-advocates-sue-new-york-over-proposed-shadow-foster-care-system (last accessed Dec. 12, 2025).

the historical absence of judicial involvement, support services, and representation has been long abrogated, and a carefully calibrated statutory system has been enacted, introducing court proceedings, representation, and mandated services to the State's foster care system. The Host Homes Regulations reverse the contemporary statutory protective scheme and constitute a legal throw-back to a former failed era, unfortunately to the detriment of New York's families and their children.

The few other states that have enacted measures similar to the Host Homes Regulations have encountered the detrimental outcomes which could be harmful for New York children if the Host Homes Regulations are upheld. Without judicial oversight, access to services, and legal representation, children are denied access to the care they should receive. For example, in North Carolina, which has allowed extended informal unpaid temporary home placements similar to the Host Homes Regulations, children have been placed in homes where they are asked to work and pay rent, have been denied access to medication and disability services, and have been separated from siblings.[5] Further, upon turning 18, children placed in Host Homes or unpaid temporary homes have no transition plan to adulthood, unlike those in foster care, who retain access to foster care, with consent, until age 21, and may

[5] *See* Lizzie Presser, *They Took Us Away from Each Other: Lost Inside America's Shadow Foster System*, PROPUBLICA (Dec. 1, 2021), https://www.propublica.org/article/they-took-us-away-from-each-other-lost-inside-americas-shadow-foster-system (last accessed Dec. 11, 2025).

access some forms of support after age 21. *See* FCA § 1055(e).[6] Additionally, while formal foster care parents receive average monthly maintenance payments of $511 to pay for the children's needs, caregivers outside the formal system only receive aid if they qualify and apply for the federal Temporary Assistance for Needy Families program.[7] Leaving families with few or no resources—especially in the absence of meaningful oversight—creates conditions ripe for exploitation and abuse. Without due process protections, children could become "trapped in an administrative mousetrap with no way out." *Laws. for Child.*, 240 A.D.3d at 104 (Pritzker, J., dissenting). The risks associated with the Host Homes Regulations cannot be overstated or ignored. Denying families court oversight, state-funded services, priority kinship placement, and access to counsel means stripping away the vital protections that reformed New York's foster care system for the better and would regress the system to one in which families could be easily exploited, while the safety and well-being of children would, for the most part, be disregarded.

CONCLUSION

For the foregoing reasons, the Third Department's decision affirming the dismissal of the Petitioners-Appellants' claims should be reversed.

---

[6] *See also* New York City Administration for Children's Services, *Guidelines for the Continuation of Care & Support Beyond Age 21*, https://www.nyc.gov/assets/acs/policies/init/2014/L.pdf (last accessed Dec. 11, 2025).

[7] *See* Amanda Robert, *Shadow Foster Care: Children and caregivers in a 'hidden' system miss out on benefits and support*, ABA J. (Aug. 1, 2025), https://www.abajournal.com/magazine/article/shadow-foster-care (last accessed Dec. 11, 2025).

Dated: New York, New York
December 31, 2025

MORRISON & FOERSTER LLP

By: 

Eric D. Lawson, Bar No. 5576434
ELawson@mofo.com
250 West 55th Street
New York, NY 10019-9601
Telephone: 212.468.8000
Facsimile: 212.468.7900

Counsel for *Amicus Curiae*
Professor Merril Sobie

CERTIFICATE OF COMPLIANCE

Pursuant to Uniform Practice Rules of the Court of Appeals of the State of New York (22 N.Y.C.R.R. § 500.13), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 4,312.