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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF LAWYERS FOR CHILDREN,

Appellant,

-against-

NO. 37

NYS OFFICE OF CHILDREN AND FAMILY
SERVICES,

Respondent.

20 Eagle Street
Albany, New York
April 14, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

WILLIAM C. SILVERMAN, ESQ.
PROSKAUER ROSE LLP
Attorney for Appellant
Eleven Times Square
New York, NY 10036

BEEZLY J. KIERNAN, ESQ.
OFFICE OF THE ATTORNEY GENERAL
Attorney for Respondent
28 Liberty Street
New York, NY 10005

Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: First case on the calendar
2 today is Matter of Lawyers for children v. the New York
3 State Office of Children and Family Services.

4 Counsel?

5 MR. SILVERMAN: Good afternoon, Your Honors. May
6 it please the court. My name is William Silverman, for
7 Appellants. May I please reserve four minutes for
8 rebuttal?

9 CHIEF JUDGE WILSON: Yes, you may.

10 MR. SILVERMAN: Thank you, Your Honor.

11 Until the 1970s, there were a large number of
12 children who were languishing in voluntary placements
13 outside of their home with no court oversight, no services,
14 no counsel. And as a result, there were serious barriers
15 to their reunification as a family and a lot of trauma for
16 those children who were separated for extended periods of
17 time from their parents. This is the critical point for
18 this court in my view. The legislature addressed this
19 issue. The legislature recognized the dangers to children
20 when they were placed outside of their homes and created a
21 detailed statutory framework - - -

22 JUDGE RIVERA: Yes. But haven't we recognized
23 that the parents have their own right, separate and apart
24 from this legislative foster care system?

25 MR. SILVERMAN: The legislature balanced the

1 rights of parents, the rights of children, and the briefs
2 sort of go back and forth in terms of what the central
3 policy is. I don't think you have to spend another minute
4 looking at our briefs to resolve that question. If you
5 look at - - - the legislature made no secret as to what the
6 policies that are in play and that are binding on this
7 court, Social Services Law 384-b - - -

8 JUDGE TROUTMAN: But again, with respect to a
9 parent's individual rights with - - - as to their children,
10 doesn't a parent have the right to decide at a given time
11 that they can allow their child to be cared for by someone
12 else without social services being involved?

13 MR. SILVERMAN: A hundred percent, Your Honor.
14 So a parent can decide to place their child with a friend.
15 They can place their child with whoever they want. That's
16 - - -

17 JUDGE SINGAS: Yeah. But what if they don't have
18 a support system?

19 MR. SILVERMAN: And that is the - - - the
20 statutory voluntary placement program that the legislature
21 put in place serves exactly the same purpose as the Host
22 Homes program. So there's a huge difference - - -

23 JUDGE SINGAS: No. But if you don't have - - -
24 parents can voluntarily decide if they have a neighbor or a
25 relative or a friend, and they can decide to put that child

1 voluntarily in that situation. I'm saying, what if a
2 parent doesn't want to give up their parental rights, but
3 doesn't have a support system like that? Why shouldn't
4 they be able to do that as well?

5 MR. SILVERMAN: Well, if I could, Your Honor,
6 push back on this idea that parents are giving up their
7 parental rights by engaging in the voluntary foster care
8 system. In Matter of Michael B., this court specifically
9 said parents in temporary crisis are encouraged to
10 voluntarily place their children in foster care without
11 fear that they will forfeit their parental rights. The
12 program itself - - - the statutory program itself is meant
13 to protect the parents' rights. Now, you might say, well,
14 what's the difference between a parent placement - - -

15 JUDGE RIVERA: Can they exit voluntary foster
16 care at any time?

17 MR. SILVERMAN: Yes, Your Honor. The statute is
18 very clear, on demand, they can have their child back from
19 voluntary child care. If it's an indefinite period, it's
20 within twenty days.

21 JUDGE TROUTMAN: How does this protect the child?

22 MR. SILVERMAN: Well, when a child is placed
23 through host homes, a child has no recourse, no voice, no
24 counsel, no ability to be heard at all.

25 JUDGE RIVERA: No. I think the question was, if

1 under voluntary foster care, a parent can do the same as
2 they could under the Host Homes program, simply decide, I
3 woke up this morning. I want my child back. I don't want
4 my child in this - - - with this family.

5 I think if I'm understanding Judge Troutman
6 correctly - - - she'll obviously say otherwise - - - I
7 think the question was posed, how does that then protect
8 the child if - - - if much of your argument here is turning
9 on the supervision and protection of the families and
10 children through the legislative framework?

11 MR. SILVERMAN: Because the danger to the child
12 in this context is the placement with a stranger outside of
13 the home. There's a big difference between a parent
14 deciding to place a child with a friend versus the parent
15 going to the state, and the state selecting a stranger.

16 JUDGE TROUTMAN: So instead - - - so the
17 difference here is that there's state involvement in the
18 placing without the oversight?

19 MR. SILVERMAN: Yes, Your Honor. It's - - - I
20 think it's two things. It's one, a stranger, and two, it's
21 the state. Once the state is involved - - -

22 JUDGE HALLIGAN: About the first, would you have
23 a challenge if there were simply organizations that offered
24 to provide these services, including care by a stranger,
25 but the agency was not involved as an intermediary?

1 MR. SILVERMAN: It's a great question, Your
2 Honor. It's one that I thought about in preparation for
3 this argument. The law is clear that only an auth - - -

4 JUDGE HALLIGAN: Maybe tell me what's your
5 position.

6 MR. SILVERMAN: Well, the - - -

7 JUDGE HALLIGAN: Would there or would there not
8 be?

9 MR. SILVERMAN: There would not be. But only an
10 authorized agency may place a child. So a parent can't go
11 to, let's say, a nonprofit and say, please place my child
12 with a stranger. That's what happened for decades and
13 decades before the legislature got involved. And that's
14 when there were all these children who were indefinitely
15 placed in voluntary placements. So the legis - - -

16 JUDGE HALLIGAN: So there couldn't be a local
17 entity - - - I'm not sure what work the word agency is
18 doing in your explanation, but you know, a local nonprofit
19 that has a set of local families who are willing to provide
20 this sort of care in circumstances where a family might
21 need some temporary assistance but doesn't happen to have a
22 friend or family member that can provide it. I took your
23 challenge to be focused, really, on the role of the agency
24 as set against the array of obligations that the
25 legislature has put on the agency.

1 MR. SILVERMAN: I think the - - - and I think I'm
2 answering your question. I think the critical point is,
3 you know - - - and the other side raises this where is - -
4 - where does the state get involved? There's an argument
5 that the state has no involvement if it's a fit parent
6 making a decision. But that's not exactly true. The
7 state, in order to - - - the legislature, in order to
8 counteract the fact that children were placed through these
9 voluntary, private, you know, charities, said only an
10 authorized agency basically approved by the state has the
11 power to place out a child. To place out a child means to
12 arrange for their care in the home of a stranger.

13 JUDGE HALLIGAN: So it looked to me like some or
14 all, I'm not sure, of the other states that have this kind
15 of program have done so through statute. Is there anything
16 that would keep the legislature from authorizing a program
17 like this as an alternative to the existing scheme?

18 MR. SILVERMAN: So in the record, there is not a
19 single instance of another state who has done this by
20 regulation. And we've all looked for that state. So - - -

21 JUDGE HALLIGAN: But could the legislature here
22 make that choice?

23 MR. SILVERMAN: The legislature could make that
24 choice. And the reason I know that there - - - you know,
25 there's some talk about to the extent Boreali even applies

1 here, you know, has the legislature considered this and
2 rejected it? Well, there's a good - - - I think, a good
3 response, which is, they haven't considered it because they
4 have their own detailed framework. They don't - - -

5 JUDGE GARCIA: Could - - - could - - -

6 MR. SILVERMAN: - - - need to consider it.

7 JUDGE GARCIA: Could we go to your point on does
8 Boreali even apply?

9 MR. SILVERMAN: Sure.

10 JUDGE GARCIA: Do you think Boreali applies here?

11 MR. SILVERMAN: So Your Honor, we raise Boreali
12 because we don't want to waive anything.

13 JUDGE GARCIA: I - - - understood.

14 MR. SILVERMAN: I don't think it does.

15 JUDGE GARCIA: Why not?

16 MR. SILVERMAN: Boreali, I think, applies when
17 you have an open - - - a general power of a regulator, and
18 then they go and do something. And sometimes you have
19 difficult cases where you decide, you know, is that policy
20 making crossing the line into executive or legislative
21 power. Whereas in this case, there's not just policy
22 making. This is not about policy making. This is about
23 policy making that is inconsistent with the statutory
24 framework. But it's even worse than that because the
25 statutory framework tells the regulator you shall go to

1 court - - - if the placement is expected to last thirty
2 days, you shall provide services.

3 JUDGE HALLIGAN: So are you now not making a
4 Boreali argument? Because I thought - - -

5 MR. SILVERMAN: I - - -

6 JUDGE HALLIGAN: - - - you did in your brief.

7 MR. SILVERMAN: We're absolutely making a Boreali
8 argument. All I'm saying is the court doesn't have to
9 reach Boreali.

10 JUDGE CANNATARO: And that's because of the
11 statutory conflict?

12 MR. SILVERMAN: That is correct, Your Honor. And
13 - - -

14 JUDGE GARCIA: And I'm sorry - - - because - - -

15 JUDGE RIVERA: How is that not one of the Boreali
16 factors?

17 MR. SILVERMAN: It's absolutely a Boreali factor.
18 And Boreali is - - -

19 JUDGE RIVERA: Okay.

20 MR. SILVERMAN: If you'd like to decide this in
21 Boreali, I think, you know, we win easily. But Boreali has
22 factors, and your weighing - - - I don't think there is
23 weighing here.

24 JUDGE HALLIGAN: On Boreali, it looks to me like
25 in Stevens, the court said that Boreali was distinct

1 because there was an extraordinarily broad grant of
2 authority. So what's the grant of authority that is at
3 issue here that brings you within the scope of Boreali?

4 MR. SILVERMAN: So here to - - - in some extent,
5 the - - - the other side is relying on general language
6 that gives OCFS broad regulatory authority.

7 JUDGE HALLIGAN: But what provision do you think
8 we should be looking at to gauge whether or not this is the
9 sort of grant of authority that we have in Boreali?

10 MR. SILVERMAN: So again, to the extent you're
11 looking at provisions, I would look at the voluntary
12 placement provisions and see how specific the legislature
13 is - - -

14 JUDGE HALLIGAN: But that's not a grant of
15 authority - - -

16 MR. SILVERMAN: But - - -

17 JUDGE HALLIGAN: - - - to promulgate regulations
18 - - -

19 MR. SILVERMAN: But - - - but - - -

20 JUDGE HALLIGAN: - - - is it?

21 MR. SILVERMAN: But I guess my point is - - - and
22 this court has been very clear that - - - one, that the
23 government can't take refuge in general rulemaking
24 authority when there are specific - - -

25 JUDGE GARCIA: Because wouldn't it be, Counsel,

1 that the same authority they have to promulgate the
2 voluntary placement in foster homes is the same authority
3 they're arguing they would have here? And as I understand
4 your point is, yes, but the legislature has already defined
5 how you exercise that authority.

6 MR. SILVERMAN: Yes, Your Honor. The - - - in
7 short, there's no room for the regulator here.

8 JUDGE HALLIGAN: But isn't that an argument that
9 the agency lacks the statutory authority to promulgate
10 these regulations? I'm not sure how that brings you under
11 Boreali.

12 MR. SILVERMAN: So I don't think the regulator
13 has the authority to make regulations that are in conflict
14 with the legislation. Now, is this the kind of policy
15 making that is appropriate? No. They want to transform
16 and modernize the child welfare system.

17 JUDGE CANNATARO: But at the baseline, they do
18 have a broad grant of regulatory authority, don't they?

19 MR. SILVERMAN: Yes, Your Honor.

20 JUDGE CANNATARO: And they can enact anything
21 that's consistent with their legislative mandate.

22 MR. SILVERMAN: That's the key point, consistent
23 with the law. And when there's a detailed framework, they
24 can't say we don't need to provide services, even though
25 the legislature says you need to provide services to keep

1 family together.

2 JUDGE RIVERA: But why can't - - - why don't they
3 have regulatory authority to address what's not covered by
4 the law? I mean, it seems to me the only way that - - -
5 just putting it this way - - - that you win is if we agree
6 with you that the legislature has covered this whole field,
7 but that strikes me as odd with the regulatory authority
8 here.

9 MR. SILVERMAN: Well, think of it from the eyes
10 of a child. From the eyes of a child, there's absolutely
11 no difference between being placed with a stranger through
12 the statutory framework or through the regulatory
13 framework. But that child will have no voice, no say, no
14 recourse, no counsel, no services. So I would say that
15 this is just not an appropriate option given how clearly
16 the legislature has spoken.

17 JUDGE RIVERA: And the legislative framework is
18 specifically set up to give sole voice to the child?

19 MR. SILVERMAN: Not sole voice, but voice. So
20 the - - - if you - - - there's one key document in this
21 case.

22 JUDGE RIVERA: When a parent places a child with
23 a friend or a neighbor, the child has a voice?

24 MR. SILVERMAN: That's a much different
25 situation, Your Honor.

1 JUDGE RIVERA: Why so?

2 MR. SILVERMAN: Because a parent does have
3 rights. And when a parent - - - this is a choice, by the
4 way, that was made by the legislature, a line that was
5 driven by the legislature.

6 JUDGE RIVERA: What right does a parent not have
7 - - -

8 MR. SILVERMAN: So - - - yeah.

9 JUDGE RIVERA: - - - in the Home Host program?

10 MR. SILVERMAN: So the legislature decided that
11 when a parent is placing a child with a friend, the state
12 is not going to get involved. That is a - - - you know,
13 that was the legislature's choice. The minute the state is
14 involved - - - the minute the state is choosing strangers
15 for - - - to place that child out of the home, that's the
16 line the legislature draw - - - drew.

17 JUDGE RIVERA: But the parent doesn't have to
18 agree. This is still within that sphere of the parent's
19 authority - - -

20 MR. SILVERMAN: And again - - -

21 JUDGE RIVERA: - - - it's for the parent to
22 decide, you know, I don't want to do that.

23 MR. SILVERMAN: Right. Within the - - -

24 JUDGE RIVERA: Why isn't it just yet another
25 option that's provided through a regulatory framework, and

1 the parent has full autonomy to decide what they want to
2 do?

3 MR. SILVERMAN: Because children do have rights
4 that are separate and apart from parent rights. Here, I
5 believe both parental rights and child rights are - - -

6 JUDGE RIVERA: What child is - - -

7 MR. SILVERMAN: - - - being violated.

8 JUDGE RIVERA: What rights does a child have if a
9 parent decides they're going to place the child with - - -
10 with - - -

11 MR. SILVERMAN: Well - - -

12 JUDGE RIVERA: - - - the neighbor?

13 MR. SILVERMAN: Again, that's a line the
14 legislature drew that - - - that when a parent is making a
15 choice to place a child with a friend, that's the choice
16 with a parent, and we're not going to interfere. And this
17 is a great debate, but this is a debate that should happen
18 across the street, not in this beautiful court.

19 JUDGE RIVERA: Well, I'm not debating the - - -

20 MR. SILVERMAN: No. I know.

21 JUDGE RIVERA: - - - the judgment behind either
22 of these choices. I'm just saying, why is it not outside
23 of the framework, and it's just an enhancement of the
24 existing right that we've recognized that parents have?

25 MR. SILVERMAN: Because we're taking away the

1 fund - - -

2 JUDGE RIVERA: And that the legislature, of
3 course, also recognizes?

4 MR. SILVERMAN: Because we're taking away the
5 fundamental right to counsel. We're taking away the right
6 to have the - - - the obligation - - -

7 JUDGE TROUTMAN: What about the fact - - -

8 MR. SILVERMAN: - - - on the state to provide
9 services.

10 JUDGE TROUTMAN: How, if at all, does the parent
11 retaining custody of their child - - - legal custody impact
12 this arrangement then?

13 MR. SILVERMAN: So I also need to push back on
14 this distinction in terms of custody. Under both
15 arrangements - - - this proposed arrangement under the
16 statutory scheme, parents agree to give up decision-making
17 authority for the duration of the placement, and those
18 decisions are bundles of custody - - - of legal custody.
19 That's what legal custody is. And in - - - under both
20 arrangements, they're temporary. And the parent can bring
21 their child back. The key difference is, if there's any
22 difficulty under their arrangement without court
23 supervision, without counsel, good luck to you. Whereas
24 under the state framework, you can make a motion - - -

25 JUDGE TROUTMAN: So under the statutory

1 framework, social services, they don't get temporary legal
2 custody of the child - - -

3 MR. SILVERMAN: So - - -

4 JUDGE TROUTMAN: - - - versus this program where
5 - - - doesn't it say that the parents are retaining legal
6 custody?

7 MR. SILVERMAN: Yes, Your Honor. And that's
8 another reason why it's inconsistent with the law. The
9 legislature said that when you're placing a child
10 voluntarily, the agency retains custody. And in Matter of
11 Michael B., this court explained that the reason they're
12 putting the custody on the agency is actually to protect
13 the parent because they don't want to give the foster - - -

14 JUDGE TROUTMAN: But here the parent is keeping
15 custody. Aren't they protected? They can take the child
16 back at any time they want.

17 MR. SILVERMAN: But I think, in this context, the
18 word custody is completely meaningless because what is
19 practically the difference between the two? Both - - - in
20 both sides, they're giving up decision-making authority
21 temporarily, and on both sides - - - both areas, they can
22 bring their kid back, but it's very difficult to do so
23 without counsel, without court oversight. And the child
24 can be placed - - -

25 JUDGE RIVERA: I'm sorry. What makes it

1 difficult?

2 MR. SILVERMAN: Because if you - - - let's say
3 the host home - - -

4 JUDGE RIVERA: If you say, I want my child back.

5 MR. SILVERMAN: Yeah. Let's say the host home
6 family says, no, I'm not giving it back. Well, you don't
7 have court oversight. You don't have counsel. So you're
8 going to have to bring an action to - - - and in fact, in
9 the assessment of public comment, which I recommend to all
10 of your honors to read - - -

11 JUDGE RIVERA: Don't you have to go back into
12 court if the host family - - - I'm sorry - - - if the
13 family says no in the voluntary placement? You're still
14 back to the same, I've got to go to court.

15 MR. SILVERMAN: You have to go to court. But
16 you're before a judge. You have appointed counsel. You
17 can make a motion, okay? Whereas the other one, you have
18 to bring an action. And in the assessment of public
19 comment, OCFS says, well, the - - - the parent could be
20 subject to civil and criminal liabilities, as if that's
21 comfort to the family who wants their child back. So the
22 statutory framework has meticulous, detailed plans about -
23 - - in fact, this court mentioned it's not good enough for
24 the child to come back sixteen out of seventeen times. It
25 has to be seventeen out of seventeen times. It's also in

1 Matter of Michael B. I'm sorry if I keep repeating the
2 same case. The idea is that they have to be able to get
3 their child back. Otherwise, people wouldn't use the
4 voluntary foster care system. So that's a critical part.

5 JUDGE RIVERA: Could they say by regulation, if a
6 - - - if the host family would not, on demand - - - it's a
7 terrible way of phrasing this - - -

8 MR. SILVERMAN: Of course.

9 JUDGE RIVERA: - - - but on demand, return the
10 child to the parent, that the parent has rights to
11 appointed counsel. Could they decide that and - - - and
12 draft a regulation to that effect, or is that - - -

13 MR. SILVERMAN: So - - -

14 JUDGE RIVERA: - - - only within the legislative
15 authority?

16 MR. SILVERMAN: Interestingly, in this assessment
17 of public comment, they say, well, we don't have the power
18 to have court oversight because this is under the General
19 Obligations Law. So they impose the General Obligations
20 Law, and then they use that as an excuse not to abide by
21 the Social Services Law and the Family Court Act, which
22 directly addressed this issue. Whereas the General
23 Obligations Law is general. It wasn't meant for a - - -
24 for a state program.

25 And so they're using the General Obligations Law

1 to say, we don't need to appoint counsel. We don't need to
2 provide services because that's not provided under the
3 General Obligations Law. But who cares if it's not
4 provided under the General Obligations Law because it's
5 provided under other laws? And this court is very clear
6 that you can't look at a statute in isolation. You need to
7 look at the whole system together. It doesn't make any
8 sense. If you can just take a program, call it something
9 else, and then say that none of the statutes apply to your
10 conduct as the government protecting children and families,
11 that's completely inappropriate.

12 JUDGE RIVERA: Even though it's fully voluntary?

13 MR. SILVERMAN: And that's a key point. We're
14 only talking about the voluntary foster care system. And I
15 think part of the back and forth here, there's a little bit
16 of confusion because they point to foster care like this
17 big deprivation of parental rights.

18 Voluntary foster care is something very
19 different. There are no deprivation of parental rights.
20 And if - - - to the extent that they're afraid the children
21 could be taken away, it's - - - as you know, it's a high
22 standard for parental rights to be terminated. And if
23 they're saying, under no circumstances should parental
24 rights be terminated, again, the legislature has drawn
25 those lines very clearly. And this court has enforced

1 those standards.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. SILVERMAN: Thank you, Your Honor.

4 MR. KIERNAN: May it please the court. Beezley
5 Kiernan, for the Office of Children and Family Services.
6 OCFS acted within its statutory authority in promulgating
7 the host family home regulations.

8 JUDGE GARCIA: Counsel, do you see this as a
9 Boreali case or not?

10 MR. KIERNAN: I do see this as a Boreali case.
11 They brought it as a Boreali case. Their principal
12 argument is that the regulations are inconsistent - - -

13 JUDGE GARCIA: Right.

14 MR. KIERNAN: - - - with the statute.

15 JUDGE GARCIA: Which is a different argument than
16 Boreali, right?

17 MR. KIERNAN: That is right. That is right. You
18 know, to the ex - - -

19 JUDGE HALLIGAN: Do you agree with them that the
20 grant of authority is as broad as they say, and therefore,
21 were within the Boreali framework?

22 MR. KIERNAN: It's different from cases like
23 Boreali and Statewide Coalition. There's no broad
24 delegation of authority to regulate - - -

25 JUDGE HALLIGAN: Well, what about - - -

1 MR. KIERNAN: - - - if they - - -

2 JUDGE HALLIGAN: - - - what about Section 23(d),
3 which, I think, authorizes the Department of Social
4 Services to establish rules, regulations, and policies to
5 carry out its powers and duties?

6 MR. KIERNAN: That is a broad statute, Your
7 Honor. But we can also point to 374 - - - Social Services
8 Law 374, which directly authorizes OCFS to, in turn,
9 authorize agencies to place out children.

10 JUDGE HALLIGAN: So that suggests to me that
11 there is a broad grant of authority. I thought I just
12 heard you say that there is not a sufficiently broad grant
13 of authority to trigger scrutiny under Boreali.

14 MR. KIERNAN: No. I think this is a Boreali
15 case, even though petitioner's primary argument is that the
16 regulations are inconsistent with the statutes.

17 JUDGE TROUTMAN: How are they consistent?

18 MR. KIERNAN: They are consistent with the
19 statutes because those statutes apply in specific
20 circumstances. When children are in foster care and foster
21 care placement is expected to exceed thirty days, they're
22 entitled to a hearing and representation at that hearing.

23 JUDGE TROUTMAN: And here, is - - - what about
24 the argument that you're placing kids. They can go back
25 and forth without the statutory protection. So how is that

1 consistent with - - - it seems quite well thought out, the
2 - - - the scheme that the legislature put in place for the
3 placement of children with strangers. There's an argument
4 here they're being placed with strangers without
5 protections. So how is that consistent with Social
6 Services Law?

7 MR. KIERNAN: As this court recognized fifty
8 years ago, in cases like matter of Sangiovanni K., a case
9 that cited matter of Bennett v. Jeffreys, when parents
10 retain custody and temporarily place their children with a
11 host family, be it a relative, a member of the community,
12 no statute is directly applicable in that situation.

13 JUDGE GARCIA: But there's no state involvement
14 there. And I find that the core of their argument is, if
15 the state is going to be involved in you voluntarily giving
16 up your children, then here's the framework. If you want
17 to put - - - place your children with a relative or even a
18 stranger, perhaps, that you know somehow, that's a very
19 different story. That's a parental right. But if you are
20 going to involve the state in this process, here's what you
21 do.

22 MR. KIERNAN: The legislature has certainly made
23 the judgment. Once custody - - - legal custody is
24 transferred to local social services district or state - -
25 -

1 JUDGE TROUTMAN: Is it just legal custody, or is
2 it the state involvement, as Judge Garcia just pointed out?

3 MR. KIERNAN: It's not just state involvement.
4 It's legal custody - - -

5 JUDGE TROUTMAN: But why is it - - - when you're
6 talking about state involvement, why is it different from
7 normal placement under - - - that's clearly under the regs?

8 MR. KIERNAN: This - - -

9 JUDGE TROUTMAN: Or is it a distinction without a
10 difference?

11 MR. KIERNAN: This is not a state-run program in
12 the sense that host families are volunteers and they're
13 vetted by a not-for-profit.

14 JUDGE TROUTMAN: Is the state involved in this
15 process?

16 MR. KIERNAN: The state's involvement is to - - -

17 JUDGE TROUTMAN: So this is not the parents just
18 simply picking someone on their own and the state has no
19 say in anything. There's state involvement.

20 MR. KIERNAN: There is state involvement only to
21 authorize the agency.

22 JUDGE GARCIA: You think there's a difference in
23 liability for the state under the traditional program set
24 out by the legislature in this program?

25 MR. KIERNAN: Yes, Your Honor.

1 JUDGE GARCIA: What would that be? What's the
2 difference in state liability here?

3 MR. KIERNAN: Well, when the state or a local
4 social services district takes actual custody of the child,
5 as this court recognized just last year in Weisbrod-Moore
6 v. Cayuga County, that means something. It means you
7 really do have a legal responsibility to take care of that
8 child. Under the host family regulations, the parents
9 retain actual custody - - - legal custody, and they can
10 take back the kids - - -

11 JUDGE GARCIA: But isn't that really just a way
12 to get around the liability issue? Like, you're saying,
13 yeah, we don't have custody now. So go over there. And
14 this nonprofit we vetted will now take your children
15 physically, but not legally, and we're cutting ourselves
16 out of the liability chain. That seems what's going to
17 happen here, right? And you don't have a lawyer, and you
18 don't have court involvement.

19 MR. KIERNAN: What's key, again, is that the
20 legislature has made the policy judgment that parents are
21 free to do this on their own. General Obligations Law 5-
22 1551 facilitates these temporary - - -

23 JUDGE HALLIGAN: But the agency has - - -

24 JUDGE RIVERA: Are you saying there are no worse
25 position? Is there some coercive aspect of this particular

1 regulatory program?

2 MR. KIERNAN: They were tailored to avoid
3 coercion, Your Honor. There's certainly a risk of coercion
4 that already exists in that system.

5 JUDGE RIVERA: Let me ask a basic question. How
6 would a parent even know about this program? I know
7 there's a stay. It's not in place. But what does the
8 commissioner envision?

9 MR. KIERNAN: So this is a model that does exist
10 in many other states.

11 JUDGE RIVERA: No. I know that. I'm talking
12 about New York.

13 MR. KIERNAN: Safe Families for Children, it does
14 advertise in the places it operates.

15 JUDGE RIVERA: I see.

16 MR. KIERNAN: It's a community program. That's
17 what it's designed to be. And I think the experience in
18 other states is informative. It's designed to be a very
19 temporary stay, and the average stay is only ten days.

20 CHIEF JUDGE WILSON: So do you think that through
21 1551 the legislature was attempting to provide an alternate
22 way, you know, alternative to the existing system? Is that
23 what you think they were trying to do?

24 MR. KIERNAN: No. Because parents already had
25 the option.

1 CHIEF JUDGE WILSON: So how do - - - what were
2 they trying to do with 1551?

3 MR. KIERNAN: To make it easier to facilitate
4 those arrangements. If parents need to temporarily place
5 their kids with grandma or with a member of the community,
6 you can formalize that arrangement and - - -

7 CHIEF JUDGE WILSON: Well, the legislative
8 history of that doesn't really talk about placement, right?
9 It talks about two specific things, I think. One is
10 medical care, and the other is education.

11 MR. KIERNAN: That's right. I read the
12 legislative history as contemplating parents temporarily
13 placing - - - and then I use the word placement - - -

14 CHIEF JUDGE WILSON: Well - - -

15 MR. KIERNAN: - - - but temporarily allowing
16 caregivers.

17 CHIEF JUDGE WILSON: It's not even clear that
18 1551 contemplates that the child isn't residing with the
19 parent. It's just, perhaps, the decision-making for
20 education and for health care might be with a grandparent
21 or an aunt or uncle or child.

22 MR. KIERNAN: That's right. That's right. And
23 we're not saying that the General Obligations Law
24 authorizes this particular program, but it does reflect the
25 legislature's judgment that parents are free to do this.

1 JUDGE CANNATARO: And isn't that kind of
2 decision-making authority essentially what custody is, or
3 at least part of what custody is?

4 MR. KIERNAN: Yes. Deciding where and with whom
5 children should live, making major decisions.

6 JUDGE CANNATARO: About education, health care,
7 any number of things that are day-to-day for - - - for
8 decision makers in a child's life.

9 MR. KIERNAN: That's right. That's right.

10 JUDGE CANNATARO: So let me just go back to what
11 you were saying before. You seem to imply that there's a
12 distinction between what happens to custody in the
13 voluntary - - - in the statutory voluntary placement and in
14 this alternative. And I'm not exactly sure what I - - -
15 whether I understand what that distinction is. So can you
16 specify that?

17 MR. KIERNAN: Well, when parents retain custody
18 and place their children with host families, they retain
19 the right to make all major decisions. They allow the host
20 family to make certain decisions as set forth in that
21 designation of persons in parental relation. But they're
22 not ceding any rights. They're not ceding any
23 responsibilities.

24 JUDGE CANNATARO: And in the voluntary custody
25 statutory scheme, the - - - they do? Is that what you're

1 saying?

2 MR. KIERNAN: Right. Custody transfers. Now,
3 there are statutes and regulations that give parents
4 certain rights, certain responsibilities, but custody
5 transfers.

6 JUDGE TROUTMAN: So how is this not creating a
7 shadow system without oversight?

8 MR. KIERNAN: It's not creating a shadow system
9 because parents can already do this. And without these
10 regulations, there's no oversight authority.

11 JUDGE TROUTMAN: Parents can already do what?

12 MR. KIERNAN: They can already place their
13 children with members of the community.

14 JUDGE TROUTMAN: With the state's assistance and
15 them having authorized agencies?

16 MR. KIERNAN: No, Your Honor. But again, the
17 state's involvement is merely to authorize a not-for-profit
18 to facilitate - - -

19 JUDGE TROUTMAN: Why is the state involved if the
20 parents are just free to do whatever they want? Why is the
21 state involvement here, but without the legal protections
22 not, in effect, the creation of a shadow foster care system
23 where the - - - no one is responsible?

24 MR. KIERNAN: So the legislature created a
25 voluntary placement regime, and it still exists, but it is

1 voluntary. It's never meant to be the only option for
2 parents in crisis. Parents in - - -

3 CHIEF JUDGE WILSON: So in the Host Homes pro - -
4 - sorry - - - in the Host Homes program, I think you just
5 said that the parents are not ceding any responsibility.
6 Responsibility for the - - - for their child?

7 MR. KIERNAN: That's right.

8 CHIEF JUDGE WILSON: So what does that mean if
9 the host home family is not one that really is suitable for
10 a child and something bad happens to the child? The parent
11 is responsible for having selected that family?

12 MR. KIERNAN: If the parents had known about that
13 in advance, yet they remain responsible - - -

14 CHIEF JUDGE WILSON: Well, if they have
15 responsible - - - responsibility for their child, then I
16 think the implication of what you said is that, if
17 something the host - - - home family is not suitable and
18 something bad happens to the child, the parent is
19 responsible for that.

20 MR. KIERNAN: That's right.

21 CHIEF JUDGE WILSON: Not the state.

22 MR. KIERNAN: Right. I - - - the state might
23 say, host family agency, you did not properly monitor this
24 placement. You did not properly vet this host family. The
25 state might be involved in that sense. But the parents are

1 ultimately responsible.

2 JUDGE TROUTMAN: But isn't that, again, as was
3 pointed out earlier, just a way of getting away from
4 liability under the regular placement system?

5 MR. KIERNAN: There's no suggestion in the record
6 that that was the intent of the program. The intent - - -

7 JUDGE TROUTMAN: Not intent. In reality, that's
8 what happens. No. You're say - - - they're not
9 responsible because you're keeping the legal custody.

10 MR. KIERNAN: But that's just - - - again, the
11 parents have the fundamental right to decide.

12 JUDGE SINGAS: Well, what are the limits - - -

13 JUDGE RIVERA: So the state isn't liable in that
14 scenario? If I'm the parent and I choose my neighbor, the
15 state isn't liable - - - if something then happens, the
16 state isn't liable in that scenario is your point?

17 MR. KIERNAN: Right. Right. If there's a report
18 of abuse or maltreatment, the state - - -

19 JUDGE RIVERA: The parent is not put in a worse
20 position when the state stamps its imprimatur on a
21 stranger?

22 MR. KIERNAN: The parents - - - well, this is a
23 completely voluntary program. We, as a state, generally
24 trust parents to make the best decision for their kids so
25 long as they retain actual legal custody.

1 JUDGE HALLIGAN: But isn't the question, really,
2 what has the legislature decided should exist in terms of
3 protections and safeguards when the state interjects itself
4 into assessing whether or not, you know, a particular
5 placement is an appropriate one? It may well be, and I'm
6 not disagreeing with the proposition that parents have the
7 right to make a range of choices, including allowing
8 someone else who's a family, neighbor, whoever it is, to
9 care for their child. But isn't the question what the
10 legislature's judgment is about when the state gets
11 engaged?

12 MR. KIERNAN: That is the question, Your Honor.

13 JUDGE HALLIGAN: And so when we see a host of
14 protections and safeguards and rights that are triggered
15 when the state is involved, I'm trying to understand why
16 this scheme is not an end run around those. I appreciate
17 the distinction of legal custody, but I'm not sure that
18 answers why the additional protection shouldn't exist.

19 MR. KIERNAN: I think the key point is that the
20 legislature has made the judgment that authorized agencies
21 can place out children. That's the first sentence of
22 Social Services Law Section 371 - - -

23 JUDGE CANNATARO: And then I'm - - -

24 JUDGE HALLIGAN: Well, but with - - -

25 JUDGE CANNATARO: - - - authorized under that,

1 authorized by whom?

2 MR. KIERNAN: By OCFS.

3 JUDGE CANNATARO: Right.

4 JUDGE SINGAS: Well, are there any limits to your
5 argument? Like, where do we draw the line, or where do you
6 draw the line about what kinds of regulations you can pass?
7 What are the limitations there?

8 MR. KIERNAN: And that's why I think this is a
9 Boreali case. So long as the agency is promoting the
10 legislature's policy goals, and it is here, the policy
11 goals of preserving parents' rights.

12 JUDGE GARCIA: But couldn't you argue the policy
13 goal is in place - - - stranger placements, voluntary
14 placements, that the child gets an attorney and a court is
15 involved? So how are they promoting that?

16 MR. KIERNAN: That applies when custody transfers
17 to the authorized agency.

18 JUDGE HALLIGAN: But - - - well, you say that so
19 but I'm not sure it's clear from the statute that that's
20 the judgment the legislature has made. Where do we see
21 that - - - where do we see that as clearly as you assert
22 it? Maybe those protections the legislature intends to
23 attach when the child is placed, regardless of who holds
24 legal custody, and presumably, liability?

25 MR. KIERNAN: It just depends on the precise

1 statute we're - - - we're looking at. You know,
2 petitioners point - - -

3 JUDGE HALLIGAN: Well, you're making this
4 assertion across a number of statutes, I think, right?

5 MR. KIERNAN: Right. Right. So foster care,
6 foster child, those terms are defined. Those terms are
7 defined in 371 of the Social Services Law. It means care
8 and custody or guardianship is with the authorized agency.
9 So that's not the case here. We're not talking about
10 foster care because parents retain legal custody. Each of
11 the statutes they cite, including, for example, the ICPC
12 talks about out-of-state placements in foster care or for
13 adoption. And this court just recently interpreted that
14 statute as meaning what it says.

15 JUDGE HALLIGAN: Hasn't this approach been
16 adopted by legislation, not regulation, in every other
17 state that has adopted it?

18 MR. KIERNAN: My understanding from the record is
19 that about fifteen states enacted statutes to facilitate
20 this program. The principal purpose of those statutes, and
21 you can see them there in 137 to 213 of the record, is to
22 allow parents to sign a power of attorney.

23 JUDGE HALLIGAN: Are you aware of any states that
24 have done this solely by regulation, with no legislative
25 authorization or facilitation?

1 MR. KIERNAN: Most states that have this program,
2 there was no change in law.

3 JUDGE HALLIGAN: So - - - you read that record
4 very differently than your adversary?

5 MR. KIERNAN: Well, in some states, laws were
6 passed, again, to facilitate that kind of power attorney.
7 We didn't need that because we already have 5-1551 in the
8 General Obligations Law. Most states, there was no change
9 in law. Safe Families for Children was just able to
10 operate within the existing structure. In our state, they
11 could operate. They just need OCFS's approval.

12 JUDGE RIVERA: And in those states, did they have
13 - - - putting aside 1550, was there, otherwise, a similar
14 foster care system as comprehensive as what it appears New
15 York State has adopted?

16 MR. KIERNAN: I'm not sure whether the other
17 states have a similar voluntary placement - - -

18 JUDGE RIVERA: Okay.

19 MR. KIERNAN: - - - regime.

20 JUDGE RIVERA: Okay.

21 JUDGE TROUTMAN: Isn't that important?

22 MR. KIERNAN: Well, in OCFS's view, voluntary
23 placements are available for parents in crisis. They're a
24 small part of the foster care system. Even Legal Aid
25 Society, one of the petitioners - - -

1 JUDGE TROUTMAN: But with respect to the issue of
2 consistency, the fact that our state has such an extensive
3 system in place, doesn't it matter to determine if this is
4 consistent with that?

5 MR. KIERNAN: The legislature intended for
6 voluntary foster care to be an option, but not the only
7 option.

8 JUDGE TROUTMAN: But here the question is, is
9 this home family placement system consistent with the
10 overall legislative scheme they put in place?

11 MR. KIERNAN: And it is consistent, Your Honor.

12 JUDGE TROUTMAN: And whether - - - you say it's
13 consistent, specifically.

14 MR. KIERNAN: Those statutes, on their face, just
15 don't apply. This court recognized fifty years ago that
16 just - - - there's no statute directly applicable when
17 parents are making the ultimate decision to place out their
18 kids.

19 JUDGE TROUTMAN: So you're saying Social Services
20 Law does not apply here?

21 MR. KIERNAN: Those provisions that petitioner
22 cite, they just do not apply. They apply when children
23 enter foster care. And that's a defined term here.

24 JUDGE TROUTMAN: So as long as you create this
25 separate system, no oversight, no rules apply?

1 MR. KIERNAN: Well, again, parents can already do
2 this. They can already rely on host families. OCFS's - -
3 -

4 JUDGE TROUTMAN: But the difference is state
5 involvement, correct?

6 MR. KIERNAN: That's right. But 374 - - -

7 JUDGE TROUTMAN: And why doesn't it matter that
8 state involvement and giving parents the imprimatur that
9 the state says this is good, that I can rely upon - - -
10 these people are the right people. And when things go
11 awry, what you're saying is, oh, no, parent, it's your
12 responsibility alone.

13 MR. KIERNAN: The regulations facilitate these
14 temporary caregiving arrangements, especially for parents
15 without the social support network that can't - - -

16 JUDGE TROUTMAN: And what about the protection of
17 the families, the children, and the parents so that
18 children are in fact protected?

19 MR. KIERNAN: And the regulations provide a
20 number of those protections. Again, without these
21 regulations, there are no - - -

22 JUDGE CANNATARO: Well, one of those protections
23 is through state certification of the placement agency.

24 MR. KIERNAN: That's right.

25 JUDGE CANNATARO: There is that state



1 involvement. So your argument, I think, hinges solely on
2 this proposal, which you see in the statutory scheme that
3 when custody rights are involved, that is state
4 involvement. But when state vetting of agencies is
5 involved for purposes of this program, that's not state
6 involvement. Is that an oversimplification of your
7 argument?

8 MR. KIERNAN: Well, the legislature has made the
9 judgment that not-for-profits can place out children. They
10 just need OCFS's approval.

11 JUDGE CANNATARO: And that - - - and why is that
12 not state participation in the process?

13 MR. KIERNAN: We do think it's state
14 participation in the process. And we promulgated these
15 regulations just to set forth standards for how we
16 authorize host family agencies in particular. That's a
17 classic exercise of how - - -

18 JUDGE CANNATARO: So when state involvement is
19 triggered, why aren't the statutory protections that the
20 legislature deemed fit to put in place for people who are
21 involved - - - you know, people who are looking to make a
22 placement like this, why aren't those stat - - - why aren't
23 those protections triggered? I just don't understand it.

24 MR. KIERNAN: Because none of those statutes talk
25 about placements writ broad. They talk about foster care

1 placements. And on their face, they just don't apply when
2 the parents retain custody.

3 JUDGE RIVERA: So if I'm understanding you - - -
4 if I got to, like, sort of the core of some of this
5 argument anyway, the commissioner's view and the agency's
6 view is, if parents are going to do this anyway, we can
7 facilitate and make this better since the state, otherwise,
8 has hands off, and the court recognizes this right. And
9 the parents are therefore not put in a worse position
10 because they always have this option.

11 MR. KIERNAN: That's right.

12 JUDGE RIVERA: And so the state would be somehow
13 of assistance to them?

14 MR. KIERNAN: Right.

15 JUDGE RIVERA: Okay. So if that's sort of the -
16 - - at least a core part of your argument, then I'm not
17 sure that I understand why, if that's what the commissioner
18 and the agency intend, and that's the way they see it that
19 - - - that that effort wouldn't undermine what I think, if
20 not expressly, is implicit in this very comprehensive
21 foster care system we have, including voluntary foster care
22 to, in many ways, disincentivize parents from doing that by
23 providing a system where you've got oversight, you've got
24 these protections, and you're trying to send that message,
25 this is better. You can always do that. But this is

1 better and safer for everybody. So if you're, in a sense,
2 elevating or facilitating or encouraging the other one, it
3 seems to me you're working against the legislative intent.

4 MR. KIERNAN: And this is where I want to point
5 to the preventive services statute - - -

6 JUDGE RIVERA: Yeah.

7 MR. KIERNAN: - - - Section 409 and 409-a of the
8 Social Services Law. The legislature has made the judgment
9 that OCFS should provide services that prevent foster care
10 placements altogether.

11 JUDGE SINGAS: Are you arguing that this is
12 preventive services?

13 JUDGE CANNATARO: Yeah.

14 MR. KIERNAN: It's preventive. We're not calling
15 it a service because we use the word service to mean
16 something we pay for - - - that the federal government pays
17 for.

18 JUDGE SINGAS: Well, isn't that just semantics?

19 MR. KIERNAN: Well, it's preventive. It furthers
20 the goal - - - the legislature's policy goal underlying the
21 preventive services statute.

22 JUDGE HALLIGAN: With the distinction being that
23 the parent holds legal custody. That's it. Because the
24 child is out of the home under this regime, in any event.

25 MR. KIERNAN: That's true, Your Honor. And I

1 will say the federal government has recognized this model -
2 - - this host family model as a preventive service even
3 though it involves - - -

4 JUDGE HALLIGAN: So - - - but I'm asking you is -
5 - - is the reason that you call it preventive. I see your
6 lights on.

7 MR. KIERNAN: Right.

8 JUDGE HALLIGAN: But the reason you call it
9 preventive, notwithstanding that the child is taken outside
10 of the home simply because the parent retains legal
11 custody?

12 MR. KIERNAN: Right. And it increases the
13 likelihood that the parents will return to - - - that the
14 children will return to the parent's home.

15 JUDGE HALLIGAN: You anticipate. It hasn't been
16 implemented, so we don't know, I assume.

17 MR. KIERNAN: Well, it has been implemented in
18 many states. And there's a study in the record at 322
19 demonstrating that Safe Families for Children, in that
20 case, actually does increase the likelihood of family unity
21 over time.

22 CHIEF JUDGE WILSON: But you don't know if those
23 states have voluntary programs like New York's?

24 MR. KIERNAN: I don't know the extent to which
25 they offer voluntary programs.

1 JUDGE CANNATARO: But that's important because
2 what's being prevented is full foster care - - - full, you
3 know, involuntary foster care.

4 MR. KIERNAN: Right.

5 JUDGE CANNATARO: This is a - - - we have a
6 unique program that that's part of a more developed
7 statutory scheme. So it's somewhat more difficult to call
8 this preventive when it looks so much like voluntary foster
9 care.

10 MR. KIERNAN: But there's no evidence in the
11 statutes that the legislature ever intended voluntary
12 placements to be the only option for parents in crisis.
13 They're called voluntary. Parents have always had the
14 right to rely on host families in the community.

15 JUDGE CANNATARO: Well, the other options would
16 be preventative - - - we don't have to use the word
17 services, but preventative actions to keep them out of
18 that. But this is an analog for that, isn't it?

19 MR. KIERNAN: It's really - - - and if I may - -
20 - I know I'm over time. It's really designed to be quite
21 temporary - - - more temporary - - - God bless you - - -
22 than foster care. As the Safe Families amicus brief notes
23 their model in other states, the average stay is only ten
24 days. There's a ninety-nine percent rate of returning the
25 children to the parents. And those are better numbers than

1 foster care.

2 OCFS did not make the judgment that parents can
3 do this. Legislators already made that judgment. The
4 legislature has also made the judgment that OCFS can
5 authorize agencies to facilitate these arrangements, and
6 the regulations are consistent with that statutory
7 authority. Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. SILVERMAN: More temporary? Under host
10 homes, placements can be indefinite as long as they're
11 renewed every six months by the parent. That's - - - the
12 potential is not temporary.

13 I need to push back again, Your Honors, on the
14 issue of custody. What's at stake? It's a bundle of
15 decision-making. And again, under both programs, parents
16 give up some decision-making for the - - - for the course
17 of the placement. I would point Your Honors to 18 NYCCR
18 441.22(d), which says that if a parent in a voluntary
19 placement doesn't sign the form, the parent retains the
20 authority to make decisions over the child. A voluntary
21 foster care placement is very different.

22 JUDGE RIVERA: Is the - - - is this regulatory
23 program coercive?

24 MR. SILVERMAN: There are - - - there was an
25 amicus brief submitted pointing to the inherently coercive

1 nature of these kinds of placements. And the other side
2 says, well, these are extreme examples, but we all know, if
3 there's no court oversight, if there's no accountability,
4 if there's no sort of exit door, there's always the
5 potential for abuse and coercion, especially when it's the
6 agency that's informing the families of the options.

7 JUDGE RIVERA: Why isn't that then the lawsuit?

8 MR. SILVERMAN: I'm sorry?

9 JUDGE RIVERA: Why isn't that then the lawsuit?

10 It's turned out that this is coercive in nature, and that's
11 clearly contrary to the - - -

12 MR. SILVERMAN: Well, I - - -

13 JUDGE RIVERA: - - - legislative intent - - -

14 MR. SILVERMAN: I - - - I - - -

15 JUDGE RIVERA: - - - rather than assuming such in
16 advance.

17 MR. SILVERMAN: I think that there are
18 protections in the voluntary placement program that protect
19 parents. A court needs to make a decision as to whether
20 the placement was voluntary, and that's an important role
21 that the court plays to make sure that this placement is a
22 knowing and voluntary. I need to also just push back a
23 little bit on the idea that - - -

24 JUDGE RIVERA: How many families might this
25 actually involve?

1 MR. SILVERMAN: Well, I know that what - - -

2 JUDGE RIVERA: Is there any way to guess?

3 MR. SILVERMAN: Lawyers for Children, which is
4 one of our clients, has about 1,000 court appearances a
5 year in voluntary placements. So I don't have an exact
6 number for you, but - - -

7 JUDGE RIVERA: But isn't the comparison the
8 parents who would not go that route - - -

9 MR. SILVERMAN: Right. We don't - - - we don't -
10 - -

11 JUDGE RIVERA: - - - and the comparison those who
12 would place their child with a friend, a neighbor, or
13 someone else?

14 MR. SILVERMAN: They make no secret that the
15 point of host homes is to divert. In fact, divert, I be -
16 - - I guess, avert is in the actual regulation. Let's
17 avert the need for child welfare involvement. So the whole
18 point of the regulation is to take people out of the child
19 welfare system.

20 JUDGE RIVERA: Then why isn't that, as he argued
21 at the end, in line with the statutory mandate?

22 MR. SILVERMAN: Because - - - well, there's one
23 argument he makes, which is - - -

24 JUDGE RIVERA: Preventive, right? Preventive
25 services.

1 MR. SILVERMAN: - - - that, you know, there's - -
2 - there's no statement - - - state involvement when the
3 parent makes a decision. But as we've discussed, when it's
4 the state's choice of a stranger, and that child is placed
5 with a stranger, again, in the eyes of the child, there's
6 no difference.

7 If I could, Your Honor, with no time remaining,
8 just push back on this idea that - - - that this is a
9 parent's choice without state involvement, the host homes
10 agency identifies the home. That's the home - - - oversees
11 the home. OCFS oversees the whole program. If there's a
12 problem with the child, the host home doesn't go to the
13 parent. It goes to the host home agency. The host home
14 agency's oversight of the home is exactly the same as the
15 oversight that an authorized agency would do on a home in a
16 voluntary foster care. If you look at the regulations, in
17 these regulations, they're very similar.

18 JUDGE TROUTMAN: But your complaint is without
19 the protections of the court system involvement and
20 representation for the children.

21 MR. SILVERMAN: Without the court oversight,
22 without the appointment of counsel, without a priority for
23 kinship placement, which is something I didn't mention,
24 which I should have mentioned - - -

25 JUDGE RIVERA: But the core - - -

1 MR. SILVERMAN: - - - critically important.

2 JUDGE RIVERA: - - - of your argument at the end
3 of the day, because it's the only way you're going to have
4 standing, is that this siphons off - - - this program will
5 encourage and incentivize families who would otherwise do
6 the voluntary foster care, right, in - - - within - - -
7 with all those protections within the legislative
8 framework, they'll choose this instead.

9 MR. SILVERMAN: Right.

10 JUDGE RIVERA: Right? That's really got to be -
11 - -

12 MR. SILVERMAN: A hundred percent.

13 JUDGE RIVERA: - - - your argument, no?

14 MR. SILVERMAN: Yes. And they're making no
15 secret. They're saying parents should be given another
16 option, that the voluntary program is not the only option
17 for parents.

18 CHIEF JUDGE WILSON: Well, the - - -

19 MR. SILVERMAN: But think about this - - -

20 CHIEF JUDGE WILSON: - - - the program is still -
21 - -

22 JUDGE RIVERA: There is already an option. Their
23 argument is we're going to facilitate that option for
24 parents who would like to exercise that option but don't
25 have family or friends that they feel comfortable with with



1 whom they're going to place their kids.

2 MR. SILVERMAN: But they're saying that it's
3 consistent with the legislative intent for there to be
4 another option. But wait a minute. If the legislature
5 says you shall provide services, you shall go to court.
6 You shall put family - - - siblings together and do an
7 investigation to find family members. Because even OCFS,
8 in their own work, they acknowledge that putting kids with
9 family members is better for the child. But somehow in the
10 regulations, it's not important. That's the definition of
11 an arbitrary government.

12 JUDGE RIVERA: I - - - well, maybe I
13 misunderstood them. And you can clarify this for me. I
14 understand this to be for parents who don't have those
15 kinds of options.

16 MR. SILVERMAN: Well - - -

17 JUDGE RIVERA: That's why it seems - - -

18 MR. SILVERMAN: So the - - -

19 JUDGE RIVERA: - - - to me it's a very small
20 group we're - - -

21 MR. SILVERMAN: But this is - - -

22 JUDGE RIVERA: - - - talking about.

23 MR. SILVERMAN: This is why the legislative
24 framework is so detailed here. It requires the agency not
25 to just hear from the parent, but to make their own

1 investigation and see if there's a family member or a close
2 family friend who may want to serve in this position, which
3 would put the child in a much better position, which would
4 increase the chances of reunification, which is something
5 that is so critically important.

6 JUDGE RIVERA: I thought - - - again, I thought
7 their argument was this is for the parents who do not have
8 that option.

9 MR. SILVERMAN: Right. Parents may not think
10 they have the option, but the legislature has said that's
11 not good enough. You, the agency, must do an investigation
12 to see if there might be someone out there. And what this
13 regulation does is it basically comes and says, I realize
14 that's what the legislature is telling us we have to do,
15 but no, we don't need to do it.

16 JUDGE CANNATARO: So this is more than just
17 vetting agencies. It actually - - - you know, the
18 voluntary - - - the statutory voluntary plan covers things
19 like looking for kinship placements and other
20 considerations?

21 MR. SILVERMAN: And fundamentally avoiding the
22 whole situation by providing services.

23 JUDGE RIVERA: Is there anything in the regs that
24 prevents them from doing that or somehow absolves them of
25 complying with that legislative mandate?

1 MR. SILVERMAN: The regulation specifically says
2 that all they have to do is provide referral lists. The
3 legislature said something very different. The legislature
4 didn't say provide - - -

5 JUDGE RIVERA: Yes. But why isn't that a
6 subsidiary obligation under - - -

7 MR. SILVERMAN: Well - - -

8 JUDGE RIVERA: - - - these regs because the
9 legislature - - - of course, the statute always supersedes
10 the regs and it controls.

11 MR. SILVERMAN: Well, of course, our position is
12 that the regulator has to provide these services. But what
13 if you have a regulation like we do here that says, no, you
14 don't have to. You certainly don't have to go to court if
15 the placement - - -

16 JUDGE RIVERA: Well, I'm sorry. I was talking
17 about the kinship placement.

18 MR. SILVERMAN: Or the - - -

19 JUDGE RIVERA: I thought you were arguing - - -

20 MR. SILVERMAN: Yeah.

21 JUDGE RIVERA: - - - through this regulatory
22 program - - -

23 MR. SILVERMAN: Yes.

24 JUDGE RIVERA: - - - they no longer have to try
25 and find kinship care.

1 MR. SILVERMAN: I think they still - - -

2 JUDGE RIVERA: Or am I misunderstanding you?

3 MR. SILVERMAN: I think they still have this
4 obligation, but they - - -

5 JUDGE RIVERA: Yes.

6 MR. SILVERMAN: - - - they have these proposed
7 regulations that would take that obligation away that says
8 - - -

9 JUDGE RIVERA: But that's what I'm asking. How
10 is that so?

11 MR. SILVERMAN: Because under the regulations, it
12 says all we have to do is we have to ask the parent - - -

13 JUDGE RIVERA: But that's for that program. It
14 doesn't - - -

15 MR. SILVERMAN: Right.

16 JUDGE RIVERA: - - - it doesn't absolve them - -
17 - at least I didn't see it. Maybe I misunderstood
18 something in the regulatory language. It doesn't absolve
19 them of a - - - what you're calling the statutory mandate.

20 MR. SILVERMAN: But that program is the placement
21 of their child with a stranger. And if they're going to
22 place their child with a stranger selected by the state,
23 then how can the regulator not have to provide services?
24 How can they not have to go to court? How can they not
25 have to prioritize families?

1 Well, my view is, under the statute, just like
2 this court is bound by the statute, they should be bound by
3 the statute too. And if this court were to uphold the
4 Third Department's decision, think of the dangerous
5 precedent of any other agency that can take the law, call
6 it something else, and this idea that that it's optional,
7 that we can create a new system without the requirements
8 that the legislature has demanded is very dangerous.

9 JUDGE RIVERA: What about those parents who are
10 very concerned about any involvement of the judicial branch
11 and the state in a heavy-handed way? What about those
12 parents? Isn't that - - - aren't some of those parents - -
13 -

14 MR. SILVERMAN: So - - -

15 JUDGE RIVERA: - - - the ones who might fall
16 within this category?

17 MR. SILVERMAN: And you know what? The system is
18 not perfect. And many of us work for reform within the
19 system. But the answer is not to transform and modernize
20 the system as a regulator and create an entirely new
21 system. The answer is to regulate the system you're given
22 - - -

23 JUDGE RIVERA: Yeah.

24 MR. SILVERMAN: - - - and to do a better job in
25 making sure that system works.



1 JUDGE RIVERA: Yeah. I assume you agree that
2 should we disagree with you and agree with them, that the
3 legislature is free then to pass legislation that would
4 prohibit adoption of such a program.

5 MR. SILVERMAN: They don't have the authority to
6 issue these - - -

7 JUDGE RIVERA: No. No. No. I understand, but
8 let's say we disagreed with you. I understand your
9 argument. Let's say we disagreed with you. You agree that
10 the legislature can always step in and correct a mistake of
11 the regulator and perhaps a mistake of this court as - - -
12 as the legislature may see it.

13 MR. SILVERMAN: A legislature could always step
14 in and say, look, read the - - - read our laws, and that's
15 what we - - - we meant what we said. And we're going to
16 reissue the same - - -

17 JUDGE RIVERA: The - - - yes.

18 MR. SILVERMAN: - - - laws over again.

19 JUDGE RIVERA: I assume you would say, and that's
20 true if we held in favor of you, that if they really had
21 that authority, they could go back to the well - - -

22 MR. SILVERMAN: I mean, look - - -

23 JUDGE RIVERA: - - - and get the legislature to
24 agree.

25 MR. SILVERMAN: - - - look at the comments in - - -

1 - in the comments to the regulations. There are lots of
2 comments on both sides. That's the kind of debate that you
3 want in a legislature, not the kind of debate you want
4 before a regulator. A regulator shouldn't make those
5 policy determinations.

6 JUDGE RIVERA: Well, but except that is the
7 system. I mean, we do have a system of note and comments,
8 right? I mean, the - - -

9 MR. SILVERMAN: No. No. I'm not arguing against
10 the system. What I'm saying is, if you read those comments
11 - - -

12 JUDGE RIVERA: Yes.

13 MR. SILVERMAN: - - - these are comments that
14 elected representatives of the people should consider and
15 should debate and should come up with a lasting choice, as
16 opposed to a regulator coming in and saying, we're going to
17 have our own agenda, and we're going to create a new
18 system, and we're going to disregard the statutes.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. SILVERMAN: Thank you for the extra time.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Lawyers for Children v. NYS Office of Children and Family Services, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: April 21, 2026

