

**Lawyers for Children v New York State Off. of
Children & Family Servs.**

2023 NY Slip Op 34906(U)

November 30, 2023

Supreme Court, Rensselaer County

Docket Number: Index No. EF2022-271346

Judge: Richard J. McNally, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At a IAS Term of the Rensselaer County Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 30th day of November, 2023.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

LAWYERS FOR CHILDREN, et al.,

Petitioners,

-against-

NEW YORK STATE OFFICE OF CHILDREN AND
FAMILY SERVICES, et al.,

Respondent.

DECISION & ORDER
Index No. EF2022-271346

APPEARANCES: PROSKAUER ROSE LLP
William C. Silverman
Michael M. Guggenheim
Sarah A. Emmerich
Perry J. Kumagai
Attorneys for Petitioners
Eleven Times Square
New York, New York 10036

LETITIA JAMES
Attorney General of the State of New York
Gregory Rodriguez
Attorneys for Respondents
The Capitol
Albany, New York

MCNALLY, J.

Petitioners, Lawyers for Children, The Legal Aid Society, and Legal Aid Bureau of Buffalo, Inc., filed the instant CPLR article 78 petition challenging regulations adopted by respondent, New York State Office of Children and Family Services (hereinafter “OCFS”). In 2022, this Court dismissed petitioner’s petition for lack of standing. The Appellate Division reversed, and now this Court will decide petitioner’s petition on the merits, specifically through an analysis of the *Boreali* factors at issue (*Laws. for Child. v. New York State Off. of Child. & Fam. Servs.*, 193 NY3d 378 [3d Dept 2023]; *Boreali v. Axelrod*, 71 NY2d 1 [1987]). The Verified Petition seeks to have this Court annul, vacate, and set aside the regulations and program promulgated by OCFS. Pending before this Court is respondent’s motion to dismiss pursuant to CPLR 3211 [a] [7]. For the reasons set forth below, respondent’s motion is granted.

Petitioners are not-for profit legal service organizations under contract to represent children that encounter the foster care system. Respondents are an executive agency controlled by the Social Services Law. In December 2021, OCFS promulgated regulations creating the Host Family Homes program. This program allows parents to place their children in the temporary care of volunteer families that have been pre-vetted by OCFS without needing to resort to the voluntary placement process of the Social Services Law (*Laws. for Child.*, 193 NY3d 378, 380; 18 NYCRR part 444). These regulations authorized certain agencies to be host family agencies that would recruit and train volunteer host families, conduct background checks, approve host families and match the host family with a family in need (*see id.*). Under this program, the placement of a child with a host family would not involve a relinquishment of legal custody; instead, the parents would execute “a designation of ‘person in parental relation’” (18 NYCRR 444.5 [b]; *see* 18 NYCRR 444.11 [a] [6]) that could be revoked at any time (*see id.*; 18 NYCRR

444.11 [a] [5]). Children cared for by a host family under this program were not entitled to assigned counsel, although they could communicate with an attorney (*see id.*; 18 NYCRR 444.7 [e]).

Petitioners characterize the Host Family Homes program as an “extrajudicial voluntary placement system” and “a shadow foster care system” for children created without any statutory authority, and assert it is irrational, arbitrary, and capricious. Additionally, petitioners contend, unlike children placed into foster care, that under the host family home program, a child displaced from home and placed with a host family would not have access to an attorney and would otherwise be deprived of an advocate to represent their interests. Petitioners further contend, OCFS exceeded its regulatory authority and engaged in impermissible rulemaking and have acted in an arbitrary and capricious manner.

***Boreali* Factors**

In *Boreali v. Axelrod*, the Court of Appeals articulated four factors to determine whether a state agency acted beyond its statutory authority when promulgating regulations. The nature of the inquiry as it relates to such an allegation is whether the legislative branch of government intended, as evidenced by the scope and language of the enabling legislation, "to grant regulatory authority over a specific subject matter to an administrative agency which exists as part of the coequal executive branch" (*Boreali*, 71 NY2d 1, 15).

The factors to be considered include (1) whether the agency merely "balance[d] costs and benefits according to preexisting guidelines," or instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems", (2) whether the agency wrote on "a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance," or whether it simply "fill[ed] in the details of broad

legislation describing the over-all policies to be implemented", (3) "whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve", and (4) whether any "special expertise or technical competence" was involved in the development of the challenged regulation (*Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610 [2015]; *Boreali v. Axelrod*, 71 NY2d 1).

First *Boreali* Factor

The promulgation of regulations necessarily involves analyses of societal costs and benefits, and cost-benefit analysis is the essence of reasonable regulation (*New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 23 NY3d 681, 697 [2014]). If an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally (*id.*). Additionally, an agency cannot make value judgments entailing difficult and complex choices between broad policy goals to resolve social problems, and cannot construct a regulatory scheme laden with exceptions based solely upon economic and social concerns (*NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Pres.*, 27 NY3d 174, 181 [2016]).

When crafting the regulations in question, OCFS acted under the broad authority granted to them by the legislature to place out and board out children for the purpose of providing care. (*see* Social Services Law § 374 [1], [2]). Importantly, Social Services Law § 374 [2] requires that OCFS not restrict or limit the right of a parent to place out or board out a child. OCFS created the Host Family Homes program for situations in which parents needed optional, temporary care for their child during an unexpected event or emergency, such as a health emergency. Prior to the creation of such regulations, children would be placed into foster care during such situations, and

parents would need to go through family court to regain custody after the emergency situation was over. When creating the Host Family Homes program, OCFS balanced the costs associated with placing children into foster care during such situations. OCFS found that promulgating the regulations in question provided parents the benefit of an additional, voluntary option that would prevent their child from being sent to foster care, and give parents the freedom to choose how long their child was placed in outside care with a pre-vetted host family. OCFS also considered the benefits of the Host Family Homes program. By allowing parents the option to circumvent foster care placement during such emergency situations, this ultimately reduces the burden on the foster care system.

OCFS did not engage in “value judgments” when promulgating the regulations in question. There were no difficult and complex choices made between broad policy goals to resolve social problems. OCFS is not attempting to solve the complex societal problems that cause children to enter foster care, and has not created regulations that force any new obligations on parents.

Second *Boreali* Factor

The second *Boreali* factor inquires as to whether the agency merely filled in details of a broad policy, or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance (*Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 NY3d 601, 609 [2018]). Where the legislature has granted powers to regulate a specific subject area, and an agency has a long history of regulation in that specific subject area, there can be no serious claim that the agency is writing on a clean slate (*id.* at 614).

Here, OCFS correctly points to multiple areas in the Social Services Law that show a long history of regulatory authority in the areas of foster care (Social Services Law §§ 371 [21];

372 [4]; 374-b; 374-e; 376 [1]; 377 [1]; 378 [2]), preventive services (Social Services Law §§ 409; 409 [A] [1] [a] [ii], [4], [5] and [6]), adoption services (Social Services Law § 371 [10] [c]), and child protective services (Social Services Law §§ 421 [3], [5] [b], and [6]; 423 [1] [c]; 424 [1]; 424-a [1] [a]; 427), as well as the broad authority granted to OCFS under Social Services Law § 374 [2] described above.

In addition, the Host Family Homes program is not creating regulations that force certain action as was the case in *New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 23 NY3d 681, [2014] (regulations mandating sugary drinks portion cap), *Stevens v. New York State Div. of Crim. Just. Servs.*, 169 NY3d 1 [2022] (regulations expanding use of database for familial DNA searches for law enforcement investigations), and *Parents for Educ. & Religious Liberty in Sch. v. Young*, 190 NY3d 816 [2023] (regulations requiring local school authorities to do substantial equivalency determinations for all nonpublic schools within their geographical boundaries). The Host Family Homes program is instead giving parents an additional, voluntary option for placing the children outside of the home during an emergency situation without needing to go through the process of foster care. Parents in such situations can still place their children in foster care if they wish, and children can still be represented by an attorney from petitioner's organizations.

Third *Boreali* Factor

Here, petitioners cite Assembly Bill A8090 to evince that the third *Boreali* factor weighs in their favor. A8090 would have allowed parents to make alternative living arrangements for children who are at substantial risk of abuse, but never made it out of committee. This limited legislative action does not make the third *Boreali* factor weigh in favor of petitioners.

Fourth *Boreali* Factor

OCFS has special expertise in the area of child protection and placing out children. OCFS utilized their special expertise in their extensive deliberative process when adopting the regulations at issue, as shown by exhibits 1-7 (NYSCEF Docketed Nos. 7-13). OCFS consulted with and received extensive comments from myriad sources including individuals and community groups and other states' officials when adopting the Host Family Homes program, and conducted internal discussions and deliberations which involved the use of their special expertise. OCFS' special expertise was necessary to the implementation of this program, which is supported by the authority granted to OCFS by the legislature as described in the analysis of the first and second *Boreali* factors above.

Rational Basis

The judicial standard of review of administrative determinations pursuant to CPLR article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v. Board of Education*, 34 NY2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis (*Heitz v. Brown*, 80 NY2d 998 [1992]). The reviewing court in a proceeding pursuant to CPLR article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law (*Matter of Flacke v. Onondaga Landfill System*, 69 NY2d 355 [1987]; *Akpan v. Koch*, 75 NY2d 561 [1990]). With respect to regulations, the court should uphold a regulation if it has a rational basis and is not unreasonable, arbitrary, or capricious (*Cavetti v. Proud*, 139, 34 NY3d 84, 87 [2016]).

Here, OCFS has been granted broad authority by the legislature in matters of child welfare, and has created the Host Family Homes program to give parents an additional option for child placement in times of need. OCFS has crafted the regulations in such a way to give full authority and decision making control to parents, and to allow parents to end the placement at any time. Host families are vetted by OCFS and a medical and background check is conducted for each host family candidate, and host families are monitored by OCFS throughout the period of the child's placement. There is nothing to indicate the regulations crafted by OCFS to create the Host Family Homes program were arbitrary, capricious, irrational, or contrary to law, and the regulations at issue were created under the rational basis of providing additional, optional support to families in need.

Conclusion

This Court holds that all four *Boreali* factors weigh in favor of OCFS, and that the Host Family Homes regulations have a rational basis and are not arbitrary and capricious.

Accordingly, it is

ORDERED that respondent's motion to dismiss is hereby granted.


The Court has uploaded the original Decision and Order/Judgment to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Rensselaer County Clerk.

Counsel for the defendants are not relieved from the applicable provisions of CPLR 2220 or the Uniform Rules of Supreme and County Courts § 202.5b (h) (2), insofar as it relates to service and notice of entry of the filed document upon all other parties to this special proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Uniform Rules of Supreme and County Courts § 202.5b (b) (2) (I) directs that service upon nonparticipating parties must be made in hard copy.

SO ORDERED!
ENTER

Dated: November 30, 2023
Troy, New York



RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

NYSCEF Docketed numbers 1-51.