

**STATE OF NEW YORK
COURT OF APPEALS**

In the Matter of the Application of
WENCESLAO JUAREZ, SERAFIN RODRIGUEZ, MICHELLE SORIANO, DANIEL
VELEZ, and GORDON, JACKSON & SIMON, ESQS.,

Petitioners-Respondents,

—*against*—

NEW YORK STATE OFFICE OF VICTIM SERVICES, ELIZABETH CRONIN, VIRGINIA
MILLER, JOHN WATSON, and MAUREEN FAHY, sued in their official capacities as
members of the New York State Office of Victim Services,

Respondents-Appellants.

BRIEF FOR RESPONDENTS

BOIES SCHILLER FLEXNER LLP

George F. Carpinello

Mark A. Singer

30 South Pearl Street

Albany, New York 12207

Tel: (518) 434-0600

Fax: (518) 434-0665

Attorneys for Respondents

Dated: January 28, 2020

DISCLOSURE STATEMENT

Gordon, Jackson & Simon, Esqs., is a New York law firm located at 70 East Sunrise Highway, Suite 500, Valley Stream, NY 11581. Gordon, Jackson & Simon, Esqs., has no parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

DISCLOSURE STATEMENTi

TABLE OF AUTHORITIESiii-iv

QUESTION PRESENTED1

STATEMENT OF THE CASE.....1

PRELIMINARY STATEMENT2

BACKGROUND6

 I. HISTORY OF OVS6

 II. OVS RETALIATES AGAINST THE GORDON FIRM AND ITS
 CRIME VICTIM CLIENTS.....9

 III. OVS AMENDS ITS REGULATIONS11

 IV. OVS MOOTS *BONNEY V. OVS*14

 V. RESPONDENTS’ APPLICATIONS15

 VI. THE DECISIONS BELOW16

ARGUMENT17

 I. THE THIRD DEPARTMENT’S ORDER SHOULD BE AFFIRMED BECAUSE
 OVS’S INTERPRETATION OF THE EXECUTIVE LAW IS ERRONEOUS AND
 NOT ENTITLED TO DEFERENCE.....17

CONCLUSION.....29

CERTIFICATE OF COMPLIANCE.....31

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page(s)</i>
<i>Acevedo v. New York State Dep't of Motor Vehicles,</i> 29 N.Y.3d 202 (2017).....	24
<i>Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections,</i> 522 F.3d 182 (2d Cir. 2008)	22
<i>Bd. of Trustees of Vill. of Groton v. Pirro,</i> 170 A.D.3d 1479 (3d Dep't 2019).....	22
<i>Bernstein v. Toia,</i> 43 N.Y.2d 437 (1977).....	24
<i>Ferro v. Lavine,</i> 46 A.D.2d 313 (3d Dep't 1974).....	19
<i>Goldstein v. State,</i> 188 Misc. 2d 524 (Sup. Ct. Albany Co. 2001).....	19
<i>In re Freeman's Estate,</i> 34 N.Y.2d 1 (1974).....	22, 23
<i>Kigin v. State of New York Workers' Compensation Bd.,</i> 24 N.Y.3d 459 (2014).....	24
<i>Kurcsics v. Merchants Mut. Ins. Co.,</i> 49 N.Y.2d 451 (1980).....	21
<i>Med. Soc'y of State v. Serio,</i> 100 N.Y.2d 854 (2003).....	25
<i>New York Const. Materials Ass'n, Inc. v. New York State Dep't of Envtl. Conservation,</i> 83 A.D.3d 1323 (3d Dep't 2011).....	19

<i>Old Republic Life Ins. Co. v. Wikler</i> , 9 N.Y.2d 524 (1961).....	25
<i>Regan v. Crime Victims Compensation Board</i> , 57 N.Y.2d 190 (1982).....	18, 19, 21
<i>United Univ. Professions v. State</i> , 36 A.D.3d 297 (3d Dep’t 2006).....	21
<i>Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep’t of Health</i> , 5 N.Y.3d 499 (2005).....	21
Regulations	
9 NYCRR 525.3 and 525.9	1
9 NYCRR 525.3(h)	11, 12
9 NYCRR 525.9(a)	8
9 NYCRR 525.9(c)	8, 13, 20
9 NYCRR 525.9(d)	23

QUESTION PRESENTED

1. Whether the Appellate Division, Third Department correctly determined that Appellants' amendments to 9 NYCRR 525.3 and 525.9 that limit counsel fee awards for crime victims to fees incurred during administrative appeals and appellate judicial review are inconsistent with the language and purpose of the Executive Law and in excess of the authority granted to OVS by the Legislature.

STATEMENT OF THE CASE

By Decision, Order & Judgment dated December 14, 2017, the Supreme Court, Albany County (1) struck down the Office of Victim Service's ("OVS") practice of (i) determining essential personal property ("EPP") claims by reference to a schedule of per-item caps and (ii) capping attorneys' fees at amounts equal to EPP awards; (2) declared valid OVS's amended rules limiting the awards of attorneys' fees only to representation before OVS on *reconsideration* or before the appellate division; and (3) found that Respondents lacked standing to challenge the amended rules limiting the awards of attorneys' fees only to *successful* requests for reconsideration or appeal and making the award of fees discretionary even under such circumstances.

By Opinion and Order dated January 31, 2019, the Appellate Division, Third Department, by a unanimous panel, reversed the Supreme Court opinion and annulled OVS's amended regulations that limit counsel fee awards for crime victims

to fees incurred during administrative appeals and appellate judicial review. The Third Department found the amended regulations inconsistent with the language and purpose of the Executive Law and *ultra vires*.¹ This appeal concerns OVS's challenge to the Third Department's January 31, 2019 Opinion and Order.

This is the second action challenging OVS's amended regulations. The first action, *Bonney v. New York State Office of Victim Services*, was dismissed by the trial court in a judgment dated April 29, 2016, on the grounds that (1) the crime victim petitioners in that action lacked standing because they had applied for benefits and attorneys' fees prior to January 13, 2016, the effective date of the amended regulations, and (2) Gordon, Jackson & Simon, Esqs. (the "Gordon Firm") lacked standing to pursue an award in its own right.² An appeal from that judgment was rendered moot by OVS's subsequent payment of attorneys' fees to those crime victim petitioners.

PRELIMINARY STATEMENT

Article 22 of the Executive Law empowers and obligates OVS to provide financial assistance to crime victims. In relevant part, Executive Law § 626(1)

¹ The Third Department affirmed the Supreme Court's finding that Respondents lack standing to challenge the provisions in the amended regulations that limit counsel fee awards to *successful* applications and that may permit OVS to deny counsel fee awards even when an application is successful. That finding is not challenged on this appeal.

² Relying on the judgment in *Bonney v. New York State Office of Victim Services*, the Supreme Court in this action dismissed the Gordon Firm for lack of standing by Decision & Order dated June 2, 2017. That finding is not challenged on this appeal.

requires OVS to reimburse crime victims for out-of-pocket loss, which “shall . . . include . . . the cost of reasonable attorneys’ fees for representation before the office and/or before the appellate division upon judicial review,” up to \$1,000. Consistent with the plain language of the statute, OVS for many years awarded attorneys’ fees to crime victims for work performed at the early stages of their claims.

That changed in January 2016 when OVS unilaterally and without statutory authorization took it upon itself to eliminate attorneys from the representation of crime victims filing claims with OVS. OVS adopted new regulations that limit awards of counsel fees to only those incurred in the very limited situations of representation of clients in *successful* applications for administrative *reconsideration* or *successful* judicial appeal. The regulations also grant OVS the unfettered discretion to deny attorneys’ fees awards even to this limited group of applicants. Around the same time, without any statutory or even regulatory authority, OVS began placing item-by-item caps on crime victims’ EPP awards and also began capping attorneys’ fees at amounts equal to the total EPP awarded to crime victims.³ The agency also instituted a policy of threatening and intimidating crime victims with non-existent financial consequences if they persisted in using

³ While OVS claimed below that the per-item EPP caps benefited crime victims, it is mathematically impossible for OVS’s capping practices to ever result in a larger total award to crime victims. Indeed, the caps had the effect of reducing total EPP awards to the crime victim Respondents in this case.

attorneys and denying attorneys' fees to crime victims who nonetheless retained attorneys.

Interpreting the statute's clear language, the Third Department correctly determined that there is "no authorization in the statute's plain language for OVS to conclude that counsel fees are never 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in every instance," because the statute does not "distinguish[] among the stages of a victim's representation before OVS, nor does the statutory text suggest that OVS may do so." RA 502-503 (Third Department Opinion at 5-6) (emphasis in original). Rather, "Executive Law § 626(1) uses broad, mandatory language in providing that out-of-pocket loss 'shall' include reasonable counsel fees for 'representation' with no qualifications or limitations other than the \$1,000 ceiling." RA 503 (Third Department Opinion at 6).

Notwithstanding the statute's text, OVS argues that its denial of attorneys' fees is justified because OVS thinks awarding such fees is bad policy—that representation at the early stages of a claim before OVS is not sufficiently "novel" or "difficult;" that it is unreasonable to incur attorneys' fees exceeding recovery from OVS; and that crime victims should instead rely exclusively on the victim assistance programs ("VAPs"), upon which OVS has chosen to bestow hundreds of millions of dollars. As the Third Department found, however, OVS does not get decide whether

it is good or bad policy for victims to recover attorneys' fees for "representation before the office" at all stages of a claim. The Legislature has already spoken. The Legislature could have easily made an exception for costs associated with navigating crime victims' initial applications through the OVS bureaucracy. But it chose not to.

Moreover, OVS's reliance on the VAPs' assistance to crime victims misses the mark because VAPs do not offer un-conflicted advice to crime victims, as VAPs are established and funded by OVS. The VAPs' conflicts have real consequences. For example, the VAPs never challenged OVS's practices of placing per-item caps on EPP awards and of arbitrarily capping attorneys' fees at the amounts awarded for EPP losses—practices the Supreme Court correctly found were *ultra vires*.

While OVS denigrates the work performed by attorneys who represent crime victims as insufficiently novel or complex to warrant significant fees, fees for such work are already subject to a modest \$1,000 cap, even in cases that prove to be very time-consuming. As the Legislature recognized, attorneys need some incentive to be involved in these cases. Moreover, as the Third Department found, OVS's position overlooks the more complicated cases in which attorneys may prepare requests for emergency assistance on behalf of crime victims.

For all the foregoing reasons and those explained in greater detail below, Respondents respectfully request that the Third Department’s Opinion and Order be affirmed.

BACKGROUND

I. HISTORY OF OVS

On or about June 22, 2010, the New York State Legislature created OVS as a successor to the Crime Victims Compensation Board. The Legislature explained that the primary purpose of OVS is to provide aid to victims of crime:

The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature’s intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

Executive Law § 620.

The Legislature expressly provided that a victim’s “[o]ut-of-pocket loss . . . *shall . . . include* the cost of reasonable attorneys’ fees for representation before the office and/or before the appellate division upon judicial review not to exceed one thousand dollars.” Executive Law § 626(1) (emphasis added).

The Legislature also required OVS to fashion rules providing for written notice to victims of their right to representation by counsel and their eligibility for an award of attorneys' fees:

The office shall determine claims in accordance with rules and regulations promulgated by the director. Such rules and regulations must provide for: (a) written notification to an applying victim of their right to representation by counsel, as well as their potential eligibility for an award of attorney's fees pursuant to subdivision one of section six hundred twenty-six of this article[.]

Executive Law § 627(1)(a).

Furthermore, the Legislature charged OVS with the power and duty to make rules for the approval of attorneys' fees for representation before the office, without qualification, and/or before the appellate division on appeal:

The office shall have the following powers and duties: . . . To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including rules for . . . the approval of attorneys' fees for representation before the office and/or before the appellate division upon judicial review as provided for in section six hundred twenty-nine of this article

Executive Law § 623(3).

To comply with its statutory mission, OVS promulgated certain regulations, including rules governing the award of attorneys' fees. After an initial series of amendments, OVS filed these rules with the Secretary of State in 2011. OVS also provided all crime victims with specific notice of their right to retain counsel and

receive reimbursement for the fees of such counsel. *See* RA 029, RA 168 (Verified Petition at ¶ 23 and Exhibit 17 thereto).

The prior version of 9 NYCRR 525.9(a) provided as follows:

Parties have the right to be represented before the office, *at all stages of a claim*, by an attorney-at-law duly licensed to practice in the State of New York and/or before the Appellate Division upon judicial review of the office's final determination. The office shall provide written notification to an applying claimant and/or victim of their right to representation by counsel, as well as their potential eligibility for an award of attorney's fees pursuant to Executive Law subdivision one of section 626 of Article 22.

9 NYCRR 525.9(a) (prior version) (emphasis added). *See* RA 148-149 (Exhibit 16 to the Verified Petition at 6-7).

The prior version of 9 NYCRR 525.9(c) provided as follows:

Reasonable attorney's fees must be approved by the office which may require a written statement of services rendered. Whenever an award is made to a claimant who is represented by an attorney, the office *shall* approve a reasonable fee commensurate with the services rendered, up to \$1,000. Fees may be disallowed in cases when the office finds that a claim was submitted without legal or factual basis and/or the claim or action is without merit and frivolous.

9 NYCRR 525.9(c) (prior version) (emphasis added). *See* RA 149 (Exh. 16 to the Verified Petition at 7).

OVS also promulgated the following regulation regarding the factors to be considered in determining the reasonableness of fees:

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the fee customarily charged in the locality for similar legal services;
- (3) the amount involved and the results obtained;
- (4) the time limitations imposed by the client or by the circumstances;
- (5) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (6) whether any part of the cost of the legal service provided to the claimant has been paid or is payable by a third party.

9 NYCRR 525.9(d).

II. OVS RETALIATES AGAINST THE GORDON FIRM AND ITS CRIME VICTIM CLIENTS

In 2015, the Gordon Firm began representing victims of crime before OVS. The Firm provides numerous services for such victims. It counsels them on their rights; it collects relevant information from them; it secures necessary documentation from medical and other providers; it assists the victims in filling out the necessary forms; it handles any inquiries or requests for additional information from OVS and it handles any requests for reconsideration of an OVS decision or an appeal of an OVS decision. RA 180, 181 (Gordon Aff. at ¶¶ 2, 4).

The claimants who appear before OVS represent a vulnerable and underprivileged segment of the population. In the absence of the attorneys' fee program created by the Executive Law, the vast majority of claimants could not afford attorneys' services, nor would it be economically feasible for an attorney to represent victims before OVS. RA 186 (Gordon Aff. at ¶ 18.)

The Gordon Firm enjoys a high degree of success: the overwhelming majority of all applications submitted by the Firm to OVS result in approvals. RA 181 (Gordon Aff. at ¶ 5). This is in sharp contrast to applications submitted by the various VAPs, whose success rate is often well less than 50%. Indeed, applications that are submitted directly to the Albany office of OVS, which is itself a funded VAP, have received less than 40% approval. RA 7 (Gordon Aff. at ¶ 7).

But the Gordon Firm's involvement with these applications has not been met with enthusiasm by officials at OVS. OVS personnel have actually called crime victims represented by the Gordon Firm and have told them, falsely, that if OVS paid any attorney fee to the Gordon Firm, OVS would have a lien on that victim's assets or could garnish that victim's wages for the purpose of recouping any payment to the Gordon Firm. RA 042-043, 044 (Bonney Aff. at ¶¶ 8-10, 15); RA 080 (Sucuzhanay Aff. at ¶¶ 7-8); RA 066 (Fernandez Aff. at ¶¶ 8-9). These harassing phone calls were made to victims that OVS knew were clients of the Gordon Firm and were clearly designed to discourage the victims from continuing their

attorney/client relationship with the Gordon Firm. RA 043-044 (Bonney Aff. at ¶¶ 14-15); RA 080 (Sucuzhanay Aff. at ¶ 9); RA 066-067 (Fernandez Aff. at ¶ 10, 12).

For example, on June 22, 2015, the Gordon Firm submitted an application to OVS on behalf of claimant Sean Bonney for out-of-pocket costs incurred in connection with an assault that left Mr. Bonney with a broken nose, deviated septum and bruising to his head and body. *See* RA 041 (Bonney Aff. at ¶¶ 2, 4). On November 2, 2015, the Gordon Firm submitted an itemized affirmation of services to OVS reflecting \$1,812.50 in fees for work performed on Mr. Bonney's behalf. *See* RA 042 (Bonney Aff. at ¶ 7). Instead of awarding attorneys' fees, however, OVS subjected Mr. Bonney to harassing and intimidating phone calls in which OVS personnel threatened "attachment" of Mr. Bonney's personal assets and subrogation claims if he persisted in seeking reimbursement for such fees. *See* RA 042-043 (Bonney Aff. at ¶¶ 8-10).

III. OVS AMENDS ITS REGULATIONS

Around the same time it was harassing crime victim claimants who had retained counsel, OVS commenced a frontal assault on any attempt by crime victims to employ private attorneys to represent them before OVS. On November 10, 2015, OVS issued a notice of proposed rulemaking. That notice purported to add 9 NYCRR 525.3(h), a new provision that narrowly defines "reasonable attorney's fees," and to amend 9 NYCRR 525.9. OVS cited Sections 623(3) and 626(1) of the

Executive Law as the statutory bases for its actions. *See* RA 172 (Exhibit 18 to the Verified Petition at 43).

Section 525.3(h) limits “reasonable attorney’s fees” to fees only for representation on reconsideration and/or before the appellate division:

Reasonable attorney’s fees for representation before the office and/or before the appellate division upon judicial review shall mean those reasonable attorney’s fees incurred by a claimant during: (1) the administrative review for *reconsideration* of such decision pursuant to subdivision (2) of section 627 of the Executive Law; and/or (2) the *judicial review* of the final decision of the office pursuant to section 629 of the Executive Law.

9 NYCRR 525.3(h) (emphasis added). *See* RA 176 (Exhibit 19 to the Verified Petition at 3).

The amended Section 525.9(a) likewise provides that parties can only recover attorneys’ fees for representation on reconsideration and/or before the appellate division:

A claimant and/or victim may choose to be represented before the office, at any stage of a claim, by an attorney . . . and/or before the Appellate Division upon judicial review of the office’s final determination. However, *only* those fees incurred by a claimant during: (1) the administrative review *for reconsideration* of such decision *pursuant to subdivision (2) of section 627 of the Executive Law*; and/or (2) the judicial review of the final decision of the office pursuant to section 629 of the Executive Law may be considered for reimbursement by the office. The office shall provide written notification to an applying claimant and/or victim of their right to representation by counsel, as well as their potential

eligibility for an award of attorney's fees pursuant to Executive Law subdivision one of section 626 of Article 22 if they are successful during the administrative review and/or before the appellate division upon judicial review, pursuant to section 525.3(g) of this Part.

9 NYCRR 525.9(a) (as amended on January 13, 2016) (emphasis added). *See* RA 178 (Exh. 20 to the Verified Petition at 1).

The amended Section 525.9(c) also provides that fees will only be awarded when the request for reconsideration is successful, and even then, at the absolute discretion of OVS:

Upon a *successful* review pursuant to subdivision (a) of this section attorney's fees *may* be approved by the office which may require a written statement of services rendered. Whenever an award is made to a claimant who is represented by an attorney, the office *may* approve a reasonable fee commensurate with the services rendered, up to \$1,000.

9 NYCRR 525.9(c) (as amended on January 13, 2016) (emphasis added). *See* RA 178 (Exh. 20 to the Verified Petition at 1).

Following a notice and comment period, the new rules went into effect on January 13, 2016. These rules have the effect of denying any crime victim reimbursement for any attorneys' fees expended to process an application before OVS. The rules also discourage crime victims from seeking an appeal by introducing a risk that the Legislature never intended. In effect, OVS now requires indigent crime victims to bear the risk of incurring attorneys' fees on appeal, yet

victims cannot possibly gauge that risk because they do not know whether OVS will decide to reimburse their fees even if they are confident they will prevail on a meritorious claim. The rules are clearly designed to put attorneys like the Gordon Firm out of the business of representing such clients.⁴

IV. OVS MOOTS *BONNEY V. OVS*

Prior to the filing of this action, the Gordon Firm, joined by crime victims Sean Bonney, Walter Avila Sucuzhanay, and Israel Fernandez, challenged OVS's new regulations by petition dated February 3, 2016. RA 025 (Verified Petition at ¶ 7.)

OVS awarded Bonney \$0 in attorneys' fees on the ground that the fees were "unsubstantiated" in a Decision dated December 9, 2015. RA 059 (Exhibit E to Bonney Aff.)

OVS awarded Fernandez \$0 in attorneys' fees on the ground that the fees were "unsubstantiated" in an Amended Decision dated January 8, 2016. RA 074 (Exhibit C to Fernandez Aff.)

⁴ It is worth noting that in one of the two instances where the new rules purport to allow a *possible* award of attorneys' fees—a successful appeal to the appellate division—the attorneys' fees would easily exceed the \$1,000 statutory limit. That fact, coupled with the fact that no award would be given for filing an application with OVS, would discourage any attorney from ever taking on an OVS case.

OVS did not rule on Sucuzhanay's application for fees until the spring of 2016, when it awarded Sucuzhanay and Fernandez the \$1,000 statutory maximum. On May 12, 2017, OVS also awarded Bonney \$1,000 in attorneys' fees.

The Supreme Court, Albany County in *Bonney v. New York State Office of Victim Services* dismissed the Verified Petition by Judgment dated April 29, 2016, on the grounds that (1) the crime victim petitioners in that action lacked standing because they had applied for benefits and attorneys' fees prior to January 13, 2016, the effective date of the amended regulations, and (2) the Gordon Firm lacked standing to pursue an award in its own right. RA 025 (Verified Petition at ¶ 7.)

On appeal, OVS argued that its payments of \$1,000 to each of the crime victim petitioners mooted the case. By Decision and Order dated July 27, 2017, the Appellate Division, Third Department dismissed the appeal as moot.

V. RESPONDENTS' APPLICATIONS

OVS capped crime victim Wenceslao Juarez's EPP award on an item-by-item basis in an Amended Decision dated August 12, 2016 and capped his attorneys' fees at that same amount in an Amended Decision dated September 8, 2016. RA 84-87 (Exhs. 4-5 to the Verified Petition).

OVS capped crime victim Serafin Rodriguez's EPP award on an item-by-item basis and capped his attorneys' fees at the same amount in an Amended Decision dated October 27, 2016. RA 98 (Exh. 8 to the Verified Petition).

OVS denied crime victim Michelle Soriano’s request for reimbursement of attorneys’ fees in an initial Decision dated June 29, 2016—even though the Gordon Firm had successfully secured an emergency award totaling over \$1,400, plus an additional award for EPP losses, on Soriano’s behalf. RA 110 (Exh. 11 to the Verified Petition). Soriano appealed that denial by letter received by OVS on August 1, 2016. RA 123 (Exh. 12 to the Verified Petition). By decision dated August 25, 2016, OVS denied Soriano’s application for administrative reconsideration. RA 121 (Exh. 12 to the Verified Petition).

OVS capped crime victim Daniel Velez’s EPP losses on an item-by-item basis and awarded him no attorneys’ fees in a Decision dated October 18, 2016. RA 133 (Exh. 14 to the Verified Petition).

VI. THE DECISIONS BELOW

Upon OVS’s motion for summary judgment, the Supreme Court, Albany County dismissed Respondents’ causes of action challenging the amended regulations, concluding that OVS has the authority to categorically exclude fees incurred in the preparation and submission of claims as not reasonable expenses and that OVS’s decision was reasonable in light of its funding of the VAPs. RA 012 (Supreme Court Decision at 10). The Supreme Court also found that Respondents lacked standing to challenge the provisions of the amended regulations that limit reimbursement of attorneys’ fees to successful applications on appeal and that permit

OVS to deny fees even under such circumstances. RA 013 (*id.* at 11). Finally, the Supreme Court declared invalid OVS’s practice of placing per-item caps on EPP and arbitrarily capping attorneys’ fees at the amount awarded for EPP losses.

By Opinion and Order dated January 31, 2019, the Appellate Division, Third Department, by a unanimous panel, annulled OVS’s amended regulations that limit counsel fee awards for crime victims to fees incurred during administrative appeals and appellate judicial review, on the ground that the amended regulations are inconsistent with the language and purpose of the Executive Law and in excess of the authority granted to OVS by the Legislature. RA 498 (Third Department Opinion). The Third Department affirmed the Supreme Court’s finding that Respondents lack standing to challenge the provisions in the amended regulations insofar as they limit counsel fee awards to only successful applications for reconsideration or successful appeals and that permit OVS to deny counsel fee awards even when such applications are successful. RA 506-507 (Third Department Opinion at 9-10).

ARGUMENT

I. THE THIRD DEPARTMENT’S ORDER SHOULD BE AFFIRMED BECAUSE OVS’S INTERPRETATION OF THE EXECUTIVE LAW IS ERRONEOUS AND NOT ENTITLED TO DEFERENCE

The question before the Court is one of pure statutory construction: whether the Legislature’s instruction that “[o]ut of pocket loss . . . shall also include . . . the

cost of reasonable attorneys' fees for representation before the office" requires that crime victims receive reasonable compensation from OVS for the costs of representation by attorneys like the Gordon Firm at all stages of the victims' claims. Executive Law § 626(1). As the Third Department correctly found, Executive Law § 626(1) "uses broad, mandatory language . . . with no qualifications or limitations other than the \$1,000 ceiling." RA 503 (Third Department Opinion at 6). There is "no authorization in the statute's plain language for OVS to conclude that counsel fees are never 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in every instance," because the statute does not "distinguish[] among the stages of a victim's representation before OVS, nor does the statutory text suggest that OVS may do so." RA 502-503 (Third Department Opinion at 5-6) (emphasis in original).

In a decision striking down the regulations of OVS's predecessor, the Crime Victims Compensation Board, this Court held that rules that "extend beyond the terms of the controlling statute" are invalid and are entitled to no deference. *Regan v. Crime Victims Compensation Board*, 57 N.Y.2d 190, 195-96 (1982). Said the Court:

Although the Legislature left it to the Board to define the precise limits of what constitutes severe financial hardship, the plain meaning of those words themselves establishes the outer boundaries The Board's interpretation of the terms of section 631 is contrary to the clear language of the statute and is therefore entitled to no

deference. To the extent that the Board's rules conflict with the statute, therefore, they are invalid.

Id. at 195-96 (citations omitted).

Put another way, “an agency may not under the guise of administering the statute ascribe a different or unreasonable meaning to its terms.” *Goldstein v. State*, 188 Misc. 2d 524, 529 (Sup. Ct. Albany Co. 2001), *aff'd sub nom. Goldstein v. New York State Indus. Bd. of Appeals*, 292 A.D.2d 706 (3d Dep't 2002) (quotation omitted). OVS's current interpretation of the statute, like the Board's interpretation in *Regan*, would require a rewriting of the statute, *i.e.*, to find that “representation before the office” means representation *only upon reconsideration* and that “shall” means “may.” The Legislature could have included such qualifications or said “may” if it so intended. But it chose not to. *See Goldstein*, 188 Misc. 2d at 534 (“If it had been the intent of the Legislature to confer upon State agencies, such as the DOL, the discretionary power to limit accessibility to the information contained in the DOSH Logs, then it appears the provision governing access would have been drafted accordingly.”); *Ferro v. Lavine*, 46 A.D.2d 313, 317 (3d Dep't 1974) (“In the absence of any indication that any limitations or restrictions were intended, there is no reasonable basis in law for allowing appellants to engraft onto these statutes a significant exception under the guise of administrative interpretation.”); *cf. New York Const. Materials Ass'n, Inc. v. New York State Dep't of Env'tl. Conservation*, 83 A.D.3d 1323, 1328 (3d Dep't 2011) (“[A]n administrative agency may not

promulgate a regulation that adds a requirement that does not exist under the statute.”) (quotation omitted).

The plain language of the statute requires that the Third Department’s decision annulling the new rules be affirmed. The Executive Law defines “office” as “the office of victim services.” Executive Law § 621(1). While the statute does not directly define “representation,” it does define “representative” broadly as “one who represents or stands in the place of another person, including but not limited to an agent, an assignee, an attorney, a guardian, a committee, a conservator, a partner, a receiver, an administrator, an executor or an heir of another person, or a parent of a minor.” Executive Law § 621(6). Thus, the plain language of the statute indicates that “representation before the office” means “stand[ing] in the place of another person” in various capacities before “the office of victim services.” This is precisely what the Gordon Firm does when it gathers required information on behalf of claimants and assists claimants in preparing their initial applications to OVS. Likewise, “shall . . . include,” Executive Law § 626(1), means what it says, and OVS recognized as much when it issued its previous rules. RA 149 (Exhibit 16 to the Verified Petition at 7, 9 NYCRR 525.9(c) (prior version) (“Whenever an award is made to a claimant who is represented by an attorney, the office *shall* approve a reasonable fee commensurate with the services rendered, up to \$1,000.”) (emphasis added).)

Furthermore, OVS's new rules are not entitled to deference. "While deference is generally given to an agency's interpretation of a statute that the agency is responsible for administering, courts need not give any deference to the agency's interpretation where no specialized expertise is involved and the question is simply a matter of reading and analyzing the statute to determine its intent." *United Univ. Professions v. State*, 36 A.D.3d 297, 299 (3d Dep't 2006) (citations omitted) (interpreting statutory meaning of "employer contributions"); *Regan*, 57 N.Y.2d at 195-96. OVS has no special expertise in the plain meaning of the English language. *See Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep't of Health*, 5 N.Y.3d 499, 506 (2005) ("[C]ourts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language."). *Accord Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451 (1980) (interpreting the application of a \$1,000 cap under another statutory scheme and finding deference unwarranted where "the question is one of pure statutory reading and analysis").

OVS primarily argues that the plain language of the Executive Law does not require it to determine reasonableness on a case-by-case basis for fees incurred for representation before OVS at the early stages of a claim. On the contrary, as the Third Department found, "the language in Executive Law § 626(1) that directs OVS to award reasonable counsel fees as part of reimbursement for out-of-pocket loss necessitates a case-by-case examination" RA 505 (Third Department Opinion

at 8). Indeed, it is well-established that a determination of the reasonableness of attorneys' fees necessarily involves consideration of all relevant circumstances on a case-specific basis. *See, e.g., In re Freeman's Estate*, 34 N.Y.2d 1, 9 (1974) ("Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.") (citations omitted); *Bd. of Trustees of Vill. of Groton v. Pirro*, 170 A.D.3d 1479, 1480 (3d Dep't 2019) ("In effect, a reasonable fee is determined by multiplying a reasonable hourly rate by a reasonable number of hours expended on a case, ***taking into account the case-specific variables.***") (emphasis added) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections*, 522 F.3d 182 (2d Cir. 2008)). In sum, a rule that says the request for attorneys' fees in every case is unreasonable is itself unreasonable on its face.

Even if OVS did have the authority to re-define "reasonable" to preclude awards for whole categories of tasks regardless of case-specific circumstances (and it does not), the Third Department recognized that OVS's amended provisions "are

not consistent” with one of its own longstanding regulations—and thus run afoul of Executive Law § 627(1)(a)’s instruction that OVS must follow its own regulations—which “requires OVS to determine the reasonableness of a counsel fee award based upon specified factors” like those recognized in *In re Freeman’s Estate*, “such as the time and labor required, the novelty and difficulty of the issues raised, the attorney’s experience and skill and the results obtained.” RA 503-504 (Third Department Opinion at 6-7) (citing 9 NYCRR 525.9(d)).

In an attempt to reconcile this inconsistency, OVS concedes that its new regulations purport to “defin[e] services for which fees are not available” and argues that it need not perform any reasonableness analysis except for “those stages of the process where attorneys’ fees are generally available.” Appellants’ Br. at 26. That is *ultra vires*. OVS does not get to decide for what services reasonable fees are “available.” Rather, the Legislature has already decided that reasonable fees are required “for representation before the office” without qualification. Executive Law § 626(1) (“Out-of-pocket loss . . . **shall . . . include** the cost of reasonable attorneys’ fees **for representation before the office.**”) (emphasis added).

OVS relies on several cases regarding what it describes as “general rules.” All of these cases miss the mark because Respondents do not contend that rules of general applicability are *per se* invalid. Rather, Respondents contend that a categorical rule prohibiting certain fees for representation before OVS is

inappropriate under the circumstances of this particular case, where the Legislature has mandated that reimbursable expenses “shall include” reasonable attorneys’ fees up to \$1,000 for “representation before the office” and OVS’s own regulations require it to apply various factors to determine reasonableness on a case-by-case basis.

In *Bernstein v. Toia*, 43 N.Y.2d 437 (1977), the Court upheld a Department of Social Services regulation setting maximum shelter allowances, where the governing statute was silent as to whether a cap should universally apply. Similarly, in *Sigety v. Ingraham*, N.Y.2d 110 (1971), “[w]hat the Commissioner ha[d] done is to place a ceiling on nursing home costs,” although reimbursement rates for patient costs below that ceiling would still be individually determined. *Id.* at 114. *Acevedo v. New York State Dep’t of Motor Vehicles*, 29 N.Y.3d 202 (2017), is even further afield, because there “the statutory scheme contemplate[d] that the Commissioner will have ***exclusive authority*** over post-revocation relicensing,” and the regulations permitted the Commissioner to “deviate from the general policy,” where appropriate on a case-by-case basis. *Id.* at 220-21 (emphasis added). Similarly, in *Kigin v. State of New York Workers’ Compensation Bd.*, 24 N.Y.3d 459 (2014), “the Legislature purposely conferred the authority on the Board to determine medical necessity for medical care” and that “necessarily meant that the Board consider what is *not* best practice and what may *not* be medically necessary.” *Id.* at 466-667 (emphasis in

original). Likewise, in *Old Republic Life Ins. Co. v. Wikler*, 9 N.Y.2d 524 (1961), the Court approved a regulation that declared certain rates *not* unreasonable “as a sort of guide or ‘bench mark’ for insurers, while affording them freedom to show that higher rates would not be unreasonable” on a case-by-case basis. *Id.* at 529-30. Here, by contrast, OVS’s inability to cap attorney fees’ awards is not at issue—the Legislature has already capped recoverable attorneys’ fees at a modest \$1,000 per case—and the statute is *not* silent as to whether reasonable fees must be awarded at all stages of the claim: it explicitly requires that “[o]ut-of-pocket loss . . . **shall also include** . . . the cost of reasonable attorneys’ fees **for representation before the office**” Executive Law § 626(1) (emphasis added).

Med. Soc’y of State v. Serio, 100 N.Y.2d 854 (2003), another case on which OVS relies, makes for a useful comparison, because it highlights the kind of statutory language that is absent here—but that OVS nonetheless attempts to read into the Executive Law. The statute at issue in that case provided that “claimants shall also be entitled to recover reasonable attorney fees ‘for services necessarily performed in connection with securing payment of the overdue claim, *subject to limitations promulgated by the superintendent in regulations*’” *Id.* at 871 (emphasis in original). Here, by contrast, the statute instructs that “[o]ut-of-pocket loss . . . **shall . . . include** the cost of reasonable attorneys’ fees for representation before the office,” and it does not contain any clause qualifying “representation before the

office.” Executive Law § 626(1) (emphasis added). If the Legislature had intended “representation before the office” to only mean representation *upon a successful request for reconsideration*, it would have referenced the section of the Executive Law that concerns requests for reconsideration (Section 627), just as it referenced the section of the Executive Law regarding appellate judicial review (Section 629) when it intended to refer to appellate judicial review. A simple comparison between what the Executive Law actually says and what OVS acts as if the statute says reveals its error:

THE STATUTE	OVS’S REWRITE
<p>The office shall have the following powers and duties: . . . [t]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including . . . rules for the approval of attorneys’ fees <i>for representation before the office</i> and/or before the appellate division <i>upon judicial review as provided for in section six hundred twenty-nine of this article</i>.</p>	<p>The office shall have the following powers and duties: . . . [t]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including . . . rules for the approval of attorneys’ fees [<i>possibly</i>] for [<i>successful</i>] representation before the office [<i>upon reconsideration as provided for in section six hundred twenty-seven of this article</i>] and/or before the appellate division upon judicial review as provided for in section six hundred twenty-nine of this article.</p>

OVS also attempts to justify its *ultra vires* rules by pointing to the millions of dollars it has bestowed upon the VAP bureaucracy as evidence that crime victims do not need attorneys like the Gordon Firm. As the Third Department found,

OVS's internal decisions on how to allocate its resources for assisting crime victims in preparing claims cannot countermand the statutory language that requires it to include reasonable counsel fees in awards for out-of-pocket loss, nor may OVS refuse to allocate its resources for a purpose specifically directed by the Legislature. Whether VAPs provide sufficiently comprehensive assistance to replace representation by counsel in every claim that does not involve an administrative or judicial appeal is a policy determination to be made by the Legislature and not by OVS, which may not, in the exercise of rule-making authority, engage in broad-based policy determinations.

RA 505-506 (Third Department Opinion at 8-9).

Moreover, even if OVS were permitted to make such a policy call, the decision to promulgate the regulations and bestow largesse upon the VAPs is arbitrary and irrational. OVS is artificially propping up VAPs by actively discouraging victims from using independent attorneys. Although OVS argues that the attorneys' fees regulations will conserve OVS's funds, OVS has a history of awarding more money to VAPs than to actual crime victims. RA 273, 286 (Exh. 8 to Gordon Aff. at 12, 25). VAPs also do not offer un-conflicted advice to crime victims because VAPs are established and entirely funded by OVS. For example, the VAPs acquiesced in OVS's practices of placing per-item caps on EPP awards and arbitrarily capping attorneys' fees at the amounts awarded for EPP losses—practices the Supreme Court correctly found were *ultra vires*. Moreover, many VAPs' success rates pale in comparison to that of the Gordon Firm, RA 273, 286

(Exh. 8 to Gordon Aff. at 12, 25), and the amount of funding VAPs receive from OVS bears little or no relationship to their success rate, *see* RA 181-182, 183, and RA 189-255 (Gordon Aff. at ¶¶ 5-7, 9 and Exhibits 2-5 thereto).

Additionally, the motivation of OVS to actively discourage crime victims from using independent attorneys in order to support the VAP bureaucracy is not a secret. Even prior to the effective date of the new regulations, OVS punished crime victims who hired attorneys by refusing to reimburse them for legal services as required by Executive Law § 626(1) and by pressuring and threatening crime victims with attachment or liens if they used attorneys. RA 042 (Bonney Aff. at ¶ 8.) With attorneys out of the way, OVS would have free reign to underfund crime-victim claims and overfund its now vast VAP bureaucracy. The self-serving actions of OVS in pushing victims to use VAPs exclusively instead of independent counsel are designed to deprive crime victims of their right to select counsel of their choice, and have the effect of doing just that. As the Third Department found, “the broad purpose of Executive Law article 22” is “to provide financial assistance to needy crime victims.” RA 505 (Third Department Decision at 8). That general purpose is not served by OVS’s curtailment of crime victims’ statutory rights in favor of VAPs.

Moreover, OVS’s assertion that awarding attorneys’ fees for work performed at the early stages of crime victims’ claims would be an unwarranted “drain” on the office’s resource because the attorneys’ fee requests are “exorbitant” is hyperbole.

The fee requests are already subject to a modest \$1,000 cap, and it is already the case that OVS need not award all fees sought for work performed at the early stages of a claim where it properly finds, applying the required factors on a case-specific basis, that a portion of the fees incurred were unreasonable.

Finally, although attorneys' fees awards may exceed non-fee awards, the result obtained is only one of many relevant factors when determining reasonableness. Parties to litigation often incur attorneys' fees in an amount greater than the value recovered, especially when vindicating important public interest rights. Moreover, this policy issue has been addressed already by the Legislature, when it expressly allowed fees to be awarded for representation before OVS up to \$1,000 without any other cap. In addition, crime victims cannot know how much they will ultimately recover until OVS makes a final determination.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Third Department's Decision and Order be affirmed.

Dated: January 28, 2020
Albany, New York

BOIES SCHILLER FLEXNER LLP

By: /s/ George F. Carpinello
George F. Carpinello
Mark A. Singer
30 South Pearl Street
Albany, NY 12207
Telephone: (518) 434-0600
Facsimile: (518) 434-0665
Email: gcarpinello@bsflp.com
msinger@bsflp.com

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR RULE 500.13(c)(1)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of 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 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 7,034.

s/ George F. Carpinello _____
George F. Carpinello