

To be Argued by:  
WILLIAM C. SILVERMAN  
(Time Requested: 15 Minutes)

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# New York Supreme Court

## Appellate Division—Third Department

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In the matter of the Application of

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

**Case No.:**  
**CV-22-2237**

*Petitioners-Appellants,*

– against –

THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES  
and SHEILA J. POOLE, in her Official Capacity as the Commissioner of  
The New York State Office of Children and Family Services,

*Respondents-Respondents.*

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### REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Appellants-Petitioners Lawyers For Children, The Legal Aid Society, and Legal Aid Bureau of Buffalo, Inc. (collectively, “Appellants”), respectfully submit this brief in further support of their appeal of the Decision and Order of the Supreme Court, Rensselaer County (McNally, J.), dated November 21, 2022, dismissing the Verified Petition (the “Petition”) on the grounds that Appellants lack standing.

### **PRELIMINARY STATEMENT**

In their effort to deny children the opportunity to challenge the Host Homes program, Respondents represent that program as a less burdensome alternative to voluntary foster care that may be chosen by parents in crisis. However, the only party for whom the Host Home program is less burdensome is the State itself, which is freed of regulatory and judicial oversight and the expense of providing services and supports to parents and children. In both the Host Homes and voluntary foster care programs, a parent relinquishes physical custody, along with medical and educational decision-making for their child, and may make a demand for the return of the child at any time. The elements of the existing voluntary foster care system to which Respondents claim they are providing a welcome alternative are in fact statutory protections that the Legislature has deemed critical to the safety and wellbeing of children, and the rights of parents, including ongoing judicial oversight and the appointment of counsel.

Respondents’ attempt in their brief to justify the validity of the Host Homes program—erroneously relying on Title 15-a of the General Obligation Law to sidestep entire sections of the Family Court Act—does nothing to defeat Appellants’ standing to challenge that program. New York law is clear that third-party standing may be conferred when the failure to do so would erect an “impenetrable barrier” to judicial review of administrative action. In reaching its decision that Appellants lack standing, the lower court improperly ignored the body of law developed to protect society’s most vulnerable citizens, including the children at issue here. Respondents acknowledge this body of law but claim there is no impenetrable barrier because a friend or relative could simply come forward and bring an action on behalf of any child caught up in the Host Homes program. That argument is flawed.

In their papers, Respondents repeatedly describe Host Homes as a program that will serve parents who do not have friends or family available to care for their children. It is absurd to argue that children placed with strangers in the Host Homes program because their families were in crisis and had no social network to rely on should nonetheless be expected to depend on these non-existent friends and family to come forward and commence a lawsuit on their behalf challenging the lack of authority for the Host Homes Regulations. Respondents’ argument further

assumes that this fictive friend or family member somehow has been made aware of the child's placement despite the fact that the Host Homes program (unlike the law governing the existing voluntary foster care system) does not require any effort to locate relatives or close family ties. Indeed, placement with strangers, including those who are out of state, is embraced by the Host Homes program. And, if that were not enough, this putative friend or family member, who was not in a position to care for the child, would have to seek what New York courts call a "drastic remedy": substituting a guardian *ad litem* for the parent as the child's representative. It is only in this make-believe world that children could challenge the Host Homes program.

Equally unavailing is Respondents' argument, which they make for the first time in their opposition brief, that Appellants' interests are not sufficiently aligned with those of the children they seek to represent. Given that Appellants' mission is to serve as counsel to indigent children and voice their wishes in Family Court proceedings, this assertion should be swiftly rejected. If Appellants do not have standing in this matter, children placed in the Host Homes program will have no legal recourse. This is the exact situation in which New York courts have found third-party standing to be appropriate but which the lower court disregarded.

Appellants also have suffered direct injury because the children they represent in voluntary foster care proceedings under current law will be diverted to

the Host Homes program, where no counsel will be appointed. In their brief, Respondents do not appear to defend the lower court's erroneous position that Appellants are required to show "proof" of the diversion of these clients. Of course, no diversion has taken place because the program has not been implemented. The entire objective of this action is to stop that implementation before a child is lost to the Host Homes program with no legal recourse. The lower court committed reversible error by imposing an impossible burden on Appellants of demonstrating actual diversion before the program has even launched, and by failing to apply the correct legal standard under which all of the allegations in the pleadings are deemed true and all facts viewed in the most favorable light. Appellants have sufficiently alleged that a direct injury to them is reasonably certain if the Regulations are permitted to go forward.

### **LEGAL ARGUMENT**

#### **I. Respondents Fail to Distinguish Well Established Law on Third-Party Standing That the Lower Court Did Not Address.**

Respondents argue that the lower court's decision would not create an impenetrable barrier for the children at issue to seek judicial review of the Host Homes Regulations and Respondents' failure to comply with their statutory obligations. (Resp'ts' Br. 25). However, courts have recognized that children like the ones Appellants represent in voluntary placements do not have access to the

courts to challenge administrative action. Indeed, if this matter does not proceed, no child will be in a position to challenge the Regulations at issue here.

As explained in Appellants' opening brief (at 22–25), the lower court did not address well established authority that standing rules should not be so “heavy handed” as to create an “impenetrable barrier” to judicial scrutiny of administrative action. Respondents acknowledge the legal principle but do not even attempt to distinguish two cases on point that recognize standing for organizations which “represent individuals who are unable to seek a judicial remedy on their own behalf.” *Mixon v. Grinker*, 157 A.D.2d 423, 427 (1st Dep’t 1990). In *Grinker*, the Court held that the Coalition for the Homeless had standing in a representative capacity to sue New York City over homeless policy. Moreover, in *New York County Lawyers’ Ass’n v. State*, 294 A.D.2d 69, 72, 76 (1st Dep’t 2002), the Court found that a lawyers association had standing to challenge the system for compensating appointed counsel where that system created a “high risk” that “children and indigent adults will be denied their constitutional rights to meaningful and effective assistance of assigned counsel,” and that “it is readily apparent” indigent children and adults “are not in a position to protect their own rights.” That case is persuasive here.

In attempting to distinguish *Grant v. Cuomo*, 130 A.D.2d 154, 159 (1st Dep’t 1987), *aff’d*, 73 N.Y.2d 820 (1988), Respondents only reinforce the strength

of that precedent in favor of Appellants. In *Grant*, the Court held that organizations devoted to the care and protection of children had standing to challenge government agencies for violating their obligation to provide protective and preventive services. Respondents argue that the challenge to Host Homes at issue here is somehow distinguishable from *Grant* because it “does not involve allegations of child abuse or maltreatment” and “thus does not involve the kinds of cases that implicate the foster-care system.” (Resp’ts’ Br. 24). That is simply not so. The whole point of this Article 78 Action is that Respondents unlawfully created a parallel system of voluntary placement of children into “Host Homes,” mirroring the voluntary foster care system but devoid of the statutorily mandated and critical safeguards present in the voluntary foster care system, including judicial oversight, the appointment of counsel, and protective and preventive services. The Court in *Grant* highlighted that the “children are not themselves able to seek a judicial remedy [to enforce their own rights], nor is it likely that parents or caretakers” would do so on their behalf. *Grant*, 130 A.D.2d at 159. The same logic applies here.

Respondents appear to concede that if the lower court’s decision were upheld, no party would have standing to bring an Article 78 action to challenge the Host Homes Regulations before they become effective. Respondents argue instead that down the road “a non-custodial parent” or a “grandparent, relative, friend or

guardian” could challenge the Regulations by seeking appointment of a guardian *ad litem*. (Resp’ts’ Br. 25). This argument—that the children at issue have sufficient legal recourse through family and friends—fails for three main reasons.

*First*, the argument is flatly contradicted by Respondents themselves, who explain in their papers that the Host Homes Regulations are “intended to address situations in which a family or parent needs temporary childcare . . . but has no extended family or social supports suitable to provide that care.” (*Id.* at 4). If there is no friend or relative available to provide temporary care, there can be no reasonable scenario in which a friend or relative would come forward to challenge the Host Homes Regulations on behalf of the child. Respondents argue that a grandparent “may be too physically infirm to safely provide care” for a child or “[a] noncustodial parent may be too distant to take on that responsibility. But there is no reason to believe that these same individuals would be in any way ill-equipped to pursue a suit on their own and the child’s behalf.” (Resp’ts’ Br. 27). That argument is absurd. A relative who is too infirm to care for a child or too far away to seek custody is most certainly not going to be in a position to commence a legal action challenging the Regulations. Just as in *Grant*, third-party standing is justified because the children at issue here do not have legal recourse and no one else can be reasonably relied upon to seek judicial remedies on their behalf.

*Second*, even if a friend or relative were available, it is entirely unlikely that they would be able to file an action challenging the Host Homes Regulations and Respondents' failure to meet their statutory obligations. There is no mechanism for them to find out about the child's placement. In contrast, under the existing voluntary foster care system, the State is *required* to seek out a relative before placing the child with strangers. N.Y. SOC. SERV. LAW § 384-a(1-a). Moreover, a friend or relative would have to meet a stringent standard in order to successfully advance the child's claims challenging the Host Homes Regulations over a parent's preference to participate in the program. As this Court has made clear, "[t]he statutory preference is for a parent to represent the child . . . . Generally, a custodial parent should be removed as the child's representative in an action only where the parent has an interest adverse to the child." *Mazzuca v. Warren P. Wielt Tr.*, 59 A.D.3d 907, 908–09 (3d Dep't 2009); *see also* N.Y. C.P.L.R. § 1201 (a child "shall appear by his guardian ad litem if . . . the court so directs because of a conflict of interest or for other cause"); *Stahl v. Rhee*, 220 A.D.2d 39, 44 (2d Dep't 1996) (the relieving of a guardian is a "drastic procedure"). The cases that Respondents cite relating to the appointment of a guardian *ad litem* are easily distinguishable because they do not involve the "drastic procedure" of replacing a custodial parent as the child's representative. *Id.* The appointment of a guardian was not disputed

in those cases. *See Linghua Li v. Xiao*, 175 A.D.3d 672, 673 (2d Dep't 2019); *Villafane v. Banner*, 87 Misc. 2d 1037, 1038 (Sup. Ct. New York Cnty. 1976).

*Third*, even if a friend or relative did come forward to assist the child, it is more likely that they would ask the parent to agree to have the child stay with them or file a custody petition, rather than filing a lawsuit challenging the validity of the entire Host Homes program, as this action does.

Respondents' unfounded claim that a friend or relative would be able to adequately assert judicial remedies on behalf of the children at issue is also inconsistent with a strong statutory preference in New York for children to have their own counsel. The Family Court Act itself expresses this preference:

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of attorneys for children who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

N.Y. FAM. CT. ACT § 241. It is for this reason that the court mandates the assignment of independent counsel to children whose parents seek to voluntarily

place them in the care of strangers in a home overseen by an OCFS-authorized agency. *Id.* § 249(a).

Respondents further argue that Appellants’ interests are not “suitably aligned” with those of the children at issue and, indeed, “are arguably adverse because they seek to channel those children to the foster-care system.” (Resp’ts’ Br. 22). Tellingly, Respondents did not make that argument before the lower court or in response to Appellants’ motion for a preliminary injunction. And for good reason. As detailed in the Petition, Appellants have spent decades dedicated to advancing the interests of indigent children in civil proceedings, providing comprehensive representation in voluntary placements and other proceedings affecting children’s rights and welfare. Appellants appear in all stages of court proceedings for the full length of time the child is out of the home, including Permanency Hearings, which ensure monitoring of the child’s well-being, safety, and permanency, as well as the child’s wishes and interests as conveyed through their attorney. (R.17-19 at ¶¶ 8–10). In fact, attorneys for children are required by law to provide direct advocacy for the express wishes of children capable of “knowing, voluntary and considered judgment.” 22 N.Y.C.R.R. § 7.2(d)(2). In arguing that the existing voluntary foster care system, which mandates the appointment of Appellants as counsel, is somehow “adverse” to children, Respondents are attempting to evade statutory obligations and substitute their own

policy judgment for that of the Legislature. That is, in fact, the very basis for this Article 78 proceeding.

Furthermore, Respondents argue that Appellants' position is not "suitably aligned" with the children sought to be represented because without the Host Home program children have no choice but to be channeled into foster care. The fallacy in this argument is that children are never in the position of deciding which system to enter. If they were, they would undoubtedly choose the one that provides them with an attorney and legal protections to ensure their prompt and safe return to their families. In short, an alignment of interests between Appellants and the children at issue, whose rights are at stake, has been sufficiently alleged. *See Grant*, 130 A.D.2d at 159 (third-party standing justified "given the historic relationship of organizations concerned with the care and protection of children to the goals sought to be achieved by the relevant statute").<sup>1</sup>

Likewise, Respondents' reliance on cases involving organizational standing is misplaced because, unlike the present case, none of them involve a program which would allow for *no* judicial remedy for injured clients on whose behalf

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<sup>1</sup> Respondents cite *Fenstermaker v. Obama*, 354 F. App'x 452, 455 (2d Cir. 2009), where the Second Circuit found that a criminal defense attorney's interests are not sufficiently aligned with Guantanamo Bay detainees. That is a far cry from Appellants, whose purpose is to defend indigent children in Family Court. In *Kowalski v. Tesmer*, 543 U.S. 125 (2004), also cited by Respondents, the United States Supreme Court applied a different standard in addressing third-party standing. In any event, in that case, unlike here, the Court specifically found that there was no "hindrance" to the indigent adult defendants at issue advancing their own rights. *Id.* at 126.

standing is being asserted. *See Civ. Serv. Emps. Ass’n, Inc., Local 1000 v. City of Schenectady*, 178 A.D.3d 1329, 1331 (3d Dep’t 2019); *Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019). Indeed, in *MFY Legal Servs., Inc. v. Dudley*, 67 N.Y.2d 706, 708 (1986), the Court specifically found that there was no “impenetrable barrier” that “prevents judicial scrutiny of respondents’ actions if we refuse to accord petitioner standing.” In *Daniels*, the individuals represented by petitioners each had an independent right to be represented by counsel in matters related to the statute that was at issue. 33 N.Y.3d at 50. As explained above, the opposite is true here, where Respondents are improperly attempting to insulate the Host Homes program and their failure to fulfill statutory obligations to children, including the right to counsel, from judicial scrutiny.

## **II. Appellants Have Standing in Their Own Right.**

As demonstrated in Appellants’ opening brief (at 27–29), Appellants have suffered an injury-in-fact because the Host Homes Regulations, if implemented, would undermine their organizational purpose and, specifically, their statutorily mandated contractual obligation to represent children in voluntary placement proceedings. The Host Homes program, by design, was created to bypass existing law governing voluntary placements, including the right to counsel. (R. 12–31 at ¶¶ 27–42; R. 737). Respondents argue that this injury is speculative because Appellants “remain free to represent children” within the existing foster care

system. (Resp'ts' Br. 12–13). That does not, however, negate the injury that Appellants will suffer through the diversion of potential clients from voluntary placements under the existing statutory scheme into the Host Homes program where children are not appointed counsel.

Respondents do not defend the lower court's requirement that Appellants prove an "actual reduction" of clients, apparently recognizing that the lower court applied the wrong legal standard given that the Host Homes Regulations have not been implemented. Instead, they argue that Appellants have not shown "the threat of imminent injury" because it is "[not] at all certain that the Host Family regulation will result in a reduction" in clients. (Resp'ts' Br. 13, 15). An injury can be "potential and in the future as long as it is reasonably certain that the harm will occur if the challenged action is permitted to continue." *Police Benevolent Ass'n of N.Y. State Troopers, Inc. v. Div. of N.Y. State Police*, 29 A.D.3d 68, 70 (3d Dep't 2006). Moreover, while an asserted injury may not be speculative, it is well established that—contrary to what the lower court required here—"it need not be stated with specific quantification." *N.Y. Propane Gas Ass'n v. N.Y. State Dep't of State*, 17 A.D.3d 915, 916 (3d Dep't 2005). As this Court has explained, "in cases such as this, where parties seeking to challenge administrative rulemaking are subject to the relatively short statute of limitations set forth in CPLR 217, the precise particulars of the asserted injury may not be ascertainable." *Id.*

Here, Appellants have sufficiently alleged an injury to their organizational missions and their contractual obligation to represent children—where the appointment of counsel is statutorily mandated—that is sufficient to confer standing. *See, e.g., Mahoney v. Pataki*, 98 N.Y.2d 45, 51–52 (2002) (attorneys have standing to challenge agency interpretation of fee statute eliminating compensation for non-lawyer defense team members); *Agencies for Children’s Therapy Servs., Inc. v. N.Y. State Dep’t of Health*, No. 15763/12, 2013 N.Y. Misc. LEXIS 1222, at \*5–6 (Sup. Ct. Nassau Cnty. Feb. 13, 2013) (complaint satisfies injury requirement where it alleges “lost opportunities” and “the inability to service children”); *NYCLA v. Bloomberg*, 30 Misc. 3d 161, 166 (Sup. Ct. New York Cnty. 2010) (injury-in-fact adequately alleged in challenge to rule regarding appointment of counsel where plaintiff argued rule “may substantially affect” its ability “to be appointed as conflict counsel and to represent indigent criminal defendants”).

Respondents decry the alleged lack of “concrete evidence” supporting the diversion of clients that would occur but, at the same time, completely ignore the fact that OCFS itself has acknowledged that the Host Homes program is intended to divert families away from voluntary placements under the current statutory scheme. As detailed in the Petition, in March 2020, one of the proponents of the Regulations from an out-of-state organization specifically asked OCFS whether parents use voluntary foster care placements for “respite.” The OCFS official

responded, “[y]es parents do use them but why should they have to.” (R. 28 at ¶ 33; R. 737). Accordingly, the diversion of clients from the established voluntary foster care system into Host Homes is not speculative, but rather, by Respondents’ own admission, is reasonably certain to occur if the Regulations go forward. At the very least, on this motion to dismiss, Appellants are entitled to a favorable inference on this point. *See Graziano v. Cnty. of Albany*, 3 N.Y.3d 475, 481 (2004) (When deciding “a pre-answer motion to dismiss, we must assume the truth of petitioner’s allegations and afford petitioner the benefit of every favorable inference.”).

Respondents’ reliance on *Roulan v. County of Onondaga*, 21 N.Y.3d 902, 905 (2013), as somehow “dispositive,” is misplaced. The plaintiff in that case challenged the process for appointment of lawyers in certain criminal proceedings, but his injury was considered to be speculative because he could not cite an example of a “case in which he was assigned” and had to withdraw or a case where he “unsuccessfully sought to be assigned.” *Id.* Significantly, that case involved a motion for summary judgment where the program at issue had already been implemented.

In contrast, where, as here, Respondents have asserted their objection to standing through a motion to dismiss, “all of the allegations in the petition are deemed to be true, and the facts set forth in the petition must be viewed in a light

most favorable to the petitioner.” *Propane Gas*, 17 A.D.3d at 916. Also, in contrast to *Roulan*, the Regulations here have *not* been implemented. In requiring Appellants to prove an “actual reduction” at this point, the lower court placed an impossible burden on Appellants — a burden Respondents no longer appear to be defending on appeal.

Respondents also contend that Appellants fall outside the zone of interest sought to be protected by the Social Services Law and the Family Court Act.<sup>2</sup> (Resp’ts’ Br. 18). In order to have standing, an injured party’s interests must be more than “‘marginally related’ to the purpose of the statute in question.” *Mahoney*, 98 N.Y.2d at 52. In *Mahoney*, the Court of Appeals found that “[a]lthough capital defendants are the primary intended beneficiaries of Judiciary Law § 35-b, the attorneys who provide the services necessary to an adequate defense certainly are within the zone of interest created by the statute.” *Id.* Likewise, Appellants are within the zone of interest created by the Social Services Law and Family Court Act, which govern voluntary placements, including the appointment of counsel. As in *Mahoney*, Appellants are attorneys who provide the services necessary to exercise a right created by statute. *See, e.g., Dental Soc’y of State of N.Y. v. Carey*, 61 N.Y.2d 330, 334–35 (1984) (association of dentists

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<sup>2</sup> Respondents incorrectly define Appellants’ interests as purely “financial,” choosing to ignore the broader interests at stake for Appellants in maintaining their organizational purpose and, specifically, their statutorily mandated contractual obligation to represent children in voluntary placement proceedings.

within the zone of interest of the Social Services laws in dispute over reimbursements); *Oil Heat Inst. of Upstate N.Y. v. Pub. Serv. Comm'n*, 90 A.D.2d 942, 943 (3d Dep't 1982) ("It cannot be gainsaid that petitioners have passed the 'zone of interest test' for they have sufficiently demonstrated that the administrative action will in fact have a harmful effect upon them and that their interest is, at least, arguably within the zone of interest to be protected by the statute.").

**CONCLUSION**

For the foregoing reasons, the Court should reverse the lower court's Decision and Order and remand this matter with instructions for the lower court to find that Appellants have standing, together with such other relief as the Court may deem just and proper.

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