



New York State Defenders Association, Inc.

Public Defense Backup Center

194 Washington Ave. • Suite 500 • Albany, NY 12210-2314

Telephone (518) 465-3524

Fax (518) 465-3249

www.nysda.org

MEMORANDUM

TO: Office of Court Administration, Ellen D. Millett, Esq., Counsel
(via email to rulecomments@nycourts.gov)

FROM: Susan C. Bryant, Executive Director, and Kimberly E. Bode, Family Court Staff
Attorney, New York State Defenders Association

DATE: August 3, 2022

RE: Comments on the proposed adoption of Section 205.19 of the Uniform Rules of the
Family Court to develop uniform standards of eligibility for assigned counsel in all
family court proceedings.

The New York State Defenders Association (NYSDA) offers these comments on the proposal to adopt a new Section 205.19 of the Uniform Rules of the Family Court to establish a uniform standard of eligibility for assigned counsel in Family Court mandated representation cases as delineated in Family Court Act (FCA) section 262, Surrogate's Court Procedure Act section 407, and Judiciary Law section 35(8). NYSDA appreciates the opportunity to provide such comments.

NYSDA is a not-for-profit membership association of more than 1,600 public defenders, legal aid attorneys, assigned counsel, and individuals dedicated to the right to counsel. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center (the Backup Center), which provides legal consultation, research, and training to nearly 6,000 public defenders. In fielding requests for information and assistance from across the state, the Backup Center obtains a statewide view of the obstacles and difficulties family defenders face in the current system. The Backup Center gains further insight into these matters through the technical assistance it gives to counties, including through the provision of its Public Defense Case Management System. Requests for assistance come from counties considering changes and improvements in their public defense systems and from those struggling to meet the state mandate of providing family defense representation with little to no state financial resources.

We are grateful to the Office of Court Administration for recognizing the importance of developing regulations that establish uniform eligibility standards for the assignment of counsel in Family Court mandated representation cases. We also thank the Chief Judge's Commission on Parental Legal Representation for bringing to the forefront the importance of effective representation by recommending that "parents be timely provided with relevant information about the right to counsel, and that parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first court appearance." See Commission on Parental Representation – Interim Report to Chief Judge DiFiore (February 2019). We also thank the New York State Office of Indigent Legal Services (ILS) for its development of the Standards for Determining Financial Eligibility for Assigned Counsel (February 16, 2021) and previous standards.

NYSDA previously provided testimony that addressed many of the provisions in the proposed section 205.19. And ILS has cited excerpts from that testimony in various documents, including in the eligibility standards that OCA now seeks to codify. Rather than address each of the provisions in section 205.19, we have attached our testimony to these comments¹ and instead will address several key issues in the proposal.

Timely Assignment of Counsel is Crucial and Helps Support Effective Assistance of Counsel

NYSDA supports the provisions in the proposed 205.19(a) regarding the timely provision of counsel. As discussed in our attached testimony, in order to provide effective assistance of counsel, counsel must be brought in to the case on a timely basis, regardless of a person's ability to afford counsel and regardless of their socio-economic status and other demographic categories, such as race, ethnicity, and sexual orientation or identification.²

It is undisputed that a person facing the removal of a child or termination of parental rights at the hands of the government, or the loss of custody or visitation through other family court proceedings, as well as anyone facing the possibility of detention or incarceration, has the right to assignment of counsel. To deny legal assistance under such circumstances would constitute a violation of the person's due process rights and a denial of equal protection of the laws. *See* FCA 261, 262; *In re Ella B.*, 30 N.Y.2d 352 (1972). The process of having one's liberty or parental rights stripped away generally begins long before a case arrives at the courthouse, the provision of counsel must cover the time when there is a threat of detention or removal of a child by a governmental agency. The adoption of paragraphs (2) and (3) of 205.19(a) makes clear that it is necessary to provide counsel during child protective services (CPS) investigations. Too often, CPS has removed a child from their parents³ before any application has filed in the family court. Even in cases where CPS has not yet removed the child, CPS has typically spoken to the parent while the parent is not represented by counsel and has no idea about their rights and the legal ramifications of their statements.

Assignment of Counsel is a Racial and Social Justice Issue

The "child welfare system" is systemically biased against people of color. There are many studies and articles that illustrate the devastating effect that the system has on Black and brown communities, where families are separated and children are placed in foster care at an alarmingly

¹ See NYSDA Testimony Before the New York State Office Of Indigent Legal Services, [Public Hearings on Eligibility for Assignment of Counsel, 10th Judicial District Public Hearing](#) (August 12, 2015); NYSDA Testimony Before the New York State Office of Indigent Legal Services, [Public Hearings on Financial Eligibility for Assignment of Counsel in Family Matters](#) (August 14, 2019); and NYSDA Testimony Before the New York State Unified Court System Commission on Parental Legal Representation, [Quality Representation for Persons Eligible for Assigned Counsel in Family Law Matters](#) (October 10, 2018).

² See NYSDA Testimony on [Financial Eligibility for Assignment in Family Matters](#), at pp. 4-6; NYSDA [Testimony Before the New York State Unified Court System Commission on Parental Legal Representation](#), at pp. 6-9.

³ For purposes of these comments, "parent" or "parents" includes legally responsible persons.

disproportionate rate.⁴ That is one reason why timely access to counsel is necessary. “Those who can afford to hire an attorney can seek legal advice before they are in legal difficulty, and before they take any action that might seriously alter their legal position [footnote omitted]. People who cannot afford an attorney must wait until they appear in court before counsel is assigned. As part of its mission to improve the scope of family defense, NYSDA advocates for the earliest possible entry of public defense counsel, because timely representation increases the quality of the representation and therefore presents the opportunity for better outcomes.” NYSDA [Testimony Before the New York State Unified Court System Commission on Parental Legal Representation](#), at p. 6.

Timely representation does not prevent CPS from investigating a complaint of abuse or neglect and taking action authorized by state law. There are a number of studies that show how entry of counsel when an investigation begins can help facilitate an open line of communication with CPS, and prevent a case from escalating and reaching the kind of crisis mode that results in unnecessary family separation. Additionally, attorneys and advocates who engage in holistic, client-centered representation tend to see better outcomes for parents and children, avoiding or substantially shortening the timeframe that children are in foster care.⁵ See NYSDA [Testimony Before the New York State Unified Court System Commission on Parental Legal Representation](#), at pp. 7-9.

The Rule Must Be Amended to Specify the Process of Ensuring Counsel at the Investigations Stage

As drafted, 205.19(a)(2) does not specify who is responsible for providing the contact information of the entity which has the primary responsibility for providing representation. To ensure that this provision is implemented statewide, OCA must amend paragraph 2 to specify who/what entity has the responsibility for providing this information, including ensuring that this information is up to date, and to detail the process for providing the information. For example, we recommend that the rule provide that the information be given orally and in writing and that the responsible person/entity make the information available in languages other than English. The larger question regarding the provision of counsel in a timely manner is discussed below.

State Funding is Required to Ensure Timely Access to Counsel in Every County

We commend OCA for proposing a rule that recognizes the need for timely access to counsel, often before a case is brought to family court. To ensure timely access to counsel in every county around the state, the State must provide significantly more funding for representation. Providers of mandated family defense representation and assigned counsel panel attorneys throughout the state have overwhelming caseloads in all types of family court proceedings throughout the state. They

⁴ [New York Committee to Investigate State’s Child Welfare System: Impacted Parents, Advocates Speak on Racial Disparities, Harm to Black Families](#), Hina Naveed, *Human Rights Watch* (May 20, 2022); [Child Protective Services agencies are tearing Black families apart, advocates warn](#), Michael Z. Muhammad, *The Final Call* (Sept. 14, 2021); [Too Many Black Families Get Caught in Child Welfare’s ‘Front Door,’ Advocates and System Leaders in New York Agree](#), Michael Fitzgerald, *The Imprint Youth and Family News* (Oct. 28, 2020); [BLM means BFM: The Foster System Hurts Black Families & We Must Include Black Mothers in the Fight for Justice](#), Patrice James, *Shriver Center on Poverty Law* (Aug. 24, 2020); [It’s Not Enough to Mean Well: The Child Welfare System Is Racist, Even If Most Professionals Think They Are Not](#), Cathy Krebs, *The Imprint Youth and Family News* (Aug. 12, 2020); [The Sad Omission of Child Welfare from Mainstream Discussion on Race](#), Tehra Coles, Zainab Akbar, Emma Ketteringham, and Lauren Shapiro, *The Imprint Youth and Family News* (Aug. 6, 2020).

⁵ [Effects of an interdisciplinary approach to parental representation in child welfare](#), Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora, and Joel Miller, 102 *Children and Youth Services Review* 42 (April 2019).

struggle to provide quality, holistic representation. And, except for a program in New York City and pilot programs in a couple of other jurisdictions, which are both focused on providing representation to parents during CPS investigations, family defenders have not been able to provide timely representation and they cannot provide it without state funding. NYSDA has and will continue to advocate for state funding of the family defense function, at the very least equivalent to the state funding that is available to counties and defense programs for criminal defense to improve quality, reduce caseloads, and provide counsel at first appearance. See, e.g., NYSDA [Testimony Before the New York State Unified Court System Commission on Parental Legal Representation](#), at pp. 10-13. We urge OCA to join with NYSDA and other statewide and local entities to advocate for additional funding in the State Budget.

Procedures for Determining Eligibility Should Not Vary by Judicial Districts

Paragraph 1 of the proposed 205.19(e) provides, in part: “Each judicial district shall establish a procedure developed in accordance with guidelines and a uniform screening tool promulgated and approved by the Chief Administrative Judge.” With guidelines and a uniform screening tool promulgated and approved by the Chief Administrative Judge, it is unclear what procedures are contemplated by this provision. In addition to subdivision (e), subdivision (f) references establishment of processes for seeking reconsideration and review of a denial, though the procedure in (f)(1) does not specifically say that it would be set by the judicial district. While we recognize that certain processes vary from judicial district to judicial district, we are concerned that allowing judicial district-specific procedures may result in less than uniform eligibility determinations. To ensure uniformity, we strongly urge OCA to amend section 205.19 to substantially limit provisions allowing the judicial districts to establish procedures. Further, the family court defense bar should be consulted before the Chief Administrative Judge promulgates guidelines and a uniform screening tool and before any judicial district-specific procedures.

Confidentiality of Financial Eligibility Information and Records

While section 205.19 closely aligns with the Office of Indigent Legal Services’ eligibility standards, there are some differences, including related to confidentiality of financial eligibility information and records. Paragraph 3 of 205.19(e) requires that the court or delegated screening entity “preserve the confidentiality of the information presented as part of the financial eligibility determination and [] take steps to ensure that the screening and determination are done in a confidential setting and that the information identifying the person seeking counsel is not accessible to the public.” In contrast, Standard XII of the ILS standards not only includes such confidentiality provisions, but also provides that an entity involved in screening “shall not make any information disclosed by the applicants available to the public or other entities (except the court)” and “[a]ny documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.” We urge OCA to incorporate these two principles into section 205.19, *i.e.*, allowing the submission of information and documentation *ex parte* and ensuring that information provided to a screening entity is shared only with the court.

The information that people provide during the screening process can be sensitive and private. In our experience, eligibility information is sometimes provided to other parties in the family court proceeding and is used by opposing counsel in an attempt to gain a tactical advantage or to try to get the assigned attorney removed from the case. This is especially the case in matters involving private parties on both sides, such as custody, visitation, and family offense proceedings. It is not enough for

the rules to provide for confidentiality from the public. This information and any documents must not be available to anyone other than the court and the screening entity.

Conclusion

We thank you again for the opportunity to provide these comments. The adoption of this rule, with the amendments suggested above, will go a long way to ensuring uniformity in eligibility determinations and timely entry of counsel. If you have any questions, please do not hesitate to contact Susan Bryant, Executive Director, at sbryant@nysda.org, or Kimberly Bode, Family Court Staff Attorney, at kbode@nysda.org.