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**Request for Public Comment on Adopting a New Section 205.19 of the Uniform Rules of the Family Court to Develop Uniform Standards of Eligibility for Assigned Counsel That Would Apply in All Family Court Proceedings**

To Whom It May Concern:

On behalf of the Chief Defenders Association of New York, we would like to thank the Office of Court Administration for the opportunity to provide 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 Chief Defenders Association of New York (CDANY) is a membership organization of the appointed Public Defenders, Conflict Defenders, Executive Directors of non-profit public defense offices and Administrators of Assigned Counsel Panels throughout New York State. Our organizations collectively represent most people prosecuted in every county of New York State—hundreds of thousands of people each year. Collectively, our public defense offices represent close to 400,000 people in the criminal, family, and appellate courts of New York State every year. Many of our member organizations also represent low-income parents and caretakers in Article 10 and related proceedings across the State.

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Our written testimony below addresses the proposed new uniform standard of eligibility for assigned counsel that would apply in all family court proceedings, which adopts the *Standards for Determining Financial Eligibility for Assigned Counsel* issued by the State's Office of Indigent Legal Services (ILS) in February 2021.<sup>1</sup> We strongly support the new rules that clarify eligibility standards and assure greater access to counsel in family court proceedings, including timely assignment of counsel.

In particular, the use of presumptive eligibility is critical for groups of clients who should not have assignment of counsel delayed while the court assesses eligibility. CDANY agrees that potential clients who are incarcerated, are in a mental health facility, are on needs-based public assistance, and/or have, within the past six months, been deemed financially eligible for counsel in another proceeding should be provided a no-cost attorney from the outset of an investigation or proceeding.

Another positive aspect of the OCA standards is the flexibility they allow in considering the totality of the potential client's means, including debts and financial obligations, as well as the cost of retaining a private attorney for the matter. It is quite costly to hire an attorney for many types of family cases, given the average number of court appearances and the length of time many of these cases take in court.

Finally, we applaud the inclusion of investigations by Child Protective Services (CPS) as an eligible proceeding for the assignment of counsel. As is discussed in more detail below, our experience is that representation at the earliest stages of an investigation can decrease court filings and increase the chances a family can remain safely together with services.

The main concern of Chief Defenders across New York State is that these standards cannot be implemented without adequate funding and resources. We have significant concerns that the current funding levels are insufficient to guarantee adherence to the standards. For those counties that handle cases through a public defense or non-profit office, the annual county-based (or city-based in NYC) budgets throughout the state are vastly insufficient to represent all eligible people. Moreover, due to the low 18-b rates for assigned counsel, there are very few attorneys willing to serve on the assigned counsel panels.

Another factor to consider is that Office of Indigent Legal Services (ILS) has issued standards for attorney representation that place a cap on the number of cases an attorney can accept.<sup>2</sup> Current funding does not meet these standards, meaning that attorneys working in this field have caseloads that exceed the cap already. The new eligibility standards will, and should, assure that more people receive an attorney free of cost, but there is no mechanism to ensure funding to make this happen. It will require a substantial infusion of monies from the state to ensure all eligible clients receive a qualified attorney to represent them and that each attorney is handling the number of cases permitted under the standards.

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<sup>1</sup><https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf>

<sup>2</sup> *Caseload Standards for Parents' Attorneys in New York State Family Court Mandated Representation Cases*, <https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>.

## **Pre-Petition Representation**

The proposed eligibility rules provide access to counsel during the investigation stage of a case, before an Article 10 petition is filed. *See* Proposed New Section 205.19(a)(3) of the Uniform Rules for Family Court. Legal assistance during the investigation prevents unnecessary removals of children from their families and reduces family court litigation by giving parents access to legal advice and social work services before and during the period when the CPS agency is deciding whether a removal of the child is warranted.

Proposed Rule 205.19 comports with the recommendations set forth in the 2019 *Interim Report to Chief Judge DiFiore* issued by the New York State Commission on Parental Representation, as well as the recommendations of the federal Administration for Children and Families. The Commission's report thoroughly described the crisis in New York's parental legal representation and recommended "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."<sup>3</sup> As further stated in the Report, "[g]iving parents representation when it matters – before they appear in court - is consistent with principles of equal protection and due process; can prevent unnecessary and prolonged separation of children from their parents; and can mitigate the disruption and trauma that accompanies State intervention into the family."<sup>4</sup>

Likewise, since 2017, the federal Administration for Children and Families has endorsed early assignment of counsel: "[t]here is a growing body of empirical research linking early appointment of counsel (at or prior to a party's initial appearance in court) and effective legal representation in child welfare proceedings to improved case planning, expedited permanency and cost savings to state government."<sup>5</sup>

Cases involving common family problems such as drug or alcohol use and mental health issues, can be resolved outside of court. This is more likely to happen if the parent is motivated positively to address these issues and agree to services. With independent legal advice from an attorney, a parent is more likely to trust that engagement is a positive step towards keeping their family together. Social work services provided through the parent's attorney are easier for a client to accept, as parents often view the CPS caseworker, who has the power to take their children away from them, in a negative light, even if the caseworker is genuinely trying to help. Perhaps more importantly, given the fact that a parent who can afford counsel during the early stages of a CPS investigation is often able to hire an attorney for legal advice, it is a matter of equity to ensure that low-income parents have that same opportunity.

For the past few years, the New York City Council has funded family defense organizations to provide early advocacy and representation during a child protective investigation. During this

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<sup>3</sup>[http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR\\_Commission-Report.pdf?fbclid=IwAR2DGVUGk86o8SH4HkViJ7a9uJyYHWZt7rktZ044xQlnyKH3K9HYNBwqLiw](http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf?fbclid=IwAR2DGVUGk86o8SH4HkViJ7a9uJyYHWZt7rktZ044xQlnyKH3K9HYNBwqLiw), p. 16-23

<sup>4</sup> *Id.*, p. 16

<sup>5</sup> Health and Human Services, ACYF-CB-IM17-02, January 17, 2017 (citations omitted).

representation, the offices provide clients with legal advice and representation as well as social work assistance. Based on this experience, it is very clear that early intervention can be quite successful in reducing court filings in Article 10 cases. Further, even when there is a filing, early intervention increases the chances the family can remain safely together during the pendency of the case or that a close family member can foster the child during the proceedings.

Each of these outcomes is a benefit to families, the courts, and local and state government. Reduction in court filings is a critical benefit to the family courts, which have very high caseloads, as well as to all litigants whose cases are further delayed by additional filings. In terms of benefits to the city or county, timely access to counsel and interdisciplinary representation saves significant foster care dollars per year, while also keeping families safely together.

A well-researched report showed that interdisciplinary representation significantly reduced the amount of time a child spends in foster care in cases that were filed in court.<sup>6</sup> The benefits of this model of representation are enhanced when parents receive assistance early on, before a case is filed. In fact, early representation has reduced the number of filings as is evidenced by some data: In FY21, nearly 80% of the CPS investigations Bronx Defenders and Brooklyn Defender Services represented parents in were never filed in family court. For the CPS investigations that were ultimately filed in court, early advocacy had a positive impact on what happened in the case. In 96% of the cases that were ultimately filed in court, children stayed home or were placed with family rather than in the foster system.

### **Timely Access to Counsel is a Racial Justice Issue**

Race and poverty are defining characteristics of the family regulation system which disproportionately surveilles and targets Black, Indigenous and immigrant people, particularly those from low-income communities of color. In New York, Black children make up 40% of the children in the foster system yet make up 15% of the children in the state, whereas white children make up 25% of the children in the foster system and 48% of the children across the state.<sup>7</sup> [The New York State Bar Association](#) recently called on New York State lawmakers to urgently “end the unnecessary disruption and destruction of Black families caused by the child welfare system.”

Ensuring more equitable access to representation to those families under investigation by CPS agencies is one way to reduce the likelihood of family separation, reduce the number of children of color in the state’s foster system and to protect the rights and integrity of Black and low-income families in New York.

Parents who are financially able to seek the assistance of counsel at these early and critical stages of a CPS investigation typically do so. The Commission’s recommendations are to ensure all parents in this position, including those with limited means, have the same access to counsel as those who can afford to hire an attorney.

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<sup>6</sup> <https://www.sciencedirect.com/science/article/pii/S019074091930088X>

<sup>7</sup> <https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20State.pdf>, page 7.

## **This Rule Protects the Due Process Rights of Parents**

Proposed Rule 205.19 does not create a new right to counsel for parents under investigation by a CPS agency. Rather, it confirms the due process rights of indigent parents in Article 10 proceedings—rights that are invoked when a CPS agency, an arm of the government, contemplates whether to interfere with a parent’s care and custody of their child—and gives indigent parents the same access to legal representation as a parent of means who can afford to hire an attorney.

The stated purpose of Article 10 of the Family Court Act (FCA) is to “provide due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.”<sup>8</sup> Important substantive and procedural due process rights are at stake when the government, through its agents, such as CPS, intervenes in a family's life. In recognition of the need for protection of these important rights, FCA Article 10 requires that, at various points before a court proceeding is initiated or a hearing conducted, parents must be notified of “the right to be represented by counsel, including procedures for obtaining counsel, if they are indigent.” This language was added in 1990 as a result of a comprehensive, federally-funded, two-year study of New York's child protective and family court systems to ensure that parents have access to publicly funded legal representation *before* a petition for neglect or abuse is filed with the court.<sup>9</sup> Family Court Act 1021 requires that persons authorized to remove a child with the written consent of his or her parent or other person legally responsible “shall, coincident with consent or removal, give written notice to the parent or other person legally responsible...of the right to apply to the family court for the return of the child..., and of the right to be represented by counsel and the procedures for those who are indigent to obtain counsel in proceedings brought pursuant to this article.”<sup>10</sup>

Family Court Act 1024, which empowers the government to remove a child from a parent on an emergency basis, also provides that “coincident with removal,” the parent “shall” be given written notice, on a form “prescribed by the chief administrator of the courts,” of certain rights, including “the right to apply to the family court for the return of the child...and of the right to be represented by counsel...and procedures for obtaining counsel, if indigent.”<sup>11</sup> These important additions to Article 10 were made to ensure that parents were informed of their right to counsel and had access to counsel when the government infringed upon their custodial rights during a CPS investigation, before filing a petition or application in court. Through this proposed rule, OCA is ensuring equity in access to counsel when it is required and when a parent’s due process rights are at risk.

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<sup>8</sup> NY Family Court Act §1011

<sup>9</sup> See Jules Kerness and Constance R. Warden, *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes Under Article Ten of the New York Family Court Act*, New York State Senate Standing Committee on Child Care, (Sen. Mary Goodhue, Chair) (National Center on Child Abuse and Neglect, December 1989), <https://www.ncirs.gov/pdffiles1/Digitizations/126665NCJRS.pdf>.

<sup>10</sup> See FCA §1021. See also §§1022, 1022-1, 1026, 1034(1)(b).

<sup>11</sup> See FCA 1024(b)(iii).

There are some who argue that the First Department's decision in *Jeter v. Poole*, --- N.Y.S.3d ---, 2022 N.Y. Slip Op. 04121 (1st Dep't 2022), wherein the court held that a parent's due process rights were not violated by a failure to assign her counsel to represent her in an OCFS administrative hearing, extends to pre-petition matters and supports the denial of access to counsel during a CPS investigation. This argument is misguided and based on a misinterpretation of *Jeter*, which in fact further supports the necessity of the proposed court rule at issue here. Citing the Court of Appeals' decision in *Matter of Ella B.*, 30 N.Y.2d 352 (1972), the Court distinguished *Jeter*, in which the parent's employment options were impacted, from *Ella B.*, which held that a parent's right to assigned counsel is invoked when their right to the care and control of their child is implicated. The circumstances addressed by this proposed rule are precisely those where a parent's due process rights to the care and control of their child are at risk, and thus warrant equitable access legal representation.

### **Conclusion**

The Chief Defenders Association of New York strongly supports the proposed eligibility standards promulgated by the Office of Court Administration under section 205.19 of the Uniform Rules of the Family Court.

Due to the lack of sufficient funding to support these standards or the attorney caseload limits, it is hoped that the state will contribute to the constitutionally mandated provision of Family Court parental representation.

For questions, please contact Mark Funk at [MarkFunk@monroecounty.gov](mailto:MarkFunk@monroecounty.gov) or James McGahan at [JMcGahan@stlawco.org](mailto:JMcGahan@stlawco.org).