Questions for State Agency Counsel

2025 Winter NYPWA Conference

January 31, 2025

OCFS:

1. Can you provide a current chart of your Counsel's Office staffing, with contact information (names, titles, email address) broken down by responsibility?

2. What is OCFS' view on the meaning of "subsequent report" in Social Services Law 427-a(5)(d)(v) - which allows for access to the prior CARES (FAR) report to "any social services district investigating a subsequent report of abuse or maltreatment involving the same subject or the same child or children named in the report. The main question is whether "subsequent report" in the statute means the same as a subsequent report in CNNX or if "subsequent" is just given it's ordinary meaning. The example given was a situation where a CARES case was closed and approximately a year later a new report was called in that was designated as an INV and not a SUB. Would CPS being able to use the information in the CARES report on the new INV, which is a subsequent report but not a SUB report? Below is an excerpt from the SSL 427-a for reference.

   SSL 427-a(5)(e)(iii): the child protective service of a social services district may unseal a report, record and information concerning such report and record of a case under the family assessment and services track in the event such report, record or information is relevant to a subsequent report of suspected child abuse or maltreatment. Information from such an unsealed report or record that is relevant to the subsequent report of suspected child abuse and maltreatment may be used by the child protective service for purposes of investigation and family court action concerning the subsequent report and may be included in the record of the investigation of the subsequent report. If the social services district initiates a proceeding under article ten of the family court act in connection with such a subsequent report of suspected child abuse and maltreatment and there is information in the report or record of a previous case under the family assessment and services track that is relevant to the proceeding, the social services district shall include such information in the record of the investigation of the subsequent report of suspected child abuse or maltreatment and shall make

that information available to the family court and the other parties for use in such proceeding provided, however, that the information included from the previous case under the family assessment and services track shall then be subject to all laws and regulations regarding confidentiality that apply to the record of the investigation of such subsequent report of suspected child abuse or maltreatment. The family court may consider the information from the previous case under the family assessment and services track that is relevant to such proceeding in making any determinations in the proceeding.

3. Significant Litigation Summary: What are the significant litigation cases OCFS are involved with that may impact local social services districts?

   The three cases below were mentioned at the Summer Conference meeting:

   Alisa W.- foster care system challenge-

   Lawyers for Children- host homes-

   Matter of Jeter v Poole- decided by Court of Appeals-

   - Petitioner has no constitutional right to free to counsel at administrative hearing;
   - amended Social Services Law §422(8)(b)(ii)(B) did not apply retroactively to proceeding;
   - administrative law judge did not abuse discretion in excluding from evidence letter written by child recanting abuse allegation;
   - substantial evidence supported the determination.

4. What is the OCFS regulatory agenda for 2025? Can you give any status reports?

5. Can you provide a summary of any regulatory changes made during 2024?

6. Has OCFS had any discussions with Senator Brisport's office concerning the "Miranda" warning legislation that he has put forth in the past and has already re-introduced in 2025?

There has been at least one meeting recently with his office and NYPWA, ACS, Caseworker union officials, parent advocates, a university professor, and parent/respondent counsel. There was some discussion of the ACS pilot program regarding providing information to parents/PLR's at the outset of a CPS investigation, as well as the notification program used in Texas. Was OCFS invited to this meeting?

7. Safe Landings Legislation- what role will OCFS take in suggesting and/or drafting the chapter amendments for this legislation?

8. Did OCFS make any comment on the proposed OPWDD regulations re supported decision making, and/or did OPWDD make any effort to discuss with OCFS?

9. 19-OCFS-LCM-05-R1 (Revised, September 24, 2024), was issued relative to 1034 orders. Has there been any feedback from OCA and/or individual judges relative to the court's use/misuse of 1034 since then?

10. If a criminal order of protection is authorized on a parent, does this automatically require that the LDSS file a petition for a removal?

11. Repeat from Summer: Although I think that this issue most commonly comes up with regard to CPS, I think the following issue could apply to another other type of caseworker, APS, foster care, etc.:

    We have more and more caseworkers being recorded. Does anyone have policies on how they handle this? We always train them to assume they are being recorded, but I wasn't sure if anyone had any specific protocols that they use with caseworkers when someone is openly recording.

I was forwarded a copy of some guidance from Charles Carson, which provided was back in 2010 to an LDSS attorney:

The regulations at 18 NYCRR 432.2(b)(3)(ii)(a) require that the CPS investigation include a face to face interview with the subject of the report. The regulation doesn't address issues such as the subject refusing to be interviewed or the situation where the subject puts conditions on the interview, such as in your question.

Our view is that the district must take reasonable steps to attempt to comply with the regulatory requirement. If the subject refuses to be interviewed or refuses to make him or herself available for an interview, CPS should document that fact, and that will demonstrate a good faith attempt to comply with the regulatory requirement.

In your situation, the subject is not refusing to be interviewed, but the subject is placing conditions on the interview. We don't see that as nullifying the requirement that the subject be interviewed. CPS would of course want to document that the subject recorded the interview. The possibility raised is that the subject could record the interview and then alter the recording, so if CPS has the technology available, they might want to also record the interview so they would have their own reliable record.

I would note that the cases you cite* appear to address the issue of the limits on the authority of courts in regard to what they can order CPS to do. I don't read them to say that how the investigation is conducted is within the exclusive discretion of DSS. Even if the cases did say that, however, this is an issue of regulatory compliance, and failing to comply with the regulatory requirements would be outside the discretion of CPS.

*the cases cited are: Matter of Zena O., 212AD2d712 (2nd Dept 1995); Matter of Mary AA, 175 AD2d 362 (3rd Dept 1991)

Is there any further advice on this issue?

12. Repeat from Summer Conference.

With the amendments to 42 CFR PART 2—Confidentiality of Substance Use Disorder Patient Records, some local districts are finding that substance abuse treatment providers, even when they have made a CPS referral, are refusing to provide records to the LDSS CPS for the CPS investigation, insisting, as the regulations require that the records may only be released to CPS via court order and subpoena.

This position is maintained despite the fact that the statute, 42 U.S.C.A. § 290dd-2 Confidentiality of records, at subsection (e), says:

42 U.S.C.A. §290dd-2 Confidentiality of records

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection

(e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

(e) Nonapplicability

The prohibitions of this section do not apply to any interchange of records--

(1) within the Uniformed Services or within those components of the Department of Veterans Affairs furnishing health care to veterans; or

(2) between such components and the Uniformed Services.

The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

The weird part of the exception is that it seems that the "…interchange of records…" part looks to only apply to the uniformed services sections (1) and (2), but not necessarily to the reporting of child abuse/neglect section.

So, I can see where the providers would say that while the statute requires reporting (assuming that there is a mandatory reporting statute) that the new regulations do not provide an exception for providing further information, absent a court order and subpoena.

My best practice advice has always been that if there is a trial, that the attorneys should be making the subpoena motion (as opposed to relying upon a previously executed authorization by the respondent). However, in the context of a CPS investigation, the time factor in obtaining the information would be a problem. Also, the regulation related to court ordered disclosure is not clear about this remedy:

> (a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:
>
> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(note- there two other exceptions, one for criminal investigation, and the other for if the patient is testifying, so not really relevant to a CPS investigation)

The regulations do not define whether any allegation of "suspected child abuse and neglect" falls within the meaning of "necessary to protect against an existing threat to life or of serious bodily injury," so I don't know if that would have to be proven each time that an LDSS made a motion to try to obtain these records. Also, since no court case is pending, there is an issue of what court the application would be made in. Since a CPS referral *might* result in a FCA Article 10 petition, would it be Family Court?

Has OCFS had any clarification from the Federal side about this, and if not, can you seek that clarification, and provide guidance to the LDSS's on how to proceed in these situations?

13. Repeat from Summer Conference.

Issue with difference of opinion between OCFS Child Fatality Review Team that allegations of inadequate guardianship and lack of supervision were not supported by preponderance, while the OCFS hearings bureau had retained the indication after their review of the case.

14. Repeat from Summer Conference.

If an individual requests access to a CPS record, and they are listed in the report as "no role," do they still count as an "other person listed in the report," entitled to access. This question was just asked the day before the conference.

15. Are there any CLE topics that your office would be willing to present at the 2025 Summer Conference?

OTDA:

1. Please provide a current chart of your Counsel's Offices staffing, with contact information (names, titles, email address) broken down by responsibility?

2. Significant Litigation Summary: What are the significant litigation cases OTDA are involved with that may impact local social services districts?

Anderson v Roberts- class action mortgage lien- credit for WEP May 31 argued at 3rd dept, waiting to hear decision

3. Any updates on regulations that were actively being worked on during 2024?

4. What is the regulatory agenda for 2025?

5. This question came from a Commissioner, and she received an answer from OTDA- our questions within this question is to confirm that this is all correct and to see if the change has been made as stated in the answer:

When recovering assistance granted to a recipient from a personal injury settlement on a TANF case, is the recovery based on the assistance granted to the entire household size or just to the actual recipient?

Answer from OTDA: Your email was forwarded to me for response as the TA Bureau liaison for Orleans County. We appreciate your patience as we researched your question to ensure our policies aligned correctly on the issue. Your question points us to the need to revise the Book 1 language, for while the Book 1 language is intended only to inform applicants and recipients about possible grant recovery, we see the need to clarify. Future revisions of the LDDS 4148A (Book 1) will contain amended language to clarify the policy. The original email is correct; the intention is to handle the recovery in the same manner as the lottery intercept due to SSL 104-b referencing the recipient rather than the assistance unit.

Thank you,

Danielle Parese *(she/her/hers)*
Temporary Assistance Specialist 1, Temporary Assistance Bureau

Another question in this area of TA recovery is can you give a summary of the current OTDA guidance on TA recovery, including any limitations on recovery based upon such things as WEP related work, etc.?

Background: SSL 104-b(1) says:

1. If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official

on and after the date when such injuries were incurred. In all such cases, notice of the commencement of such an action shall be served upon the public welfare district that has provided or is providing such assistance and care, or upon the department of health.

The Glossary to the TA Sourcebook defines "recipient" as:

RECIPIENT- Person who has submitted an application for TA and who has been determined by the local district to be eligible for a specific program. Also includes those eligible individuals on whose behalf a TA application was submitted by another person.

However, there is an old case from 1974 (Borsman v. Mannix, 46 A.D.2d 885 [2nd Dept., 1974]) involving the recovery of AFDC based upon 104-b, that says that those amounts have to be pro-rated based upon the number of the family members. A subsequent case (Mendelson v Transport of New Jersey, 113 A.D.2d 202 [2nd Dept., 1985] talked about recovery against the entire TA grant based upon SSL 104, finding that it was permitted to recover the entire amount.

6. We have many benefits cases detected through RFI (Resource File Integration), and SOLQ (State On-Line Query). These cross checks, as intended, detect unreported assets and income. With the advent of artificial intelligence (AI) and other significant computer advances, the follow-up work processes for these detections are woefully inefficient and outdated. The current systems inefficiencies result in a gross waste of State and Federal funds. By the time unreported income and assets are detected and followed-up on the local level, overpayments of benefits funds are unrecoverable.

What's the solution? A system where RFI, SOLQ and other asset/income detections would immediately prompt a systems generated notice of cessation of benefits or grant reductions, detailing the reasons, with a right to a fair hearing, and with local social services districts copied on the grant cessation or reduction notice. Through internet applications and other inputs, salient information is already within the system to accomplish this.

These systems reforms would provide much needed integrity into our benefits programs, save enormous amounts of wasted funds, and assure benefits are there for needy individuals and their families. Obviously, such systems enhancements are complex. This email is a macro overview. However, implementation is overdue and compelling.

- Is OTDA aware of this gross waste of funds and actively working towards modernizing its systems to create these enhancements, with a projected timeframe rollout?

- For the Federal SNAP and Family Assistance Programs is the Federal Government actively working on requiring States to develop these solutions, with implementation time deadlines established?
- For SNAP, do you have any USDA recommended contacts? For the Federal Government's Family Assistance benefits, do you have any recommended Health and Human Services contacts?

7. Repeat from Summer Conference

The local districts are still having difficulties with housing and the use of hotels and other shelters, and the assertion of tenant rights by those housed in hotels for over 30 days.

At the Summer conference there was suggested regulations to review 18 NYCRR 352.3(C), 18 NYCRR 352.35(B)(3) and 18 NYCRR 352.35(4) Temporary Assistance Definition, however there are still issues- can OTDA issue a written opinion on this issue?

8. Repeat from Summer Conference

IRS Refund Child Support Tax Offsets: The Washington Post reports the IRS suspended child support Federal tax refund offsets for some Native American tribes, and this could threaten the States' IRS child support offsets too. The issue involves States having private contractors access confidential tax data. In light of these recent developments, does NYS' child support IRS tax refund offset process require any compliance changes?

In the Summer, we were told that Federal legislation is pending to resolve problems with the tribes and contractors, if that does not pass, OTDA is working on another plan

9. A follow up to the Summer question about child support- is OTDA going to update 10 ADM-02 relative to LDSS/County attorneys being mandated to provide reciprocal enforcement services when an SCU violation petition gets transferred to their county?

10. Repeat from Summer- Fair hearings- phone hearings to continue? They can be cumbersome for the LDSs in that they have to stay on the phone waiting.

11. Repeat from Summer- Is any action being taken on the SNAP skimming problem?

12. Are there any CLE programs that your office would be willing to present at the 2025 Summer conference?