Questions for OCFS and OTDA Counsel

2024 NYPWA Summer Conference

July 17, 2024

These are the questions submitted to OCFS and OTDA counsel for our meeting on the morning of July 17.

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

3. What is the OCFS regulatory agenda for the remainder of 2024? Can you give any status reports?

4. At the Winter Conference we had a discussion about 1034 orders- Do you have any advice relative to FCA 1034 and the ordering of those by courts even where there is no allegation of neglect or abuse in the home(s)? There is at least one case (Corrigan v Orosco, 84 AD3d 955 [2nd Dept., 2011]) that says that they are not to be ordered unless there is some indicia of abuse or maltreatment. Can OCFS have a dialogue with or communicate this issue to OCA? Given that a 1034 order must be reported to the SCR as a referral, 1034 orders in which there are no actual allegations or concerns about neglect or abuse waste both CPS and SCR resources.

   At the Winter conference, we discussed that: OCFS had understood that all court ordered investigations under FCA 1034 were called into the SCR. LDSS attorneys clarified this is not accurate and that practice differs county to county. OCFS Legal will take this back for an internal discussion as this is also a programmatic concern for CPS and the SCR.

   Are there any new thoughts on this issue since we last met?

5. Another question that we discussed in January had to do with the disclosure of CPS reporter information in different contexts. I recently had another question from and LDSS attorney regarding this situation:

   > An issue has arisen with respect to the disclosure of the identity of a mandated reporter to an ALJ Hearing Officer in Child Abuse or Maltreatment Hearings and/or Day Care Hearings.
   >
   > My understanding is that pursuant to SSL 422, the identity of the reporter is kept confidential and is only disclosed under the specific circumstances such as to law enforcement agencies or by court order if the reporter's testimony is required in court proceedings or when the reporter gives explicit consent for the disclosure.
   >
   > However, I was informed that if a 2221A is submitted by a police officer or a doctor, then their consent is not required in order to submit the 2221A into evidence at the fair hearing pursuant to FCA 1046(a)(v) or SSL 415. One Administrative Law Judge believes the 2221A is a public record and there is a distinction between a "mandated" reporter and a "confidential" reporter.
   >
   > In conclusion, does the local DSS need to obtain the written consent of a mandated reporter prior to releasing his/her identity to a ALJ Hearing Officer in a Child Abuse or Maltreatment Hearing and/or Day Care Hearing; assuming the identity is released to prove the truth of the matter asserted and the 2221A is submitted as part of the local Agency's evidence, with the mandated reporter identity information intact? Are there any professions among mandated reporters for whom the Local DSS can disclose their identity without consent?

6. What specific information is allowable to share with consent under the Violence Against Women Act (VAWA)? Could there be a potential HIPAA violation when CPS shares information with the DV provider without signed consent? We need to address this concern for the sake of our client's privacy and professional integrity.

   For example, there is still confusion regarding the release of evaluations, particularly from psychologist to client. Can the contracted psychologist share the evaluation with the client? Either way, the client will receive the evaluation's outcome. What laws support the release of information? Since our trafficked youths are exposed to violence, are they too protected under VAWA? If so, then based on VAWA we may be in violation.

7. We currently have parent advocates who are co-located and under contract. 23-OCFS INF-10 says they are not mandated reporters, but they are credentialed,

and their agencies say they are and must call in a report. Who is right? Are they mandated reporters?

8. When an LDSS conducts an emergency removal (1024), at the time of the removal the LDSS has the authority to place a child without the consent of the child's parents/PLR in the protective custody/foster care of the LDSS. Thus, the child is in the care and custody of the Commissioner. Are there any circumstances where an emergency removal occurs, and at the time of the emergency removal, 1017 can occur, or a release to the non-respondent parent can occur?

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

10. Concurrent planning: There seems to be differences of opinion on this issue:

In the red corner, we have:

Matter of Khadijah D., 226 AD3d 1012 (2nd Dept., 2024)- The mother's contention that the Family Court erred in changing the permanency goal for the children from reunification with the mother to placement for adoption, with a concurrent goal of reunification with the mother, was unpreserved for appellate review. In any event, the contention was without merit, as ACS established by a preponderance of the evidence *that a goal of placement for adoption, with concurrent planning for reunification with the mother, was in the children's best interests*.

Also, Chapter 6 ("Permanency Planning Options") starting at page B-1, of the Foster Care Practice Guide for Supervisors and Caseworkers is entitled "Concurrent planning."

Also, 00 OCFS INF-5:

> II. Concurrent Planning Concurrent Planning is a term heard frequently in child welfare since ASFA's enactment. ASFA amended section 471 (a) (15) (F) of the Social Security Act to explicitly permit that reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts to make it possible for a child to safely return to the child's home. In other words, it is permissible to work toward reunification, while at the same time establishing an alternative permanency plan.

And fighting out of the blue corner, we have…

Third Department- **Matter of Timothy GG** 163 AD3d 1065 (3rd Dept., 2018):

> Family Court erred in imposing concurrent and contradictory permanency goals of return the child to parent and free the child for adoption. As we have previously held, the statute permits imposition of only one permanency goal (*see Matter of Julian P. [Melissa P.-Zachary L.]*, 106 AD3d 1383, 1384 [2013]; *Matter of Dakota*

F. [Angela F.], 92 AD3d 1097, 1099 [2012]; *see also* Family Ct Act § 1089 [d] [2] [i]).

Also, **David UU**, 206 AD3d 1502 (3rd Dept., 2023) noted the "erroneous imposition of concurrent permanency goals," and **Matter of Issac Q** 212 AD3d 1049 discussed that family court was prohibited from adopting inconsistent goals, citing **Samuel DD**, 123 AD3d 1159.

And… FCA §1089(d)(2) where the child is not returned to the parent or other person legally responsible:

(i) whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The permanency goal may be determined to be:

(A) return to parent;

(B) placement for adoption with the local social services official filing a petition for termination of parental rights;

(C) referral for legal guardianship;

(D) permanent placement with a fit and willing relative; or

(E) placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older and the court has determined that as of the date of the permanency hearing, another planned permanency living arrangement with a significant connection to an adult willing to be a permanency resource for the child is the best permanency plan for the child and there are compelling reasons for determining that it continues to not be in the best interests of the child to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian;

11. This is another repeat from the Winter Conference- Matter of Kimberly DD., 220 AD3d 1091 (3rd Dept., 2023) relative to the LDSS responsible to serve as MHL Article 81 guardian. It is our understanding that OCFS will be issuing guidance on this issue- any timeframe on that?

    Note- there was an unreported case decided in March, *Matter of United Health Servs. Hosps., Inc.* (J.W.), 82 Misc3d 1218(A) (Supreme Court, Broome County, 2024) in which the court discharged the Commissioner of Broome County DSS and the Commissioner of the Tioga County DSS, as temporary guardian of J.W. after determining that determined that the Tioga County DSS was a more appropriate agency to handle J.W.'s affairs on a temporary basis, based on his residency in Tioga County prior to his admission to UHS. Although this decision did not specify whether or not the AIP was receiving public assistance of any

kind, it did indicate that one of the powers being requested was the power to make a Medicaid application for the AIP.

12. 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?

13. What is the current OCFS position regarding a “non-offending” parent- as in the parent that is not actively maltreating or abusing the child, but is aware of the maltreatment or abuse, but is not acting to protect the child? This is one example from a local district:

With the increasing use of fentanyl throughout our State, I am wondering if you have been made aware of any unpublished decisions regarding a nonoffending parent who knew, or should have known, of the other parent’s drug use, whose impaired level of parental judgment placed the children at imminent risk of harm?

The following cases, although not specific to fentanyl, would seem to indicate that the “non-offending” parent can be found to have neglected the children for failing to act:

Matter of L.B., AD3d 2024 NY Slip Op 02137 (1st Dept., 2024)- the father at the hospital after the child's birth and that the father admitted he was aware that the mother was "actively using" heroin before she got pregnant and continuing until she went into a treatment facility about six or seven months into her pregnancy. After that, he would also see her when she left the facility and give her money, and, there was testimony from the father that at some point prior to giving birth, the mother lived with the father and his mother. This supported a finding that the father neglected the child because he knew or should have known that respondent mother was abusing narcotics while she was pregnant with the child, but failed to take any steps to stop her drug use. The child was born at 36 weeks, with serious health issues requiring an extended stay in the NICU, further supporting a finding of neglect against the father.

Matter of Timothy L., 221 AD3d 1006 (2nd Dept., 2023) Orange County DSS filed an article 10 alleging that the father neglected the children by failing to intervene even though he was aware that they were being neglected by the mother and her paramour, who both abused drugs and with whom the children resided. Contrary to the father's contention, a preponderance of the evidence supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by, inter alia, the failure of the father to exercise a minimum degree of care in providing the children with proper supervision or guardianship.

Matter of Alisha S., 223 AD3d 827 (2nd Dept., 2024), isn't a drug case, but there was a finding of neglect where it was proved that the mother failed to act to protect the children from unsanitary living conditions, inconsistent school attendance by the children, gang and gun violence, a lack of medical and mental health treatment, as well as having failed to act upon the older children's inappropriate behavior.

Matter of Ahren B.-N., AD3d 2023 NY Slip Op 06646 (4th Dept., 2023) The 4th Dept. rejected the father's contention that the evidence did not establish that the child's malnourished state was attributable specifically to his actions. Petitioner established that the father resided in the same household with the child and the mother, that he was aware that the mother was unable to provide the child with adequate nutrition and that his assistance was critical to the health of his child, and that he was reluctant, and sometimes unwilling, to offer his assistance in ensuring that his child received proper nourishment. Petitioner thereby established that the father knew or should have known of circumstances requiring action to avoid harm or risk of harm to the child and failed to act accordingly.

14. 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?

15. When LDSS contracts with another agency to provide preventive services to a family and there is a new SCR report under investigation by LDSS, can LDSS share the existence of the report and the allegations so that the contractor can best serve the family?

16. Families First Audit: What are the Federal audit prospects for Qualified Individual Assessments and other Families First compliance requirements? As of the January conference, there was nothing from the Feds on QI or FFPS

17. Family Court “Court Improvement Project”: What is the status of OCFS’ involvement with this initiative? Anything new since January? There was a kickoff meeting for the “Family Justice Initiative” in May- is OCFS involved with that?

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

19. Local DSS Employee Retention and Pay Equity (repeat from Winter Conference):

Current State funding of child welfare makes it difficult for more impoverished areas of the State to retain skilled staff. Is OCFS exploring child welfare funding reform to enhance personnel funding reimbursement for more impoverished social services districts?

Pay Equity with State Counterparts: In fulfilling State mandates, local DSS staff are more public facing then their State counterparts. However, current State funding exacerbates pay equity and employee retention as more impoverished areas do not have the financial resources to competitively fund staffing to fulfill State mandated requirements. Are there any State initiatives to reform local social services funding, to study compensation equity between the more public facing DSS workers and their less public facing state counterparts, and appropriate State funding to achieve compensation equity, especially for more impoverished areas of the State?

Quality Legal Representation: OCFS was involved in a webinar concerning providing quality legal representation for parents, when cases are registered by the SCR and forwarded to local CPS for investigation. This initiative is supported by State grant appropriations. What enhanced State funding will be available to local DSS’ to assure quality legal representation for CPS?

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?

3. What is the regulatory agenda for remainder of 2024? Any updates on regulations that are actively being worked on?

4. This question is a recurring issue in different counties, having to do 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. One example from May:

Our county, as a last resort, has been housing individuals and families in hotel rooms when shelters do not have capacity or when we need to keep a family together.

Recently, an individual was asked to leave a hotel for disruptive/violent behavior, the local police department refused to ask her to leave as she had been in the room for over 30 days and needed to be formally evicted under 9 NYCRR 2204.1. Currently, we voucher hotels daily or every 3 days.

We had a discussion of this issue at the Winter Conference meeting. Has there been any further review of this issue by OTDA along the lines of issuing guidance or otherwise taking a position relative to these situations?

5. SNAP and Temporary Assistance (TA) Application Determinations: What monitoring process for NY State does the Federal Government have in place concerning timeliness of NYS' SNAP and TA application determinations?

6. 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?

7. A follow up to the January 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?

8. Would your office be willing to do a child support caselaw update at the 2025 Winter conference?

9. Are there any other CLE programs that your office would be willing to present at the 2025 Winter conference?