*State of New York*
*Unified Court System*

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*Lawrence K. Marks*
*Chief Administrative Judge*

September 23, 2021

Ms. Kathleen Brady Stepian, President and CEO
Council of Family and Child Caring Agencies
254 West 31st Street, 5th Floor
New York, NY 10001
Via email: KBradyStepian@cofcca.org

RE: Family Court Rule 205.18

Dear Ms. Stepian:

Many thanks for your letter, dated September 6, 2021, expressing the concerns of the Council of Family and Child Caring Agencies regarding Family Court Rule 205.18. We wish to assure you that the court rule is completely in harmony with the federal and state statutes on which it is based,[1] furthers their salutary legislative goals and is clear in its terms. It provides an indispensable tool for the Family Court as it, along with the families and agencies that appear before it, undertakes the task of implementing the new laws on a fair and timely basis. The rule was recommended by the Chief Administrative Judge's Family Court Advisory and Rules Committee in accordance with the specific authorization in section 17 of Part L, as quoted in your letter, for the "*office of court administration ...to promulgate such rules and regulations ...as may be necessary to implement the provisions of this act*" on or before its effective date (September 29, 2021). Rule 205.18 is absolutely essential for the Family Court to be able to comply with the rigid time limits, contained in both the Federal and NYS statutes as a condition of New York State's receipt of substantial Federal reimbursement for the placement of children in all case categories in congregate care settings.

Necessity for the Court Rule

With the stated aim of sharply reducing the use of congregate care of children nationally, the Federal act requires all states to establish a new layer of hearings in their Family or Juvenile Courts to approve or disapprove all placements of children in non-secure, group settings. If the

[1] *Family First Prevention Services Act of* 2018 (FFPSA) [Public Law 115-123]; Laws of 2021, chapter 56, Part L.

legislation is successful, all localities will have sufficient alternatives so that fewer congregate care applications will need to be made. Nonetheless, significant efforts to comply will need to be made across the board in Family Court, as both the New York State and Federal statutes apply to all categories of juvenile cases that may result in placements,[2] including child abuse and neglect, voluntary foster care, Persons in Need of Supervision, juvenile delinquency, destitute minors, youth reentering foster care and youth freed or surrendered for adoption but not yet adopted.

Significantly, both the Federal and New York State statutes establish strict time-limits both for the completion of the required independent review by a "Qualified Individual" (QI) and for the determination by the Family Court approving or disapproving the placement, that is, within 30 and 60 days, respectively, of the child's entry into the "Qualified Residential Treatment Program" (QRTP). *See* P.L. 115-123, §50742; 42 U.S.C.A.§675(a)( c); NY Soc. Serv. Law §393.[3] While the new State law authorizes some of these QRTP hearings to be coordinated with already-scheduled dispositional, extension of placement or permanency planning hearings, *if* the coordination can occur within the time limits, many cases in each category will require additional hearings, particularly if an emergency placement or transfer is necessary in between scheduled reviews. As you know, if the Family Court determination does not occur on a timely basis, New York State will lose federal reimbursement for the entire duration of the child's QRTP placement beyond the first 60 days.

It is critically important, therefore, for the Family Court and all parties, including the attorney for child, to receive the federally required report and assessment by the "Qualified Individual" sufficiently in advance of the Family Court QRTP hearing so that the hearing can go forward on a timely basis without any adjournments. Moreover, it is equally essential that the report contain all of the information that must be considered by the Family Court in order to render a fair and considered decision. The court rule thus requires the report and assessment to be provided to the parties within five days of its completion, but in no event more than 10 days prior to the hearing, and specifies the essential contents, all of which are relevant to, and necessary for, the Family Court's determination. In so providing, the court rule protects the due process rights of parents and children so that all parties will be able to fully prepare and so that the Family Court will be fully informed and thus able to render a timely decision in conformity with the statutes.

Importantly, Family Court Rule 205.18 must be read together with the statutes upon which it is based. It neither contradicts nor unnecessarily repeats the provisions of these statutes

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[2] A few narrow categories of specialized facilities are exempted from the new hearing process, *i.e.*, facilities for pregnant and parenting teens, youth suspected of having been trafficked, youth over 18 who require a supported transitional living environment, residential substance abuse programs for families and youth placed securely after adjudications or convictions for designated serious felonies.

[3] *See also,* U.S. Dept. of Health & Human Services Admin. On Children, Youth & Families Children's Bureau, Program Instruction ACYF-CB-PI-18-07 (July 9, 2018) at 10-11; *Family First Prevention Services Act of 2018: A Guide for the Legal Community (*American Bar Association, 2020) at 23; Children's Defense Fund, Amer. Acad. Of Pediatrics, ChildFocus, FosterClub, Generations United, Juvenile Law Center & National Indian Child Welfare Assoc., *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders* (Jan. 2020), at 100-104.

and is in all respects consistent with them and ensures compliance with the requirements in a manner that fulfills the statutory purposes and protects the families' constitutional rights. Significantly, the rule must also be read together with Family Court Rule 205.1(b), which provides that " *For good cause shown, and in the interests of justice, the court in a proceeding may waive compliance with any of these rules other than sections 205.2 and 205.3, unless prohibited from doing so by statute or by a rule of the Chief Judge.* "

Request for Family Court Determination Regarding QRTP Placement

Rule 205.18 specifically provides that requests for Family Court QRTP placement determinations may be made either "*prior to or no later than five days after the child's entry into the [QRTP] placement*" -- clearly consistent with the statutory authorization for the Family Court determinations to be made *either* before the child enters the QRTP *or* once the child has already entered the QRTP placement. Nowhere does the rule require prior court approval.

Significantly, the Children's Bureau of the US Department of Health and Human Services Administration on Children, Youth and Families, in its FFPSA Program Instruction ACYF-CB-PI-18-07, at page 10, clearly contemplates both pre- and post-entry determinations. While many cases will address children already in a QRTP, both PINS and juvenile delinquency proceedings may involve children in temporary facilities pending disposition, where the QRTP determination may, if consistent with the federal 60-day time limit, be combined with the dispositional hearing. There may be other cases as well in which the full application process for residential treatment may not be undertaken until Qualified Individual and Family Court approvals have been provided. The court rule, like the statutes, thus provides flexibility in contemplating both pre-placement and post-placement requests for hearings.

Physical appearances in Family Court

Both the court rule and the statutes use the term "hearing," but, as with many hearings referenced throughout NYS statutes, actual in-person hearings may be waived and determinations may be made on papers where there are no issues in contest. The court rule must, therefore, be read together with the statutory authorization to waive in-person hearings where all parties, including the attorney for the child, consent. In light of the constitutional dimensions of the liberty interests involved, in order to waive a hearing, the Family Court must be assured that the consent of all parties has been given knowingly, intelligently and voluntarily, which, in some cases, may require at least an oral allocution (either in person or virtually) as to the parties' understanding of the fundamental rights they are waiving. Additionally, in light of the pandemic, many, if not most, proceedings are being convened virtually, with participation by Microsoft TEAMS or telephone, a trend that is likely to continue in at least some non-quasi-criminal categories of cases. Nowhere does Rule 205.18 require that all parties must be physically present in all cases.

Significantly, special concerns are implicated regarding participation in hearings and waivers of rights by children. In both juvenile delinquency and PINS cases, which are quasi-criminal in nature, the accused juveniles have both constitutional and statutory rights that must be protected; both they and their parents have rights, albeit waivable, to participate. *See* Family

Court Act §§341.2, 741. Additionally, with respect to permanency hearings, children 10 years of age and older have statutory rights to participate in accordance with Family Court Act §1090-a – and the Family Court has a duty under both Federal and State law to "consult" with children to ascertain their positions.

Specificity of the Qualified Individual's Assessment and Family Court Determination

The degree to which constitutionally protected liberty and due process rights of both children and their parents are implicated when placement out of the home is requested – and, in particular, when placement in congregate care settings, such as QRTP's, are at issue—cannot be overstated. The Federal statute, aimed, in large measure, to restrict unnecessary, inappropriate use of congregate care placements and to preserve families wherever possible, specifically requires independent assessments by QI's and then reviews by the Family Court "approving or disapproving" the placements. In order to make an appropriate determination – and in order to afford all parties, including the attorney for the child, the ability to prepare – the court rule properly sets forth information relevant and vital to its review, that is, the elements that, taken together, allow first the QI and then the Family Court to assess whether the proposed QRTP placement plan is the least restrictive setting that matches the child's needs, best interests and short- and long-term goals. *See,* American Bar Association, *The* Family *First Prevention Services Act of 2018: A Guide for the Legal Community* (FFPSA Guide; Dec., 2020) at 23-25. Confidentiality must be preserved as required, but, concomitantly, the due process rights of the parties to know what factors are contributing to the assessment and the Family Court's need for a full picture to inform its determination must likewise be preserved.

Significantly, neither the parties nor the Family Court, can be expected to simply rubber-stamp a request for approval of a QRTP placement if the only specificity in the request is a "non-secure level of care, "which is the general level that applies to all QRTP's.[4] Certainly, if the child is already in the QRTP, as is authorized in the statutes, a focus upon and specific review of that facility is inevitable. Moreover, if the child has been placed for replacement pursuant to Family Court Act §353.3(4), consideration of that particular placement facility must occur. In order to fulfill the Federal and NYS statutory requirements to match the QRTP placement request with the child's needs, best interests and long- and short-term goals, as well as to determine whether the setting is the least restrictive alternative appropriate for the child, more particularity is needed than simply "non-secure." Significantly, Social Services Law §393(2)(iii)(B) requires the Court to state its reasons for its determination – and to do that, the Court must have the full information as to how the setting fulfills the child's best interests, the lack of "an alternative setting" in a less restrictive environment and the "circumstances ...that necessitate" the placement. [5] And importantly, adding specificity to the assessment to ensure

[4] The specialized facilities for pregnant and parenting teens, youth suspected to be victims of trafficking, families in substance abuse facilities and older youth in transitional, supervised settings, as well as limited secure or secure facilities for adjudicated juvenile delinquents are not QRTP's and will thus not be the subject of QRTP determinations.

[5] Although the phrase "a QRTP placement" is used at various points in the NYS statute, the phrases "such placement," "that placement," and "the QRTP" are also used at various points. *See, e.g.,* Social Services Law §§358-

that there is a match between the child's needs and best interests and the proposal for a new or continuing QRTP placement in no way compromises the independence of the QI.

National organizations, in providing guidance on the Federal law, have emphasized the importance of specificity. The American Bar Association's FFPSA Guide, supra at 22, indicates that the assessment must include "*the reasons the specified QRTP meets the child's treatment goals and needs.*" Additionally, the guide developed by the Children's Defense Fund, the American Academy of Pediatrics, Child Focus, Foster Club, Generations United, the Juvenile Law Center and the National Indian Child Welfare Association, entitled *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders* (Jan., 2020), at 101, indicates that: "*The process ensures that a specific QRTP is correct for a specific child, given that each QRTP will have unique strengths and capacities based on its treatment model, staff, and approach. [42 USC §475A(c)(1)(A); P.L. 115-123, §50742].* "

Required Planning Upon Court's Disapproval of the Requested Placement

The Federal law provides that upon the Court's disapproval of the requested placement, Title IV-E funding is available for only 30 days of continued care in the QRTP, which means that the petitioning agency must be on an expedited time-frame to make alternate arrangements. *See* U.S. Dept. of Health & Human Services Admin. On Children, Youth & Families Children's Bureau, Program Instruction ACYF-CB-PI-18-07 (July 9, 2018) at 11. Consistent with Federal law, the NYS statute requires, as the primary alternative, the need for the Family Court to set a schedule for the child's return home and to direct the petitioning agency "*to make such other arrangements for the child's care and welfare that is in the best interest of the child and in the most effective and least restrictive setting as the facts of the case may require.*" [Soc. Serv. Law §393(2)(b)]. If return home is not appropriate, and assuming the other specialized categories of non-QRTP out-of-home care noted above are inapplicable, the statutory priorities for the child are, first, kinship care, then foster care and, as a last resort, another congregate care setting. It is only if another QRTP setting is proposed that a new QI assessment and Family Court approval or disapproval are required. *Id.* Much of the information in the original QI assessment will be current and can simply be incorporated. Clearly, Federal law requires that all QRTP placements, not simply the initial placement proposed, be the subject of an independent QI assessment and court review and it is that requirement to which the requirement of Rule 205.18 is directed.

Requests for Continued QRTP Placement at Subsequent Permanency Hearing

Just to clarify, Rule 205.18 does not in any way require a referral to a Qualified Individual for a new assessment and report for each permanency hearing. To the contrary, as quoted in your letter, the rule simply requires the petitioner (generally, the local social services district, or, in the case of youth outside New York City placed with NYS OCFS for non-secure care, NYS OCFS) to provide the information necessary for the Family Court to carry out its statutory duty to determine whether placement in the QRTP continues to be necessary that is,

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a(3)(g)(ii); 393(2)(a)(ii); Family Court Act §§353.7(2(a) & (b), 353.7(3)(a)(iii)(A)(iii), 1055-c(2)( c)(i)(A); 1089(2)(vii)(H)(II).

that "*the needs of the child cannot be met through placement in a foster family home*," (and lack of foster homes is not a justification), that the placement is in the child's best interests and is the least restrictive alternative that fulfills the child's short- and long-term goals, as specified in the child's permanency plan. The rule does not mandate *any* QI involvement, but simply requires the provision of up-to-date information, using similar criteria and factors as in the original assessment, since the criteria remain the same. Again, the child's and parent's due process and liberty interests are at stake and they, too, need the information in order to prepare – and, in fact, most of the information has already long been required for pre-FFPSA permanency reports and pre-FFPSA permanency hearings and is not new.

In conclusion, Rule 205.18 is well-grounded in and is completely consistent with the statutes upon which it is based and is, in fact, essential for compliance with the complex new requirements. We hope the above explanation has allayed your concerns and we look forward to working with the Council and with all of our Family Court partners in implementing the new statutes.

Sincerely,