



August 19, 2020

Commissioner Sheila J. Poole  
Office of Children and Family Services  
Capital View Office Park  
52 Washington Street  
Rensselaer, NY 12114-2834

RE: Need for OCFS Guidance on ASFA Requirements During Covid-19 Crisis

Dear Commissioner Poole:

We are parents and advocates for thousands of families affected by the child welfare system. Families affected by the child welfare system live in the same low-income communities that have been disproportionately impacted by the novel coronavirus crisis. We write to ask the Office of Children and Family Services to meet with us to discuss the issuance of formal guidance to local social service departments and foster care agencies on how ASFA requirements are to be applied during the COVID-19 emergency.

As you know, since March, when the governor began the New York Pause (see Executive Orders 202.6, 202.7, 202.8, 202.10, and 202.11), child welfare involved parents have faced significant barriers to participation in services and to family time with their children in foster care. Many service providers have closed or significantly reduced their operations, leaving many parents unable to access rehabilitative services. Additionally, most foster care agencies eliminated or strictly limited in-person family time, forcing families to connect virtually, if at all. Though necessary in some cases, virtual “visits” are poor substitutes for in-person visitation. Virtual visits fail to meet the emotional needs of children and families and are fraught with their own unique set of hurdles, from technological glitches to children’s inability to sit still and stay engaged for extended periods over a virtual connection. For these reasons, virtual visits are often not as successful as in-person visits.

Because of its impact on services and family time, the Covid-19 crisis has greatly limited parents’ ability to reunify with their children in the usual timeframes. That is why it is imperative that OCFS issue clear and specific guidance to foster care agencies on how to alter their approaches to reunification efforts and the timelines set out in the Adoption and Safe

Families Act (ASFA) and New York's Social Services Law during the current state of emergency and its aftermath.

On June 23, 2020, the federal Children's Bureau issued important guidance about reasonable efforts and the filing of termination of parental rights petitions during the pandemic.<sup>1</sup> In particular, Children's Bureau Associate Commissioner Jerry Milner emphasized that "[d]uring the pandemic and its aftermath, agencies also may want to consider instituting protocols that provide an extra layer of review prior to filing a TPR petition."<sup>2</sup> In keeping with New York's longstanding commitment to keeping families together whenever safely possible,<sup>3</sup> we believe it is critical for OCFS to take up that call and issue specific directives for New York State.

In particular, we believe OCFS should issue ASFA-related guidance stating the following:

1. During the COVID-19 emergency, reasonable efforts in furtherance of reunification require agencies to identify appropriate virtual options for each aspect of a family's service plan that cannot be done in person;
2. During the COVID-19 emergency, reasonable efforts in furtherance of reunification include providing in-person family time whenever possible consistent with health guidelines, and expanding family time whenever possible;
3. The state of emergency, the pandemic, and the subsequent limitations on rehabilitative services and family time should be considered "compelling reasons" under S.S.L. 384-B (2)(L)(I) for a foster care agency to not request a permanency goal change to adoption;
4. Agencies shall not file TPR petitions that contain a cause of action that accrued during the months of the active state of emergency (March 7, 2020 through the end of the ongoing state of declared emergency which is yet unknown) or the 12 months immediately thereafter.

The last of these directives is particularly important. As the Children's Bureau directs, "A decision to file a TPR petition should be made in light of the impediments that a parent might face as a result of the pandemic. An agency should evaluate carefully whether parents have had a meaningful opportunity to demonstrate that they have made the necessary efforts to reunify with their children before taking that step."<sup>4</sup> Given how early and intensely the novel

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<sup>1</sup> June 23, 2020 letter from U.S. Children's Bureau Associate Commissioner Jerry Milner, available at [https://www.acf.hhs.gov/sites/default/files/cb/parental\\_rights\\_adoption\\_assistance.pdf](https://www.acf.hhs.gov/sites/default/files/cb/parental_rights_adoption_assistance.pdf).

<sup>2</sup> Id.

<sup>3</sup> See, e.g., *Matter of Medina Amor S.*, 856 N.Y.S.2d 35 (1st Dept 2008) ("termination of parental rights is a drastic event."); *Matter of Sheila G.*, 61 N.Y.2d 368, 370 (1984); *Matter of Leon RR*, 48 N.Y.2d 117 (1979).

<sup>4</sup> June 23, 2020 letter from U.S. Children's Bureau Associate Commissioner Jerry Milner, available at [https://www.acf.hhs.gov/sites/default/files/cb/parental\\_rights\\_adoption\\_assistance.pdf](https://www.acf.hhs.gov/sites/default/files/cb/parental_rights_adoption_assistance.pdf).

coronavirus hit New York, every New York family with children in foster care has faced extreme impediments and will not have a meaningful opportunity to reunify unless given time to engage in service planning after the emergency has ended and full access to services and family time has been restored.

Further, during the crisis, these families have not had access to the courts to resolve issues regarding services and family time as they typically would have. It would be a terrible injustice for a court to terminate a parent's rights because of a finding that he or she failed to plan during a time when quality rehabilitative services and in-person visits were severely restricted and the parent had no recourse to seek judicial intervention to ensure the services and family time to which the family was entitled.

Moreover, even in cases in which an agency believes that termination and adoption is in a child's best interests, that goal will be most efficiently accomplished by waiting to file a TPR petition when a cause of action has accrued outside the time period of the pandemic and its aftermath. Due to the extensive impediments to reunification efforts during the pandemic, any TPR petition based on this time period can expect to be met with a vigorous and viable defense that will tie up the case in litigation for lengthy periods of time. Thus, even when adoption may be the appropriate goal, it can be achieved more expeditiously by not filing a TPR petition based on the months of the state of emergency and its aftermath. The proposed guidance would prevent needlessly extensive TPR litigation and permit our courts to prioritize addressing the backlog of hearings that continues to build.

Agencies can already choose not to file terminations of parental rights based on one of the statutory exemptions to the 15/22 timeline.<sup>5</sup> However, as Associate Commissioner Milner and Children's Bureau Special Assistant David Kelly have emphasized, proactive steps are necessary to ensure that agencies protect family integrity to the greatest extent possible. In moving words, they have explained: "There will be those who choose to weaponize our systemic shortcomings and use them against parents. Child development and bonding will be used in arguments not to return children to their parents and to expedite adoptions in instances where families did not have a fair chance. We must be vigilant and prepared to stop this from happening, because justice demands it... We cannot allow the coronavirus to serve as a modern-day orphan train that leads to the redistribution of other people's children."<sup>6</sup>

This is an issue of racial and economic justice. Given that low-income communities of color are vastly disproportionately impacted by both the child welfare system and COVID-19, it is critical

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<sup>5</sup> See SSL § 384-b(3)(l).

<sup>6</sup> Jerry Milner and David Kelly, "Family is a Compelling Reason," THE IMPRINT (April 6, 2020), available at <https://chronicleofsocialchange.org/child-welfare-2/family-is-a-compelling-reason/42119>.

that OCFS take steps now to ensure we are vigilant in protecting New York families against the injustice of unnecessarily severing parent-child relationships.

Given the time-sensitive nature of this issue, we would greatly appreciate the opportunity to discuss it with you as soon as possible. We can be reached through Amy Mulzer, of Brooklyn Defender Services, at 347-977-1587 and [amulzer@bds.org](mailto:amulzer@bds.org).

Sincerely,

The Bronx Defenders  
Brooklyn Defender Services  
Brooklyn Law School Disability and Civil Rights Clinic  
Center for Family Representation  
CUNY School of Law Family Law Practice Clinic  
Hiscock Legal Aid Society by Executive Director Linda Gehron  
Monroe County Public Defender's Office  
Neighborhood Defender Service of Harlem  
NYU School of Law Family Defense Clinic  
Parent Legislative Action Network (PLAN)  
RISE  
Sinergia

Cc: Deputy Commissioner Suzanne E. Miles-Gustave