THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Persons In Need Of Supervision Proceedings

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I. Introduction

In 1962, the Family Court Act was enacted. The FCA separated status offenses from juvenile delinquency offenses, and applied the label "person in need of supervision" ("PINS") to status offenders. Both delinquency and PINS proceedings were incorporated in FCA Article Seven and most provisions in Article Seven were applicable to either cause of action. In 1982, the Legislature separated out delinquency proceedings through the enactment of FCA Article Three.

While delinquent and PINS youth used to be placed in the same facilities, called "training schools," state and federal legislation, and court decisions, have narrowed the family court's involvement, and authority, in dealing with PINS youth. The New York State Legislature enacted the PINS Adjustment Services Act, which defined detailed adjustment and mediation procedures that are conditions precedent to the filing of most PINS petitions. Once a petition is filed, a PINS respondent cannot be securely detained or placed in a secure facility. This has bred controversy between those who believe that the family court is an inappropriate forum for addressing the non-criminal misbehavior involved in PINS cases, and those who believe the court should have broader authority to sanction, and if necessary securely confine, those youth who are engaging in uncontrolled and self-destructive behavior.

PINS youth may also qualify for preventive services mandated under the Child Welfare Reform Act. Social Services Law §409-a(1)(a) states: "A social services official shall provide preventive services to a child and his or her family ... upon a finding by such official that ... the child is the subject of a petition under article seven of the family court act, or has been determined by the assessment service ... or by the probation service where no such assessment service has been designated, to be at risk of being the subject of such a petition," and a finding that the child is at risk of placement.

II. Child's Right to Counsel and the Role of the Child's Attorney

There is little controversy regarding the proper role of the child's attorney in a PINS proceeding. The attorney usually should advocate for the child's stated position, not the attorney's own perception of the child's best interests. Even in the context of FCA Article Ten abuse and neglect proceedings, in which the child's liberty interests are at stake but the child is not at risk of being stigmatized due to his/her misconduct, it has been recognized that the child's attorney should be a loyal advocate for a child who is old enough to make litigation-related decisions. *Rules of the Chief Judge*, §7.2 (in juvenile delinquency and person in need of supervision proceedings, "the attorney for the child must zealously defend the child"); *In re Albanese*, 272 AD2d 81, 707 NYS2d 171 (1st Dept. 2000) (Society for the Prevention of Cruelty to Children relieved as guardian *ad litem* where it did not advocate for position of fifteen-year-old child); *Matter of Colleen CC.*, 232 AD2d 787, 648 NYS2d 754 (3rd Dept. 1996) (attorneys provided ineffective assistance where they, *inter alia*, impeached testimony of fourteen-year-old client concerning sexual abuse); *Matter of Angelina AA.*, 211 AD2d 951, 622 NYS2d 336 (3rd Dept. 1995), *lv denied* 85 NY2d 808; *Matter of Elianne M.*, 196 AD2d 439, 601 NYS2d 481 (1st Dept. 1993) (child had right to substitute counsel of her own choosing for attorney who was not advocating as she wished); *Matter of Scott L. v. Bruce N.*, 134 Misc2d 240, 509 NYS2d 971 (Fam. Ct., N.Y. Co., 1986); Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 NYU Law Review 76, 91 (April, 1984) (child should be able to instruct counsel at age seven, just as he or she would do in a delinquency proceeding); *see also New York State Bar Association Standards for Attorneys Representing Children in Person in Need of Supervision Proceedings* (2015) (hereinafter, "*NYSBA Standards"*), Standard A-1 ("Whether retained or assigned … the child's attorney shall maintain a traditional attorney-client relationship with the child and zealously defend the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences, shall protect confidential information, and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with the child and advise the child in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances"); New York State *Rules of Professional Conduct*, Rule 1.14(a) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client"); *but see Rules of Professional Conduct*, Rule 1.14(b) ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian").

Moreover, while the child's attorney in a child protective proceeding can under some circumstances determine what position to take -- *see New York State Bar Association Standards for Attorneys Representing Children in New York Child*

Protective, Foster Care, and Termination of Parental Rights Proceedings, Standard A-3 (child's attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to imminent danger of grave physical harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision," or "[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions") -- the child's attorney in a PINS proceeding may advise the respondent to make an admission, but is in no position to make an admission on behalf of a respondent who desires dismissal and refuses to make an admission after being informed of the legal consequences.

Given that PINS proceedings place at stake the same liberty interests involved in a juvenile delinquency proceeding, it also seems clear that the respondent has, if not a Federal constitutional right to effective assistance of counsel, at least a State constitutional right. *See Matter of Chad "H"*, 278 AD2d 601, 717 NYS2d 725 (3rd Dept. 2000) (respondent denied effective representation where counsel should have moved for dismissal based on inadequate adjustment attempts); *Matter of Kelly "XX"*, 264 AD2d 911, 695 NYS2d 204 (3rd Dept. 1999).

Moreover, in the same way that defense counsel's conflict of interest may result in a finding of ineffective assistance in a criminal or juvenile delinquency proceeding, the inherent conflict created when a parent-petitioner retains an attorney to represent the respondent could result in a right to counsel violation. *See Matter of La Bier v. La Bier*, 291 AD2d 730, 738 NYS2d 132 (3rd Dept. 2002), *lv denied* 98 NY2d 671 (2002) (trial court properly refused to permit attorney who had been recruited by party to replace assigned attorney); *Matter of Linda F.*, 105 AD2d 523, 481 NYS2d 784 (3rd Dept. 1984) (children can be represented by counsel to whom they are referred by parent, but not by counsel retained by parent).

III. Causes of Action

A. Statutory Definition

A "Person in need of supervision" is defined as: "A person less than eighteen years of age: (i) who does not attend school in accordance with the provisions of part one of article sixty-five of the education law; (ii) who is ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority; (iii) who violates the provisions of section 230.00 of the penal law; (iv) or who appears to be a sexually exploited child as defined in [SSL §447-a(1)(a), (c) or (d)], but only if the child consents to the filing of a petition under this article." FCA §712(a); *see Matter of Morrison*, 110 Misc2d 329, 442 NYS2d 43 (Fam. Ct., Rensselaer Co., 1981) (Legislature intended to include school authorities as "other lawful authority"; since §3205 of the Education Law requires the attendance of children in school, "a school logically becomes an example of 'other lawful authority' beyond whose control a respondent could get"). The child charged with being a PINS is called the "respondent."

The constitutionality of the statute's arguably vague language – "ungovernable or habitually disobedient and beyond the lawful control" – was upheld in *A. v. City of New York*, 31 NY2d 83, 335 NYS2d 33 (1972) ("terms, 'habitual truant,' 'ungovernable,' 'habitually disobedient and beyond ... lawful control', as well as the sort of conduct proscribed, are easily understood").

The statute originally included males under the age of sixteen, and females under the age of eighteen. In *A. v. City of New York,* 31 NY2d 83, the Court of Appeals held that the age distinction violated constitutional equal protection principles. Thus, until the statute was amended to extend jurisdiction to cover all children under eighteen, the operative jurisdictional cut-off age was sixteen.

B. Age of Respondent

"The family court has exclusive original jurisdiction over any proceeding involving a person alleged to be a person in need of supervision." FCA §713. "In determining the jurisdiction of the court under [§713] the age of the respondent at the time the need for supervision allegedly arose is controlling." FCA §714(a). When determining the age of the child, the calendar date, and not the precise time of birth, controls. *See People v. Alouisa*, 120 Misc2d 968, 466 NYS2d 1007 (County Ct. Suffolk Co., 1983) (criminal court had jurisdiction over defendant on his sixteenth birthday despite fact that crime was allegedly committed a half hour before exact time of birth).

"If the respondent is within the jurisdiction of the court, but the proceedings were initiated after the respondent's eighteenth birthday, the family court shall dismiss a petition to determine whether a person is in need of supervision." FCA §714(b).

When sixteen was the cut-off, a petition could be filed after the child turned sixteen if "the need for supervision allegedly arose" when the child was still fifteen. *But see Matter of Lawrence T.*, 165 Misc2d 1008, 630 NYS2d 910 (Fam. Ct., Oneida Co., 1995) (petition dismissed where child truanted on day before she turned sixteen, but did not become habitual truant until she continued to truant after she turned sixteen).

However, the absolute cut-off of jurisdiction at age eighteen under FCA §714(b)

leaves no room for filing after the child turns eighteen no matter when "the need for supervision allegedly arose."

There is conflicting authority regarding whether, in the absence of a specific challenge by the respondent, the petitioner must prove the respondent's age at trial. *Compare Greller v. Shandell B.*, 157 AD2d 840, 550 NYS2d 423 (2d Dept. 1990) (general denial of allegations in petition activates requirement that PINS petitioner prove age at fact-finding hearing) and *Matter of Kalvin*, 99 Misc2d 996, 417 NYS2d 826 (Fam. Ct., Onondaga Co., 1979) (age must be established at trial in juvenile delinquency proceeding) *with Matter of Deon L.*, 173 AD2d 469, 570 NYS2d 998 (2d Dept. 1991) (no dismissal where presentment agency failed to prove age); *Matter of Anthony J.*, 143 AD2d 668, 532 NYS2d 924 (2d Dept. 1988) (jurisdiction established where delinquency petition alleged age, and respondent never alleged that he was outside court's jurisdiction) and *Matter of Donald F.*, 97 AD2d 980, 468 NYS2d 784 (4th Dept. 1983) (petition alleged age, and jurisdiction need not be established at fact-finding hearing).

C. Requirement That Misconduct be Habitual

In *In re Christine M.*, 98 AD3d 920, 951 NYS2d 496 (1st Dept. 2012), the court, upholding a PINS finding, noted that, even if the respondent's treatment of her mother was an isolated incident, the term "Habitually" immediately precedes "disobedient," and, therefore, qualifies "disobedient" but not "ungovernable." However, other case law suggests that an isolated incident is never sufficient to support a finding. *Matter of Raymond O.*, 31 NY2d 730, 338 NYS2d 105 (1972) ("record is silent on any misbehavior other than a single act of criminal trespass, and there must be more than a single isolated incident to support the determination of 'need of supervision'"); *Matter of David W.*, 28 NY2d 589, 319 NYS2d 845 (1971) (record silent as to misbehavior other than single act of harassment); *In re V.*, 34 AD2d 1101, 312 NYS2d 983 (4th Dept. 1970) (single assault incident insufficient); *In re Bordone v. F.*, 33 AD2d 890, 307 NYS2d 527 (4th Dept. 1969) (conversion of delinquency petition to PINS petition pursuant to FCA §716 was improper where there was only a single instance of throwing stones); *Matter of Kathie L.*, 100 Misc2d 173, 418 NYS2d 859 (Fam. Ct., N.Y. Co., 1979) (single act of running away from home does not make child ungovernable or habitually disobedient); *see also* 9 NYCRR §357.1(o) ("A pattern of behavior must be documented for complaints involving PINS behavior other than running away or marijuana possession").

D. Requirement That Parent Prove Attempts to Supervise

In FCA Article Ten abuse and neglect proceedings, "Impairment of emotional health" and "impairment of mental or emotional condition" are defined in FCA §1012(h) as including "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, *control of aggressive or self-destructive impulses*, ability to think and reason, *or acting out or misbehavior, including ungovernability or habitual truancy*...." (emphasis supplied) Whether a particular child becomes the subject of a PINS proceeding, or is seen as the legally blameless victim of parental abuse or neglect, will often depend upon the child's age, the seriousness of the child's misconduct, and the subjective views of the child protective services caseworker, or the social worker, school official, mental health

professional or other person who reported the child's condition. Indeed, because the initial labeling of a child as a PINS may be inappropriate, the law provides that a neglect petition may be substituted for a PINS petition when it appears that a child's condition is attributable to the neglectful behavior of the parent. FCA §716.

Accordingly, when the respondent has not committed acts, such as drug possession, truancy or assault, that are independently unlawful, it can be argued that the respondent's intent to defy the lawful authority of the petitioner is not proven unless the petitioner establishes that the respondent's alleged misconduct was preceded by efforts at supervision.

Compare In re Miller, 12 AD2d 890, 209 NYS2d 964 (4th Dept. 1961) (finding of habitual truancy reversed where all or most of the offenses occurred with the knowledge and acquiescence of the mother) and

Matter of Kathie L., 100 Misc2d 173 (running away from home, even if repeated several times, can justify no inference against the child absent proof that the child behaved without just cause, and "the State cannot merely presume, without some factual showing, that the child's seemingly independent acts and/or judgment are without parental consent, or, absent such consent, that they are, in the first instance, wrong")

with Matter of Shena SS., 263 AD2d 809, 693 NYS2d 313 (3rd Dept. 1999) (no requirement that court find specific intent to be truant);

Matter of Jeremiah RR., 260 AD2d 676, 687 NYS2d 483 (3rd Dept. 1999) ("That [respondent's] truancy was willful was further established by respondent's grandmother, with whom he resided during the relevant periods, who testified that when she confronted him about his refusal to go to school his only explanation was that he did not want to go. Further, petitioner testified that on two occasions she drove her son to school but he refused to go into the building, walking home instead");

Matter of Brittany H., 184 AD2d 903, 585 NYS2d 560 (3rd Dept. 1992) (although petitioner did supply written excuses for respondent's absences from school, she merely acted upon respondent's claims of illness) and

In re Doe, 194 Misc2d 93, 753 NYS2d 656 (Fam. Ct., Delaware Co., 2002) (evidence might support educational neglect charges against parents where respondent was absent from school without legal excuse on four days and was "tardy" to school, but school was unable to get note from parent as to any of the missed days, and, as to the first three days, respondent alleged that he had been traveling, shopping or vacationing with parents, and respondent was in school between 7:45 and 8:10 a.m. on 16 of the 23 days on which he was allegedly tardy and was tardy when driven to school by parents).

In addition, it can be argued that *mens rea* is a necessary element of a PINS finding. *Matter of John G.*, 89 AD2d 704, 453 NYS2d 824 (3rd Dept. 1982) (while affirming finding based on evidence of child's continuous violent and offensive behavior, court, accepting parents' contention that mens rea is necessary element of PINS adjudication, concludes that there was insufficient evidence to raise a reasonable doubt where respondent was tested as having IQ of 41 and was hyperactive, but there was no expert testimony that this precluded him from forming intent to engage in his conduct).

E. Failure to Attend School

1. Attendance Requirement

According to Education Law §3205(1)(a): "In each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction." A minor who becomes six years of age on or before December 1st (or, in New York City, December 31st) shall be required to attend school starting on the first day of school in September of that year. Ed. Law §3205(c); Chancellor's Regulation A-101(I)(A). "In each school district, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction until the last day of session in the school year in which the student becomes seventeen years of age." Ed. Law §3205(3). New York City has exercised that power. Chancellor's Regulation A-101(I)(A).

"The term 'school year' means the period commencing on the first day of July in each year and ending on the thirtieth day of June next following the school year commences on the first day in July of each year and ends on June 30th of the following year." Ed. Law §2(15); *Matter of Kiesha B.B.*, 30 AD3d 704, 815 NYS2d 800 (3rd Dept. 2006) (PINS adjudication upheld even though respondent turned sixteen approximately three weeks prior to commencement of mandatory classes in September).

2. Sufficiency of Evidence of Non-Attendance

As is the case when other types of misbehavior are charged, the petitioner must establish that the respondent's misconduct – his/her failure to attend school – was habitual.

Compare Matter of Alexander C., 83 AD3d 1058, 922 NYS2d 186 (2d Dept. 2011) (finding made where respondent was illegally absent at least 13 times during school year)

Matter of Toni Ann O., 56 AD3d 563, 867 NYS2d 504 (2d Dept. 2008) (finding made where respondent had more than three illegal absences from school);

Matter of Joel P., 16 AD3d 511, 791 NYS2d 613 (2d Dept. 2005) (petition facially sufficient where it specified ten dates on which respondent was absent without authorization);

Matter of Sharon D., 274 AD2d 702, 710 NYS2d 205 (3rd Dept. 2000) (evidence sufficient where respondent missed school approximately thirty-five times between September 1998 and April 1999 and, when in attendance, severely misbehaved, and respondent and mother demonstrated unwillingness to cooperate with voluntary diversion program as they twice failed to appear for initial screening);

Matter of Shena SS., 263 AD2d 809 (absence for entire school day on nine specified dates, and for another half-day, supported finding);

Matter of Jeremiah RR., 260 AD2d 676 (evidence sufficient where attendance records and testimony of principal established that respondent had numerous unexcused absences, unauthorized departures and suspensions resulting from respondent's insubordination and refusal to attend classes while in school building);

Matter of Rebecca Y., 195 AD2d 727, 600 NYS2d 329 (3rd Dept. 1993) (finding made where respondent was illegally absent on sixteen occasions and tardy on sixteen other occasions, and left school illegally on ten occasions);

Matter of Brittany H., 184 AD2d 903 (finding made where respondent missed over sixty

days of school, was tardy an additional six times and failed all of her courses) and
Matter of Mark E., 136 AD2d 766, 523 NYS2d 223 (3rd Dept. 1988) (finding made where it was alleged that respondent was absent on approximately seven occasions, and, even assuming that attendance counselor whose testimony was admitted without objection had no personal knowledge of respondent's absences, he had personal knowledge of three of the seven unexcused absences);
with Matter of Nicole T., 201 AD2d 844, 608 NYS2d 539 (3rd Dept. 1994) (finding reversed where only evidence presented at hearing was respondent's admission that she had been late to first period math class on at least four occasions during past several months, that there had been one incident where she had become disruptive during technology class, and that she did not go directly home from school because she would "just stand outside and talk to [her] friends").

Evidence of truancy is usually presented in the form of a certified transcript of attendance. However, it can be argued that the admission of school records prepared solely for the purpose of litigation is improper.
Compare Matter of Jodel KK., 189 AD2d 63, 595 NYS2d 835 (3rd Dept. 1993) (noncertified, unauthenticated copy of form purporting to be school attendance record does not qualify as business record in absence of indication as to when or by whom document was made and whether it is an original attendance record or one prepared with the PINS proceeding in mind) and
Matter of George C., 91 Misc2d 875, 398 NYS2d 936 (Fam. Ct., N.Y. Co., 1977) (transcripts prepared by attendance teachers inadmissible since they were prepared solely for use in court, by copying from roll books; requirement in Article Seven that evidence be competent supersedes Education Law §3211[2])
with Matter of Kelly V., 94 Misc2d 172, 405 NYS2d 207 (Fam. Ct., N.Y. Co., 1978) ("Transcript of Record of Attendance of Child" admissible pursuant to CPLR §§ 4518 and 2307, and Education Law §3211[2]) and
In re John R., 79 Misc2d 339, 357 NYS2d 1001 (Fam. Ct., N.Y. Co., 1974) (although business records prepared for litigation generally are not admissible, official documents are deemed trustworthy and admissible even when prepared for litigation; while respondents contend that rollbook in which attendance is first recorded should be produced, school absences would not deliberately be overstated in the transcript, and production of rollbook in court might impede ongoing transaction of school's affairs, force upon the school the trouble and expense of duplicating records, or invade the privacy of other pupils whose names appear on the same rollbook page) and Education Law §3211(2) ("A duly certified transcript of the record of attendance and absence of a child which has been kept, as provided in this section, shall be accepted as presumptive evidence of the attendance of such child in any proceeding brought under the provisions of part one of this article).

In addition, the admission of a school record prepared by an individual who is available to testify may violate Due Process principles. *Cf. Crawford v. Washington*, 541 US 36, 124 SCt 1354 (2004); *Matter of Samantha K.*, 61 AD3d 1322, 877 NYS2d 517 (3rd Dept. 2009) (admission of attendance records did not violate Confrontation Clause; although business records are not automatically deemed non-testimonial, this record contained contemporaneous record of objective facts, contents were not directly

accusatory, and petitioner was neither arm of law enforcement nor influenced by pro-law enforcement bias); *Matter of George C.*, 91 Misc2d 875 (no necessity for use of transcripts as substitute for live testimony of available individuals who kept roll books).

3. Defenses

A finding may be avoided if the respondent can establish a compelling justification for not attending school:

Education Law §3210(2)(b) ("Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish");

Matter of Benjamin A., 33 Misc3d 1232(A), 946 NYS2d 65 (Fam. Ct., Oswego Co., 2011) (court dismissed truancy petition where respondent had Asperger's Syndrome, which affects decision-making abilities, and thus failure to attend school was unintentional or excusable, and it would be unjust to adjudicate respondent a PINS and subject him to what probably would be destructive placements until after implementation of IEP and proper services have at least been attempted; while making recommendations, court notes that it has no authority to directly review school's procedures and decision of Committee on Special Education, court is not bound to accept school's decision without question);

Matter of Kristopher I., 289 AD2d 685, 733 NYS2d 539 (3rd Dept. 2001) (there is no need for express finding of specific intent to be a truant, and, although respondent consistently was diagnosed as suffering from depression and the need for continued therapy and medication was apparent, evidence did not raise reasonable doubt as to lawfulness of respondent's persistent absence from school);

Simon v. Doe, 165 Misc2d 379, 629 NYS2d 681 (Fam. Ct., Seneca Co., 1995) (petitioner failed to prove beyond a reasonable doubt that respondent acted intentionally where respondent suffered from a multitude of disabilities, including school phobia, and a clinical psychologist testified that a phobia is an anxiety-based disorder which results in avoidance "in the extreme" of the feared object or circumstance);

Matter of Barbara M., 130 Misc2d 20, 494 NYS2d 968 (Fam. Ct., Nassau Co., 1985) (petition dismissed where testimony of respondent, her mother, and her pediatrician established that respondent suffered from various ailments, including upper respiratory infection, viral pneumonia, repeated ear and throat infections, strep throat and allergies, and a staph infection in her nose and a swollen face, and respondent testified that she made every effort to attend school and was absent or late only when she was at a medical appointment or felt ill; court rejects County Attorney's argument that court is without discretion to examine underlying reasons for child's non-attendance and that truancy is a "strict liability" offense);

Matter of Andrew R., 115 Misc2d 937, 454 NYS2d 820 (Fam. Ct., Richmond Co., 1982) (where placement of respondent for over seven months under so-called voluntary placement without any review by neutral fact finder violated respondent's fundamental

liberty interest, failure to attend school was manifestation of his deep-seated desire not to be in placement, and court could not find that respondent had requisite intent to disobey mandates of Article 65 of Education Law);

Matter of Ian D., 109 Misc2d 18, 439 NYS2d 613 (Fam. Ct., N.Y. Co., 1981) (relying on reasoning underlying justification defense in PL §35.05, court dismisses petition where respondent was unable to attend school because of constant abuse from students who ridiculed him about his being poor and having to wear secondhand clothing, and his repeated pleas to school authorities for protection and assistance resulted in no meaningful action; court rejects Corporation Counsel's argument that the defense is affirmative in nature and must be pleaded and proven pursuant to CPLR 3018(b), since a PINS proceeding is at least quasi-criminal in nature and a PINS finding must be established by proof beyond a reasonable doubt);

Matter of Gregory B., 88 Misc2d 313, 387 NYS2d 380 (Fam. Ct., Kings Co., 1976) (while denying respondents' discovery requests, court concludes that respondents, who allege that conditions at the school are chaotic, that the education is "inadequate," and that there is crime and are numerous fights around the school and that the safety of students is endangered, have right to raise and establish defense of alleged "inadequacy" of education, but their affidavits fail to lay foundation for such a claim);

Ossant v. Millard, 72 Misc2d 384, 339 NYS2d 163 (Fam. Ct., Yates Co., 1972) (PINS petitions dismissed where parents refused to send children to school because of discontinuance of door-to-door bus transportation; children, who were absent under express direction of parents, had no intent to violate compulsory education law);

cf. Matter of Baum, 86 Misc2d 409, 382 NYS2d 672 (Fam. Ct., Suffolk Co., 1976), *aff'd* 61 AD2d 123, 401 NYS2d 514 (2d Dept. 1978) (in neglect proceeding, mother's claim that she failed to send child to school because she had been subjected to racist remarks by teacher was affirmative defense that mother failed to establish).

4. Violation of Respondent's Educational Rights

In *Matter of Beau II.*, 95 NY2d 234, 715 NYS2d 686 (2000), the child's attorney moved to dismiss the PINS petition filed by school officials, arguing that the family court had no jurisdiction because the petition contemplated a change in educational placement without affording respondent the protections contained in the Individuals with Disabilities Education Act and the Education Law. The family court denied the motion, holding that "the mere filing of a PINS petition does not necessarily work a change" in the educational services received by the respondent. The family court noted that the pre-dispositional investigation report prepared by the probation department did not recommend a change in placement, but instead recommended probation. The Appellate Division reversed, holding that the filing of the PINS petition did constitute a proposed change to the respondent's individualized education program, and triggered the substantive and procedural safeguards set forth in the IDEA and Article Eighty-Nine of the Education Law.

However, the Court of Appeals reversed, concluding that the filing of a PINS petition did not, by itself, constitute a change in placement. The school officials did not seek to change the respondent's placement by filing a PINS petition, and the probation

disposition merely sought to enforce the respondent's Individualized Education Plan. The probation department sought to improve the respondent's attendance record and supervise his activities, but did not seek to alter the educational services provided. The PINS proceeding was compatible with and supportive of the IEP, and the respondent attended the same school, the same classes and received the same counseling and school services to address his disability as before the PINS proceeding. The court refused to condone a blanket rule that all PINS proceedings are barred by the IDEA, as suggested in *Morgan v Chris L.* (927 F.Supp. 267). The court stated that the need to follow IDEA procedures "turns on whether there truly is a contemplated change in a child's educational placement." 95 NY2d at 241. The IDEA protections are triggered when a change is "'likely to effect the child's learning experience in some significant way.' (citation omitted)." 95 NY2d at 239-40. *See also Matter of Charles U.*, 40 AD3d 1160, 837 NYS2d 356 (3rd Dept. 2007), *lv denied* 9 NY3d 807 (dismissal of petition not required where, within 3 days after petition was signed, respondent almost succeeded in committing suicide, individualized education program recommending removal from mainstream junior high school setting and transition to small structured environment was formulated, and petition was verified; since petition did not contemplate change in placement at time of its making, substantive and procedural safeguards of IDEA were not triggered).

In contrast, in *Matter of Doe*, 194 Misc2d 93, 753 NYS2d 656 (Fam. Ct., Delaware Co., 2002), the family court dismissed in the interest of justice charges of misbehavior in school. After discussing the requirements in the IDEA, the court concluded that, since the school district specifically sought a more restrictive placement for the respondent, compliance with the IDEA was necessary. The court stated that a school district should first attempt to develop a reasonable and appropriate environment for a child before commencing judicial proceedings.

In *Matter of Ruffel P.*, 153 Misc2d 702, 582 NYS2d 631 (Fam. Ct., Orange Co., 1992), the court dismissed the petition in the interests of justice where the school merely used different discipline techniques on the nine-year-old respondent, but never dealt with the respondent's problems in another manner, such as by trying a different teaching approach. And, while the court recognized that it could not directly review the school's decision to bar the respondent from being classified by the Committee of Special Education, the court asserted that it was not bound to accept the school's decision without question, and noted that "[a]s long as his parents can handle him at home, and there is an academic setting in which this child can learn without posing a threat to others, respondent should remain home." 153 Misc2d at 706. The court concluded that "it would be most unjust to adjudicate this young boy as a PINS and subject him to probable destructive placements until after the district has at least attempted, in good faith, to engage the problem." 153 Misc2d at 707.

In *Matter of Shelly M.*, 115 Misc2d 19, 453 NYS2d 352 (Fam. Ct., Monroe Co., 1982), the family court, after concluding that the respondent was a "child with a handicapping condition" as defined at the time by the Education Law, concluded that an out-of-home placement should not be considered before the school district fulfilled its obligations under the Education Law.

Additional support for a motion to dismiss is found in FCA §732(a), which states that "[w]here habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition shall also include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the respondent[.]"

Practice Considerations

In determining whether a motion to dismiss should be made because there has been a change in the respondent's educational placement in violation of IDEA safeguards, the child's attorney should consider, *inter alia*, whether the program in the IEP has been revised; whether the respondent is mainstreamed to the same extent; whether the respondent can participate in the same non-academic and extracurricular activities; and whether the new placement is the same on the continuum as the old placement.

F. Absconding From Home or Staying Out Late

As usual, it must be established that the respondent's behavior is habitual. *Compare Matter of Freeman B.*, 93 AD2d 997, 461 NYS2d 743 (4th Dept. 1983) (testimony of petitioner concerning respondent's failure "to come home on time" was not sufficiently specific to constitute proof beyond a reasonable doubt) *with Matter of Nelly O.*, 51 AD2d 910, 381 NYS2d 66 (1st Dept. 1976) (where respondent absconded from home for two-day period, struck her mother on two occasions and had run away from facility where she had been remanded, the "indiscretions occurring over a period of several days patently do not fall within the rationale of cases holding that a single instance of wrongful conduct cannot provide a basis for a PINS adjudication").

A PINS adjudication may not be appropriate when, rather than abscond from home unlawfully, the child has moved to another location with the knowledge and acquiescence of the parent:

Matter of Kerri H., 193 Misc2d 238, 748 NYS2d 236 (Fam. Ct., Seneca Co., 2002) (where the almost eighteen-year-old respondent had been living independently for over a year, was gainfully employed and received little if any monetary support from parents, defense based on emancipation appeared to be available since one lawfully on her own is not beyond the lawful control of her parents);

Matter of Price, 94 Misc2d 345, 404 NYS2d 821 (Fam. Ct., Monroe Co., 1978) (petition dismissed where respondent left mother's home without permission shortly after her eleventh birthday, and lived with maternal grandparents on the same street, because of conditions in mother's home – such as the presence of two dogs and five cats who may have contact with the food, the presence of animal excretions, and discipline imposed by the mother by means of a stick or other implement which left marks upon the child – and because there was a very intense and hostile relationship between the mother and the maternal grandparents; although, on first impression, respondent's acts appeared to come within the statute, there was reasonable doubt as to whether respondent had a conscious intent to violate the law and to be habitually disobedient to her mother);

Matter of Reynaldo R., 73 Misc2d 390, 341 NYS2d 998 (Fam. Ct., Kings Co., 1973) (petition dismissed, and no "absconding" found, where fourteen-year-old respondent

moved to furnished room near parents' home, obtained employment and informed parents where he was, and mother had gone to see him and he visited parents on weekends and other occasions).

It may also be possible to raise a justification-type defense where the child has absconded as a result of mistreatment by the petitioner:

Matter of Lori M., 130 Misc2d 493, 496 NYS2d 940 (Fam. Ct., Richmond Co., 1985) (respondent, who was sexually involved with older lesbian and left home to live with aunt, where she was well-behaved and regularly attended school, took action reasonably calculated to protect her constitutional rights);

Matter of Andrew R., 115 Misc2d 937 (running away from placement and refusal to return did not constitute PINS behavior where there was a failure to afford respondent any review of foster care placement by neutral fact-finder for over seven months in violation of his right to due process).

G. Sexual Activity

A respondent charged with being a PINS based solely on consensual sexual relations may be able to mount a constitutional challenge to the charge. *See Matter of Lori M.*, 130 Misc2d 493 (court dismisses petition alleging that respondent was associating with twenty-one year-old lesbian, concluding that respondent's behavior fell within constitutionally protected zone of privacy).

Alternatively, dismissal in furtherance of justice may be appropriate. *See In re Z.C.*, 165 P3d 1206 (Utah, 2007) (where thirteen-year-old was charged with sexual abuse after she engaged in consensual sex with twelve-year-old boy, Legislature could not possibly have intended to punish them under child sexual abuse statute, and thus application of statute would produce absurd result and is prohibited; the crime charged envisions a perpetrator and a victim); *In re B.A.M.*, 806 A2d 893 (Pa. Super. Ct., 2002); *Matter of Cerino P.*, 296 AD2d 868, 744 NYS2d 627 (4th Dept. 2002); *Matter of Jessie C.*, 164 AD2d 731, 565 NYS2d 941 (4th Dept. 1991), *app dism'd* 78 NY2d 907; *Matter of Kevin S.*, 190 Misc2d 80, 737 NYS2d 509 (Fam. Ct., Clinton Co., 2001); *People v. M.K.R.*, 166 Misc2d 456, 632 NYS2d 382 (Justice Ct., Delaware Co., 1995).

In *Matter of Mary P.*, 111 Misc2d 532, 444 NYS2d 545 (Fam. Ct., Queens Co., 1981), the court held that the respondent's refusal to have an abortion did not justify a PINS finding. The court adjourned the case in contemplation of dismissal, and issued an order of protection directing the mother not to interfere with the child's decision to have her child.

H. Drug and Alcohol Abuse

Habitual drug or alcohol abuse may form the basis for a PINS cause of action. *See, e.g.*, *Matter of Mark E.*, 136 AD2d 766, 523 NYS2d 223 (3rd Dept. 1988) (finding made where respondent was intoxicated at his residence on approximately six occasions and was drinking at his home on two occasions).

I. Use of Obscene Language

In *Matter of Mark E.*, 136 AD2d 766, a PINS finding was made where the respondent, while intoxicated, used obscene language toward the petitioner and his

siblings.

J. Lawfulness of Directive

A defense to a PINS charge may be available when the respondent is alleged to have refused to obey commands that were themselves unreasonable or unlawful. *See, e.g., Matter of East Islip High School v. Ian M.*, 33 AD3d 921, 824 NYS2d 305(2d Dept. 2006) (child may not be adjudicated PINS for refusing to comply with directive that violates constitutional rights or is otherwise unlawful; adjudication affirmed where it was based on respondent's misbehavior in school, not on refusal to comply with allegedly improper drug test or search); *Matter of Andrew R.*, 115 Misc2d 937, 454 NYS2d 820 (Fam. Ct., N.Y. Co., 1982) (respondent failed to attend school while he was in placement for over seven months without judicial review); *Matter of Mary P.*, 111 Misc2d 532, 444 NYS2d 545 (Fam. Ct., Queens Co., 1981) (respondent allegedly refused to get abortion).

K. Substitution of Article Ten Neglect Petition

"On its own motion and at any time in the proceedings, the court may substitute a neglect petition under article ten for a petition to determine whether a person is in need of supervision." FCA §716.

Compare Matter of Charlene H., 64 AD2d 900, 408 NYS2d 103 (2d Dept. l978) (neglect proceeding should have been instituted where there was evidence that respondent's parents separated within a year of her birth, that her father was frequently drunk and that she and her three siblings had been placed voluntarily in foster care facilities on a number of occasions);

Matter of Richard G., 55 AD2d 939, 391 NYS2d 448 (2d Dept. 1977) (family court abused discretion in failing to substitute neglect petition where mother failed to appear for delinquency trial on three successive dates, and, after a fact-finding determination was made, failed to appear on five adjourned dates, and when she was arrested upon a warrant, mother stated that respondent was living with his aunt and that "I want this kid to be put away today," and also expressed concern that she might have to return to court and miss another day of work);

Matter of Richard C., 43 AD2d 862, 352 NYS2d 15 (2d Dept. 1974) (family court abused discretion in failing to substitute neglect petition where mother failed to attend hearing on three occasions and court had to issue warrant, and she failed to appear at dispositional hearing, and court stated, on the record, that respondent may be a neglected child);

Matter of R.L. v. A.J., 23 Misc3d 564 (Fam. Ct., Kings Co., 2015) (substitution ordered and PINS petition dismissed where mother was respondent in abuse/neglect proceeding that commenced before PINS proceeding and allegations suggested that child's behavior in running away from mother's home was related and/or attributable to alleged sexual abuse by mother's ex-boyfriend and to intervention of ACS and court system) and

Matter of Tad M., 123 Misc2d 1071, 475 NYS2d 996 (Fam. Ct., N.Y. Co., 1984) (after learning prior to fact-finding hearing that respondent was required to sleep in same

room as mother and three sisters, ages fifteen, nine and seven, and that respondent had also been forced to live in home with no heat or running water, court dismissed PINS petition and substituted neglect petition)

with Matter of Jeremiah RR., 260 AD2d 676 (no error in family court's refusal to substitute neglect petition for PINS petition based on testimony that respondent was allowed to drink alcoholic beverages in grandmother's household, since there was no evidence to suggest that respondent's conduct, principally his refusal to attend school, was related to alcohol consumption or any other parental neglect);

Matter of Sandra "I", 245 AD2d 655, 665 NYS2d 117 (3rd Dept. 1997) (family court did not abuse discretion in refusing to substitute neglect petition where there was testimony that respondent's stepfather slapped her on one occasion for misbehaving and swearing and that their relationship was strained, but there was no indication that respondent's misbehavior at school was related to parental abuse or neglect);

Matter of Brittany "H", 184 AD2d 903, 585 NYS2d 560 (3rd Dept. 1992) (family court did not abuse discretion in refusing to substitute neglect petition where petitioner supplied written excuses for respondent's absences from school, but she merely acted upon respondent's claims of illness);

Matter of Jeanne TT., 184 AD2d 895, 585 NYS2d 552 (3rd Dept. 1992) (family court did not abuse discretion where respondent's running away occurred between six months and almost a year after she was out of mother's custody and while she was in residential treatment facility, there was no proof that the behavior was attributable to parental abuse or neglect, and a previous PINS proceeding had been dismissed because of a neglect adjudication and placement);

Matter of Matthew FF., 179 AD2d 928, 579 NYS2d 178 (3rd Dept. 1992) (family court did not abuse discretion in failing to substitute neglect petition where petitioner testified that respondent's two older siblings had been subject to physical abuse in home by respondent's father, that such abuse occurred in respondent's presence, and that petitioner was found guilty of neglect for failing to comply with protective order prohibiting respondent's father from having contact with the children, but the abuse had not occurred for approximately two and a half years, petitioner was actively committed to receiving counseling services to deal with her inability to discipline the children and respondent had been out of foster care and back in the home for three months without incident, and there was no proof that respondent's behavior was the result of any contemporaneous abuse or neglect) and

Matter of Sheifa R., 22 Misc3d 1106(A), 880 NYS2d 227 (Fam. Ct., Queens Co., 2008) (in juvenile delinquency case where respondent, aged 9½ years, sexually abused 7-year-old complainant, and neglect petition was filed against respondent's father, in whose home respondent's offenses took place, court denies defense counsel's request for substitution of PINS finding and conversion of PINS finding into neglect finding; court notes that respondent's acts are not less serious or traumatic than maltreatment respondent may have experienced, that PINS substitution would afford court fewer dispositional options and would ignore fact that offense resulted in victimization of another child, and that there does not appear to be causal connection between neglect charges against father and respondent's offenses), *aff'd* 57 AD3d 678, 868 NYS2d 540

(2d Dept.).

The statute is silent with respect to the procedure to be used when the court substitutes a neglect proceeding. Often, upon receiving information suggesting that a neglect proceeding would be more appropriate, the court will order an investigation by child welfare authorities pursuant to FCA §1034, and, if the agency determines that a neglect petition should be filed, the court will hear the neglect proceeding and either dismiss, or consolidate for purposes of a fact-finding hearing, the PINS proceeding.

In *Matter of Tad M.*, 123 Misc2d 1071, the court endorsed a different course of action. While noting that substitution of petitions is unique to PINS proceedings, and that in other proceedings the court may employ §1034 when evidence of neglect arises, the court concluded that the Legislature did not intend that the §1034 procedure be used in PINS proceedings. Since "[t]he perimeters of PINS behavior and parental neglect often overlap," "substitution makes not only good sense but good law. It provides a swift machinery to address the needs of an apparently neglected child." 123 Misc2d at 1073. The court noted that if, after a fact-finding hearing, the court dismisses the neglect petition, the mother could re-initiate the PINS proceeding, and there would be no double jeopardy problem since the PINS hearing had not begun. In *Matter of Kenneth J.*, 102 Misc2d 415, 423 NYS2d 821 (Fam. Ct., Richmond Co., 1980), the same judge had advised both the petitioner and her husband that they should obtain private counsel since the judge was considering substitution of a neglect petition against them for the PINS petition against their son, and even noted that §716 "permits substitution 'at any time' without requiring the attendance of the party to be charged." 102 Misc2d at 420. The same judge also had, in *Matter of Leif Z.*, 105 Misc2d 973, 431 NYS2d 290 (Fam. Ct., Richmond Co., 1980), held that it could substitute an adjudication of neglect after a PINS hearing even though the parents had had no opportunity to rebut the new charge. The judge noted that, by filing the PINS petition, the parents had consented to the court's assumption of jurisdiction over the parent-child relationship.

It does appear that a FCA §1034 investigation is not required before the court may substitute a neglect petition. In *Matter of Charlene H.*, 64 AD2d 900, the Second Department, after concluding that a neglect petition should have been substituted, directed the family court to exercise its power under FCA §1032 by designating an appropriate person to file a neglect petition. The Second Department noted that if the family court made a finding of neglect, it should dismiss the pending delinquency and PINS petitions.

However, an Article Ten respondent has a statutory and State constitutional right to counsel. FCA §262(a)(i); *Matter of Erin G.*, 139 AD2d 737, 527 NYS2d 488 (2d Dept. 1988). Thus, a judge's use of the procedure endorsed by the court in *Matter of Tad M.*, 123 Misc2d 1071, *Matter of Leif Z.*, 105 Misc2d 973 and *Matter of Kenneth J.*, 102 Misc2d 415 would be improper if it led to a neglect finding without the PINS petitioner/neglect respondent having had an opportunity to be represented by counsel, and without the filing of a legally adequate Article Ten petition that provides the respondent with clear notice of the charges. Sobie, *Practice Commentary*, FCA §716, (*Leif Z.* decision "raises serious and probably insurmountable due process issues, such as the right to notice and the right to be represented by counsel"); *see also Matter of*

Beekmantown Central School District v. John, 69 Misc.3d 888, 133 N.Y.S.3d 430 (Fam. Ct. Clinton Co. 2020), where the court, noting that ordering a FCA §1034 investigation would not necessarily lead to an Article Ten filing and that the court and DSS already had enough information, ordered DSS to file an Article Ten petition; after the filing, the PINS petition would be dismissed. The court noted: "In order to give meaning to Family Ct Act § 716, and to protect [the Article Ten respondent's] due process rights, the court concludes that the term 'substitute' in the context of Family Ct Act § 716 requires the filing of a new valid article 10 petition."

Ordinarily, the judge who found evidence of neglect sufficient to justify substitution should not be disqualified from hearing the neglect proceeding due to bias. *Matter of Diana A.*, 65 Misc2d 1034, 319 NYS2d 691 (Fam. Ct., N.Y. Co., 1971) (court denies recusal motion where, during neglect proceeding brought against grandmother of subject child, court directed the filing of neglect proceeding against mother).

Representation Standards

NYSBA Standards, Standard B-2 ("The attorney should ensure that facts in support of the child's position which may be relevant to any stage of the proceeding are presented to the court. To this end, the attorney should: * * * (8) Consider whether a neglect petition or child protective investigation under F.C.A. § 1034 should be undertaken, and if appropriate and the client consents, make the necessary motions, unless the court proceeds on its own motion under F.C.A. § 716").

Practice Considerations

While the substitution of a neglect petition for a PINS petition would appear to be advantageous to the PINS respondent in all instances, since he/she shifts the stigma to the parent, there are risks that must be evaluated by the child's attorney and discussed with the respondent before any attempt at substitution is made.

When the parent is a PINS petitioner, the course of the proceeding ordinarily will be dictated by the parent. In such a case, the attorney only needs to negotiate with and be concerned about the wishes of one party. Once a child protective agency becomes a party to the proceeding, the attorney loses a measure of control, and the PINS respondent stands at risk of being placed outside the home even if both he/she and the parent are opposed to placement. In addition, the parent may come under the influence of child protective authorities, and/or become resentful towards the attorney for advocating in favor of substitution. Thus, winning the substitution battle could result in losing the war.

L. Substitution of PINS Petition For Juvenile Delinquency Petition

Pursuant to FCA §311.4(1), the court may, with the consent of the respondent and the presentment agency, "substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent." At the conclusion of the dispositional hearing, the court may order a PINS substitution without the consent of the presentment agency. FCA §311.4(2). *See, e.g., Matter of Kayla F.*, 122 AD3d 1399 (4th Dept. 2014) (PINS adjudication substituted where respondent, found guilty of third degree assault, demonstrated no danger to community at large and could have received same placement as PINS, and conduct was consistent

with PINS behavior, not juvenile delinquency); *Matter of Dylan P.*, 121 AD3d 1118 (2d Dept. 2014) (respondent should have been adjudicated PINS in proceeding involving argument between respondent and mother that led to respondent damaging television where respondent had no prior delinquency finding, accepted responsibility for actions, mother played active and positive role in respondent's life, respondent was improving in area of curfew violations and school absences, and court could have required Probation or other agency to monitor school attendance and curfew "without adding the stigma of a juvenile delinquent adjudication"); *In re Priscilla V.*, 99 AD3d 414, 952 NYS2d 6 (1st Dept. 2012) (court properly declined to convert proceeding to PINS proceeding where incident was serious and violent attack on respondent's mother; respondent had committed violent acts and generally misbehaved in home; and respondent lacked remorse and had history of running away from home, truancy and drug use); *In re Na'Quana J.*, 50 AD3d 291, 853 NYS2d 884 (1st Dept. 2008) (family court properly refused to substitute PINS adjudication in view of respondent's serious drug abuse, truancy problems, gang involvement, general misbehavior and history of running away from home and from residential facilities); *In re Diana P.*, 49 AD3d 390, 852 NYS2d 838 (1st Dept. 2008) (PINS substitution denied in view of respondent's violent conduct toward father in underlying incident and her history of violent behavior at school and truancy problems); *In re Jeffrey C.*, 47 AD3d 433, 849 NYS2d 517 (1st Dept. 2008), *lv denied* 10 NY3d 707 (court did not impose least restrictive alternative, and erred in denying PINS substitution, where proceeding involved altercation between respondent and brother in their home and, while respondent may have "overreacted," his outburst appears to have been in response to heat of the moment and provocation by older brother; respondent had no prior delinquency or PINS findings; there were no reports of alcohol or illegal drug use; and, while Probation report indicated that respondent did not follow curfew and had several school absences, court could have required Probation to monitor respondent's behavior to assure that he attended school regularly and obeyed curfew "without adding the stigma of a juvenile delinquent adjudication"); *Matter of Michael OO.,* 37 AD3d 1002, 830 NYS2d 390 (3rd Dept. 2007) (court erred in concluding it could not convert delinquency petition to PINS petition because respondent made admission before different judge in another county); *In re Devon R.*, 278 AD2d 15, 717 NYS2d 145 (1st Dept. 2000), *lv denied* 96 NY2d 707 (2001) (family court abused discretion in refusing to substitute PINS finding where eight-year-old sodomy respondent was in need of psychiatric treatment); *Matter of Tiahek Q.*, 178 AD2d 1020 (4th Dept. 1991) (court had no power to issue order substituting delinquency finding for PINS finding); *Matter of Ricky A.*, 18 Misc3d 1116(A), 856 NYS2d 502 (Fam. Ct., Clinton Co., 2008) (while denying respondent's application to substitute PINS finding despite argument that many of respondent's problems are result of lack of support by mother, court authorizes child's attorney to file Article Ten petition); *Matter of Gerry B.*, 15 Misc3d 1134(A), 841 NYS2d 819 (Fam. Ct., Queens Co., 2007) (court vacates substitution order: without such authority, judges might be discouraged from ordering substitution); *State ex rel. Kloogman v. Schall*, 134 Misc2d 231, 510 NYS2d 453 (Sup. Ct., N.Y. Co., 1987) (re-conversion of substituted PINS petition to delinquency petition after respondent absconded from custody of Commissioner of Social Services was proper exercise of court's discretion and inherent power, since initial substitution of PINS petition was neither an adjudication nor a final order of

disposition); *Matter of Derrick C.*, 137 Misc2d 124, 519 NYS2d 934 (Fam. Ct. Richmond Co., 1987).

The usual requirement that misconduct be habitual does not apply in the PINS substitution context. *See Matter of Theresa C.*, 222 A.D.2d 1107 (4th Dept. 1995); *Matter of Robert Z.*, 214 A.D.2d 203, 632 N.Y.S.2d 274 (3d Dept., 1995), *lv denied* 87 N.Y.2d 808.

In any juvenile delinquency proceeding based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in 22 U.S.C. §7105 (Trafficking Victims Protection Act of 2000). Upon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition. If, however, the respondent has been previously adjudicated as a juvenile delinquent for an act that would be a crime pursuant to Penal Law Article Two Hundred Thirty of the penal law if the respondent was an adult, or expresses a current unwillingness to cooperate with specialized services for sexually exploited youth, continuing with the delinquency proceeding shall be within the court's discretion. The necessary findings of fact to support the continuation of the delinquency proceeding shall be reduced to writing and made part of the court record. If, subsequent to issuance of a substitution order under this subdivision, and prior to the conclusion of the fact-finding hearing on the PINS petition, the respondent is not in substantial compliance with a lawful order of the court, the court may, in its discretion, substitute the original petition alleging that the respondent is a juvenile delinquent for the petition alleging that the respondent is in need of supervision. FCA §311.4. See *Matter of Bobby P.*, 28 Misc3d 959, 907 NYS2d 540 (Fam. Ct., Queens Co., 2010) (substitution of PINS denied where court found unwillingness to cooperate; while respondent offered to assist District Attorney's office in prosecuting pimp, extent and usefulness of assistance was questionable since respondent ultimately failed to cooperate with prosecutor and misled prosecutor about intention to re-enter GEMS program). Prior to substitution of a PINS petition pursuant to this “Safe Harbour” legislation, the respondent could move to dismiss the juvenile delinquency charges in furtherance of justice. *See People v. Samatha R.*, 33 Misc.3d 1235(A), 941 NYS2d 540 (Crim. Ct., Kings Co., 2011) (court, citing Safe Harbour Act, dismisses in interest of justice charge that 16-year-old defendant committed loitering for purpose of prostitution).

M. Conversion Of Criminal Prostitution Charge To PINS Proceeding

Notwithstanding any other provision of law, at any time at or after arraignment on a charge of prostitution under PL §230.00, or loitering for the purposes of prostitution under PL §240.37(2) where the person is not charged with loitering for the purpose of patronizing a prostitute, where such offense allegedly occurred when the person was sixteen or seventeen years of age, and except where, after consultation with counsel, a knowing and voluntary plea of guilty has been entered to such charge, any judge or justice hearing any stage of such case may, upon consent of the defendant after consultation with counsel: (a) conditionally convert such charge in accordance with CPL §170.80(3) and retain it as a PINS proceeding for all purposes, and shall make such proceeding fully subject to the provisions of and grant any relief available under FCA

Article Seven; and/or (b) order the provision of any of the specialized services enumerated in Title Eight-A of Article Six of the Social Services Law, as may be reasonably available. CPL §170.80(1).

In the event of a conviction by plea or verdict to such charge or charges of prostitution or loitering for the purposes of prostitution, the court must find that the person is a youthful offender and proceed in accordance with CPL Article 720, provided, however, that the available sentence shall be the sentence that may be imposed for a violation as defined in PL §10.00(3). In such case, the records of the investigation and proceedings relating to such charge shall be sealed in accordance with CPL §720.35. CPL §170.80(2).

When a charge of prostitution or loitering for the purposes of prostitution has been conditionally converted to a PINS proceeding, the defendant shall be deemed a "sexually exploited child" as defined in SSL §447-a(1) and therefore shall not be considered an adult for purposes related to the charges in the PINS proceeding. FCA §§ 781, 782, 782-a, 783 and 784 shall apply to any proceeding conditionally converted. CPL §170.80(3)(a). The court after hearing from the parties shall state the condition or conditions of conversion, which may include the individual's participation in specialized services provided pursuant to SSL Article Six, Title Eight-A and other appropriate services available to PINS in accordance with FCA Article Seven. CPL §170.80(3)(b). The court may, upon written application by the people at any time during the pendency of the PINS proceeding or during any disposition thereof, but in no event later than the individual's eighteenth birthday, restore the accusatory instrument if the court is satisfied by competent proof that the individual, without just cause, is not in substantial compliance with the condition or conditions of the conversion. CPL §170.80(3)(c)(i). Notice of such an application shall be served on the person and his or her counsel by the court. The notice shall include a statement setting forth a reasonable description of why the person is not in substantial compliance with the condition or conditions of the conversion and a date upon which such person shall appear before the court. The court shall afford the person the right to counsel and the right to be heard. Upon such appearance, the court must advise the person of the contents of the notice and the consequences of a finding of failure to substantially comply with the conditions of conversion, and ask the person whether he or she wishes to make any statement with respect to such alleged failure. In determining whether such person has failed to substantially comply with the terms of the conversion, the court shall conduct a hearing at which time such person may cross-examine witnesses and present evidence on his or her own behalf. Any findings the court shall make shall be made on the record. If the court finds that such person did not substantially comply, it may restore the accusatory instrument, modify the terms of conversion or otherwise continue such terms as in its discretion it deems just and proper. CPL §170.80(3)(c)(ii). If such accusatory instrument is restored, the proceeding shall continue in accordance with CPL §170.80(2). If the individual does not comply with services or does not return to court, the individual shall be returned in accordance with the provisions of FCA Article Seven. CPL §170.80(3)(c)(iii). At the conclusion of the PINS proceeding, all records of the investigation and proceedings relating to such proceedings, including records created before the charge was conditionally converted, shall be sealed in accordance with CPL §720.35. CPL §170.80(4).

IV. Pre-Filing Release and Custody

The procedures described below in (A)-(D), which apply prior to the filing of a PINS petition, are left over from the time when Article Seven covered juvenile delinquency proceedings, in which it is common for a youth to be taken into custody prior to the filing of a petition when an officer has probable cause to arrest. In present day PINS proceedings, these procedures are mostly irrelevant, although they would govern where an officer takes a youth into custody as a suspected runaway pursuant to FCA §718.

A. Duties of Police Officer

1. Notification of Parent

"If a peace officer or a police officer takes into custody or if a person is delivered to him under [FCA §723, which, *inter alia*, requires that a private person who has taken a youth into custody take the youth, without unnecessary delay, to his home or to a family court judge, or deliver him to a peace officer], the officer shall immediately notify the parent or other person legally responsible for his care, or the person with whom he is domiciled, that he has been taken into custody." FCA §724(a).

2. Release or Transport of Child by Police Officer

"After making every reasonable effort to give notice under paragraph (a), the officer shall (i) release the [child] youth to the custody of his or her parent or other person legally responsible for his or her care upon the written promise, without security, of the person to whose custody the youth is released that he or she will produce the youth before the lead agency designated pursuant to [FCA §735] in that county at a time and place specified in writing; or (ii) forthwith and with all reasonable speed take the youth directly, and without first being taken to the police station house, to the designated lead agency located in the county in which the act occasioning the taking into custody allegedly was done, unless the officer determines that it is necessary to question the youth, in which case he or she may take the youth to a facility designated by the chief administrator of the courts as a suitable place for the questioning of youth or, upon the consent of a parent or other person legally responsible for the care of the youth, to the youth's residence and there question him or her for a reasonable period of time; or (iii) take a youth in need of crisis intervention or respite services to an approved runaway program or other approved respite or crisis program; or (iv) take the youth directly to the family court located in the county in which the act occasioning the taking into custody was allegedly done, provided that the officer affirms on the record that he or she attempted to exercise the options identified in paragraphs (i), (ii) and (iii) of this subdivision, was unable to exercise these options, and the reasons therefor." FCA §724(b).

"In the absence of special circumstances, the officer shall release the child in accord with paragraph (b)(i)." FCA §724(c).

3. Questioning of Child

"In determining what is a "reasonable period of time" for questioning a child, the

child's age and the presence or absence of his parents or other person legally responsible for his care shall be included among the relevant considerations." FCA §724(d); *see also* 22 NYCRR §205.60 ("Designation of facilities for the questioning of children pursuant to section 724(b)(ii) of the Family Court Act shall be in accordance with [22 NYCRR §205.20]"); 22 NYCRR §205.20 (governs "Designation of a facility for the questioning of children in custody" in juvenile delinquency cases); *Practice Manual for Children's Lawyers, Volume Two, Representing Children in Juvenile Delinquency Proceedings, Part Two: Suppression Issues,* Chapter Three (re: admissibility of statements).

B. Release or Pre-dispositional Placement by Court

"If a child in custody is brought before a judge of the family court before a petition is filed, the judge shall hold a hearing for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child. At the commencement of the hearing, the judge shall advise the child of his right to remain silent, his right to be represented by counsel of his own choosing, and of his right to have [an attorney] assigned in accord with part four of article two of this act. He must also allow the child a reasonable time to send for his parents or other person legally responsible for his care, and for counsel, and adjourn the hearing for that purpose." FCA §728(a).

After a hearing, "the judge shall order the release of the child to the custody of his parent or other person legally responsible for his care if the court does not appear to have jurisdiction." FCA §728(b). "An order of release under this section may, but need not, be conditioned upon the giving of a recognizance in accord with [§724(b)(i)]." FCA §728(c).

"Upon a finding of facts and reasons which support a pre-dispositional placement order pursuant to this section, the court shall also determine and state in any order directing pre-dispositional placement: (i) that there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to such placement have been exhausted; and (ii) whether continuation of the child in the child's home would be contrary to the best interests of the child based upon, and limited to, the facts and circumstances available to the court at the time of the hearing held in accordance with this section; and (iii) where appropriate, whether reasonable efforts were made prior to the date of the court hearing that resulted in the detention order, to prevent or eliminate the need for removal of the child from his or her home or, if the child had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the child to safely return home; and (iv) whether the setting of the pre-dispositional placement takes into account the proximity to the community in which the person alleged to be or adjudicated as a person in need of supervision lives with such person's parents or to which such person will be discharged, and the existing educational setting of such person and the proximity of such setting to the location of the [pre-dispositional placement] setting." FCA §728(d); *see also* 22 NYCRR §205.67(a) (court may request petitioner, presentment agency, if any, and local probation department to provide information to court to aid in

determinations and may also consider information provided by child's attorney).

D. Issuance of Process by Family Court

"The family court before which a person failed to produce a child pursuant to a written promise given under [§724] may issue a summons requiring the child and the person who failed to produce him to appear at the court at a time and place specified in the summons or may issue a warrant for either or both of them, directing that either or both be brought to the court at a time and place specified in the warrant." FCA §725.

V. Probation Intake and Diversion

A. Generally

The law "intends that article 7 matters should be resolved primarily with nonjudical remedies through the provision of adjustment services to potential respondents and their families." 9 NYCRR 357.3(b).

"Intake services rendered by probation intake shall at least, and in addition to all other requirements of law, rule, regulation or court order, include the following: (i) conferring with all persons referred to intake relative to the advisability of filing a petition; (ii) conferring, relative to the availability of adjustment services, with the potential petitioner, the potential respondent, the parent(s), legal guardian or custodian with whom the potential respondent is living and, with the consent of the potential respondent, any other interested person(s) whose participation in adjustment services would be, in the opinion of the probation officer, beneficial to the potential respondent[.]"

"Intake services shall also include the prompt advisement of: (i) the potential respondent, that the provision of adjustment services is contingent upon his agreement to consent to or cooperate in the provision of such services; (ii) the potential respondent and the potential petitioner, that a petition may not be filed during the period that probation intake is attempting to adjust the case or after the case has been successfully adjusted if such petition is based on the same factual allegations which gave rise to the adjustment attempts; (iii) the potential respondent, potential petitioner, and all other involved interested parties, that they may not be compelled to appear at or participate in any conference scheduled by probation intake, or to produce any papers, unless ordered to do so by the Family Court; and (iv) the potential respondent and the potential petitioner that they may have their lawyer present at any stage of the process." 9 NYCRR §357.4(b)(3). However, there is no right to appointed counsel. *Matter of David J.*, 70 AD2d 276, 421 NYS2d 411 (3rd Dept. 1979); *Matter of Anthony S.*, 73 Misc2d 187, 341 NYS2d 118 (Fam. Ct., Richmond Co., 1973).

These definitions are contained in 9 NYCRR §357.1:

"(a) The term accountability measure refers to consequences designed for youth to take responsibility for their actions. Such measures may include apology letters, behavioral contracts, community service, and school attendance tracking.

(b) The term actuarial risk refers to the relative risk of the youth continuing the behaviors related to the presenting problem. Actuarial risk calls for the administration and delivery of more intensive services and supervision to higher-risk offenders, while lower risk cases may receive minimal probation intervention services. This requires a system of risk screening and needs assessment that assesses youth in a reliable and valid manner to measure for static risks (that cannot be changed), and dynamic risks (that can be changed). Actuarial risk assessments are used to develop youth profiles of needs to be addressed to reduce the risk of re-offending.

(c) The term case plan means the individual plan developed to provide diversion services, and shall be based on the actuarial risk assessment. The plan shall be developed by probation directly or through an assessment service, and shall include:

participation of the youth, parent(s)/guardian(s); and with input from the complainant and other service providers, as appropriate. The plan shall be developed to remediate the behavior which gave rise to the complaint. It shall address the identified risks and needs, and shall incorporate protective factors.

(d) The term complainant means the person or agency who seeks to file a petition, as described under [FCA §733], including: a peace officer, acting pursuant to his special duties, or a police officer; the parent(s)/guardian(s); any person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision, or a witness to such activity; the recognized agents of any duly authorized agency, association, society or institution; or the presentment agency.

(e) The term complaint means a written statement of essential facts constituting the alleged PINS behavior.

(f) The term conference means the process of meeting with the parties in real time, either in-person, by telephone, or through videoconference.

(g) The term control measure refers to practice designed to limit youth opportunity to engage in behaviors underlying the presenting problem(s), and to provide supports which will assist parents and schools to stabilize the situation. Such practice may include graduated sanctions, including curfews, probation monitoring and by court order electronic monitoring.

(h) The term diligent efforts means the sufficient attempts to engage the youth and family in the constructive resolution of the complaint through the provision of services that target the specific identified risks and behaviors which gave rise to the complaint. These efforts shall take into account available school, community, and cross-systems resources. The use of accountability measures, control measures and disciplinary actions without the attempt of intervention services alone shall not suffice in meeting the diligent efforts standard.

(i) The term diversion services means services provided to children and families pursuant to [FCA §735] for the purpose of avoiding the need to file a petition or direct the [pre-dispositional placement] of the child. Diversion services shall include: efforts to adjust cases before a petition is filed, or by order of the court, after the petition is filed but before fact-finding is commenced; and preventive services provided in accordance with [SSL §409-a] to avert the placement of the child into foster care, including crisis intervention and respite services.

(j) The term evidence-based practice means practice that is demonstrated through data-supported research and evaluation to be effective in producing the desired outcome.

(k) The term intervention service refers to a community-based service targeted to reduce dynamic risk factors related to the presenting problem, such as family-focused

treatment, school-based interventions, cognitive-behavioral skill-building, mental health and substance abuse, and other evidence-based practices.

(l) The term Manifestation Determination refers to a New York State Education Department (SED) mandated procedure. It is a review by the Committee on Special Education (CSE) to establish the relationship between the student's disability and the behavior subject to disciplinary action (which includes a PINS referral), and to determine whether the behavior is a manifestation of the disability.

(m) The term no substantial likelihood means the probability that further or additional services will not resolve the underlying issues because either: all appropriate services have been exhausted, the youth was not available to participate in such services; or the youth or parent(s)/guardian(s) did not engage in such services.

(n) The term petition report means a written report, prepared by probation pursuant to the requirements of Section 357.9 of this Part. * * *

(p) The term potential respondent means a youth who is the subject of a PINS complaint, and who meets the definition of PINS pursuant to [FCA §712] and as defined in this Section.

(q) The term pre-diversion services means services to youth whose behavior meets the criteria for FCA Article 7 cases, where the potential complainant, youth and family are engaged in an attempt to address the presenting problem as an alternative to proceeding with a complaint at probation intake.

(r) The term preliminary procedure means all efforts prior to the filing of a petition, including: providing an immediate response to families in crisis; identifying and utilizing appropriate alternatives to [pre-dispositional placement]; and other services to divert youth from being the subject of a petition in Family Court. Preliminary procedure includes probation intake and diversion services.

(s) The term probation intake means the initial process of conferring with the complainant, potential respondent, the parent(s) with whom the potential respondent is living, the legal guardian or custodian of the potential respondent, and any other interested person whose participation in diversion services would be, in the opinion of the probation officer, beneficial to the potential respondent for the purpose of avoiding the need to file a petition or directing the [pre-dispositional placement] of the youth.

(t) The term protective factor means certain strengths or assets that have been demonstrated by research to reduce risk of negative outcomes.

(u) The term referred for petition means the advisement by probation to the complainant that a petition may be filed, whether or not a petition is actually filed.

(v) The term risk assessment means a validated protocol approved by the State Director of Probation and Correctional Alternatives to screen and assess the youth's risk for continuing in the presenting PINS behavior.

(w) The term runaway means a youth who has left home without parental/guardian permission and has indicated to that parent/guardian or another person that they have no intention to return or whose whereabouts are unknown to the parent/guardian.

(x) The term successfully diverted means a determination by probation that the risks and needs related to the presenting problem have been satisfactorily addressed and the complaint has been adjusted."

B. Pre-Filing PINS Diversion Services

1. Statutory Requirement

"Each county and any city having a population of one million or more shall offer diversion services as defined in [FCA §712] to youth who are at risk of being the subject of a person in need of supervision petition. Such services shall be designed to provide an immediate response to families in crisis, to identify and utilize appropriate alternatives to placement and to divert youth from being the subject of a petition in family court. Each county and such city shall designate either the local social services district or the probation department as lead agency for the purposes of providing diversion services." FCA §735(a).

2. Preliminary Procedure

"The designated lead agency shall: (i) confer with any person seeking to file a petition, the youth who may be a potential respondent, his or her family, and other interested persons, concerning the provision of diversion services before any petition may be filed; and (ii) diligently attempt to prevent the filing of a petition under this article or, after the petition is filed, to prevent the placement of the youth into foster care; and (iii) assess whether the youth would benefit from residential respite services; and (iv) assess whether the youth is a sexually exploited child as defined in [SSL §447-a] and, if so, whether such youth should be referred to a safe house in accordance with FCA §739]; and (v) determine whether alternatives to placement or services provided pursuant to this section are appropriate to avoid remand of the youth to such placement; and (vi) determine whether an assessment of the youth for substance use disorder by an office of alcoholism and substance abuse services certified provider is necessary when a person seeking to file a petition alleges in such petition that the youth is suffering from a substance use disorder which could make the youth a danger to himself or herself or others." FCA §735(b); *see also* 22 NYCRR §205.62(b),(c),(d) (lead agency must begin to hold preliminary conferences on same day persons are referred and permit anyone who is represented by a lawyer to be accompanied by lawyer; during preliminary conferences, lead agency shall ascertain, *inter alia*, information bearing on propriety of pretrial placement, and inform each person that he/she has the right to participate in the diversion process but that the lead agency cannot compel any person to appear, produce papers or visit any place, and that the person seeking to originate the proceeding will not be able to do so if he/she does not cooperate with the lead

agency); 9 NYCRR §357.5(a) (“Each probation director shall establish and maintain written policies and procedures regarding preliminary procedure services pursuant to their responsibilities as designated by the county, in accordance with the provisions of the Executive Law, the Family Court Act, court order, and all other applicable laws, rules and regulations. These policies and procedures shall include: (1) Reasonable timeframes for the initiation of preliminary procedure; (2) Criteria for determining standards of "diligent efforts" and "no substantial likelihood that the youth and family will benefit from continued services"; and (3) Sharing resources wherever appropriate and feasible with other agencies and service providers, to effectively and efficiently implement preliminary procedure”); 9 NYCRR §357.6 (“Prior to commencing diversion services, probation shall review the complaint to determine whether it is within the scope of FCA Article 7. (a) Where the behavior meets the criteria set forth in FCA Article 7, pre-diversion services may be provided as an alternative to probation intake; (b) Where it is determined that the complaint is within the scope of FCA Article 7 and the complainant seeks preliminary procedure services, probation shall confer with any person seeking to file a petition, the potential respondent, family, and other interested persons concerning the provision of diversion services before any petition may be filed. This shall include: (1) Making a determination as to whether alternatives to placement are appropriate to avoid remand of the youth to placement; and (2) Scheduling and holding at least one conference with the youth and his or her family and the person or representatives of the entity seeking to file a petition under this article concerning alternatives to filing a petition and services that are available. Where feasible, such conference shall be held jointly with all parties present; and (3) Identifying the level of youth risk for continuing in the behaviors underlying the presenting problem using an actuarial risk screening instrument; a youth presenting as low risk shall be considered for prompt termination of diversion efforts with minimal probation intervention services; and (4) Providing, at the first contact, information on the availability of or referral to services in the geographic area where the youth and family are located to reduce the risk of recidivism and prevent the filing of a petition under this article; including: (i) Residential Respite: availability of a residential respite program, for up to 21 calendar days, if the youth and parent(s)/guardian(s) agree; and (ii) Crisis Intervention: availability of other non-residential crisis intervention programs such as family crisis counseling or alternative dispute resolution programs. (5) Advising the youth and parent(s)/guardian(s) of their rights and responsibilities, including the fact that parent(s)/guardian(s) may be barred from filing a petition where diversion services have been terminated because of parental/guardian's failure to consent to or participate in diversion services. * * * (e) Probation shall attempt to secure from the parent(s)/guardian(s) all necessary consents for release of information regarding the youth, and shall further request from the school certain information deemed pertinent to the presenting behaviors. For school-based complaints, where parents refuse such consent, probation may refer the matter for petition for the purpose of requesting a court order to direct either the parent/guardian to sign a release of information for school records or for the court on its own volition, to direct the release of information from school authorities. Where appropriate, probation may recommend that the school pursue an educational neglect report”); 9 NYCRR §357.11 (“Pre-Diversion Services: this case designation shall apply where: (1) the youth has demonstrated a pattern of

behavior that meets the definition of PINS; and (2) the potential complainant does not file a complaint; and (3) the potential complainant, youth and family were engaged in an alternative resolution of the presenting problem").

3. Nature of Diversion Services

a. Generally

"Diversion services" are: "Services provided to children and families pursuant to [FCA §735] for the purpose of avoiding the need to file a petition or direct the pre-dispositional placement of the child. Diversion services shall include: efforts to adjust cases pursuant to this article before a petition is filed, or by order of the court, after the petition is filed but before fact-finding is commenced; and preventive services provided in accordance with [SSL §409-a] to avert the placement of the child, including crisis intervention and respite services." Diversion services also may include, in cases where any person is seeking to file a petition that alleges that the child has a substance use disorder or is in need of immediate detoxification or substance use disorder services, an assessment for substance use disorder; provided, however, that notwithstanding any other provision of law to the contrary, the designated lead agency shall not be required to pay for all or any portion of the costs of such assessment or substance use disorder or detoxification services, except in cases where medical assistance for needy persons may be used to pay for all or any portion of the costs of such assessment or services. FCA §712(g). A "Substance use disorder" is "[t]he misuse of, dependence on, or addiction to alcohol and/or legal or illegal drugs leading to effects that are detrimental to the person's physical and mental health or the welfare of others." FCA §712(h). An "Assessment for substance abuse disorder" is an "[a]ssessment by a provider that has been certified by the office of alcoholism and substance abuse services of a person less than eighteen years of age where it is alleged that the youth is suffering from a substance use disorder which could make a youth a danger to himself or herself or others." FCA §712(i). "A substance use disorder which could make a youth a danger to himself or herself or others" is "[a] substance use disorder that is accompanied by the dependence on, or the repeated use or abuse of drugs or alcohol to the point of intoxication such that the person is in need of immediate detoxification or other substance abuse disorder services." FCA §712(j). "Substance use disorder services" are as described in Mental Hygiene Law §1.03. FCA §712(k).

"Diversion services shall include documented diligent attempts to engage the youth and his or her family in appropriately targeted community-based services, but shall not be limited to: (i) providing, at the first contact, information on the availability of or a referral to services in the geographic area where the youth and his or her family are located that may be of benefit in avoiding the need to file a petition under this article; including the availability, for up to twenty-one days, of a residential respite program, if the youth and his or her parent or other person legally responsible for his or her care agree, and the availability of other non-residential crisis intervention programs such as family crisis counseling or alternative dispute resolution programs. (ii) scheduling and holding at least one conference with the youth and his or her family and the person or representatives of the entity seeking to file a petition under this article concerning alternatives to filing a petition and services that are available. Diversion services shall

include clearly documented diligent attempts to provide appropriate services to the youth and his or her family before it may be determined that there is no substantial likelihood that the youth and his or her family will benefit from further attempts." FCA §735(d); *see also* 9 NYCRR §357.5(b) ("Probation shall provide intake and diversion services, which shall include diligent attempts to engage the youth and family in appropriately targeted community-based services. Such diligent attempts shall: * * * (2) Be designed to provide an immediate response to families in crisis; (3) Identify and utilize appropriate alternatives to placement; and (4) Attempt to divert youth from being the subject of a petition in family court"); 9 NYCRR §357.7 ("(a) In the provision of diversion services, probation shall: (1) Provide written notice to the complainant that the case has been opened for diversion services; and (2) Diligently attempt to provide diversion services in accordance with the general requirements of this Part; and (3) Target the underlying risk factors related to the presenting problem behavior(s) which gave rise to each complaint; (4) Make referrals for service as needed, based on the results of actuarial risk and needs assessment; (5) Prioritize resources to higher risk youth and target interventions to reduce dynamic risk factors. (b) In addition to providing community-based intervention services that target specific dynamic risk factors, probation may engage youth and family in appropriate accountability or control measures. (c) Electronic monitoring may only be used with probation director consent and upon specific court order"); 9 NYCRR §357.8 ("(a) As part of diversion services, probation shall conduct actuarial assessments and utilize case planning tools and protocols, as approved by the State Director of Probation and Correctional Alternatives, to: (1) Identify youth to address the priority areas for intervention who are at moderate or high risk for continuing in the behaviors underlying the presenting problem; and (2) Develop case plans based on assessment results that focus on the priority areas for intervention to resolve the presenting problem. (b) As part of assessment, case planning, and reassessment probation shall: (1) Engage youth and parent(s)/guardian(s) in each of these processes; seek input from parent(s)/guardian(s) and youth to identify any barriers to meeting case plan goals; and (2) Develop a case plan within 30 calendar days of the initial conference with the youth and parent(s)/guardian(s) that focuses on: (i) priority risk and need areas for intervention; (ii) objectives that build on existing protective factors; (iii) roles and responsibilities of the youth, parent(s)/guardian(s), probation officer, and other service providers; and (iv) intended outcomes for successful case closure. (3) On an ongoing basis, review and update the case plan to document any changes in priority areas, goals, action steps, roles and responsibilities, and status (progress toward completion); and (4) Reassess all youth with open diversion cases within 60 calendar days of the initial case plan, and every 90 calendar days thereafter, to measure progress toward intended outcomes; and update the case plan in accordance with the results of reassessment; and (5) Seek the participation of community-based service providers as appropriate").

b. Complaints By Education Officials

"[W]here the entity seeking to file a petition is a school district or local educational agency or where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation, the designated lead agency shall review the steps taken by the school district or local educational

agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth. Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall contact such district or agency to resolve the truancy or school behavioral problems of the youth in order to obviate the need to file a petition or, at minimum, to remediate the education-related allegations of the proposed petition." FCA §735(d)(iii).

Where the matter involves truancy and or ungovernability behavior in school and the youth is a special education student, probation shall gather information from the Committee on Special Education regarding the youth's behaviors and any relationship to the youth's disability. Probation may require a Manifestation Determination before accepting a school-filed complaint." 9 NYCRR §357.5(d).

"For all school-based referrals, the probation director shall develop a procedure by which: (1) Schools shall report the steps taken to improve the youth's attendance and/or conduct in school, and (2) Before accepting a school referral, the probation department shall determine that acceptable efforts have been made, taking into account the available school and community resources and the needs of the youth. Disciplinary actions alone shall not suffice as acceptable efforts." 9 NYCRR §357.5(e); *see also* 9 NYCRR §357.6(c) ("Where the complainant is a school district or local educational agency, probation shall review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears that such attempts will be beneficial to the youth").

4. Absconding Children

"Where the complainant states that the youth has run away, the probation department: (1) Shall gather information from the parent(s)/guardian(s) regarding possible contact information, and what efforts have been made to locate the youth; and (2) May attempt to contact a runaway youth for the purpose of engaging the youth and family in diversion services; and (3) Shall inform the parent(s)/guardian(s) that they must file a missing person report with police where it is determined that the youth's whereabouts are unknown; and (4) May refer the matter for petition as necessary for the purpose of seeking a warrant where efforts to secure and engage the youth are unsuccessful." 9 NYCRR §357.6(d).

5. Time Limit

"Efforts to prevent the filing of a petition pursuant to this section may extend until the designated lead agency determines that there is no substantial likelihood that the youth and his or her family will benefit from further attempts. Efforts at diversion pursuant to this section may continue after the filing of a petition where the designated lead agency determines that the youth and his or her family will benefit from further attempts to prevent the youth from entering foster care." FCA §735(f); *see also* 9 NYCRR §357.7(d).

6. Record Keeping By Lead Agency

"The designated lead agency shall maintain a written record with respect to each youth and his or her family for whom it considers providing or provides diversion services pursuant to this section. The record shall be made available to the court at or prior to the initial appearance of the youth in any proceeding initiated pursuant to this article." FCA §735(e); *see also Matter of Jazmyne VV.*, 217 AD3d 1168 (3d Dept. 2023) (compliance with requirement that designated lead agency maintain written record of diversionary services and make record available to court at or prior to initial appearance not jurisdictional prerequisite); FCA §735(c) ("Diversion services shall include clearly documented diligent attempts to provide appropriate services to the youth and his or her family unless it is determined that there is no substantial likelihood that the youth and his or her family will benefit from further diversion attempts"); 9 NYCRR §357.5(b) 9 NYCRR §357.5(b) (diligent attempts "shall: (1) Be clearly documented in the case record"); 9 NYCRR §357.13 ("(a) All preliminary procedure case records shall be kept in either paper or electronic format, or a combination of both. (b) Pre-Diversion Services: where pre-diversion services are provided in lieu of initiating preliminary procedure, it is not necessary to open an individual case file. However, at minimum a record of the following information shall be maintained: (1) Youth name and date of birth; (2) Date(s) of receipt of the complaint(s); (3) Description of the pre-diversion services either referred to or directly provided, and any information regarding outcome(s). (c) Preliminary Procedure: where preliminary procedure was commenced, probation case records shall include the following, where applicable: (1) Documents: (i) Copy of the complaint; (ii) Copy of letter to complainant advising of the initiation of diversion services; (iii) All assessment and reassessments; (iv) The initial case plan, and case plan updates that flow from the reassessments; (v) A brief closing summary of progress toward achieving case plan goals; (vi) Copy of written notices to the complainant regarding the case closing and whether the complaint has been successfully resolved; (vii) Documentation of notification to the parent(s)/guardian(s) of the potential respondent regarding: the case closing; whether the complaint has been successfully resolved; and if there is any bar to petition by the parent(s)/guardian(s); and (viii) Copy of the petition report in all cases where a petition is filed with the court. (2) Other Required Case Record Information: (i) Date(s) of receipt of the complaint(s); (ii) Date(s) of conference(s) with the youth, parent(s)/guardian(s) and complainant; (iii) Documentation that the youth and parent(s)/guardian(s) were advised of their rights related to the diversion process; (iv) Parent and youth acknowledgement of participation in diversion services; (v) Summary of the reasons for any delay in developing an initial case plan; (vi) Date(s) of any referral(s) for specialized assessment and treatment (i.e., educational, mental health, substance abuse, sexual victimization, or sexualized acting out behaviors); (vii) Documentation of services provided in accordance with the assessment and reassessment; (viii) Dates and types of contacts and any significant information, events, or actions taken; (ix) Date of case closing").

7. Provision of Written Notice to Potential Petitioner

"The designated lead agency shall promptly give written notice to the potential petitioner whenever attempts to prevent the filing of a petition have terminated, and

shall indicate in such notice whether efforts were successful. The notice shall also detail the diligent attempts made to divert the case if a determination has been made that there is no substantial likelihood that the youth will benefit from further attempts." FCA §735(g)(i); *see also* 22 NYCRR §205.62(e) (lead agency shall notify in writing all persons who participated in diversion process of reasons for unsuccessful conclusion of process, services offered and efforts made to avert filing of petition; notification shall be appended to petition); 9 NYCRR §357.12(c) ("Probation shall promptly give written notice of case closure to the potential petitioner and the parent(s)/guardian(s) of the potential respondent").

8. Confidentiality

"No statement made to the designated lead agency or to any agency or organization to which the potential respondent has been referred, prior to the filing of the petition, or if the petition has been filed, prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated, or prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously, may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction." FCA §735(h); *see also* 9 NYCRR §357.9(g) ("Pursuant to [FCA §735(h)], no statement made by the potential respondent to the lead agency, or to any agency or organization to which the potential respondent has been referred, may be admitted into evidence at a fact-finding hearing, or, if the proceeding is transferred to a criminal court, at any time prior to a conviction. This shall apply when such statements were made to the designated lead agency or to any agency or organization: (1) Prior to the filing of the petition; or (2) Prior to the time the respondent has been notified that attempts at diversion will not be made or have been terminated; or (3) Prior to the commencement of a fact-finding hearing if attempts at diversion have not terminated previously"); *Matter of Luis R.*, 92 Misc2d 55, 399 NYS2d 847 (Fam. Ct., Kings Co., 1977) (evidence obtained as fruit of improperly disclosed statements may be suppressible, but court denies delinquency respondents' motion to dismiss delinquency charges that were based on disclosures made by intake probation officers to law enforcement personnel); *United States v. Griffith*, 385 F3d 124 (2d Cir. 2004) (confidential information provided to pretrial services in connection with bail determination could be used to impeach defendant during cross examination at trial).

C. Referral to Lead Agency by Clerk of Court

"Any person or agency seeking to file a petition pursuant to this article which does not have attached thereto the documentation required by [§735(g)] shall be referred by the clerk of the court to the designated lead agency which shall schedule and hold, on reasonable notice to the potential petitioner, the youth and his or her parent or other person legally responsible for his or her care, at least one conference in order to determine the factual circumstances and determine whether the youth and his or her family should receive diversion services pursuant to this section." FCA §735(c); *see also* 22 NYCRR §205.62(a).

D. Consolidation of Probation Records

"Notwithstanding any other provision of law, in a city having a population of one million of more, an index of the records of the local probation departments located in the counties comprising such city for proceedings under article seven shall be consolidated and filed in a central office for use by the family court and local probation service in each such county. After consultation with the state administrative judge, the state director of probation and correctional alternatives shall specify the information to be contained in such index and the organization of such consolidated file." FCA §783-a.

VI. Filing of Petition

A. Venue

Proceedings under [FCA Article Seven] are originated in the county in which the act or acts referred to in the petition allegedly occurred. On motion made on behalf of the respondent or by his parent or other person legally responsible for his care or on the court's motion, and for good cause shown, the court may transfer the proceedings to another county." FCA §717; *see also* 9 NYCRR §357.4 ("Where the youth resides in one county but the acts giving rise to the presenting problem occur in another county, the complaint shall be made in the county where the acts occurred. The matter may be transferred directly to the county of residence. Where transferred, the receiving county shall accept the case for consideration of diversion services. Where diversion services are unsuccessful, the matter shall be returned to the originating county for referral to petition").

B. Persons Who May File

A PINS proceeding may be originated by "(a) a peace officer, acting pursuant to his special duties, or a police officer; (b) the parent or other person legally responsible for [the child's] care; (c) any person who has suffered injury as a result of the alleged activity of [the respondent], or a witness to such activity; (d) the recognized agents of any duly authorized agency, association, society or institution; or (e) the presentment agency that consented to substitute a petition alleging the person is in need of supervision for a petition alleging, that the person is a juvenile delinquent pursuant to [FCA §311.4]." FCA §733.

Arguably, the reference to "the parent or other person legally responsible for [the child's] care" includes a parent who does not have legal custody. *Matter of S. v. S.*, 70 Misc2d 406, 333 NYS2d 649 (Fam. Ct., N.Y. Co., 1972); *cf. Matter of Maureen G.*, l03 Misc2d l09, 426 NYS2d 384 (Fam. Ct., Richmond Co., l980) (non-custodial parent may be neglect respondent).

The reference to "the recognized agents of any duly authorized agency, association, society or institution" would include school officials, or representatives of child protective and foster care agencies who wish to bring allegations against a child in their custody. *See Matter of Keelin E.*, 65 AD2d 736, 410 NYS2d 615 (1st Dept. 1978) (contract foster care agency, which had been given authority to act as agent for DSS but agreed to get DSS approval before filing PINS petition, had standing).

The reference to "any person who has suffered injury as a result of the alleged activity of [the respondent], or a witness to such activity" is stunningly broad, since it would include witnesses who have absolutely no official responsibilities, are not aggrieved, and have no connection to the respondent or any interest in the respondent's welfare.

C. The Petition

1. Drafting the Petition

"Whenever a petitioner is not represented by counsel, any person who assists in

the preparation of a petition shall include all allegations presented by the petitioner." FCA §216-c(a). If there is a question regarding whether or not the family court has jurisdiction of the matter, the petition shall be prepared and the clerk shall file the petition and refer the petition to the court for determination of all issues including the jurisdictional question." FCA §216-c(c).

2. Required Allegations

A PINS proceeding "is originated by the filing of a petition, alleging: "(a) (i) the respondent is an habitual truant or is ungovernable, or habitually disobedient and beyond the lawful control of his or her parents, guardian or lawful custodian, and specifying the acts on which the allegations are based and the time and place they allegedly occurred. Where habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition shall also include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the respondent; (ii) the respondent was under eighteen years of age at the time of the specified acts; (iii) the respondent requires supervision or treatment; and (iv) the petitioner has complied with the provisions of [FCA §735]; or (b) the respondent appears to be a sexually exploited child as defined in [SSL §447-a(a), (c) or (d)]." FCA §732; *Matter of Harley B.*, 50 Misc3d 828 (Fam. Ct., Clinton Co., 2016) (no proof required at fact-finding hearing that respondent currently needs supervision or treatment; it is merely a pleading requirement).

see, e.g., Matter of Aaron UU., 125 AD3d 1155 (3d Dept. 2015) (PINS petition substituted for delinquency petition sufficient where it did not adequately specify acts supporting accusations and time and place of occurrence, but incorporated by reference allegations in delinquency petition and supporting documents);

Matter of Samantha K., 61 AD3d 1322, 877 NYS2d 517 (3rd Dept. 2009) (petition not defective where steps taken by petitioner to improve respondent's school attendance were listed in documents attached to petition);

Matter of Joel P., 16 AD3d 511, 791 NYS2d 613 (2d Dept. 2005) (petition facially sufficient where it specified ten dates on which respondent was absent without authorization);

Matter of Jeremiah RR., 260 AD2d 676, 687 NYS2d 483 (3rd Dept. 1999) (petition sufficient where it itemized twenty-five days on which respondent was absent from school without excuse, suspended for misconduct or left school without permission, and two days on which he was removed from class for being uncooperative; and alleged that he had run away from home on several unspecified occasions, and generally that he refused to follow rules at home and refused to come home or stay home when directed to do so);

Matter of Shana R., 2003 WL 21212586 (Fam. Ct., Monroe Co.) (petition alleged that respondent left group home without permission, and attached affidavits alleged that respondent went for home visit, left home without permission during visit and did not return to group home as scheduled on following day, and that respondent's whereabouts were unknown on specified dates; motion to dismiss denied, with court

noting that petition and supporting affidavits allege a course of conduct that includes leaving home when respondent was visiting after she was told that she could not go to spend time with her boyfriend, failing to return to the group home as directed, and remaining away from her placement for at least twenty-five consecutive days);

Matter of Jeanette M., 178 Misc2d 99, 677 NYS2d 916 (Fam. Ct., Orange Co., 1998) (after finding insufficient a petition alleging, *inter alia*, that respondent used foul language, would not behave in school, was kicked out of detention, had been suspended from school two or three times, ran away from home and was kicked off the school bus, court holds that additional allegations set forth in Affidavit in Opposition prepared by petitioner's attorney may be used to amend petition pursuant to CPLR §3025[b]);

Matter of Cassandra R., 155 Misc2d 756, 589 NYS2d 739 (Fam. Ct., Bronx Co., 1992) (only first allegation sufficiently specific where petition alleged: (1) "Respondent absconded from the home on May 18, 1992. Whereabouts are unknown;" (2) "Respondent has absconded three times in the past;" (3) "Respondent is truant from school;" (4) "Respondent smokes cigarettes;" (5) "Respondent drinks alcohol;" and (6) "Respondent is disobedient and beyond petitioner's control");

Matter of Morrison, 110 Misc2d 329, 442 NYS2d 43 (Fam. Ct., Rensselaer Co., 1981) (acts must be alleged in specific terms, with dates and frequency, nature of behavior and conduct charged; but rather than dismiss petition, court directs counsel for petitioner to provide bill of particulars);

Matter of Reynaldo R., 73 Misc2d 390, 341 NYS2d 998 (Fam. Ct., Kings Co., 1973) (petition merely alleging that respondent "does not obey the just and lawful commands of his parents" is dangerously defective; acts complained of must be set forth in specific terms with the conduct charged and dates and frequency).

A challenge to the petition's lack of specificity is waived unless it is raised via a motion to dismiss or a request for a bill of particulars (which could, of course, result in the defect being cured). *Matter of Jeremiah RR.*, 260 AD2d 676.

3. Hearsay Allegations

There is no statutory or constitutional requirement that the allegations in a PINS petition be non-hearsay; allegations made on information and belief are permitted. *Matter of Jodel KK.*, 189 AD2d 63, 595 NYS2d 835 (3rd Dept. 1993), *lv denied* 82 NY2d 652 (neither legislative history nor general principles of statutory construction support nonhearsay requirement, nor do due process or equal protection concerns); *Matter of Keith H.*, 188 AD2d 81, 594 NYS2d 268 (2d Dept. 1993) (after noting that before the petition is filed the respondent has been advised of the source of the allegations against him and the particular conduct at issue, court concludes that requiring nonhearsay allegations would not appreciably add to the reliability of the charges or to the respondent's knowledge of the allegations, that a nonhearsay requirement might interfere with the State's goal of providing an informal procedure whereby youths at risk of committing more serious acts receive appropriate rehabilitation and treatment, that a PINS petition must be based on a course of conduct, and that equal protection does not require that PINS respondents be treated the same as delinquency respondents).

4. Amendment of Petition

In *Matter of Cassandra R.*, 155 Misc2d 756, the family court looked to FCA §311.5 and due process considerations while concluding that amendment of the petition pursuant to CPLR 3025(b) was not permissible. A contrary conclusion was reached in *Matter of Jeanette M.*, 178 Misc2d 99.

Given the appellate decisions rejecting application of the nonhearsay pleading requirement that exists in delinquency proceedings, it is likely that amendments are permitted.

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(2) Review the petition to determine if it meets the requirements of F.C.A. § 732 and § 735").

Practice Considerations

Because FCA §216-c(a) requires that all the petitioner's allegations are included, and because a parent-petitioner is often angry and voluble, a PINS petitions may contain unsubstantiated and unreliable information acquired by a parent from others, the parent's own suspicions, and pejorative references to the respondent that have no evidentiary value. While the child's attorney could choose to raise objections and move for redaction of the improper language, it is usually better not to do so. While a judge may, if faced later on with a formal motion, agree with the attorney's legal arguments, at the initial appearance the judge may be very interested in any available information, however speculative and unreliable it may seem. Thus, the attorney's objections will not cause the judge to disregard unsubstantiated allegations, and may instead highlight them, and also cause the judge to ask the parent for additional information that might make matters worse for the respondent. The attorney's objections might also cause the parent to become angry and spontaneously provide additional facts in court.

Even when the petition appears to be defective, the attorney must decide whether it makes sense from a strategic point of view to make a motion to dismiss at the initial appearance, particularly when the petitioner is the parent. Most judges will not entertain an oral motion to dismiss, and in most instances it will be simple for the parent, with the assistance of court personnel, or of counsel -- indeed, the attorney's aggressive challenge might cause the court to assign counsel – to draft a proper petition. While the possibility of re-filing ordinarily would not deter the attorney from making a dismissal motion in a delinquency proceeding or when the PINS petitioner is a public official, when the petitioner is the parent the attorney risks alienating the parent and losing the good will that is required for a settlement.

On the other hand, later on in the proceeding it may be appropriate to move for dismissal if no resolution has been reached and the case is headed for trial.

D. Documentation Regarding Diversion

Notwithstanding the provisions of [FCA 216-c], the clerk shall not accept for filing under this part any petition that does not have attached thereto the documentation required by [§735(g)]." FCA §735(c).

"The clerk of the court shall accept a petition for filing only if it has attached thereto the following: (A) if the potential petitioner is the parent or other person legally responsible for the youth, a notice from the designated lead agency indicating there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services; (B) a notice from the designated lead agency stating that it has terminated diversion services because it has determined that there is no substantial likelihood that the youth and his or her family will benefit from further attempts, and that the case has not been successfully diverted; and (C) where the proposed petition contains allegations of truancy and/or school misbehavior, whether or not the school district or local educational agency is the proposed petitioner, a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition under this article." FCA §735(g)(ii); *see also* 9 NYCRR §357.9 ((a) A complaint may be referred for petition only after determining that there is no substantial likelihood that the youth and family will benefit from further attempts to remediate the behavior which gave rise to the complaint; (b) No petition may be filed by the parent(s)/guardian(s) where diversion services have been terminated because of the failure of the parent(s)/ guardian(s) to consent to or participate in diversion services; (c) Where a parent refuses to cooperate with services in a school-referred PINS matter, an educational neglect report may be made regarding the parent where there has been a pattern of illegal absences; (d) Where the matter involves truancy and or ungovernable behavior at school and the youth is a special education student, probation shall not refer the matter for petition unless a Manifestation Determination hearing has been held by the Committee on Special Education (CSE) and the school has provided such documentation to the probation department and the court that the student's behaviors are not related to the student's disability, thereby warranting court action; (e) Once a petition is filed, diversion efforts may continue pending court action in accordance with 357.7(d)(2) of this Part).

A failure to comply with these statutory requirements constitutes a nonwaivable jurisdictional defect. *Matter of Sage G.*, 121 AD3d 985 (2d Dept. 2014); *Matter of Samantha K.*, 61 AD3d 1322, 877 NYS2d 517 (3rd Dept. 2009) (petition not defective where documents attached to petition indicated that diversion services were terminated because respondent had not cooperated and it was unlikely she would participate in or benefit from such services); *Matter of Mercedes M.M.*, 52 AD3d 1210, 859 NYS2d 550 (4th Dept. 2008) (petition not jurisdictionally defective where it did not expressly allege that petitioner complied with FCA §735, but documents attached to petition established compliance); *Matter of Rajan M.*, 35 AD3d 863, 826 NYS2d 720 (3rd Dept. 2006) (petition dismissed where it failed to allege compliance with §735, as required by FCA §732(d), and did not have attached to it a statement regarding termination of diversion services, as required by FCA §735(g)(ii)(B); these deficiencies effectively denied respondent the pre-petition and post-filing procedural and substantive rights afforded to youths and their families under the new statutory scheme mandating diversion services); *Matter of Thomas C.*, 27 Misc3d 565, 896 NYS2d 653 (Fam. Ct., Clinton Co., 2010) (although notice attached to petition did not contain required language, petition stated that respondent continuously refused to go to school and did not give reasons;

that he was involved in PINS diversion with poor results; that he could be very upset when any mention of school was initiated; and that although several agencies and mother had attempted to assist and encourage respondent, he refused to attend school; however, notice was signed by member of Probation Department rather than member of Department of Social Services, which was designated lead agency); *but see Matter of Jazmyne VV.*, 217 AD3d 1168 (3d Dept. 2023) (even assuming arguendo that manifestation hearing was warranted to establish whether behavior underlying PINS petition was result of disability, failure to hold hearing did not render petition jurisdictionally defective).

"Whenever a petition is filed pursuant to this article, the lead agency designated pursuant to [FCA §735] shall file a written report with the court indicating any previous actions it has taken with respect to the case." FCA §742(a); *see also* 9 NYCRR §357.9(f) ("Where probation refers a matter for petition, it shall prepare a petition report to the court. The petition report shall be approved and signed by a supervisor or their designee. The report shall address all of the required elements for filing, including: (1) Whether probation has diligently attempted to prevent the filing of a PINS petition; and (2) Whether probation has assessed if the youth would benefit from residential respite services; and (3) Whether probation has considered if alternatives to [pre-dispositional placement] are appropriate to avoid remand of the youth to [pre-dispositional placement]; and (4) Whether the potential petitioner has complied with the requirements of preliminary procedure as set forth in [FCA §735]; and (5) That probation has terminated diversion services because it has determined that there is no substantial likelihood that the youth and family will benefit from further attempts; and (6) That the underlying issues of the complaint have not been resolved after attempting to engage the youth and/or family in services or been unable to engage the youth in services where such youth is a runaway; and (7) Where probation has determined that the youth is a runaway whose current whereabouts are unknown, that the appropriate police agency has been notified, and the parent(s)/guardian(s) are seeking a warrant from the court; and (8) Where the potential petitioner is the parent/guardian, that there is no bar to the filing of the petition as the potential petitioner consented to and participated in diversion services; and (9) Any previous actions probation has taken with respect to the case, and the documentation of diligent attempts to provide appropriate services; and (10) Specific information regarding the unresolved issues related to the complaint; and (11) A recommendation as to the feasibility of returning the case to probation diversion so that diversion attempts may be undertaken; and (12) Attachment of any additional written records that support the complaint"); *Matter of Jazmyne VV.*, 217 AD3d 1168 (petition not jurisdictionally defective for failing to plead diligent efforts to provide diversion services and grounds for concluding that judicial intervention was necessary where petition made specific reference to six different types of services and seven individual service providers); *Matter of Nicholas R.Y.*, 91 AD3d 1321, 937 NYS2d 654 (4th Dept. 2012) (petition jurisdictionally defective where Probation representatives stated in conclusory fashion that Probation provided requisite diversion services prior to filing, and petition failed to demonstrate that Probation exerted documented diligent attempts to avoid necessity of filing); *Matter of James L.*, 74 AD3d 1775, 902 NYS2d 487 (4th Dept. 2010) (petition jurisdictionally defective where it failed to specify what diversion services were offered and demonstrate that petitioner exerted documented

diligent attempts); *In re Jahad R.*, 68 AD3d 423, 890 NYS2d 44 (1st Dept. 2009) (petition jurisdictionally defective where report accompanying petition stated that "diligent efforts" were made, that services were "exhausted," that respondent was "resistant to services," and that there was "no substantial likelihood that the family will benefit from diversion services," but agency failed to document diligent attempts); *Matter of Samantha K.*, 61 AD3d 1322 (although designated agency's efforts only lasted one week, agency reviewed numerous steps taken by petitioner to improve respondent's attendance and, in view of her failure to cooperate, determined that further diversion attempts would not be beneficial); *Matter of Sonya LL.*, 53 AD3d 727, 861 NYS2d 463 (3rd Dept. 2008) (petition jurisdictionally sufficient where attached "petition report" indicated that respondent and mother met with officer to discuss PINS diversion program and that they were provided with seven distinct services, including anger management, and report concluded that while respondent had been in diversion program for a month, services rendered had no significant impact on her behavior and she posed risk of harm to mother); *Matter of Leslie H.*, 47 AD3d 716, 849 NYS2d 612 (2d Dept. 2008) (petition dismissed as jurisdictionally defective where statement of Probation Department neither indicated that attempts had been made to avoid filing of petition nor clearly documented diligent attempts to provide appropriate services before it was determined that there was no substantial likelihood that respondent and family would benefit from further attempts); *Matter of Terri W. v. Nicholas O.*, 22 Misc.3d 1109(A), 880 NYS2d 227 (Fam. Ct., Clinton Co., 2009) (petition jurisdictionally defective where documents attached to petition did not detail diligent efforts or include notice from designated lead agency indicating there was no bar to filing because petitioner consented to and actively participated in diversion services); *Matter of James S. v. Jessica B.*, 9 Misc3d 229, 800 NYS2d 892 (Fam. Ct., Suffolk Co., 2005) (court dismisses petition as defective where it contained required form notices, but there was no documented evidence of particular diversion efforts).

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(1) Review the pre-petition diversion efforts to determine if the diligent efforts required by F.C.A. § 735 have been made to divert the child from being the subject of a PINS petition").

E. Diversion-Related Bar to Filing

"No petition may be filed pursuant to this article by the parent or other person legally responsible for the youth where diversion services have been terminated because of the failure of the parent or other person legally responsible for the youth to consent to or actively participate." FCA §735(g)(i).

"No persons in need of supervision petition may be filed pursuant to this article during the period the designated lead agency is providing diversion services. A finding by the designated lead agency that the case has been successfully diverted shall constitute presumptive evidence that the underlying allegations have been successfully resolved in any petition based upon the same factual allegations." FCA §735(g)(i); *see also* 9 NYCRR §357.12(d).

VII. Preliminary Proceedings

A. Issuance and Service of Process and Notices

1. Issuance of Summons and Petition

When the petitioner is not a parent and the respondent and his/her parent are not present when the petition is filed, “the court may cause a copy of the petition and a summons to be issued, requiring the respondent and his parent or other person legally responsible for his care, or with whom he is domiciled, to appear at the court at a time and place named to answer the petition. The summons shall be signed by the court or by the clerk or deputy clerk of the court.” FCA §736(1). If the petitioner is the respondent’s parent, and he/she is present with the respondent, “the provisions of part four of this article [*e.g.*, §741] shall be followed.” FCA §736(1).

2. Notice to Non-Petitioner Parent Or Other Person Legally Responsible

When the petitioner is one of the parents or another person legally responsible for the respondent’s care, “the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon any parent of the respondent or other person legally responsible for the respondent's care who has not signed the petition, provided that the address of such parent or other person legally responsible is known to the court or is ascertainable by the court. Such petition shall include a notice that, upon placement of the child in the care and custody of the department of social services or any other agency, said parent may be named as a respondent in a child support proceeding brought pursuant to article four of this act. Service shall be made by the clerk of the court by mailing such notice and petition by ordinary first class mail to such parent or other person legally responsible at such person's last known residence.” FCA §736(2).

When the petitioner is not a parent or other person legally responsible for the respondent’s care, “the court shall cause a copy of the petition and notice of the time and place to be heard to be served upon each parent of the respondent or other person legally responsible for the respondent's care, provided that the address of such parent or other person legally responsible is known to the court or is ascertainable by the court. Service shall be made by the clerk of the court by mailing such notice and petition by ordinary first class mail to such parent or other person legally responsible at such person's last known residence.” FCA §736(3).

Where the petition contains allegations of truancy and/or school misbehavior and where the school district or local educational agency is not the petitioner and where, at any stage of the proceeding, the court determines that assistance by the school district or local educational agency may aid in the resolution of the education-related allegations in the petition, the school district or local educational agency may be notified by the court and given an opportunity to be heard. FCA §736(4).

Practice Considerations

Often, when the petitioner-parent firmly desires removal of the respondent from the home, and the respondent expresses a desire to live with the other parent, the

advocacy strategy of the child's attorney is to ensure that the other parent appears in court as soon as possible and expresses a willingness to assume responsibility. Other family resources should be explored as well as an alternative to foster care.

3. Service of Summons and Petition

"Service of a summons and petition shall be made by delivery of a true copy thereof to the person summoned at least twenty-four hours before the time stated therein for appearance. If so requested by one acting on behalf of the respondent or by a parent or other person legally responsible for his care, the court shall not proceed with the hearing or proceeding earlier than three days after such service." FCA §737(1)(a).

"If after reasonable effort, personal service is not made, the court may at any stage in the proceedings make an order providing for substituted service in the manner provided for substituted service in civil process in courts of record." FCA §737(1)(b).

4. Issuance of Warrant for Respondent or Person Legally Responsible

"The court may issue a warrant, directing that the respondent or other person legally responsible for his care or with whom he is domiciled be brought before the court, when a petition is filed with the court under this article and it appears that (a) the summons cannot be served; or (b) the respondent or other person has refused to obey the summons; or (c) the respondent or other person is likely to leave the jurisdiction; or (d) a summons, in the court's opinion, would be ineffectual; or (e) a respondent on bail or on parole has failed to appear. A warrant issued for a respondent under this section shall expire at the end of six months from the date of its issuance, unless extended for an additional period of not more than six months upon application by the petitioner for good cause shown." FCA §738(1).

Practice Considerations

Warrants are commonly issued at the outset of the proceeding when the petitioner appears at probation intake and reports that the child has absconded and that his/her whereabouts are unknown, or that the child has expressly refused to appear. In such instances, judges usually excuse compliance with PINS adjustment services requirements, at least until the child later appears in court. Because judges do not always ask enough questions before issuing a warrant, sometimes the child's attorney will learn after assignment that the parent actually knew where the respondent was staying at the time the warrant was issued, and that fact should be brought to the court's attention. Indeed, whenever a parent appears during the course of the proceeding and reports that the respondent has left home, or has refused to appear, the child's attorney should speak to the parent in private to ascertain whether an argument against issuance of a warrant can be fashioned.

B. Interviewing the Parties

Although the child's attorney is formally assigned to represent the respondent at the initial appearance, it is common family court practice in New York City to have the attorney interview the respondent and the parent before the initial appearance in an effort to determine the facts and whether any temporary or dispositive settlement can be reached.

Under *Rules of Professional Conduct*, Rule 4.3, a lawyer, "[i]n communicating on behalf of a client with a person who is not represented by counsel … shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." *See also Commentary to Rules of Professional Conduct*, Rule 4.3 ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person…. The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations").

Obviously, these considerations must be kept in mind when the child's attorney interacts with a PINS petitioner.

However, to provide effective representation, the child's attorney must engage in contacts with the petitioner. In *Rappoport v. Berman*, 49 AD2d 930, 373 NYS2d 652 (2d Dept. 1975), where the family court had ordered the child's attorney not to contact petitioners in any PINS cases, the Second Department concluded that an attorney "representing a juvenile respondent in a Family Court adversary proceeding has the right to interview any petitioner or witness who may possess information bearing on the issues before the court." 49 AD2d at 931. The Second Department did acknowledge the family court's "justifiable concern that there be no improper interference with the course of 'adversary' proceedings," but observed that the child's attorney had only attempted to properly represent his client. *Id.* The court also noted that "[w]here a trial court believes that an attorney has violated ethical standards, has overstepped the bounds of propriety or has violated any of the canons of ethics (absent contumacious conduct, etc.), the matter should be referred to this court to ascertain whether disciplinary action is warranted." *Id.*

Representation Standards

NYSBA Standards, Standard A-2 ("The attorney has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance. A child may be more susceptible to intimidation and manipulation than an adult client, and therefore the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child. The attorney's duties as counselor and advisor include: (1) Developing a thorough knowledge of the child's circumstances and needs; (2) Informing the child of the relevant facts and applicable laws; (3) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings; (4) Providing an assessment of the case and the best position for the child to take, and the reasons for such assessment; (5) Expressing an opinion concerning the likelihood that the court will accept particular arguments; (6) Counseling for or against pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position").

NYSBA Standards, Standard B-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child as soon as possible and on a continuing basis, prior to court hearings and when apprised of emergencies or significant events impacting on the child. Additionally, if appropriate, the attorney should maintain telephone contact. The attorney should undertake training to be reasonably culturally competent regarding the child's ethnicity and culture").

NYSBA Standards, Standard B-2 (attorney should "(6) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g. judge, parties and their advocates, intervenors, caseworkers, child's attorney), and what to expect in the legal process").

Practice Considerations

When a parent-petitioner is unrepresented, the child's attorney will have opportunities to engage in direct contacts that are impossible when a litigant is represented by counsel. While the attorney must comply with ethical constraints and should not exploit inappropriately his/her superior knowledge of the law and the court system, the attorney is duty bound to engage in advocacy with the parent during private contacts, and, in general, develop a strategy designed to convince the parent to agree to a result that is consistent with the respondent's wishes. To accomplish this without alienating the parent, or the respondent, and without violating the ethical proscription against giving "advice," the attorney must employ tact, psychology, and common sense.

Generally, PINS proceedings cannot be won through litigation. Unless the parent is particularly unsympathetic – for instance, there is evidence of abuse or neglect, or the parent is disrespectful to the judge – the judge will do whatever the parent asks. This absence of leverage requires the attorney to strike an alliance of sorts with the parent. The attorney should come across as a responsible adult, interested in the welfare of the respondent but also aware of the trials of parenthood, rather than a single-minded advocate for the respondent's position. Unless the parent raises the subject, counsel usually should refrain from trumpeting the respondent's qualities and good intentions --

the parent may be too angry at the time to hear that -- and should not challenge or discount the seriousness of the parent's claims and concerns. The parent should be permitted to vent while the attorney listens attentively and, when appropriate, displays sympathy and a desire to work together with the parent and the client in seeking a solution. When appropriate, the attorney could cement the connection with the parent by agreeing with or least acknowledging the sincerity of some of the parent's complaints, and by promising to encourage, and even prod the respondent to do better.

While an assigned lawyer ordinarily should begin by interviewing the client, in the PINS context that may not be a good idea. After interviewing the parent, the attorney will know where things stand and have a context for the interview with the respondent. Left alone at the start, the parent may fear that the attorney will adopt the respondent's point of view. Although the respondent may wonder the same thing if the attorney speaks first to the parent, the parent's leveraged position makes it particularly important for the attorney to preserve the parent's trust. To minimize the risk that the respondent will be confused or begin to doubt his/her loyalty, the attorney should immediately make it clear that he or she has been assigned to represent only the respondent. Although this means negotiating with the parent without first ascertaining what the respondent wants, it is likely that he/she wants to go home, and if that turns out not to be the case, the attorney can shift gears rather easily.

The attorney usually should avoid interviewing the parties at length at the same time until more is known about their relationship and their present state of mind. A joint interview denies the respondent the protection of the attorney-client privilege, and could propel two angry people into a heated confrontation that will make matters worse. After speaking to the parties individually, the attorney can decide whether shuttle diplomacy, or a group discussion, or both, is in order.

When it can be undertaken safely, a joint interview is useful. The attorney can gain insight into how the parties interact and the ways in which they provoke each other. When appropriate, the attorney could sow the parent's good will by speaking plainly to the respondent about his/her misconduct, and about the corrective actions that are required.

The attorney should not be the one who alerts the parent to the possibility of placing the respondent in foster care. The attorney should not outline the possible outcomes, or even ask what the parent wants the judge to do. Rather, the attorney should simply ask the parent to explain what led him/her to bring the respondent to court. The attorney may learn that the parent has been "pushed" by someone else, such as a school official, to file the petition, and does not really want to proceed. If it later appears that the parent seeks placement, the attorney can mention less drastic remedies, such as outpatient therapy or substance abuse treatment, a strict curfew, or education services, and determine whether there is flexibility or ambivalence in the parent's position. When the parent mentions placement outside the home, but thinks that the judge can send the respondent to a boarding school or "boot camp," the parent might lose interest in proceeding upon learning that the available placements are not secure or closely supervised, and that the respondent would be interacting closely with youths whose acting out behavior may be worse. The attorney also should inform the parent that until the respondent turns eighteen, the parent can return to court at any

time; sometimes this tempts the parent to give the respondent one more chance.

The attorney should not unreasonably take the respondent's side in private discussions and, perhaps, mislead him/her into thinking that the judge will also be sympathetic. To the extent that the respondent is in the wrong, and/or must modify his/her behavior in order to make peace with the parent, the attorney should offer criticism, and encourage, and if necessary prod, the respondent to do what is necessary. Because many PINS youth have demonized their parent and refuse to believe that the judge will side with the parent, the attorney must make it clear that, despite whatever lawyering skills the attorney may possess, continued acting out will result in placement outside the home. By "reading the riot act," the attorney does an immature and misguided respondent a favor.

C. Negotiated Resolutions

While in many cases a negotiated resolution cannot be reached until some time has passed during which the respondent's behavior has improved, in some cases the child's attorney will find that the parties are not really not far apart, and will wonder why the matter was forwarded to court. The answer may be that probation, DAS personnel and/or other service providers "dropped the ball," or that the respondent's initial reluctance to cooperate was seized upon by probation and the matter was referred to court prematurely. In any event, a prompt resolution can be reached.

1. Court Referral for Diversion

At the initial appearance of the respondent the court may order that adjustment attempts be undertaken by the probation service. (This is discussed below along with other procedures at the initial appearance.)

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(1) Review the pre-petition diversion efforts to determine if the diligent efforts required by F.C.A. § 735 have been made to divert the child from being the subject of a PINs petition" and "(3) Determine if additional diversion efforts should be made post-petition, pursuant to F.C.A. § 742").

2. Withdrawal of Petition

Where the Family Court Act has not prescribed the method of procedure, provisions of the Civil Practice Law and Rules shall apply in PINS proceedings "to the extent that they are appropriate to the proceedings involved." FCA §165(a). According to CPLR 3217(a)(1), an action may be discontinued by the plaintiff as of right "by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court." After twenty days, an action may not be discontinued except upon order of the court. CPLR 3217(b). In *People ex rel. Intner v. Surles*, 149 Misc2d 644, 566 NYS2d 512 (Sup. Ct., Bronx Co., 1991), it was held that Rule 3217(a)(1) permits a PINS petitioner to withdraw the petition over the court's objection. *See also Matter of Sheena B.*, 83 AD3d 1056 (2d Dept. 2011) (court erred in allowing petitioner to discontinue proceeding because child had turned eighteen; although court has

discretion under 3217(b), public has interest in matters involving welfare of child, and child, who could have been placed with her consent, would have been prejudiced by discharge from foster care without services to which she would be entitled upon finding of neglect).

3. Adjournment in Contemplation of Dismissal ("ACD")

"Upon or after a fact-finding hearing, the court may, upon its own motion or upon a motion of a party to the proceeding, order that the proceeding be 'adjourned in contemplation of dismissal'. An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months with a view to ultimate dismissal of the petition in furtherance of justice. Upon issuing such an order, upon such permissible terms and conditions as the rules of court shall define, the court must release the individual." FCA §749(a). While the statutory language, "[u]pon or after a fact-finding hearing," suggests that an ACD cannot be granted at the initial appearance, many judges have not been deterred by that language when the parties have reached an agreement. In any event, to comply with the statute, the court could hold an abbreviated "fact-finding hearing" on the spot, and then issue the ACD order.

The court may, as a condition of an adjournment in contemplation of dismissal order, in cases where the record indicates that the consumption of alcohol may have been a contributing factor, require the respondent to attend and complete an alcohol awareness program established pursuant to [Mental Hygiene Law §19.07(a)(6-a)." Other permissible terms and conditions of an ACD are set forth in 22 NYCRR §205.65(a): "(1) attend school regularly and obey all rules and regulations of the school; (2) obey all reasonable commands of the parent or other person legally responsible for the respondent's care; (3) avoid injurious or vicious activities; (4) abstain from associating with named individuals; (5) abstain from visiting designated places; (6) abstain from the use of alcoholic beverages, hallucinogenic drugs, habit-forming drugs not lawfully prescribed for the respondent's use, or any other harmful or dangerous substance; (7) cooperate with a mental health or other appropriate community facility to which the respondent is referred; (8) restore property taken from the petitioner, complainant or victim, or replace property taken from the petitioner, complainant or victim, the cost of said replacement not to exceed $1,500; (9) repair any damage to, or defacement of, the property of the petitioner, complainant or victim, the cost of said repair not to exceed $1,500; (10) cooperate in accepting medical or psychiatric diagnosis and treatment, alcoholism or drug abuse treatment or counseling services, and permit an agency delivering that service to furnish the court with information concerning the diagnosis, treatment or counseling; (11) attend and complete an alcohol awareness program established pursuant to section 19.25 of the Mental Hygiene Law; (12) abstain from disruptive behavior in the home and in the community; or (13) comply with such other reasonable terms and conditions as may be permitted by law and as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the filing of the petition."

"A copy of the order setting forth the terms and conditions imposed and the duration thereof shall be furnished to the respondent and to the parent or other person legally responsible for the respondent." 22 NYCRR §205.65(c).

"An order adjourning a proceeding in contemplation of dismissal ... may set a time or times at which the probation service shall report to the court, orally or in writing, concerning compliance with the terms and conditions of said order." 22 NYCRR §205.65(b). In addition, "[u]pon application of the petitioner, or upon the court's own motion, made at any time during the duration of the order, the court may restore the matter to the calendar. See *Matter of Ashley EE.*, 81 AD3d 1124, 917 NYS2d 374 (3d Dept. 2011) (order restoring matter need not be in writing). If the proceeding is not so restored, the petition is at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice." FCA §749(a); *see Matter of Ramon H.-T.*, 87 AD3d 1141, 930 NYS2d 49 (2d Dept. 2011) (where case not restored to calendar within six months, any subsequent action by court was nullity); *Matter of Patrick R.*, 216 AD2d 964, 629 NYS2d 715 (4th Dept. 1995) (by consenting to restoration of case to calendar, respondent waived argument that restoration was untimely because it occurred after expiration of ACD).

4. Voluntary Placement

When the petitioner-parent and the respondent are in agreement that placement is appropriate, an alternative to proceeding to a PINS adjudication and placement is to arrange for the petitioner to execute a voluntary placement instrument pursuant to Social Services Law §384-a. The placement would thereafter be reviewed in accordance with SSL §§ 358-a and FCA Article Ten-A.

Practice Considerations

When it is apparent that the parent seeks help, but not placement, there are several options. The parties can agree to have the matter returned to the Probation Department so that services may be arranged. Or the parent can agree to withdraw the petition. Or the judge could order an adjournment in contemplation of dismissal. Or the matter could be adjourned and the respondent released with conditions of behavior. In negotiating a resolution, the child's attorney should keep in mind that the parent is in control until the respondent turns eighteen. Thus, the attorney should not necessarily suggest the best *legal* result -- that would be dismissal -- rather than a resolution that includes sanctions or conditions of behavior that might induce the respondent to improve his/her behavior.

The ethical proscription against giving "advice" comes into play when the attorney is attempting to negotiate a resolution of the case. The attorney can communicate the respondent's expressed desire to do better and comply with parental directives, and offer to help the parent obtain social services or other assistance, but cannot "advise" the parent to "take a chance" with the respondent. The attorney can explain what dispositions are available and how they work, but cannot recommend one disposition over another or give advise regarding which disposition best suits the parent's needs and desires.

In their approach to PINS cases, judges usually fit into one of two categories. Some judges, concerned that the child's attorney has a negotiating advantage and might overreach with an unrepresented parent, ask many questions and scrutinize a proposed settlement to make certain that the parent understands the consequences.

Other judges, pleased that the public policy favoring intact families and PINS diversion has been served, merely ask the parent whether he or she has, in fact, agreed to what has been proposed. The attorney's preparation for court appearances must take into account the type of judge involved. With activist judges, the attorney must be careful to explain the agreement carefully to the parent and tease out all the parent's concerns and questions, so that it will be clear to the inquiring judge that counsel has been thorough and scrupulous.

Finally, when the parent insists upon placement and the respondent consents, arranging for execution of a voluntary placement accomplishes the same thing as a court-ordered placement, while enabling the respondent to avoid a PINS adjudication. The attorney's success in going this route will depend on the respondent's behavioral history. A child with a history of absconding, or aggressive behavior, may frighten off the child protective agency, and in any event the agency may be disinclined generally to voluntarily assume responsibility for a disobedient teenager.

The attorney is unlikely to have much luck arguing that the respondent is legally entitled to be voluntarily placed rather than placed as a PINS. However, while reminding the court that a voluntary foster care placement is one of the potential results of PINS diversion, the attorney should enlist the court's support when lobbying with the child protective agency.

D. Procedures at Initial Appearance

1. Notice of Rights

"At the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his parent or other person legally responsible for his care shall be advised of the respondent's right to remain silent and of his right to be represented by counsel chosen by him or his parent or other person legally responsible for his care, or by [an attorney] assigned by the court.... Provided, however, that in the event of the failure of the respondent's parent or other person legally responsible for his care to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court shall appoint [an attorney] and shall, unless inappropriate also appoint a guardian ad litem for such respondent, and in such event, shall inform the respondent of such rights in the presence of such [attorney] and any guardian ad litem." FCA §741(a).

Where the respondent is actually represented by counsel and does not make an admission at the initial appearance, the court's failure to advise the respondent and parent of these rights is not reversible error. *Matter of Mark "J"*, 259 AD2d 40, 696 NYS2d 583 (3rd Dept. 1999) (when right to remain silent became critical – at time of admission – respondent was advised of that right).

2. Respondent's Right to Counsel and the Role of the Child's Attorney

The court must appoint an attorney to represent the respondent "if independent legal representation is not available to [the] minor." FCA §249(a).

Moreover, "[a] minor who is the subject of a ... [PINS] proceeding shall be

presumed to lack the requisite knowledge and maturity to waive the appointment of [an attorney]. This presumption may be rebutted only after [an attorney] has been appointed and the court determines after a hearing at which the [attorney] appears and participates and upon clear and convincing evidence that (a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense, and (c) waiver is in the best interest of the minor." FCA §249-a. It seems unlikely that this test could ever be met, particularly given the admonition in FCA §249(a) that the court may never permit a waiver by a PINS respondent in a proceeding to "extend or continue" placement.

3. Counsel for Petitioner

A PINS petitioner is not among the persons specifically identified in FCA §262 as having a right to the assignment of counsel, nor is a PINS respondent's non-petitioner parent. However, at least in instances when the parent, whether or not he/she is the petitioner, is raising objections to the removal of the respondent from the home, it can be argued that a constitutional right to counsel exists. FCA §261 states that "[p]ersons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings." According to FCA §262(b), "a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel." *See Matter of David W.*, 309 AD2d 758, 768 NYS2d 827 (2d Dept. 2003) (citing FCA §§ 261 and 262, court holds that, "under the particular circumstances," assignment of counsel to PINS petitioner was proper), *lv denied* 1 NY3d 503.

Moreover, a parent can make a right to counsel argument under FCA §262(a)(v), which refers to "the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody[.]" *See also In re Hilary*, 880 NE2d 343 (Mass., 2008) (after child is adjudicated child in need of services, parent is entitled by statute to counsel at dispositional phase if custody of child could be granted to Department of Social Services).

Rather than assign an attorney to represent the petitioner, "[t]he family court or the appropriate appellate division of the supreme court may request the corporation counsel of the city of New York or the appropriate county attorney to present the case in support of the petition when, in the opinion of the family court or appellate division such presentation will serve the purposes of the [family court] act." FCA §254(a); *see Matter of Kenneth J.*, 102 Misc2d 415, 423 NYS2d 821 (Fam. Ct., Richmond Co., 1980) (privately retained attorney representing petitioner not entitled to participate at disposition because he was not counsel presenting petition within the meaning of FCA § 750; private counsel may properly limit thrust of representation to client's interests without regard to standards normally applied to public prosecutors who, because of the nature of their offices and the scope of their legal interests, should have access to the dispositional process and to confidential dispositional reports).

If the petitioner is represented by counsel, the child's attorney must follow the admonition in *Rules of Professional Conduct*, Rule 4.2(a), which states as follows:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

Rule 4.2 is discussed in detail in JRD's *Practice Manual for Children's Lawyers, Volume Two, Part Three*, Chapter Two.

4. Court Referral for Diversion

"Whenever a petition is filed pursuant to this article, the lead agency designated pursuant to [FCA §735] shall file a written report with the court indicating any previous actions it has taken with respect to the case." FCA §742(a).

"At the initial appearance of the respondent, the court shall review any termination of diversion services pursuant to such section, and the documentation of diligent attempts to provide appropriate services and determine whether such efforts or services provided are sufficient. The court may, at any time, subject to the provisions of [FCA §748], order that additional diversion attempts be undertaken by the designated lead agency. The court may order the youth and the parent or other person legally responsible for the youth to participate in diversion services. If the designated lead agency thereafter determines that a case referred for diversion efforts under this section has been successfully resolved, it shall so notify the court, and the court shall dismiss the petition." FCA §742(b); *see also* 9 NYCRR §357.10 (probation shall notify court when it determines that case has been successfully resolved, or that there is no substantial likelihood that youth and/or youth's family will benefit from continued diversion services).

A respondent who failed to appear at probation intake and was later arrested on a post-petition warrant has not forfeited the right to participate in the diversion process. *See In re Charles C.*, 83 Misc2d 388, 371 NYS2d 582 (Fam. Ct., N.Y. Co., 1975) (delinquency respondent did not forfeit the substantial possible benefits of adjustment at intake merely because he failed to appear in court on one occasion for reasons which were beyond his control).

In *Matter of Chad H.*, 278 AD2d 601, 717 NYS2d 725 (3rd Dept. 2000), the court found a violation of the respondent's constitutional right to the effective assistance of counsel where the child's attorney failed to seek a court referral for adjustment where it was clearly appropriate.

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(1) Review the pre-petition diversion efforts to determine if the diligent efforts required by F.C.A. § 735 have been made to divert the child from being the subject of a PINs petition" and "(3) Determine if additional diversion efforts should be made post-petition, pursuant to F.C.A. § 742").

Practice Considerations

Regardless of whether probation's failure to prepare the required petition attachments and petition report constitutes grounds for finding the petition defective, the absence of such documentation, and/or probation's inability to provide a persuasive explanation as to why diversion failed, constitutes a useful backdrop to an argument that additional diversion efforts should be made.

5. Service of Petition

Although there are provisions in Article Seven requiring service of a summons and petition upon the parent and the respondent when a non-parent petitioner has filed a PINS petition, there is no provision requiring service in other instances, or in any case in which the respondent is present and appears in court the day the petition is filed. If the court does not provide a copy to the respondent, as is required in juvenile delinquency proceedings (*see* FCA §320.4[1]), the child's attorney certainly should.

E. Pre-dispositional Placement

1. Statutory Criteria

"Pre-dispositional placement" is "[t]he temporary care and maintenance of children away from their own homes pursuant to [FCA § 720]." FCA §712(b).

In order to insure continued federal funding under the provisions of the *Juvenile Justice and Delinquency Prevention Act of 1974* (42 USC §5601 *et seq.*), a state may not place a status offender in a secure facility. To bring New York State into compliance with the Act, the Legislature amended Article Seven to provide that "[n]o child ... shall be detained in any prison, jail, lockup, or other place used for adults or children convicted of crime or under arrest and charged with a crime," FCA §720(1), and that "[t]he detention of a child in a secure detention or non-secure facility shall not be directed under any of the provisions of this article." FCA §720(2). *See also 1980 N.Y. Op. Atty. Gen. 33*, 1980 WL 107176 ("In order to comply with the Federal Act, which requires the complete removal of all PINS from secure detention facilities, the Legislature must have intended a total prohibition on the placement of PINS in such facilities" if non-secure facilities are available); *see also Matter of Jennifer G.*, 26 AD3d 437, 811 NYS2d 85 (2d Dept. 2006), *rev'g* 196 Misc2d 692, 764 NYS2d 503 (Fam. Ct., Queens Co., 2003) (§720(2) is not unconstitutional and does not violate separation of powers doctrine since any inherent contempt authority to confine PINS respondent who absconds is expressly limited by FCA §156; also, §720(2) is not preempted by Juvenile Justice and Delinquency Prevention Act since Act permits, but does not mandate, secure detention of juvenile status offenders who violate court orders, and New York has declined to adopt that optional provision as part of statutory scheme).

However, at least one judge has concluded that steps can be taken to physically restrain a child who is about to abscond. *Matter of Darren H.*, 179 Misc2d 130, 684 NYS2d 126 (Fam. Ct., Kings Co., 1998) (while holding New York City Administration for Children's Services in contempt for violating order to take steps to prevent respondent from absconding, court rejects ACS' argument that it could not physically restrain respondent).

Pre-dispositional placement of a person alleged to be or adjudicated as a person in need of supervision shall be authorized only in a foster care program certified by the office of children and family services or a short-term safe house in accordance with [FCA §739], or a certified or approved family boarding home pursuant to the social services law. The setting of the placement shall take into account: (a) The proximity to the community in which the child lives with his or her parents or to which the child will be discharged; and (b) The existing educational setting of such person and the proximity of such setting to the location of the placement setting." FCA §720(3).

"After the filing of a petition under [FCA §732] the court in its discretion may release the respondent or direct his or her pre-dispositional placement. If the respondent may be a sexually exploited child as defined in [SSL §447-a(1)], the court may direct the respondent to an available short-term safe house as an alternative to placement. However, the court shall not direct pre-dispositional placement unless it finds and states the facts and reasons for so finding that unless the respondent is placed there is a substantial probability that the respondent will not appear in court on the return date and all available alternatives to such placement have been exhausted." FCA §739(a). Under an order of protection, the court may release the respondent to the custody of "an appropriate relative within the second degree." FCA §§ 759, 740(a).

The court shall not order or direct pre-dispositional placement if the sole basis for the petition is an allegation of an unlawful failure to attend school pursuant to FCA §712(a)(i). In other cases the court may not order or direct pre-dispositional placement unless the court determines and states in its written order; (1) that there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services, including but not limited to, any available respite services; and (2) that all available alternatives to detention have been exhausted; and (3) that pre-dispositional placement of the respondent is in the best interest of the respondent; and (4) that it would be contrary to the welfare of the respondent to continue in their own home. FCA §720(4)(a).

"Where the youth is sixteen years of age or older, the court shall not order or direct pre-dispositional placement under this article under this article, unless the court determines and states in its order that special circumstances exist to warrant such placement." FCA §720(4)(b).

"If in addition to the provisions of this section, the respondent may be a sexually exploited child as defined in [SSL §447-a(1)], the court may direct the respondent to an available short-term safe house in accordance with [FCA §739]." FCA §720(4)(c).

Representation Standards

NYSBA Standards, Standard C-1 ("(14) If the child is removed from the home, the attorney should consult with the child and investigate the possibility of placement in the home of a suitable relative or other adult with whom the child has a relationship").

Practice Considerations

When the parent is the petitioner, most judges will not order pre-dispositional placement unless the parent requests it. In an unusual case a judge might be so

concerned about the respondent's behavior that he/she will initiate a discussion of pre-dispositional placement, and might even order it, but that is unusual.

When the parent, despite the best efforts of the child's attorney at negotiation, refuses to take the respondent home, effective advocacy at the hearing may require more than a challenge to the asserted grounds for pre-dispositional placement. Some judges, in the face of a parent's refusal to take the respondent home, but lacking statutory grounds for pre-dispositional placement, will release the respondent to the parent. Despite the clear language of the statute, other judges will order pre-dispositional placement merely because of the parent's refusal. Thus, the attorney must be ready with a strategy designed to overcome a judge's reluctance to force the parent to take the respondent home. Often the best strategy is to have a sympathetic and articulate respondent appeal directly to the judge, and hope that the parent will relent when under pressure in open court, and/or that the parent will come across to the judge as unreasonable.

When addressing the statutory criteria, the attorney should not assume that the judge will focus exclusively on whether the respondent has in the past failed to appear in court when required; that is a flawed and dangerous assumption. The judge is just as likely to consider the respondent's overall behavior at home, at school and elsewhere, as well as the willingness and ability of the parent to provide supervision, in determining whether to order pre-dispositional placement. Even if the facts arguably do not establish a substantial risk of non-appearance, the judge may order pre-dispositional placement merely because there is a pattern of defiant behavior. Accordingly, the attorney must be prepared to address the judge's potential concerns regarding the respondent's past behavior, and then, in court, display a client and parent who are respectful, willing to change if necessary, and plan to take steps to prevent any future misconduct. In other words, the attorney must try to prevail at the hearing on the judge's own terms, by anticipating and preparing to address whatever grounds for pre-dispositional placement the judge might consider.

In preparing for the hearing, the attorney must question the parent and the respondent thoroughly to ascertain what has already been revealed to probation, and other prejudicial information that might be revealed for the first time in court. (If new facts do surface in court, the attorney should quickly consult with the juvenile and, when appropriate, the parent, or ask for a recess if an adequate and confidential discussion in court seems impossible.) The attorney should fish for useful information about the respondent's school honors, part-time jobs, charitable work, or religious exercise. The attorney should also look to uncover mitigating evidence, but that information should not be used if it contradicts other facts the judge is sure to credit, or it is likely to be viewed by the judge as excuses and rationalizations from an adolescent who has no remorse or insight into his/her behavior.

Because judges also scrutinize the behavior and body language displayed by the respondent and the parent, as well as what they say and how they say it, counsel should determine whether either one seems volatile and likely to erupt in court or show disrespect to the judge, and provide appropriate instructions; for instance, to maintain silence unless asked a question by the judge or advised by the attorney to speak, to answer only the question that is asked and refrain from volunteering information, or, in

the case of the respondent, to stand up straight, speak clearly and look interested in what is going on. The respondent should be encouraged to show remorse and a commitment to improving his/her behavior through participation in therapeutic, educational or other services, and any services that already are being provided should be trumpeted. Finally, the attorney should determine whether there are other family members willing to provide a home or additional supervision for the respondent, and consider proposing such a plan to the judge.

Conducted by judges with busy calendars, hearings are fast-paced and pressurized. Faced with a barrage of accusations, the attorney must guard against the temptation to repeat whatever unlikely story the respondent whispers, or ask follow up questions to which the answers are not known. Except when the attorney can successfully challenge the allegations that support pre-dispositional placement, it is unwise to suggest to the judge that the respondent has done nothing wrong. Instead, the attorney needs to stick to a forward-looking script, and move the focus from the respondent's past behavior to changed circumstances that will minimize the risk of future misconduct. In need of reassurance that it is appropriate to release the respondent, the judge is looking for signs that the parent is stepping up the level of supervision in response to the respondent's behavior, or that the respondent has expressed genuine remorse, or that necessary services have been or are about to be put in place. In sum, the attorney should outline a supervision plan that will allow the judge to release the respondent with a clear conscience.

Judges learn what they need to know in different ways. Some only want to hear from the attorney, while others want to hear from the parent, and even the respondent. When the judge addresses the parent directly, it is usually a sign that the judge is struggling with the decision and wants more information, and the attorney should not interfere. And, although the judge should not address the respondent without the attorney's permission, the judge's questioning of a well-prepared client need not be cause for objection; indeed, a remorseful statement by the respondent can be highly persuasive. As for those clients and parents the attorney has decided should be kept under wraps, the attorney should remember to keep them within sight at all times, since the sometimes provocative give and take in the courtroom may provoke them.

The "special circumstances" requirement in cases involving respondents over the age of sixteen is not defined in the statute, and so, until there is more legislative and/or judicial guidance, the term will mean whatever the attorney can persuade the judge it means. In arguing for a strict application of the special circumstances standard, the attorney should point out that, according to the legislative memo accompanying the bill that added the special circumstances requirement, the goal of the legislation is to avoid "unnecessary and expensive institutional placements in foster care or detention" and to insure that "children are not placed in high cost institutional settings when community-based preventive or other services would better meet their needs." Accordingly, before considering a remand or placement, the court should insure at the very least that there has been a concerted and meaningful effort made to deal with the family's problems through the use of community services. It should be very difficult for probation to establish this on the day of arraignment.

The special circumstances test is not made applicable only to cases filed after

the respondent turned sixteen. All sixteen-year-olds, including those who were under sixteen when the case was filed, are covered by the provisions of the new law and cannot be remanded or placed in the absence of special circumstances.

Although the statute refers to the remand and placement of sixteen-year-olds, the attorney should argue that it also precludes the court from remanding or placing a fifteen-year-old to a date beyond his/her sixteenth birthday in the absence of special circumstances. Except when the child's sixteenth birthday is imminent and the special circumstances finding is somewhat timely, the attorney should insist that a placement order run only until the respondent's sixteenth birthday, and that the court rule that there must an application in writing for a "special circumstances" extension if placement beyond that date is desired.

Also, although many judges have invented a third ground for remand – the parent's refusal to take the child home – the special circumstances requirement certainly adds force to an argument that the parent's refusal cannot justify a remand.

The requirement that the court "determine[] that there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to pre-dispositional placement have been exhausted" provides an additional layer of protection, and the attorney should be aggressive in challenging probation to show that it made diligent efforts.

2. Reasonable Efforts Determination

"Upon a finding of facts and reasons which support a detention order pursuant to subdivision (a) of this section, the court shall also determine and state in any order directing detention: (i) whether continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstance available to the court at the time of the court's determination in accordance with this section; and (ii) where appropriate, whether reasonable efforts were made prior to the date of the court order directing pre-dispositional placement in accordance with this section, to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the respondent to safely return home." FCA §739(c); *see also* SSL § 458-m (describes services provided by "family support services program," which is "a program established pursuant to this title to provide community-based supportive services to children and families with the goal of preventing a child from being adjudicated a person in need of supervision and help prevent the out of home placements of such youth or preventing a petition from being filed under article seven of the family court act"); 22 NYCRR §205.67(a) (court may request petitioner, presentment agency, if any, and local probation department to provide information to court to aid in determinations and may also consider information provided by child's attorney).

Practice Considerations

Although the statute does not state that the respondent cannot be remanded when the court finds that there are reasonable efforts that could be made and might

eliminate the need for removal, the statutory requirement that the court "determine[] that there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to detention have been exhausted" provides protection along those lines. *See also Nicholson v. Scoppetta*, 3 NY3d 357, 787 N.Y.S.2d 196 (2004) (before issuing removal order under FCA §1027, "[t]he court must do more than identify the existence of a risk of serious harm," and "must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal," "balance that risk against the harm removal might bring, and ... determine factually which course is in the child's best interests," and "specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim").

3. Probable Cause Hearing

"Unless the respondent waives a determination that probable cause exists to believe that he is a person in need of supervision, no pre-dispositional placement under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays." FCA §739(b).

Since §739(b) specifically provides that a case may be adjourned for three days exclusive of weekends and holidays, but does not exclude weekends and holidays from the initial three-day period, it appears that weekends and holidays are included in the initial computation. *See also* General Construction Law §20; *People ex rel. Barna v. Malcolm*, 85 AD2d 313, 448 NYS2d 176 (1st Dept. 1985), *appeal dism'd* 57 NY2d 675 (interpreting CPL §180.80); *Matter of D.P.*, 17 Misc3d 1106(A) (Fam. Ct., Nassau Co., 2007) (under General Construction Law §20, date petition filed is not counted for purposes of speedy initial appearance deadline); *People ex rel. Vrod v. Schall*, 142 Misc2d 968, 539 NYS2d 262 (Sup. Ct. Bronx Co., 1989) (interpreting FCA §325.1); *Matter of Kenneth D.*, 102 Misc2d 363, 423 NYS2d 423 (Fam. Ct. Kings Co., 1980).

However, if the initial three-day period ends on a weekend or holiday, it appears that the probable cause hearing may be held on the next court day. GCL §25-a; *Matter of Kerry V.M.*, 267 AD2d 1035, 701 NYS2d 584 (4th Dept. 1999); *People v. Powell*, 179 Misc2d 1047, 690 NYS2d 826 (App. Term, 2d Dept., 1999); *Matter of D.P.*, 17 Misc3d 1106(A). However, particularly when pre-dispositional placement commences on a Wednesday, the child's attorney should consider requesting that the hearing be held before the weekend or holiday.

"[T]he evidentiary standards applicable to a hearing on a felony complaint in a criminal court" are found in Criminal Procedure Law §180.60(8), which, like FCA §325.2(3), provides generally that only non-hearsay evidence is admissible but that certain scientific reports and sworn statements may be admitted.

Practice Considerations

While, given the liberty interests involved and the potential for useful discovery, a probable cause hearing should almost be demanded in a juvenile delinquency

proceeding, in a PINS proceeding the child's attorney usually obtains full discovery merely by talking to the parent, and, by advising the respondent to demand a probable cause hearing, and perhaps require the parent to take an extra day off from work, the attorney may alienate the parent while securing absolutely no litigation advantage for the respondent.

F. Remand To Hospital And Competency To Stand Trial

After the filing of a PINS petition, "the court may order any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for that purpose by the court when such an examination will serve the purposes of this act, the court may remand any such person for physical or psychiatric examination to, or direct such person to appear for such examination at: (1) the department of health of the city of New York, if the court is located in a county within the city of New York, or (2) a hospital maintained by the county in which the court is located, if the court is in a county outside the city of New York, or (3) a hospital maintained by the state of New York, or (4) a qualified private institution approved for such purpose by the local social services department." FCA §251(a).

If, outside of the city of New York, the court orders a psychiatric examination, "the court may direct the director of an institution in the department of mental hygiene serving the institutional district in which the court is located to cause such examination to be made. Such director shall be afforded an opportunity to be heard before the court makes any such direction. The director may designate a member of the staff of the institution or any psychiatrist in the state to make the examination. The psychiatrist shall forthwith examine such person. The examination may be made in the place where the person may be or the court may remand such person to, or otherwise direct that such person appear at, such institution or to a hospital or other place for such examination. During the time such person is at such institution for examination, the director may administer or cause to be administered to such person such psychiatric, medical or other therapeutic treatment as in the director's discretion should be administered. The chief administrator of the courts shall prescribe the form of an order for examination. Upon completion of the examination, the director shall transmit to the court the report of the psychiatrist who conducted the examination." FCA §251(a).

Unless the family court has made a fact-finding *and* also determines according to the criteria in FCA §739(a) that the respondent should be detained pending disposition, or where the child's attorney consents, "all examinations pursuant to [§251] shall be conducted on an outpatient basis." FCA §251(b). An order for remand "shall include findings on the record supporting the need for examination in a residential facility and a determination that it is the most appropriate facility. Remands for examinations shall be for a period determined by the facility, which shall not exceed thirty days, except that, upon motion by the person detained on its own motion, the court may, for good cause shown, terminate the remand at any time." FCA §251(a).

However, "[n]othing in [§251] shall preclude the issuance of an order by the family court pursuant to section 9.43 of the mental hygiene law for emergency admission for immediate care, observation and treatment of a person before the court or

pursuant to section twenty-one hundred twenty of the public health law for commitment for care and maintenance of a person before the court." FCA §251(c). Mental Hygiene Law §9.43 states that "[i]f ... it appears to the court, on the basis of evidence presented to it, that [a] person has or may have a mental illness which is likely to result in serious harm to himself or herself or others, the court shall issue a civil order directing his or her removal to any hospital specified in subdivision (a) of section 9.39 or any comprehensive psychiatric emergency program specified in subdivision (a) of section 9.40, willing to receive such person for a determination by the director of such hospital or program whether such person should be retained therein pursuant to such section." *See also* Mental Hygiene Law §9.37 (hospital director "may receive and care for ... any person who ... has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others").

Although, in juvenile delinquency proceedings, there are elaborate procedures governing determinations regarding a child's competency to proceed, and long-term confinement is possible when the court determines that a child is nor competent, Article Seven contains no mechanism for such a determination. *See In re Kotey M.*, 965 A.2d 1146 (N.H., 2009) (due process does not require that juvenile be competent before being adjudicated Child in Need of Supervision).

Representation Standards

NYSBA Standards, Standard C-4 ("In some cases the attorney may feel that the client needs a competency evaluation, which can be ordered by the court or can be arranged by the attorney. The attorney should explain to the client why such an evaluation is needed").

Practice Considerations

The issue of hospitalization is often raised by a probation officer who requests that an emergency evaluation be done by the court mental health clinic. Such requests are often based on a history of hospitalization or other clear evidence of serious mental health problems, or bizarre behavior reported by the parent or observed by a probation officer during the adjustment process. Other times, the request is based on the nature of the charges. For instance, allegations of sexual abuse, bizarre violence, or arson, often lead to a request for an emergency mental health evaluation.

When it is known that an evaluation will be requested, or a request appears likely, the child's attorney should discuss the issue with the respondent and the parent before going into court. A recess should be sought if the request comes as a surprise. If the request appears to be frivolous or the parent indicates that the respondent's problems have been exaggerated, the attorney should usually oppose the request, since, even if the facts suggest that hospitalization is inappropriate, the examiner may not see things that way. If the request appears to be legitimate, it is difficult to raise a persuasive objection, since the emergency examination itself is designed to gather information and involves no loss of liberty. Indeed, if it appears that the respondent may need immediate hospitalization, the attorney might want to encourage the respondent to cooperate. If the respondent has expressed an intent to commit suicide, the attorney

should consider disclosing that to the court. *See State Bar Ethics Opinion 486*, 1978 WL 14149 (lawyer may disclose client's expressed intention to commit suicide).

When the examination has been completed, the examiner usually will issue an oral report in court and be made available for cross-examination. When cross-examining the witness in an attempt to prevent hospitalization, the attorney should concentrate on challenging the significance of the behavior or statements underlying the diagnosis. Since many judges will, in the rush of a busy day, prefer to keep the hearing short and rely upon short-hand psychiatric conclusions, the attorney should be prepared to meet with some resistance.

When the standards in Mental Hygiene Law §9.43 are not met, and the respondent objects to the remand, the attorney should argue that any treatment the respondent is in need of must be provided on an outpatient basis.

G. Temporary Order of Protection

"Upon the filing of a petition under this article, the court for good cause shown may issue a temporary order of protection which may contain any of the provisions authorized on the making of an order of protection under [FCA §759]." FCA §740(a). A temporary order of protection is not a finding of wrongdoing. FCA §740(b). "The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant directing that the respondent be arrested and brought before the court pursuant to [FCA §738]." FCA §740(c).

Upon the issuance of a temporary order of protection, or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with FCA §842-a. FCA §780-a.

VIII. Absconding Respondents

A. Procedures

"When a child absconds from a facility to which he or she was remanded pursuant to [F *Note: Placement for reasons that include truancy should also be considered against the backdrop of the bar on placement where the only underlying PINS fact-finding is an unlawful failure to attend school.*
CA §739], written notice of that fact shall be given within 48 hours by an authorized representative of the facility to the clerk of the court from which the remand was made. The notice shall state the name of the child, the docket number of the pending proceeding in which the child was remanded, the date on which the child absconded, and the efforts made to secure the return of the child. Every order of remand pursuant to section 739 shall include a direction embodying the requirements of this subdivision." 22 NYCRR §205.64(a); *see also* 9 NYCRR 180.7(g) (oral notice shall be confirmed in writing within 48 hours).

"Upon receipt of the written notice of absconding, the clerk shall cause the proceeding to be placed on the court calendar no later than the next court day for such action as the court may deem appropriate and shall give notice of such court date to the petitioner, presentment agency and [the child's attorney]." 22 NYCRR §205.64(b).

B. Return of Runaway by Police or Peace Officer

"A peace officer, acting pursuant to such peace officer's special duties, or a police officer may return to a parent or other person legally responsible for such child's care any child under the age of eighteen who has run away from home without just cause or who, in the reasonable conclusion of the officer, appears to have run away from home without just cause. For purposes of this action, a police officer or peace officer may reasonably conclude that a child has run away from home when the child refuses to give his or her name or the name and address of a parent or other person legally responsible for such child's care or when the officer has reason to doubt that the name or address given are the actual name and address of the parent or other person legally responsible for the child's care." FCA §718(a)

"A peace officer, acting pursuant to the peace officer's special duties, or a police officer is authorized to take a youth who has run away from home or who, in the reasonable opinion of the officer, appears to have run away from home, to a facility certified or approved for such purpose by the office of children and family services, if the peace officer or police officer is unable, or if it is unsafe, to return the youth to his or her home or to the custody of his or her parent or other person legally responsible for his or her care. Any such facility receiving a youth shall inform a parent or other person responsible for such youth's care." FCA §718(b).

"If a child placed pursuant to this article in the custody of a commissioner of social services or an authorized agency shall run away from the custody of such commissioner or authorized agency, any peace officer, acting pursuant to his special duties, or police officer may apprehend, restrain, and return such child to such location as such commissioner shall direct or to such authorized agency and it shall be the duty of any such officer to assist any representative of the commissioner or agency to take

into custody any such child upon the request of such representative." FCA §718(c).

Constitutional search and seizure issues raised when a youth is taken into custody under FCA §718, and found in possession of contraband, are addressed in JRD's *Practice Manual for Children's Lawyers*, *Volume Two, Part Two, Suppression Motions*, Chapter One.

C. Bootstrapping

In *Matter of Naquan J.*, 284 AD2d 1, 727 NYS2d 124 (2d Dept. 2001), the family court instituted contempt proceedings against the respondent pursuant to Judiciary Law §750 *et seq.* and eventually committed the sixteen-year-old respondent to an adult facility, after more than thirty warrants had been issued during the course of a PINS proceeding. The family court had issued an order of protection directing the respondent not to abscond from placement, and based the contempt charges on an alleged violation of that order. The Second Department held that the family court exceeded its authority in bringing the criminal contempt charges, concluding that "the family court did not have the statutory authority to issue the subject contempt orders and commit Naquan to secure detention facilities." 284 AD2d at 6.

In reaching this conclusion, the Second Department relied on FCA §156, which limits the family court's inherent contempt power by prohibiting the use of that power when "a specific punishment or other remedy for such violation is provided in this act or any other law." The court noted that "if the child fails to comply with the terms and conditions of the dispositional alternative imposed at the time of the PINS adjudication," there are remedies in FCA §§ 777, 778 and 779, "which essentially state that the court may, upon competent proof that the respondent has violated the order, revoke its original order and make any order that might have been made at the time the original order was made." 284 AD2d at 4. In addition, under FCA §773, the family court may transfer a PINS to another placement facility upon a finding that his or her presence is seriously detrimental to the welfare of the applicant institution, society, agency or other persons in its care. *Id.*

In addition to finding a statutory proscription in FCA §156, the Second Department found fundamental unfairness in the criminalizing of PINS behavior, and concluded more generally that it was not "permissible for the court to employ a 'bootstrapping' process and use its inherent contempt power to punish this runaway status offender with criminal consequences." 284 AD2d at 6. The Second Department requested legislative action which would provide family court judges with remedies designed to deal with cases like this, but which would not undermine the family court's "foundational purpose to provide a parens patriae role to [PINS individuals]." 284 AD2d at 7.

Although in *Naquan J.* the Second Department was dealing with an attempt to use the family court's power under the Judiciary Law, *In re Jasmine A.*, 284 AD2d 452, 727 NYS2d 122 (2d Dept. 2001) involved the filing of a juvenile delinquency petition alleging criminal contempt against a PINS respondent who had been placed in a residential treatment facility with directions not to leave until she successfully completed the program. The Second Department, although not dealing as it was in *Naquan J.* with the express prohibition in FCA §156 against the institution of Judiciary Law contempt

charges, relied on its reasoning in *Naquan J.* in concluding that delinquency charges could not be maintained either. The Second Department noted:

> [Jasmine's] act of eloping from the treatment facility, although violative of the Family Court's orders, was nevertheless an act consistent with PINS behavior, not with juvenile delinquency. Notwithstanding the Family Court's frustration with the statutory scheme, which often renders the PINS proceeding an exercise in futility, the Family Court may not do indirectly what it is prohibited from doing directly - placing a PINS in a secure facility ... In effect, the Family Court 'bootstrapped' a PINS proceeding into two juvenile delinquency proceedings through employment of its contempt power to punish typical runaway behavior of a PINS ... this is not permitted under the Family Court Act as currently structured.

284 AD2d at 453.

In *Matter of Edwin G.*, 296 AD2d 7, 742 NYS2d 53 (1st Dept. 2002), the family court adjudicated the respondent a PINS and placed him with ACS for twelve months. The family court also entered an order of protection that required the respondent to cooperate with his order of placement and not abscond from the ACS facility. The respondent shortly thereafter absconded, and the family court directed the Corporation Counsel to file a delinquency petition charging the respondent with criminal contempt. The family court found that the respondent had violated its PINS orders and thus found him in criminal contempt and placed him with OCFS for one year. Following the earlier decisions from the Second Department, this First Department reversed, holding that the family court was not empowered to impose a sanction of criminal contempt against a PINS respondent who violated a dispositional order. The family court may not "'bootstrap' the present PINS proceeding into a juvenile delinquency proceeding . . . as a sanction for what, in sum, is PINS-type behavior rather than true delinquency." 296 AD2d at 12. *See also People v. Nancy C.*, 188 Misc2d 383, 727 NYS2d 867 (Watertown City Ct., 2001) (defendant could not be charged with criminal contempt where she left facility in violation of PINS dispositional order).

Delinquency charges may be subject to dismissal not only when the PINS respondent runs away from a facility, but also when he/she violates an order of disposition in some other manner. In *Matter of Asia H.*, 289 AD2d 404, 734 NYS2d 230 (2d Dept. 2001), the Second Department does not set forth the facts, but the juvenile's brief on appeal reveals that the contempt charge in the juvenile delinquency proceeding was based on assaultive behavior that violated an order of protection. Similarly, in *Matter of Jenny M.*, 305 AD2d 225, 758 NYS2d 491 (1st Dept. 2003), the First Department reversed delinquency findings of criminal contempt *and* criminal trespass; the juvenile's brief on appeal reveals that the charges were based on her entry into her own home in violation of a court order. *See also Matter of Daniel I.*, 57 AD3d 666, 871 NYS2d 183 (2d Dept. 2008) (respondent could not be charged with criminal mischief and obstructing governmental administration where he allegedly violated electronic monitoring conditions of PINS probation by damaging strap of monitoring device and

breaking curfew).

Finally, the Court of Appeals addressed these issues in *Matter of Gabriela A.*, 23 NY3d 155 (2014). The Court upheld the Second Department's dismissal of resisting arrest and obstructing governmental administration charges where the respondent resisted probation officers' attempts to take her into custody after she had absconded from a nonsecure facility and the family court had issued a warrant. The Court held that the restraint of a PINS who has absconded is not the same as a criminal arrest and that a PINS who resists being restrained or transported back to a placement facility is not resisting arrest within the meaning of Penal Law §205.30. With respect to the charge of obstructing governmental administration, the Court concluded that the Appellate Division's finding that the respondent's resistance fell within the bounds of the PINS statute rather than Penal Law §195.05 more nearly comported with the weight of the evidence than the findings of the family court. *But see Matter of Dominick M.*, 147 A.D.3d 951 (2d Dept. 2017) (no improper bootstrapping where respondent was arrested for possession of open container of alcohol in public place, a violation not chargeable in delinquency proceeding, and charged with obstructing governmental administration and resisting arrest, since respondent was never subject of PINS proceeding and charges did not arise out of failure to comply with order issued in PINS proceeding).

D. Escape Charge

Under Penal Law §205.05, "[a] person is guilty of escape in the third degree "when he escapes from custody." "Custody" in defined in PL §205.00 as "restraint by a public servant pursuant to an authorized arrest or an order of a court." *See Matter of Joe A.*, 171 Misc2d 241, 653 NYS2d 221 (Fam. Ct., N.Y. Co., 1996) (escape charge defective where there was no indication that employees of placement facility were "public servants"). In *Matter of Bryan "JJ"*, 175 AD2d 416, 572 NYS2d 106 (3rd Dept. 1991), the Third Department held that the respondent could be charged in a delinquency proceeding with escape after he was arrested on a PINS warrant, and then escaped from police custody by jumping out of a police car. In response to the respondent's "bootstrapping" argument, the court asserted that the respondent had not been adjudicated a delinquent based on an escape from a non-secure facility, but rather because he escaped from an officer after an arrest and ran through the streets, which "is a far graver situation than one involving simply leaving a nonsecure facility." 175 AD2d at 417. However, this holding appears to have been fatally undermined by the Court of Appeals' decision in *Matter of Gabriela A.*, 23 NY3d 155.

Moreover, absconding from a non-secure facility arguably does not constitute an escape from "custody" under P.L. §205.05. *Compare Matter of Pauline W.*, NYLJ, 12/4/09, at 27, col. 1 (Fam. Ct., Queens Co.) (escape from non-secure facility constitutes escape from "custody" under P.L. §205.05) *with Matter of Bobby H.*, 25 Misc3d 1245(A), 906 NYS2d 778 (Fam. Ct., Richmond Co., 2009) (juvenile who absconds from non-secure facility cannot be prosecuted for escape in third degree because juvenile is not in "custody" as term is defined by Penal Law §§ 205.00(2) and 205.05; court notes that PINS respondents may not be charged with escape for absconding from non-secure detention facility, and there is less reason to charge delinquency respondent with escape since respondent faces risk of having remand status changed to secure). In *People v Ortega*, 69 NY2d 763, 513 NYS2d 103 (1987),

the Court of Appeals dismissed an escape charge brought under PL §205.05 because the facility from which the defendant escaped was a non-secure psychiatric hospital.

Although PL §205.00(1) includes within the definition of "Detention Facility" any place used for the confinement of a person charged with being or adjudicated as a PINS or a juvenile delinquent, it has been held that for purposes of a second degree escape charge (*see* PL §205.10[1]), a non-secure detention facility is not a "Detention Facility." *Matter of Dylan C.*, 16 NY3d 614, 926 NYS2d 1 (2011) (after enactment of Penal Law provisions, Article Three introduced distinction between secure detention facilities and nonsecure detention facilities, and distinction is crucial because it is anomalous to speak of "escaping" from facility that is characterized by absence of physically restrictive construction, hardware and procedures; in *People v Ortega*, 69 NY2d 763, court held that nonsecure psychiatric hospital did not constitute detention facility, and it would be incongruous to treat adult acquitted of rape upon plea of insanity with impunity for escape from nonsecure psychiatric facility, but deem child answerable to felony charge for leaving nonsecure detention facility to which he had been remanded, through its evidently unlocked door).

IX. Discovery and Trial Preparation

The discovery provisions of the Civil Practice Law and Rules are applicable when "appropriate to the proceedings involved." FCA §165(a). Thus, discovery devices such as a bill of particulars (CPLR 3041), oral depositions (CPLR 3107), written depositions (CPLR 3108), non-party subpoenas (CPLR 3120), interrogatories (CPLR 3130), and requests for admission (CPLR 3123) may be available. *See Matter of Morrison*, 110 Misc2d 329, 442 NYS2d 43 (Fam. Ct., Rensselaer Co., 1981) (court directs attorney for petitioner school official to provide information requested by respondent in demand for bill of particulars); *Matter of Gregory B.*, 88 Misc2d 313, 387 NYS2d 380 (Fam. Ct., Kings Co., 1976) (where respondents were alleging that they did not attend school because of chaotic and dangerous conditions at the school, discovery pursuant to CPLR would be only adequate way of getting information from school authorities); *but cf. Matter of Vanessa R.*, 148 AD2d 989, 539 NYS2d 224 (4th Dept. l989) (while upholding denial of respondent father's motion for pre-trial depositions of one of the child's therapists and the mother, Fourth Department notes that, absent special circumstances, such depositions are not appropriate in child protective proceedings).

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(7) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at fact-finding and dispositional hearings and including factual and legal issues"; "(10) Participate in depositions, negotiations, discovery, pretrial conferences and hearings"; "(13) Obtain evaluations and retain expert services if deemed necessary to zealously defend the client").

NYSBA Standards, Standard C-1 ("To advocate for the client's position, the attorney must conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to: (1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case; (2) Reviewing relevant records of the petitioner in the case; (3) Reviewing the court files of the child, case-related records of the social service agency and other service providers; (4) Contacting attorneys for other parties for background information; (5) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their attorney; (6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records; (7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, child welfare caseworkers, non-respondent parents, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses; (8) Conducting all necessary discovery; (9) Reviewing relevant statements, photographs, video or audio tapes and other evidence; (10) Considering whether the child should be examined by a physician, a mental health professional, or a social worker; (11) Retaining any necessary expert services; (12) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences concerning the child as needed").

NYSBA Standards, Standard C-2 ("The attorney should file petitions, motions,

responses or objections as necessary to represent the child").

Practice Considerations

The role of discovery in PINS proceedings depends on who has filed the petition, and whether that individual/agency is represented by counsel. An unrepresented parent-petitioner is in no position to respond to discovery requests, and so the child's attorney's attempts to secure such discovery will likely be met with the parent's confusion and inaction, and with hostility from the judge. Moreover, in most cases, the parent will freely share with the attorney all desired information in any event, and so formal discovery is unnecessary and there is no reason to risk alienating the parent by requesting it.

When the petitioner is a governmental agency or employee, and the case defies resolution and there is no strategic downside to seeking discovery, the attorney should feel free to demand, and pursue through motion practice, whatever discovery is necessary and appropriate.

According to *Rules of Professional Conduct*, Rule 1.2(a): "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Thus, the respondent should be the one to decide whether to make an admission, whether to testify if the case goes to trial, and what disposition should be sought. The attorney should, of course, provide the respondent with information and guidance concerning those decisions. *Rules of Professional Conduct*, Rule 1.4.

Generally speaking, decisions concerning legal arguments, the choice of witnesses, cross-examination of witnesses, investigation priorities, and other matters that come under the heading of litigation strategy and legal analysis, are made by the attorney. However, although the attorney makes the final decisions, the attorney should consult with the client, and keep the client informed, with respect to litigation decisions and strategies and the overall progress of the case. *Rules of Professional Conduct*, Rule 1.4. *See also Rules of Professional Conduct*, Rule 1.2(e) ("A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client").

When the parent is not the petitioner, it is appropriate to solicit the opinion of the parent and involve the parent in the decision-making process. However, disputes between the respondent and the parent must be resolved in favor of the respondent. *See State Bar Ethics Opinion 648*, 1993 WL 560288 ("If the attorney discerns that the infant's best interests conflict with the actions or views of the parent, the attorney should, nevertheless, act in the child's best interest").

Finally, it must always be remembered that the decision-making process in PINS cases is complicated by the age and maturity level of the client. Obviously, the attorney

should always attempt to bring the respondent into the decision-making process whether or not the decision involved is one which ought to be made by client. However, faced with a youthful client's diminished ability to understand complex factors and strategies, the attorney might properly refrain from discussing certain matters which would be discussed with an adult client, or give less weight to the wishes of the client.

X. Admissions

A. Acceptance Of An Admission

Before accepting an admission, the court shall advise the respondent of his/her right to a fact-finding hearing. The court shall also ascertain through allocution of the respondent and his/her parent or person legally responsible for his/her care, if present, that the respondent: (i) committed the act or acts to which an admission is being entered; (ii) is voluntarily waiving his/her right to a fact-finding hearing; and (iii) is aware of the possible specific dispositional orders. These provisions shall not be waived. FCA §743(a); *see Matter of Chad "H"*, 278 AD2d 601, 717 NYS2d 725 (3rd Dept. 2000) (admission invalid where attorney stated that respondent had circled allegations he denied and admitted the others, and respondent so acknowledged by signing copy of petition, but there was no colloquy concerning allegations in petition and court did not assure itself of the integrity of the process or that the admissions were knowing, intelligent or accurate); *Matter of Justin M.*, 79 AD2d 1028, 435 NYS2d 49 (2d Dept. 1981) (family court erred in failing to conduct further inquiry into basis for admission where respondent exhibited confusion and emotional distress during allocution); *Matter of Felix A.*, 58 AD2d 562, 396 NYS2d 25 (1st Dept. 1977) ("sparse" record failed to disclose that respondent was advised of right to remain silent or questioned by court as to any of the facts alleged in the petition).

It is not sufficient for the child's attorney to state that the respondent admits responsibility. *Matter of Steven Z.*, 19 AD3d 783, 796 NYS2d 459 (3rd Dept. 2005) (allocution inadequate where attorney recited eighteen allegations respondent was admitting, and family court asked respondent one compound question as to whether he was admitting behavior attorney had placed on record); *Matter of Kent H.*, 162 AD2d 1058, 559 NYS2d 60 (4th Dept. 1990) (reversal where admission was made by attorney); *In re Diallo H.*, 94 AD2d 976, 464 NYS2d 102 (4th Dept. 1983) (adjudication reversed and petition dismissed where only evidence concerning respondent's conduct was partial admission from attorney that respondent had been guilty of curfew violations; "'admission' from one who has no personal knowledge of the facts cannot serve as legally competent evidence sufficient to prove the acts complained of beyond a reasonable doubt"); *In re Joseph G.*, 52 AD2d 924, 383 NYS2d 85 (2d Dept. 1976).

The court must advise the respondent and the parent of the respondent's right to remain silent and otherwise comply with the requirements of FCA §741(a). *Compare Matter of Nichole A.*, 300 AD2d 947, 753 NYS2d 162 (3rd Dept. 2002) (adjudication reversed where family court failed to advise respondent of her right to remain silent until engaging in colloquy with respondent and parents *after* the admission); *Matter of Ashley A.*, 296 AD2d 627, 745 NYS2d 121 (3rd Dept. 2002) (admission to violation of probation improper where respondent not advised of right to remain silent) *with Matter of Mark "J"*, 259 AD2d 40, 696 NYS2d 583 (3rd Dept. 1999) (admission upheld where family court failed to inform respondent of right to assigned or retained counsel, but respondent was represented by assigned attorney). It is not sufficient that the respondent was advised of his rights pursuant to §741(a) on another date; the court must so advise the respondent on the date the admission is made. *Matter of Melanie UU.*, 254 AD2d 632, 679 NYS2d 185 (3rd Dept. 1998) (notice given at initial appearance two months earlier not sufficient).

Upon acceptance of an admission, the court shall state the reasons for its determination and shall enter a fact-finding order. The court shall schedule a dispositional hearing in accordance with FCA §749(b) and (c). FCA §743(b).

B. Description of PINS Acts

The court must satisfy itself that the respondent is, in fact, admitting to certain PINS acts.

C. Alford Plea

In *North Carolina v. Alford*, 400 US 25, 91 SCt. 160 (1970), the Supreme Court held that a criminal defendant may plead guilty while claiming innocence in order to obtain the benefits of a plea bargain and avoid the apparent certainty of a conviction and lengthy sentence. The Supreme Court noted that such a plea should not be accepted unless there is evidence of guilt in the record, and the court resolves the apparent conflict by determining on the record that the defendant is knowingly and intelligently waiving the right to a trial despite his or her claim of innocence. In other words, there is a special *Alford* allocution that must be performed. *People v. Serrano*, 15 NY2d 304, 258 NYS2d 386 (1965); *see also People v. Alexander*, 97 NY2d 482, 743 NYS2d 45 (2002).

In *Matter of Tracey B.*, 94 Misc2d 827, 405 NYS2d 609 (Fam. Ct., Onondaga Co., 1978), the court held that it could accept an "Alford" plea in a PINS proceeding.

Representation Standards

NYSBA Standards, Standard D-6 ("The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner").

Practice Considerations

It is the rare PINS case in which the parent or other petitioner can prove none of the charges. In addition, while going to trial in a delinquency case, without a viable defense, because a prosecutor is offering no plea bargaining benefit makes good strategic sense, forcing the respondent and the respondent to go to trial risks exacerbating the problems and the bad blood between them. The child's attorney does not act inappropriately when he/she advises a client to make an admission when the parent refuses to discontinue the proceeding and there is no defense, even though no promise is made regarding disposition, since the parent's good will is critical at the dispositional stage and beyond if the respondent is to ever achieve the family reunification that he/she so desperately may desire. Accordingly, a trial is a rare event for most PINS attorneys; nearly all cases are resolved by way of an admission or result in dismissal. *See Matter of Skylar DD.*, 183 AD.3d 994 (3d Dept. 2020) (no ineffective assistance of counsel where, given evidence of absences, tardiness and school disciplinary referrals, it was a reasonable strategy to have respondent admit allegations, which demonstrated acceptance of responsibility; and, at disposition, counsel argued that respondent should be placed outside of mother's home but with his grandparents, and, although counsel called no witnesses, petitioner had not called witnesses and counsel may have made reasoned choice not to expose grandparents to cross-

examination).

If the respondent makes an admission, the attorney should try to ensure that it is to the most innocuous charge. While, in the future, professionals may examine the petition and not only the fact-finding order, the order is the most conspicuous evidence and it can only help to have the record reflect a finding of, e.g., truancy, rather than, e.g., playing with matches and setting fires or assaulting siblings.

XI. Motion Practice

A. Motion to Dismiss in the Interests of Justice

Courts have disagreed as to whether a PINS proceeding may be dismissed in the interests of justice. *Compare Matter of Doe*, 194 Misc2d 93, 753 NYS2d 656 (Fam. Ct., Delaware Co., 2002) (court dismisses in the interest of justice charges of misbehavior in school where school district specifically sought a more restrictive placement for respondent, and thus compliance with the IDEA was necessary; school district should first attempt to establish a reasonable and appropriate environment for a child before commencing judicial proceedings); *Matter of Ruffel P.*, 153 Misc2d 702, 582 NYS2d 631 (Fam. Ct., Orange Co., 1992) (while the provisions of Article Seven do not appear to contain such a ground for dismissal, it is within the inherent authority of the court to dismiss "in the interests of justice") and *Simon v. Doe*, 165 Misc2d 379, 629 NYS2d 681 (Fam. Ct., Seneca Co., 1995) (dismissal in the interest of justice not justified where child failed to attend school because of school phobia) *with Matter of Kerri H.*, 193 Misc2d 238, 748 NYS2d 236 (Fam. Ct., Seneca Co., 2002) (Article Seven contains no authority for dismissal in the interests of justice) and *Matter of Anonymous*, 11 Misc3d 1058(A), 815 NYS2d 493 (Fam. Ct., Nassau Co., 2006).

There appears to be support for both positions. Unlike FCA Article Three (*see* FCA §315.3), Article Seven contains no provision setting forth standards governing dismissal. Moreover, a juvenile delinquency or criminal proceeding cannot be dismissed in furtherance of justice unless the court balances the statutory factors. *See People v. Rickert*, 58 NY2d 122, 459 NYS2d 734 (1983).

On the other hand, FCA §751 provides that "[t]he court may in its discretion dismiss a petition under this article, *in the interests of justice* where attempts have been made to adjust the case as provided for in [§§ 735 and 742] and the probation service has exhausted its efforts to successfully adjust such case as a result of the petitioner's failure to provide reasonable assistance to the probation service." (emphasis supplied) In addition, FCA §749(a), which governs issuance of an adjournment in contemplation of dismissal, provides that "[a]n adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months *with a view to ultimate dismissal of the petition in furtherance of justice*." (emphasis supplied)

B. Motion to Dismiss Defective Petition

A motion to dismiss a PINS petition may be based on the failure of the petition to "specify[] the acts on which the allegations are based and the time and place they allegedly occurred." FCA §732(a).

A motion also may be based on the absence of diversion-related documentation. *See* FCA §735(c) ("Notwithstanding the provisions of [FCA 216-c], the clerk shall not accept for filing under this part any petition that does not have attached thereto the documentation required by [§735(g)]"); FCA §735(g)(ii) ("The clerk of the court shall accept a petition for filing only if it has attached thereto the following: (A) if the potential petitioner is the parent or other person legally responsible for the youth, a notice from the designated lead agency indicating there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services; and (B) a notice from the designated lead agency stating that it has terminated diversion

services because it has determined that there is no substantial likelihood that the youth and his or her family will benefit from further attempts, and that the case has not been successfully diverted").

If some other basis for dismissal exists – for instance, if the petition fails to state a cause of action because the respondent's behavior does not appear to come within the statute – the motion to dismiss should be made pursuant to CPLR 3211.

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(2) Review the petition to determine if it meets the requirements of F.C.A. § 732 and § 735"; "(8) Consider whether a neglect petition or child protective investigation under F.C.A. § 1034 should be undertaken, and if appropriate and the client consents, make the necessary motions, unless the court proceeds on its own motion under F.C.A. § 716").

NYSBA Standards, Standard D-3 ("The attorney should make appropriate motions, including motions in limine and evidentiary objections, to advance the child's position at or after trial").

XII. Fact-Finding Proceedings

The "Fact-finding hearing" is "[a] hearing to determine whether the respondent did the acts alleged to show that he or she violated a law or is ungovernable or habitually disobedient and beyond the control of his or her parents, guardian or legal custodian." FCA §712(c).

A. Exclusion of General Public

"The general public may be excluded from any hearing under this article and only such persons and the representatives of authorized agencies admitted thereto as have a direct interest in the case." FCA §741(b). For a complete discussion of the issues raised, *see JRD Practice Manual for Children's Lawyers, Volume Two, Part One*, Chapter One.

B. Presence of Parent of Other Person Responsible for Care

"At any hearing under this article, the court shall not be prevented from proceeding by the absence of the respondent's parent or other person responsible for his care if reasonable and substantial effort has been made to notify such parent or responsible person of the occurrence of the hearing and if the respondent and his [attorney] are present. The court shall, unless inappropriate, also appoint a guardian ad litem who shall be present at such hearing and any subsequent hearing." FCA §741(c).

When the parent does not appear on a date the respondent is in court after being arrested, or remanded by the court, the court may issue a summons pursuant to FCA §737(1)(a) or, when appropriate, a warrant pursuant to FCA §738(1).

Practice Considerations

Obviously, when the parent is the petitioner, the case cannot proceed to a fact-finding hearing without the parent being present to provide non-hearsay testimony supporting the charges. A parent's repeated absence from court may be grounds for a motion to covert the proceeding to a neglect proceeding pursuant to FCA §716.

C. Procedures, Evidence and Standard of Proof

The respondent and parent or other person legally responsible must be advised of the respondent's right to remain silent. FCA §741(a); *see Matter of Tabitha E.*, 271 AD2d 719, 705 NYS2d 721 (3rd Dept. 2000) (failure to advise respondent of right to remain silent at dispositional hearing constitutes reversible error).

"Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing." FCA §744(a). For a complete discussion of evidence issues, *see JRD Practice Manual for Children's Lawyers, Volume Two, Part One*, Chapter Eight.

"Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on proof beyond a reasonable doubt. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient." FCA §744(b).

"If the allegations of a petition under this article are not established, the court shall dismiss the petition." FCA §751; *see Matter of Kristopher I.*, 289 AD2d 685, 733 NYS2d 539 (3rd Dept. 2001) (family court erroneously relied on preponderance standard; however, Appellate Division makes finding beyond a reasonable doubt based

on record); *Matter of Terry F.*, 51 AD2d 743, 379 NYS2d 466 (2d Dept. 1976) (where family court relied on preponderance standard, adjudication reversed and case remitted for new fact-finding hearing).

Representation Standards

NYSBA Standards, Standard D-1 ("The attorney should attend and fully participate in all hearings, telephone communications, or other conferences with the court").

NYSBA Standards, Standard D-2 ("The attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during, and after each hearing. Post-court appearance updates should be provided to the child as soon as possible").

NYSBA Standards, Standard D-3 "The attorney should make appropriate motions, including motions in limine and evidentiary objections, to advance the child's position at or after trial. If necessary, the attorney should file briefs in support of evidentiary issues. Further, during all hearings, the attorney should preserve legal issues for appeal, as appropriate").

NYSBA Standards, Standard D-4 ("The attorney should make an opening statement, present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position").

NYSBA Standards, Standard D-5 ("The attorney should decide, in consultation with his or her client, whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the attorney is bound by the child's direction concerning testifying").

NYSBA Standards, Standard D-6 ("The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner").

NYSBA Standards, Standard D-7 ("If appropriate, the attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered and make any necessary post-trial motions").

Practice Considerations

Advocating for Due Process Protections

Given the liberty interests at stake, the child's attorney should always consider arguing for Federal and/or State constitutional due process protections similar to those enjoyed by criminal defendants and juvenile delinquency respondents. The Legislature's decision to apply the reasonable doubt standard certainly lends Legislative intent-based support to such an argument. *See In re Cecilia R.*, 36 NY2d 317, 367 NYS2d 770 (1975) ("The due process to be accorded a juvenile pursuant to our New York family law statutes is consistent with the decision of the United States Supreme Court in In re Gault (387 US 1), requiring States in the adjudicatory phase of juvenile delinquency proceedings to give written notice to the child and his parents of the specific issues they must meet, advise them of their right to be represented by counsel and to have counsel

appointed, to apply the constitutional privilege against self incrimination and to afford the right of confrontation and cross-examination of witnesses"; the tenets established in juvenile delinquency matters "represent governmental recognition of important due process rights of juveniles threatened with loss of liberty in other types of proceedings as well"); FCA §711 ("The purpose of this article is to provide a due process of law for (a) considering a claim that a person is in need of supervision"); *but see Matter of Mary Jane HH.*, 120 AD2d 906, 502 NYS2d 827 (3rd Dept. 1986) (Grand Jury immunity afforded respondent did not preclude use of her testimony in non-criminal PINS proceeding).

Presenting Respondent's Testimony

Calling the respondent to testify is risky business. The respondent may have difficulty absorbing the attorney's advice and guidance and in understanding questions and concentrating on what is happening in court. The respondent may be especially vulnerable to manipulation by a skillful cross-examiner. Indeed, counseling the respondent to forego testifying may be the best course. But if the respondent will be testifying, the attorney must prepare him/her for all aspects of the courtroom experience, especially the rigors of cross-examination, and prepare a brief and simply constructed direct examination that narrows exposure on cross-examination.

Although the Rules of Professional Conduct preclude the child's attorney from presenting testimony that the attorney *knows* is false, the Rules do not forbid presentation of testimony that the attorney merely *believes* is false. See *Rules of Professional Conduct*, Rule 3.3 ("(a) A lawyer shall not knowingly: * * * (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6").

If the juvenile has specifically admitted that his/her defense is fabricated, or facts ascertained during the investigation make it clear that the respondent's claims are false, the testimony cannot be presented. But when the respondent's claims appear unlikely, but there is no clear evidence that he/she is lying, the attorney decision becomes strategic; that is, will the testimony help, or hurt, the defense cause. In some cases, the attorney has come to learn much more than the judge will ever know, and there remains the possibility that the respondent's well-prepared testimony will be persuasive.

Because few children can testify effectively, and fewer still are believed by the judge, the attorney should lean against calling the respondent when there are weaknesses in the petitioner's case that leave open a viable argument for dismissal. The respondent's testimony may fill a hole in the petitioner's case.

The attorney should provide the respondent with a blow-by-blow description of what will happen, identify the role of each person in the courtroom, point out the witness

chair, and make certain the respondent knows that “yes,” not “yeah,” is an appropriate answer. Typical witness instructions should be driven home in simplified language designed for a child. For instance: the respondent should answer “yes” or “no” when possible and give short answers otherwise; should listen to each question carefully; should speak slowly, and with a clear and strong voice; should answer truthfully without arguing with or trying to outwit a cross-examiner; should hesitate before answering questions on cross-examination so the attorney can make objections; and should look at the judge frequently and make eye contact.

The attorney should prepare a list of questions and rehearse direct examination. When necessary, counsel should explain what information a particular question calls for, and suggest appropriate language. At a second rehearsal, the attorney should evaluate the respondent’s progress and do more fine-tuning, and then aim for one, final rehearsal. When doing direct examination, the attorney should elicit only testimony needed to establish the defense. This will minimize opportunities for the respondent to say something damaging or unexpected, and force a cross-examiner to explore new areas with no advance knowledge of what might be said.

Because there is no way to know beforehand what a client will say on the stand, the attorney must, during pretrial preparation, draw out the respondent’s testimony in as much detail as possible, probing for inconsistencies and damaging facts a thorough and skillful cross-examination would reveal. But the best way to gauge the respondent’s testimonial abilities is to conduct a simulated cross-examination. The attorney should forewarn the respondent that he/she will be assuming the role of cross-examiner, and explain why. Although an opposing lawyer’s cross-examination skills should be considered when the attorney is deciding whether to call the respondent and how to structure the direct, the respondent should be prepared for cross as if opposing counsel – or a judge who is known for interrupting with hostile questions – is a first-rate cross-examiner. If the attorney is not a strong cross-examiner, a colleague who is should be recruited. If the respondent’s testimony begins to come undone when challenged, the attorney can revisit the decision to have the respondent testify. At the very least, the attorney will know to steer the respondent clear of certain subjects on direct and help him/her construct truthful, but carefully worded answers that might leave damaging facts camouflaged.

Finally, prior to cross-examination of the respondent at trial, the attorney should think about how active he/she wants to be in making objections other than those designed to exclude inadmissible evidence. Several factors should be weighed. To protect a client who angers easily, gives long-winded answers, and/or is likely to come unglued under cross-examination, the attorney might choose to make numerous objections. Also, the lack of objections might suggest to some judges that the attorney does not really believe in the testimony.

On the other hand, by making few objections, and in other ways appearing relaxed and confident in the respondent’s performance and ability to handle questioning, the attorney impliedly communicates to the judge a belief that the respondent is telling the truth. In addition, frequent objections may not only annoy the judge, but also agitate the respondent and undermine his/her ability to remain focused and calm. The attorney should forewarn the respondent that there may be heated argument and advise him/her to remain calm, and, when making objections, glance over

to make sure the respondent is remaining calm.

D. Time of Hearing

"A fact-finding hearing shall commence not more than three days after the filing of a petition under this article if the respondent is in pre-dispositional placement." FCA §747.

"If the respondent is in pre-dispositional placement, the court may adjourn a fact-finding hearing (i) on its own motion or on motion of the petitioner for good cause shown for not more than three days; (ii) on motion on behalf of the respondent or by his or her parent or other person legally responsible for his or her care for good cause shown, for a reasonable period of time." FCA §748(a). Successive motions to adjourn a fact-finding hearing may be granted only under special circumstances." FCA §748(b). "The court shall state on the record the reason for any adjournment of the fact-finding hearing." FCA §748(c). As in juvenile delinquency proceedings, dismissal is the required remedy where there has been a speedy trial violation. *Matter of Erik N.*, 185 AD2d 433, 585 NYS2d 634 (3rd Dept. 1992) (dismissal required where family court improperly adjourned hearing on its own motion for significantly longer than three days, and the reason given – to await the reception of a diagnostic report – did not justify an adjournment beyond the statutory limit).

Since §747 does not exclude weekends and holidays from the three-day period, it appears that weekends and holidays are included in the computation. *See also* General Construction Law §20; *People ex rel. Barna v. Malcolm*, 85 AD2d 313, 448 NYS2d 176 (1st Dept. 1985), *appeal dism'd* 57 NY2d 675 (interpreting CPL §180.80); *People ex rel. Vrod v. Schall*, 142 Misc2d 968, 539 NYS2d 262 (Sup. Ct. Bronx Co., 1989) (interpreting FCA §325.1); *Matter of Kenneth D.*, 102 Misc2d 363, 423 NYS2d 423 (Fam. Ct. Kings Co., 1980).

However, if the three-day period ends on a weekend or holiday, it appears that the hearing may be commenced on the next court day. GCL §25-a; *Matter of Kerry V.M.*, 267 AD2d 1035, 701 NYS2d 584 (4th Dept. 1999); *People v. Powell*, 179 Misc2d 1047, 690 NYS2d 826 (App. Term, 2d Dept., 1999). However, particularly when pre-dispositional placement commences on a Wednesday, the child's attorney should consider requesting that the hearing be held before the weekend or holiday.

There are no statutory time limits governing fact-finding hearings when the respondent is not in pre-dispositional placement.

For a full discussion of "good cause," "special circumstances," and other speedy trial-related issues in juvenile delinquency proceedings, *see JRD Practice Manual for Children's Lawyers, Volume Two, Part One*, Chapter Six.

E. Role of Judge

The court may not assume a prosecutorial role at the fact-finding hearing. *Matter of Yadiel Roque C.*, 17 A.D.3d 1168, 793 N.Y.S.2d 857 (4th Dept. 2005) (violation of respondent's right to a fair trial where family court assumed the appearance of an advocate by conducting extensive examination of certain witnesses); *Matter of Cynthia H.*, 105 AD2d 1149, 482 NYS2d 394 (4th Dept. 1984) (while citing *People v. Yut Wai Tom*, 53 NY2d 44, Fourth Department finds reversible error where the family court assumed role of absent County Attorney by calling and examining witnesses against

respondent).

Obviously, an unrepresented parent would have difficulty presenting a case at the fact-finding hearing. Accordingly, some judges will appoint counsel for the parent when it appears that there is no longer any possibility of a negotiated settlement and that the case is going to trial. Other judges, while attempting to avoid assuming the role of a prosecutor, choose instead to allow the parent to testify in narrative form regarding each allegation in the petition.

Practice Considerations

Whether or not to object to the judge's involvement in eliciting testimony from the petitioner is a strategic decision for the child's attorney. If an objection is likely to cause the judge to assign an attorney for the petitioner, the result may be a more complete and coherent presentation of the petitioner's case.

Assignment of an attorney to the petitioner can sometimes have a salutary effect. While an unrepresented and insecure petitioner may distrust the attorney and resist negotiating a settlement, a represented petitioner may feel more comfortable giving ground. Also, when the petitioner is being unreasonable, his/her attorney might conspire with the attorney and assist in the negotiation rather than take a hard prosecutorial line.

F. Amendment of Petition

According to CPLR 3025(c), the "court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances."

However, since PINS proceedings are quasi-criminal, it can be argued that application of CPLR 3025(c) is not "appropriate" under FCA §165(a). In *Matter of Andrew R.*, 115 Misc2d 937, 454 NYS2d 820 (Fam. Ct., N.Y. Co., 1982), the Assistant Corporation Counsel, representing the petitioner father, attempted to elicit testimony about misbehavior other than that specifically set forth in the petition, and argued that it was sufficiently pleaded under the umbrella allegation that the respondent "is beyond the lawful control of his parents." The court sustained the child's attorney's objection, concluding that there is a clear legislative intent to accord a PINS respondent adequate notice of the charges, and "a general allegation that a respondent is beyond the lawful control of his parents may not be utilized as a predicate to subject the child's life to parental attack." 115 Misc2d at 938-39.

G. Fact-Finding Order

If the court later adjudicates the respondent a PINS, the order must contain the grounds for the fact-finding. FCA §752; *Matter of Rebecca T.*, 154 AD2d 934, 545 NYS2d 879 (3rd Dept. 1989) (order reversed where court failed to make specific findings supporting adjudication and to advise respondent of right to remain silent).

H. Double Jeopardy

Arguably, as a matter of due process, constitutional double jeopardy principles apply in PINS proceedings. *Cf. Matter of Tad M.*, 123 Misc2d 1071, 475 NYS2d 996 (Fam. Ct., N.Y. Co., 1984).

XIII. Dispositional Proceedings

A. Bifurcated Nature of Proceeding

Article Seven proceedings are bifurcated; the respondent is not adjudicated a person in need of supervision unless it is established at the dispositional stage that the respondent is in need of supervision or treatment. *See* FCA §712(d) ("Dispositional hearing" is "[a] hearing to determine whether the respondent requires supervision or treatment"); *Matter of Stephany OO.*, 22 AD3d 909, 802 NYS2d 289 (3rd Dept. 2005) (respondent's right to hearing violated in absence of evidence that respondent was given opportunity to review or contest reports and offer evidence or that respondent waived right to hearing; order was based on respondent's unsworn consent); *Matter of Tanya "U"*, 243 AD2d 785, 662 NYS2d 625 (3rd Dept. 1997) (adjudication reversed where no sworn testimony was taken and no documentary evidence was admitted to establish that respondent required supervision or treatment; rather, "the dispositional hearing consisted of an unsworn discussion between Family Court, counsel for the parties, the [child's attorney], respondent and petitioner, with references to letters, mental health evaluations and a probation report which were available to the parties but not made a part of the record"); *Matter of Harry J.*, 191 AD2d 1016, 594 NYS2d 946 (4th Dept. 1993) (petitioner bears burden of proving by preponderance of the evidence that disposition is warranted; fact that respondent admitted allegations of petition does not require disposition ordering supervision or treatment).

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(11) Identify (upon consultation with the child) appropriate family and professional resources for the child; (12) Obtain and review all court and agency records concerning the child's placement history and consult with all attorneys who had previously represented the child; (13) Obtain evaluations and retain expert services if deemed necessary to zealously defend the client").

NYSBA Standards, Standard C-1 ("To advocate for the client's position, the attorney must conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to: (1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case; (2) Reviewing relevant records of the petitioner in the case; (3) Reviewing the court files of the child, case-related records of the social service agency and other service providers; (4) Contacting attorneys for other parties for background information; (5) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their attorney; (6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records; (7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, child welfare caseworkers, non-respondent parents, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses"; "(10) Considering whether the child should be examined by a physician, a mental health professional, or a social worker; (11)

Retaining any necessary expert services; (12) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences concerning the child as needed; (13) Ensure that the required efforts to avoid removal of the child from the home have been made. (14) If the child is removed from the home, the attorney should consult with the child and investigate the possibility of placement in the home of a suitable relative or other adult with whom the child has a relationship").

NYSBA Standards, Standard C-3 ("Consistent with the child's legal interests, the attorney should seek appropriate services (by court order, if necessary) to access entitlements, to protect the child's interests and to implement a service plan through a referral back for diversion or for a continuing case. These services may include services for the child or for the parent(s), as long as the request for services is made in order to advance the child's legal interests. Such services may include, but are not limited to: (1) Family preservation-related prevention or reunification services; (2) Sibling and family visits; (3) Child support; (4) Domestic violence prevention, intervention, and treatment; (5) Medical and mental health care; (6) Drug and alcohol treatment; (7) Parenting education; (8) Semi-independent and independent living services; (9) Foster care placement; (10) Education; (11) Recreational or social services; and (12) Housing." The attorney should monitor the child's progress in health care and education. If the child is in foster care, the attorney should monitor the quality of care provided to the child in the foster home or institution. Whenever it is consistent with the child's legal interests, the attorney should also advocate for the broadest parental and sibling visiting and monitor its provision").

NYSBA Standards, Standard C-5 ("The attorney who represents a young person, age 14 or older, should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of placement").

NYSBA Standards, Standard D-8 ("The attorney should, in consultation with the child, develop a dispositional plan and should request a hearing if necessary to advocate for that plan").

B. Time Of Hearing

"Upon completion of the fact-finding hearing the dispositional hearing may commence immediately after the required findings are made." FCA §746.

However, "[o]n its own motion, the court may adjourn the proceedings on conclusion of a fact-finding hearing or during a dispositional hearing to enable it to make inquiry into the surroundings, conditions and capacities of the respondent." FCA §749(b). "An adjournment on the court's motion may not be for a period of more than ten days if the respondent is in pre-dispositional placement, in which case not more than a total of two such adjournments may be granted in the absence of special circumstances. If the respondent is not in pre-dispositional placement, an adjournment may be for a reasonable time, but the total number of adjourned days may not exceed two months." FCA §749(b); *see Matter of Ashley EE.*, 81 AD3d 1124, 917 NYS2d 374 (3d Dept. 2011) (no error where court adjourned dispositional hearing beyond two-month deadline; Article Seven does not provide for dismissal for failure to provide speedy dispositional hearing).

On motion on behalf of the respondent or by his parent or other person legally responsible for his care, the court may adjourn the proceedings on conclusion of a fact finding hearing or during a dispositional hearing for a reasonable period of time. FCA §749(c).

C. Dispositional Reports

"All reports or memoranda prepared or obtained by the probation service shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with this section or as otherwise provided for by law. Except as provided in [FCA §735], such reports or memoranda shall not be furnished to the court prior to the completion of the fact-finding hearing and the making of the required findings." FCA 750(1); *but see Matter of Devon H.*, 208 AD2d 1098, 617 NYS2d 549 (3rd Dept. 1994) (although probation failed to include in the package of descriptive materials sent to private facilities the most recent evaluative report, it was unlikely that inclusion of full report would have precipitated a more favorable response); *Matter of Hasan R.*, 177 AD2d 817, 576 NYS2d 431 (3rd Dept. 1991) (no error where family court proceeded without updated psychological evaluation, but there was a recent psychiatric evaluation report which had been dictated over the telephone by the psychiatrist, and a number of other psychological, psychiatric, school and probation reports).

"After the completion of the fact-finding hearing and the making of the required findings and prior to the dispositional hearing, the reports or memoranda prepared or obtained by the probation service and furnished to the court shall be made available by the court for examination and copying by the child's [attorney] or by the respondent if he is not represented by [an attorney]. All diagnostic assessments and probation investigation reports shall be submitted to the court at least five court days prior to the commencement of the dispositional hearing." FCA §750(2).

"In its discretion the court may except from disclosure a part or parts of the reports or memoranda which are not relevant to a proper disposition, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the reports or memoranda are not disclosed, the court shall state for the record that a part or parts of the reports or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to review on any appeal from the order of disposition. If such reports or memoranda are made available to respondent or his [attorney], they shall also be made available to the counsel presenting the petition pursuant to [FCA §254] and, in the court's discretion, to any other attorney representing the petitioner." FCA §750(2); *see Matter of Kenneth J.*, 102 Misc2d 415, 423 NYS2d 821 (Fam. Ct., Richmond Co., 1980) (privately retained attorney representing petitioner not entitled to confidential dispositional reports).

D. Independent Reports Obtained by Child's Attorney

Pursuant to County Law §722-c, the child's attorney may request resources for an independent clinical or other evaluation of the respondent. *See Matter of Norman K.*, 62 AD2d 1038, 404 NYS2d 39 (2d Dept. 1978) (new dispositional hearing ordered

where family court permitted respondent to be examined by psychologist of his own choosing on condition that copy of psychologist's report be given to prosecution, court and probation department; Second Department concludes that disclosure requirement applies only to probation reports and assessments, and the effect of imposing such conditions "would not be to provide more information for the court, but rather, as here, to discourage the defense from using its own experts to prepare for the dispositional hearing").

Representation Standards

NYSBA Standards, Standard B-2 (attorney should "(13) Obtain evaluations and retain expert services if deemed necessary to zealously defend the client").

E. Procedures, Evidence and Standard of Proof at Hearing

The respondent is entitled to appropriate due process protections at the dispositional hearing, including the right to be present, *Matter of Cecilia R.*, 36 NY2d 317, 367 NYS2d 770 (1975), and the right to review and contest the evidence presented. *Matter of Ashley MM.*, 271 AD2d 796, 705 NYS2d 447 (3rd Dept. 2000); *see also* FCA §711 ("The purpose of this article is to provide a due process of law for (a) considering a claim that a person is in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged in need of supervision"). The child's attorney should argue that although it is not directly applicable, FCA §350.4, which provides, *inter alia*, that the court may call witnesses who may be cross-examined by the parties, that the parties may call witnesses and offer such rebuttal or surrebuttal evidence as the court may deem appropriate, and that the parties may deliver statements and rebuttal statements concerning the advisability of specific dispositional alternatives, should be used as a guide.

The respondent and parent or other person legally responsible must be advised of the respondent's right to remain silent. FCA §741(a); *Matter of Mercedes M.M.*, 52 AD3d 1210, 859 NYS2d 550 (4th Dept. 2008) (PINS adjudication reversed and new dispositional hearing ordered where family court failed to advise respondent of right to remain silent at dispositional hearing, at which respondent testified); *Matter of Tabitha E.*, 271 AD2d 719, 705 NYS2d 721 (3rd Dept. 2000) (failure to advise respondent of right to remain silent at dispositional hearing constitutes reversible error).

"Only evidence that is material and relevant may be admitted during a dispositional hearing." FCA §745(a). "An adjudication at the conclusion of a dispositional hearing must be based on a preponderance of the evidence." FCA §745(b).

Practice Considerations

A dispositional hearing, at which the respondent has the right to, among other things, cross-examine witnesses, should not be requested every time the respondent is challenging a dispositional recommendation. Moreover, when the recommendation is based on a demonstrable pattern of misconduct, the child's attorney should not concentrate on discrediting the witnesses making the recommendation – witnesses who are trained professionals and usually are voicing defensible conclusions drawn from the evidence – and risk bringing to light additional prejudicial information and otherwise buttressing the witness's opinion. Except in the rare case in which the recommended

disposition is based on inaccurate and unreliable information and on conclusions that are easily discredited on cross-examination, the attorney's preferred strategy is to focus the judge's attention on the respondent's positive achievements, and outline for the judge a plan of supervision and services that will help the respondent succeed in school and refrain from misconduct.

Deciding Whether to Request a Full Hearing

A full adversarial hearing always should be requested by the attorney when the respondent is contesting a placement recommendation. There is little the judge can do to further punish the respondent for choosing to fight, and the prospect of a protracted hearing might create an incentive for the judge to propose a settlement involving probation supervision, and, if necessary, pressure the petitioner to withhold his/her own request for a hearing.

When a non-placement disposition is recommended, and there is evidentiary support for an even more favorable result, such as an ACD, the proper course of action is not as clear, and should be tailored to the circumstances and the particular judge involved. Faced with the attorney's demand for a time-consuming hearing, a judge might lean towards granting the attorney's request. With a judge who is loathe to create the impression that he/she can be coerced by the threat of a hearing, the attorney might be better off challenging the recommendation through the presentation of documentary evidence and oral argument. Although something is lost when there are no live witnesses, the attorney's insistence upon a full hearing may anger the judge and destroy any chance of prevailing, while a willingness to fight battles selectively will be appreciated, and perhaps rewarded, by the judge. If the attorney finds through experience that a particular judge never departs from the Probation Department's recommendation, the attorney can adjust his/her strategy; however, judges who pressure the attorney to waive a full hearing usually know that they must reward the attorney some of the time.

Cross-Examining the Probation Officer

Pre-conditioned to cross-examine adverse witnesses, the attorney will be tempted to challenge at the dispositional hearing the probation officer and the mental health examiner whose reports and placement recommendations have been submitted. However, while challenging through cross-examination the legally sufficient testimony of witnesses is the only way to win at trial, cross-examination at a dispositional hearing may at worst be counterproductive, and at best be unnecessary if not beside the point.

The testimony of the probation officer has limited intrinsic value. While the officer may be known and respected by the judge, usually he/she is not viewed as an expert who is providing the judge with insight into a subject beyond the scope of the judge's expertise. An experienced family court judge is likely to believe that, like an experienced probation officer, he/she is capable of formulating, based on information regarding the respondent's legal and social history and mental status, some common sense expectations regarding the respondent's future behavior. Thus, the attorney should be concerned less with the probation officer's bottom-line opinion than with the facts uncovered during the officer's investigation. Nothing the attorney does during cross-examination is going to change the probation officer's opinion or the facts stated in the report. While some lawyers like to elicit testimony from the probation officer highlighting positive information in the report, an attorney representing the petitioner will then

highlight the negative information, and neither side gains any traction. For the attorney, therefore, an indirect attack on the probation officer is best.

The attorney should attempt to establish what the probation officer has failed to do during his/her investigation. For instance, the probation officer may be relying on school records but has not spoken to school officials; has not interviewed certain family members, including a relative who is offering to become a custodian; or has not contacted those in the community, such as members of the clergy, sports coaches or employers, with whom the respondent has had extensive and positive contacts. This type of challenge, while worth pursuing in conjunction with other strategies, does have its limitations, however; while the attorney may be able to establish that the probation officer has formulated a recommendation without performing a thorough investigation, the evidence of the respondent's history of misconduct remains unchallenged.

The attorney also should attempt to establish that the probation officer, having decided at the outset that placement is appropriate, has made no effort to uncover or follow up on favorable information, and has failed to even consider an alternative plan that would allow the respondent to remain at home under probation supervision. Some probation officers can be challenged through cross-examination establishing that the officer recommends placement in a remarkably high percentage of cases. Because the Family Court Act requires the judge to determine whether probation has made appropriate and reasonable efforts to eliminate the need for placement, these attacks will lend support to the attorney's legal argument at the hearing.

While some attorneys also attempt to induce the probation officer to admit, and in doing so remind the judge, that the services the respondent requires are available in the community, the judge already knows that, and the attorney risks providing the probation officer with an opportunity to explain why the respondent is unlikely to adhere to any court-ordered regimen. Moreover, like an attack on the probation officer's lack of thoroughness, this type of challenge, by itself, may have limited value, particularly when the judge concludes that, given the respondent's history of misconduct, the probation officer's inclination to ignore non-placement options is understandable.

Cross-Examining the Mental Health Examiner

Needless to say, the best way to challenge the mental health examiner is with another, apparently more qualified and perceptive, mental health expert. Faced with a placement recommendation the respondent wants to challenge, the attorney usually should request authorization pursuant to County Law §722-c for a defense expert.

Like the probation officer, the mental health examiner may be open to attack on the ground that he/she failed to conduct a thorough evaluation – often, the expert has spent less than an hour with the respondent and little or no time with his/her family and other important figures – and, therefore, has offered an opinion of limited value. The mental health examiner, like the probation officer, may have a history of recommending placement in nearly all cases. The attorney also can attempt to show that the expert's conclusions – usually expressed in a canned opinion that the respondent lacks impulse control and suffers from a conduct disorder – lack sufficient foundation in the record. A witness's arrogance, tendency to overstate the case, and/or unwillingness to make reasonable concessions, should be exposed and exploited.

On the other hand, experts usually are polished and clever witnesses, and few lawyers are able to cross-examine them effectively. The expert's conclusions may be

based on the respondent's proven history of misconduct, and on statements made by the respondent that do reflect a lack of insight and remorse. Usually, the attorney's principal goal at the hearing is to convince the judge that, regardless of what the respondent has done in the past, a combination of probation supervision and rehabilitative services will reduce to an acceptable level the risk of future misconduct. Thus, it may be best for the attorney to forego a risky cross-examination, and concentrate on working around the expert's conclusions; in fact, when the expert has prescribed treatment that can most easily be found in the community rather than in institutional care, the attorney can even work *with* the expert's conclusions.

Presenting a Dispositional Plan

Because they rarely suffice to undermine the placement recommendation, the strategies described above must be topped off with the final, and most important, component of the defense case at disposition; the presentation of a dispositional plan of supervision and rehabilitative services.

The attorney should call as witnesses all individuals who are or will soon be providing educational or mental health services to the respondent. The witnesses should describe in detail the services provided, and explain why the respondent appears to be a good candidate for rehabilitation. Any progress the respondent has made since his/her arrest should be detailed and highlighted. While the respondent should not be asked to bite off more than he/she can chew, it is best if the witnesses set forth for the judge a schedule of activities -- a "net" of supervision -- that keeps the respondent too busy to get into trouble. If the respondent objects to the degree of structure and complains about the loss of freedom, the attorney should explain that the alternative is placement.

In addition to these witnesses, the attorney also should call other supportive witnesses, such as school personnel, whose objectivity cannot be questioned. When the parent is not the petitioner, or is contesting a placement recommendation, at least one of the respondent's parents should testify. While judges understand that parents do not always make good witnesses, the failure to present the parent's personal expression of faith in his/her child and willingness to provide a high level of supervision, and to expose the parent to cross-examination, usually is taken by the judge to be an indication that the attorney is hiding something, and/or lacks confidence in the parent.

Finally, the witness with the most potential – and the witness from whom the judge most wants to hear – is the respondent. While the judge will understand the attorney's reluctance to expose an immature and/or intellectually limited client to cross-examination, and is unlikely to draw a negative inference if the respondent does not testify, unexpected success at a dispositional hearing comes most often when the respondent has testified, and won over the judge.

F. Dispositional Orders

"If the allegations of a petition under this article are not established, the court shall dismiss the petition." FCA §751; *see Matter of Anthony J.*, 87 Misc2d 34, 383 NYS2d 851 (Fam. Ct., Onondaga Co., 1976) (dismissal ordered where respondent refused probation, and court could not find that treatment needed by respondent was available in placement).

"If the allegations of a petition under this article are established in accord with

part three, the court shall enter an order finding that the respondent is a person in need of supervision. The order shall state the grounds for the finding and the facts upon which it is based." FCA §752; *Matter of Rebecca T.*, 154 AD2d 934, 545 NYS2d 879 (3rd Dept. 1989) (order reversed where court failed to make specific findings supporting adjudication and to advise respondent of right to remain silent).

1. Possible Orders

"Upon an adjudication of person in need of supervision, the court shall enter an order of disposition: (a) Discharging the respondent with warning; (b) Suspending judgment in accord with [§755]; (c) Continuing the proceeding and placing the respondent in accord with [§756]; provided, however, that the court shall not place the respondent in accord with [§756] where the respondent is sixteen years of age or older, unless the court determines and states in its order that special circumstances exist to warrant such placement; *or* (d) Putting the respondent on probation in accord with [§757]." FCA §754(1). The court must elect one disposition from among these dispositional alternatives. *Matter of Lester NN.*, 76 AD2d 687, 432 NYS2d 258 (3rd Dept. 1980) (court could not divide supervisory responsibility between Department of Social Services and Department of Probation); *but see Matter of Lee V.*, 203 AD2d 639, 610 NYS2d 99 (3rd Dept. 1994) (family court could order that respondent reside with father during DSS placement, since order does not divide supervisory responsibility between a social services department and a probation department).

"The order shall state the court's reasons for the particular disposition." FCA §754(2)(a); *Matter of Samantha T.*, 296 AD2d 869, 744 NYS2d 626 (4th Dept. 2002) (order adequate where it stated, *inter alia*, that respondent requires supervision and placement because she "continues her behavior despite efforts to permit her to remain in the community"); *Matter of Tabitha E.*, 271 AD2d 719, 705 NYS2d 721 (3rd Dept. 2000) (statute requires that order specify court's underlying rationale for particular disposition; it "is simply insufficient to state in conclusory terms the basis for the disposition"); *Matter of Mark VV.*, 258 AD2d 786, 685 NYS2d 865 (3rd Dept. 1999) (required information may not simply be stated on record, but must be included in order, "both for judicial and policy review"); *Matter of Tynisah S.*, 201 AD2d 958, 607 NYS2d 532 (4th Dept. 1994) (although court stated reasons for its determination on record, "the requirement of the statute is mandatory"); *Matter of Randy SS.*, 222 AD2d 884, 635 NYS2d 106 (3rd Dept. 1995) (matter remitted for compliance with statute where family court's order of disposition failed to state reasons for particular disposition).

2. Suspended Judgment

The maximum duration of any term or condition of a suspended judgment is one year, unless the court finds at the conclusion of that period that exceptional circumstances require an additional period of one year. FCA §755(b).

"The court may order as a condition of a suspended judgment restitution or services for public good pursuant to [FCA §758-a], and, except when the respondent has been assigned to a facility in accordance with [Executive Law §504], in cases wherein the record indicates that the consumption of alcohol by the respondent may have been a contributing factor, the court may order attendance at and completion of an alcohol awareness program established pursuant to [Mental Hygiene Law §19.25]."

FCA §755(a).

The permissible terms and conditions of a suspended judgment are set forth in 22 NYCRR §205.66(a): "An order suspending judgment entered pursuant to [§754] shall be reasonably related to the adjudicated acts or omissions of the respondent and shall contain at least one of the following terms and conditions directing the respondent to: (1) attend school regularly and obey all rules and regulations of the school (it should be kept in mind that placement cannot be ordered pursuant to FCA §756(a)(iii) where the only underlying PINS fact-finding is based on an unlawful failure to attend school); (2) obey all reasonable commands of the parent or other person legally responsible for the respondent's care; (3) avoid injurious or vicious activities; (4) abstain from associating with named individuals; (5) abstain from visiting designated places; (6) abstain from the use of alcoholic beverages, hallucinogenic drugs, habit-forming drugs not lawfully prescribed for the respondent's use, or any other harmful or dangerous substance; (7) cooperate with a mental health or other appropriate community facility to which the respondent is referred; (8) make restitution or perform services for the public good; (9) restore property taken from the petitioner, complainant or victim, or replace property taken from the petitioner, complainant or victim, the cost of said replacement not to exceed $1,000; (10) repair any damage to, or defacement of, the property of the petitioner, complainant or victim, the cost of said repair not to exceed $1,000; (11) abstain from disruptive behavior in the home and in the community; (12) cooperate in accepting medical or psychiatric diagnosis and treatment, alcoholism or drug abuse treatment or counseling services, and permit an agency delivering that service to furnish the court with information concerning the diagnosis, treatment or counseling; (13) attend and complete an alcohol awareness program established pursuant to section 19.25 of the Mental Hygiene Law; (14) comply with such other reasonable terms and conditions as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the filing of a petition."

"An order entered pursuant to section 754 of the Family Court Act may set a time or times at which the probation service shall report to the court, orally or in writing, concerning compliance with the terms and conditions of said order." 22 NYCRR 205.66(c). "A copy of the order setting forth the terms and conditions imposed and the duration thereof shall be furnished to the respondent and to the parent or other person legally responsible for the respondent." 22 NYCRR §205.66(d).

The respondent should consider moving after expiration of the suspended judgment order for dismissal of the proceeding, and move pursuant to FCA §762 to vacate the fact-finding as well. *Cf. Matter of Leenasia C.*, 154 A.D.3d 1 (1st Dept. 2017); *Matter of Anoushka G.*, 132 A.D.3d 867 (2d Dept. 2015).

3. Probation

a. Length of Probation

"The maximum period of probation shall not exceed one year. If the court finds at the conclusion of the original period that exceptional circumstances require an additional year of probation, the court may continue probation for an additional year." FCA §757(b). The order may extend beyond the respondent's eighteenth birthday.

Matter of Matthew L., 65 AD3d 315, 882 NYS2d 291 (2d Dept. 2009) (Family Court Act authorizes issuance of probation order extending beyond respondent's eighteenth birthday without consent; "placing a PINS in the care of the Department of Social Services at least provides that individual with an opportunity to benefit from educational programs, counseling, and services aimed at teaching independent living skills," and "[i]t is equally important to give the Family Court the option of involuntarily placing a teenager on probation after the age of 18 where, as here, it is clear that the child has been generally noncompliant with his probation officer"); *Matter of Brittny MM.*, 51 AD3d 1303, 858 NYS2d 815 (3rd Dept. 2008), *lv denied* 11 NY3d 713 (nothing in §757 prevents order of probation from extending beyond child's 18th birthday, particularly where respondent consented to order, and thus violations alleged to have occurred after respondent turned 18, but before order of probation expired, were properly before court); *Matter of Carliesha C.,* 17 AD3d 1057, 794 NYS2d 211 (4th Dept. 2005) (violation of probation petition properly filed after respondent's 18th birthday; respondent remained under court's jurisdiction pending expiration or termination of period of order of probation, which extended beyond 18th birthday), which, in some instances, will be the disposition of choice in a case commenced around the time of the respondent's eighteenth birthday.

b. Standard Terms and Conditions

The permissible terms and conditions of a probation order are set forth in 22 NYCRR §205.66(b): "An order placing the respondent on probation in accordance with [§757] shall contain at least one of the following terms and conditions, in addition to any of the terms and conditions set forth in subdivision (a) of this section, directing the respondent to: (1) meet with the assigned probation officer when directed to do so by that officer; (2) permit the assigned probation officer to visit the respondent at home or at school; (3) permit the assigned probation officer to obtain information from any person or agency from whom the respondent is receiving or was directed to receive diagnosis, treatment or counseling; (4) permit the assigned probation officer to obtain information from the respondent's school; (5) cooperate with the assigned probation officer in seeking to obtain and in accepting employment and employment counseling services; (6) submit records and reports of earnings to the assigned probation officer when requested to do so by that officer; (7) obtain permission from the assigned probation officer for any absence from the county or residence in excess of two weeks; or (8) attend and complete an alcohol awareness program established pursuant to section 19.25 of the Mental Hygiene Law; (9) do or refrain from doing any other specified act of omission or commission that, in the opinion of the court, is necessary and appropriate to implement or facilitate the order placing the respondent on probation."

In addition, "[t]he court may order as a condition of probation restitution or services for public good pursuant to [FCA §758-a]." FCA §757(c). "In cases wherein the record indicates that the consumption of alcohol by the respondent may have been a contributing factor, the court may order as a condition of probation attendance at and completion of an alcohol awareness program established pursuant to section 19.25 of the mental hygiene law." FCA §757(d).

c. School Attendance

It has been held that the court may require the respondent to attend school as a condition of probation even after he/she is no longer required to attend pursuant to the Education Law. *Matter of Wendy C.*, 133 AD2d 904, 520 NYS2d 277 (3rd Dept. 1987). This holding appears to be in conflict with the Third Department's earlier ruling in *Matter of Terry UU.*, 52 AD2d 683, 382 NYS2d 373 (3rd Dept. 1976) (family court abused discretion in placing respondent for a period more than one year beyond time respondent was required to attend school). *See also People ex rel. Tara P. v. DiStefano*, 146 Misc2d 513, 550 NYS2d 989 (Fam. Ct., Dutchess Co., 1989) (in habeas proceeding, court rejects challenge to placement based on truancy of respondent who was not legally required to attend school; court opines that after *Wendy C.*, *Terry UU.* is no longer good law). However, the Second Department's decision in *Matter of Charles Frederick M.*, 228 AD2d 601, 644 NYS2d 758 (2d Dept. 1996) (application for termination of placement properly denied where respondent had problems other than truancy), and the Third Department's decision in *Matter of Ellie "OO"*, 85 AD2d 841, 446 NYS2d 432 (3rd Dept. 1981) (same as *Charles Frederick M.*), hew more closely to *Terry UU.*

However, it should be kept in mind that placement cannot be ordered pursuant to FCA §756(a)(iii) where the only underlying PINS fact-finding is based on an unlawful failure to attend school.

d. Electronic Home Monitoring

The court may require electronic home monitoring as a condition of probation. *Matter of Kristian CC.*, 24 AD3d 930, 805 NYS2d 473 (3rd Dept. 2005), *lv denied* 6 NY3d 710.

e. Service of Order

"A copy of the order setting forth the terms and conditions imposed and the duration thereof shall be furnished to the respondent and to the parent or other person legally responsible for the respondent." 22 NYCRR §205.66(c).

Practice Considerations

Because the conditions of an adjournment in contemplation of dismissal can mirror the conditions set forth in connection with an order of probation, in any case in which the respondent will be permitted to remain at home the child's attorney should consider arguing that an adjournment in contemplation of dismissal, which would leave the respondent without an adjudication as a person in need of supervision, would be appropriate. *See Matter of Justin Charles H.*, 9 AD3d 316, 780 NYS2d 13 (1st Dept. 2004) (in juvenile delinquency proceeding, family court erred in adjudicating respondent a juvenile delinquent and conditionally discharging him for twelve months where the finding was based on respondent's admission that, while "horsing around" at 2:30 a.m. on a subway platform, he threw pennies at a train and struck the conductor, "accidentally hit[ting] him in the face"; court notes that respondent had not previously been in trouble at home or in school, that the underlying incident was an act of thoughtlessness committed by an adolescent fooling around with some friends after a party on a weekend night, and that there is no indication that respondent's parents are

unable to supervise him and his home is described as a stable one).

4. Restitution

"In cases involving acts of children over twelve and less than eighteen years of age, the court may (a) recommend as a condition of placement, or order as a condition of probation or suspended judgment, restitution in an amount representing a fair and reasonable cost to replace the property or repair the damage caused by the child, not, however, to exceed one thousand dollars. The court may require that the child pay out of his or her own funds or earnings the amount of replacement or damage, either in a lump sum or in periodic payments in amounts set by the court; and/or (b) order as a condition of placement, probation or suspended judgment, services for the public good, taking into consideration the age and physical condition of the child." FCA §758-a(1).

"If the court recommends restitution or requires services for the public good in conjunction with an order of placement pursuant to section seven hundred fifty-six, the placement shall be made only to an authorized agency which has adopted rules and regulations for the supervision of such a program, which rules and regulations shall be subject to the approval of the state department of social services. Such rules and regulations shall include, but not be limited to provisions (i) assuring that the conditions of work, including wages, meet the standards therefor prescribed pursuant to the labor law; (ii) affording coverage to the child under the workers' compensation law as an employee of such agency, department or institution; (iii) assuring that the entity receiving such services shall not utilize the same to replace its regular employees; and (iv) providing for reports to the court not less frequently than every six months, unless the order provides otherwise." FCA §758-a(2).

"If the court requires restitution or services for the public good as a condition of probation or suspended judgment, it shall provide that an agency or person supervise the restitution or services and that such agency or person report to the court not less frequently than every six months, unless the order provides otherwise. Upon the written notice sent by a school district to the court and the appropriate probation department or agency which submits probation recommendations or reports to the court, the court may provide that such school district shall supervise the performance of services for the public good." FCA §758-a(3).

"The court, upon receipt of the reports provided for in subdivision two of this section may, on its own motion or the motion of any party or the agency, hold a hearing to determine whether the placement should be altered or modified." FCA §758-a(4).

5. Order of Protection

"The court may make an order of protection in assistance or as a condition of any order issued under this article. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or other person legally responsible for the child's care or the spouse of the parent or other person legally responsible for the child's care, or respondent or both." FCA §759; *see Matter of Brett M.*, 125 Misc2d 1006, 480 NYS2d 711 (Fam. Ct., Richmond Co., 1984) (statute covers non-petitioner parents).

Such an order may require any such person (a) to stay away from the home, school, business or place of employment of any other party, the other spouse, the other parent or the child, and to stay away from any other specific location designated by the

court; (b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods; (c) to refrain from committing a family offense, as defined in subdivision one of section eight hundred twelve of this act, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons; (d) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this act or the domestic relations law; (e) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child; (f) to participate in family counseling or other professional counseling activities, or other services, including alternative dispute resolution services conducted by an authorized person or an authorized agency to which the youth has been referred or placed, deemed necessary for the rehabilitation of the youth, provided that such family counseling, other counseling activity or other necessary services are not contrary to such person's religious beliefs; (g) to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order; (h) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household; and/or (i) to observe such other conditions as are necessary to further the purposes of protection. FCA §759.

"The court may also award custody of the child, during the term of the order of protection to either parent, or to an appropriate relative within the second degree. Nothing in this section gives the court power to place or board out any child to an institution or agency. In making orders of protection, the court shall so act as to insure that in the care, protection, discipline and guardianship of the child his religious faith shall be preserved and protected." FCA §759.

"Notwithstanding the foregoing provisions, an order of protection, or temporary order of protection where applicable, may be entered against a former spouse and persons who have a child in common, regardless whether such persons have been married or have lived together at any time." FCA §759.

Upon the issuance of an order of protection, or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with FCA §842-a. FCA §780-a.

6. Placement

a. Type of Placement

The court "may: (i) place the child in [his/her] own home; (ii) order the child be placed in the custody of a suitable relative or other suitable private person; or (iii) order the child be placed in the custody of a commissioner of social services." FCA §756(a).

"Where the child is placed with the commissioner of the local social services district: (i) (A) the child may be placed by the social services district into a foster boarding home; or (B) if the court finds that the respondent is a sexually exploited child

as defined in [SSL §447-a(1)], an available long-term safe house; or (ii) the court may direct the commissioner to place the child with an authorized agency or class of authorized agencies." FCA §756(b).

However, the child may not be placed in the custody of a commissioner of social services where the only PINS finding made against the respondent is that he or she unlawfully failed to attend school, or, in other cases, unless the court finds and states in its written order that the placement of the respondent is in the best interest of the respondent, and that it would be contrary to the welfare of the respondent to continue in their own home. FCA §756(c).

Unless the dispositional order provides otherwise, the court so directing shall include one of the following alternatives to apply in the event that the commissioner is unable to so place the child: (i) the commissioner shall apply to the court for an order to stay, modify, set aside, or vacate such directive pursuant to [FCA §§ 762 or 763]; or (ii) the commissioner shall return the child to the family court for a new dispositional hearing and order." FCA §756(d).

It should be noted that when placing a New York City juvenile delinquent with the Administration for Children's Services pursuant to the 2012 "Close to Home" legislation, the court cannot specify an agency or class of authorized agencies. FCA §353.3(2)(i). In order to obtain the advantage of such a specification, the child would have to obtain a PINS substitution order pursuant to FCA §311.4.

b. Length of Placement

"Placements under [FCA §756(a)(iii)] may be for an initial period of no greater than sixty days. The court may extend a placement pursuant to [§756-a]." FCA §756(e).

It appears that an initial placement, as opposed to an extension of placement pursuant to FCA §756-a(g), may begin, or reach beyond, the respondent's eighteenth birthday. *Matter of Thomas M.*, 62 AD3d 1003, 878 NYS2d 903 (2d Dept. 2009) (family court had authority to initially place respondent, without consent, for period extending beyond 18th birthday); *Matter of Brittny MM.*, 51 AD3d 1303 (3d Dept. 2008); *see* also *Matter of Robert J.*, 2 NY3d 339, 778 NYS2d 763 (2004) (family court may order initial placement that extends beyond delinquency respondent's eighteenth birthday; in deciding to permit such placement, Legislature has strengthened probation as a viable option for older juveniles, who otherwise could ignore conditions of probation without serious consequences); *In re Jude F.*, 291 AD2d 165 (2d Dept. 2002) (initial placement may be order after child turns eighteen).

c. Placement of Child Over the Age of Sixteen

"[T]he court shall not place the respondent ... where the respondent is sixteen years of age or older, unless the court determines and states in its order that special circumstances exist to warrant such placement[.]" FCA §754(1)(c).

d. Reasonable Efforts Determination

In the placement order, the court "shall determine: (i) whether continuation in the child's home would be contrary to the best interest of the child and where appropriate, that reasonable efforts were made prior to the date of the dispositional hearing held pursuant to this article to prevent or eliminate the need for removal of the child from his

or her home and, if the child was removed from his or her home prior to the date of such hearing, that such removal was in the child's best interest and, where appropriate, reasonable efforts were made to make it possible for the child to return safely home." FCA §754(2)(a); *see also* SSL § 458-m (describes services provided by "family support services program," which is "a program established pursuant to this title to provide community-based supportive services to children and families with the goal of preventing a child from being adjudicated a person in need of supervision and help prevent the out of home placements of such youth or preventing a petition from being filed under article seven of the family court act").

"If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding; and (ii) in the case of a child who has attained the age of fourteen, the services needed, if any, to assist the child to make the transition from foster care to independent living. Nothing in this subdivision shall be construed to modify the standards for directing pre-dispositional placement set forth in section seven hundred thirty-nine of this article." FCA §754(2)(a); *see Matter of Jessica PP.*, 23 AD3d 953, 804 NYS2d 463 (3rd Dept. 2005) (placement order reversed and case remitted to family court where dispositional order attempted to satisfy "reasonable efforts" requirement by stating that "[a]ll prior interventions have been unsuccessful, including prior hospitalization, treatments and service including probation," and dispositional hearing consisted only of receipt in evidence of reports from Probation Department and Psychiatric Center and oral argument; court notes that neither report addresses current efforts to prevent or eliminate need for removing respondent from home, and that "no discussion of realistic dispositional alternatives appears in the record")*; Matter of Nathaniel JJ.*, 270 AD2d 783, 705 NYS2d 135 (3rd Dept. 2000) (matter remitted for compliance with requirement regarding services needed, if any, to assist the child to make the transition from foster care to independent living; respondent cites no authority in support of proposition that omission in order entitles him to immediate release from placement); *Matter of Tynisah S.*, 201 AD2d 958, 607 NYS2d 532 (4th Dept. 1994) (remitted for reasonable efforts determination); *Matter of Tiatelpa*, D25844-03/05C, NYLJ, 8/21/06 (Fam. Ct., Kings Co.) (in delinquency proceeding, extension petition dismissed where reasonable efforts not made by OCFS).

Such reasonable efforts "shall not be required where the court determines that: (i) the parent of such child has subjected the child to aggravated circumstances, as defined in [FCA §712(e)]; (ii) the parent of such child has been convicted of (A) murder in the first degree as defined in section 125.27 or murder in the second degree as defined in section 125.25 of the penal law and the victim was another child of the parent; or (B) manslaughter in the first degree as defined in section 125.20 or manslaughter in the second degree as defined in section 125.15 of the penal law and the victim was another child of the parent, provided, however, that the parent must have acted voluntarily in committing such crime; (iii) the parent of such child has been convicted of an attempt to commit any of the crimes set forth in subparagraphs (i) and (ii) of this paragraph, and the victim or intended victim was the child or another child of the parent; or has been convicted of criminal solicitation as defined in article one hundred, conspiracy as defined in article one hundred five or criminal facilitation as

defined in article one hundred fifteen of the penal law for conspiring, soliciting or facilitating any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent; (iv) the parent of such child has been convicted of assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10 or aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law, and the commission of one of the foregoing crimes resulted in serious physical injury to the child or another child of the parent; (v) the parent of such child has been convicted in any other jurisdiction of an offense which includes all of the essential elements of any crime specified in subparagraph (ii), (iii) or (iv) of this paragraph, and the victim of such offense was the child or another child of the parent; or (vi) the parental rights of the parent to a sibling of such child have been involuntarily terminated." FCA §754(2)(b). "For the purpose of this section, a sibling shall include a half-sibling." FCA §754(2)(d). *See also* 22 NYCRR §205.16(b) (motion for order providing that reasonable efforts are not required shall be filed in writing on notice to parties, including child's attorney, on form officially promulgated by the Chief Administrator of the Courts and shall contain all information required therein).

However, notwithstanding the existence of one of the above-described circumstances, the court may still determine "that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future. The court shall state such findings in its order." FCA §754(2)(b).

"For the purpose of this section, in determining reasonable efforts to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern." FCA §754(2)(c).

e. Restitution or Services for the Public Good

"In its discretion, the court may recommend restitution or require services for public good pursuant to [FCA §758-a] in conjunction with an order of placement." FCA §756(2)(b).

f. Transfer of Records

"Whenever a person is placed with an institution suitable for the placement of a person adjudicated in need of supervision maintained by the state or any subdivision thereof or to an authorized agency, the family court so placing such person shall forthwith transmit a copy of the orders of the family court pursuant to [§§ 752 and 754], and of the probation report and all other relevant evaluative records in the possession of the family court and probation department related to such child, including but not limited to any diagnostic, educational, medical, psychological and psychiatric records with respect to such person to such institution or agency, notwithstanding any contrary provision of law." FCA §782-a.

g. Propriety of Placement

In determining whether to place the respondent outside the home, the court must take into account the needs and best interests of the respondent, and the need to protect the community. The court is not required by statute to conduct the "least restrictive" disposition analysis required in non-designated felony juvenile delinquency

proceedings under FCA §352.2(2)(a), but on occasion courts have employed a similar analysis. *Compare Matter of Justin H.*, 278 AD2d 555, 717 NYS2d 406 (3rd Dept. 2000) *with Matter of Tammy JJ.*, 190 AD2d 913, 593 NYS2d 376 (3rd Dept. 1993) (evidence establishes that placement was "least restrictive effective disposition and was best suited to meet respondent's particular psychological and educational service needs") and *Matter of Peter VV.*, 169 AD2d 995, 565 NYS2d 271 (3rd Dept. 1991) (no evidence in record supported "a less restrictive alternative").

Sampling of case law:
Note: When considering placement for reasons that include truancy, the court should keep in mind the bar on placement where the only underlying PINS fact-finding is an unlawful failure to attend school.
Compare Matter of Joel J., 33 AD3d 344, 823 NYS2d 7 (1st Dept. 2006) (order placing delinquency respondent reversed, and family court directed to order adjournment in contemplation of dismissal, where it was respondent's first arrest, his involvement in possession of marijuana was minor, he posed no threat to safety of community, he made significant progress between day of arrest and date of disposition, he was subjected to random drug testing on three separate occasions with negative results, and he appeared at each court session and was responsive to services; child should not be stigmatized as juvenile delinquent because of shortcomings of his family, and it "is fairly obvious here that the court placed [respondent] with OCFS on the basis of his family history and living situation. The court's decision lacked any discussion of the crime");
Matter of Wayne I., 24 AD3d 1139, 807 NYS2d 190 (3rd Dept. 2005) (court erred in placing respondent, over objection of petitioning school authorities, after finding violation of probation; record indicates that respondent's sister and her husband were available to provide supervision, and there was no evidence that respondent's absences and misbehavior were attributable to lack of supervision in sister's home);
Matter of Joshua K., 299 AD2d 968, 750 NYS2d 720 (4th Dept. 2002) (court abused discretion in placing respondent where one report recommended that respondent remain with mother while continuing to participate in counseling and receiving other necessary services, and clinical psychologist recommended that respondent remain at home while receiving mental health services);
Matter of Jose B., 71 AD2d 551, 418 NYS2d 73 (1st Dept. 1979) (while ordering new dispositional hearing in delinquency proceeding, court notes, *inter alia*, that respondent had been treated by psychiatrist who expressed the view that respondent had responded positively to treatment and that it would be better not to separate him from his home and a concerned and interested mother);
Matter of Terry UU., 52 AD2d 683, 382 NYS2d 373 (3rd Dept. 1976) (court abused discretion in ordering continuation of placement for eighteen months to ensure that respondent attend school where period exceeded by more than a year the time respondent was required to attend school;
In re Stanley M., 39 AD2d 746, 332 NYS2d 125 (2d Dept. 1972) (placement in training school was inappropriate, and respondent should have been given "a final chance at rehabilitation in a program designed for his needs and age," where respondent claimed that drug rehabilitation program in which he had been placed was for older persons, and child's attorney and representative of Addiction Services Agency of the City of New York

recommended that respondent be placed in a twenty-four hour residential drug rehabilitation program suitable for his age) and
Matter of Anthony J., 87 Misc2d 34, 383 NYS2d 851 (Fam. Ct., Onondaga Co., 1976) (dismissal ordered where respondent refused probation, and court could not find that treatment needed by respondent was available in placement)
with Matter of Gordon "L" v. Michelle "M", 296 AD2d 628, 745 NYS2d 105 (3rd Dept. 2002) (while rejecting father's argument that family court had to find "extraordinary circumstances" under *Bennett v. Jeffreys* before placing respondent with DSS and depriving father of custody, Third Department concludes that placement was appropriate where, although father offered to arrange for inpatient treatment in New Hampshire where he lived, child was deeply troubled and needed intensive treatment that can only be provided in a residential treatment facility, and father, who had known respondent for only seven months, had "inappropriate level of affection" for her and had shared a bed with her after learning that she had been sexually abused);
Matter of Justin H., 278 AD2d 555, 717 NYS2d 406 (3rd Dept. 2000) (Third Department rejects respondent's argument that placement was "incongruous" because family court was aware at beginning of dispositional hearing that probation considered respondent a "danger to the community" but he was allowed to remain at home during the five months it took to complete hearing; family court had no basis under FCA §739 to detain respondent during hearing);
Matter of Rebecca Y., 195 AD2d 727, 600 NYS2d 329 (3rd Dept. 1993) (placement upheld where family court concluded that respondent's truancy problems were "part of [a] larger problem" and that she should receive professional counseling, respondent's mother and stepfather were not receptive to the idea of counseling, two prior PINS diversions had occurred, and, although respondent gave the assurance that she had learned her lesson and would have no problem going to school, she had been tardy again and left school without proper excuse);
Matter of Robert U., 192 AD2d 760, 596 NYS2d 208 (3rd Dept. 1993), *lv denied* 82 NY2d 653 (placement appropriate where respondent's parents were unable to provide a home, and his aunt, with whom he was residing when the petition was filed, was a single parent with three small children of her own and was unable to get respondent to attend school regularly or do his school work);

Matter of Jeanne "TT", 184 AD2d 895, 585 NYS2d 552 (3rd Dept. 1992) (placement with DSS, not ACD, was appropriate where respondent needed structured setting, mother had surrendered parental rights, and respondent had history of PINS behavior after dismissal of prior PINS petition).

j. Placement with Juvenile Delinquents

In *Ellery C. v. Redlich*, 32 NY2d 588, 347 NYS2d 51 (1973), the Court of Appeals, while noting that a dispositional hearing in a case involving delinquency is one to determine whether the juvenile requires supervision, treatment *or confinement*, while such a hearing in a PINS proceeding is to ascertain whether the youngster requires supervision or treatment, but not confinement, held that PINS "should not be placed in institutions in which juvenile delinquents are confined…."

k. Right to Treatment

In *DeShaney v. Winnebago County Department of Social Services*, 489 US 189, 109 SCt 998 (1989), the Supreme Court noted:

> When "the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg v. Romero*, *supra*, 457 U.S., at 317, 102 S.Ct., at 2458 …. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs–e.g., food. Clothing, shelter, medical care, and reasonable safety–it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause [citations omitted]."

489 US at 199-200.

Similarly, in *Matter of Lavette M.*, 35 NY2d 136, 359 NYS2d 20 (1974), the Court of Appeals stated:

> Where the State, as Parens patriae, involuntarily places a PINS child in a training school, it is for the purpose of individualized treatment and not mere custodial care. Whatever the altruistic theory for depriving the child of his liberty, if proper and necessary treatment is not forthcoming, a serious question of due process is raised [citations omitted].

35 NY2d at 142-143. *See also Matter of Ellery C.*, 32 NY2d 588, 591, 347 NYS2d 51 (1973) ("Proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision"). In addition, due process requires that the nature of a juvenile's incarceration bear some reasonable relation to the purpose for which the juvenile is incarcerated. *Alexander S. v. Boyd*, 876 F.Supp 773 (Dist. Ct., South Carolina, 1995).

Even if there were no Constitutional right to treatment, applicable Family Court Act provisions make it clear that the family court must become involved in dispositional planning in PINS proceedings, and, when doing so, has broad discretion to issue appropriate orders. Authority for necessary orders appears in FCA §255, which provides, in pertinent part, as follows:

> It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act.

Undoubtedly, this grant of authority includes the power to order the agency under

whose "care, treatment, supervision or custody" the respondent will be to render "assistance" and "cooperation" by ensuring that the respondent receive necessary treatment. *See Usen v. Sipprell*, 41 AD2d 251, 259, 342 NYS2d 599 (4th Dept. 1973) (pursuant to FCA 255, family court "may solicit and order such care, education, and treatment" of PINS respondent "as it may appear can appropriately be afforded" by mental health officials); *Matter of Nicholas M.*, 189 Misc2d 318, 731 NYS2d 332 (Fam. Ct., Onondaga Co., 2001) (while finding that lack of special education services outlined in respondent's Individualized Education Program may result in failure to provide him with services he requires, court directs OCFS to have respondent evaluated by qualified personnel with respect to his need for speech language therapist and teacher of the deaf); *Matter of Joseph I.*, 2001 WL 1328620 (Fam. Ct., Suffolk Co.) (while denying OCFS' motion for modification of order directing OCFS to place "respondent ... in an OASAS certified program of substance abuse treatment wherein he shall also be given psychotherapy ... [and that] OCFS shall provide progress reports to the court every 90 days," court notes that, while it may not designate the particular facility or place where a juvenile will be housed and select the type of program that the juvenile will be enrolled in, the court does have power to order generally that juvenile receive psychotherapy, and substance abuse treatment and counseling, in a certified "program"); *Matter of Dennis M.*, 82 Misc2d 802, 370 NYS2d 458 (Fam. Ct., Bronx Co., 1975) (Commissioner of Mental Hygiene ordered to place neglected child in appropriate treatment facility); In re Leopoldo Z., 78 Misc2d 866, 358 NYS2d 811 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to find or create suitable facility for delinquent child who was moderately retarded and had antisocial personality); *In re Graham* S., 78 Misc2d 351, 355, 356 NYS2d 768 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to provide juvenile with a "setting and treatment specifically recommended for his condition").

The respondent's interest in obtaining treatment and services cannot "be subordinated to agency claims of insufficient time, staff, or funds …." *Matter of Lofft*, 86 Misc2d 431, 435, 383 NYS2d 142 (Fam. Ct., Cayuga Co., 1976). *See also Matter of Lavette M.*, 35 NY2d 136, 143 ("Nor can the failure to provide suitable and adequate treatment be justified by lack of staff or facilities"); *Matter of Andrew B.*, 53 Misc3d 405 (Fam. Ct., Monroe Co., 2016) (difficulty in placing 18-year-old after his release from prison no defense to contempt charge against agency for failing to comply with permanency hearing order where agency failed to prove it had explored all available foster care placements before releasing child); *Matter of Edward M.*, 76 Misc2d 781, 787, 351 NYS2d 601 (Fam. Ct., St. Lawrence Co., 1974), *affd,* 45 AD2d 906 (3rd Dept. 1974) (official "may not hide behind a shield of insufficient time, inadequate staff, insufficient funds, or mere rhetoric").

Moreover, orders specifying particular treatment are consistent with, and clearly contemplated by, statutory provisions governing disposition. The requirement in FCA §754(2) that the court make reasonable efforts determinations certainly implies authority to direct essential reasonable efforts. In addition, at a permanency/extension of placement hearing conducted pursuant to FCA §756-a, the court must again make reasonable efforts determinations, FCA §756-a(d)(i), and must also consider and determine whether and when the respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with a relative, or placed

in another permanent living arrangement. FCA §756-a(d)(iv).

I. Placement In Qualified Residential Treatment Program

FCA § 756-b (Court review of placement in a qualified residential treatment program) shall apply when a respondent is placed on or after September 29, 2021 and resides in a qualified residential treatment program, and whose care and custody were transferred to a local social services district in accordance with this part. FCA § 756-b(1).

When a respondent is in the care and custody of a local social services district pursuant to this part, such social services district shall report any anticipated placement of the respondent into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the respondent, forthwith, but not later than one business day following either the decision to place the respondent in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district shall subsequently notify the court and the attorneys for the parties, including the attorney for the respondent, of the date the placement change occurred; such notice shall occur no later than one business day following the placement change. FCA § 756-b(2)(a).

When a respondent whose legal custody was transferred to a local social services district in accordance with this part resides in a qualified residential treatment program, and where such respondent's initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to paragraph (2)(a) and motion of the local social services district, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3). Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the respondent in the qualified residential treatment program commenced. FCA § 756-b(2)(b).

Within sixty days of the start of a placement of a respondent referenced in subdivision (1) in a qualified residential treatment program, the court shall:

(i) Consider the assessment, determination and documentation made by the qualified individual pursuant to SSL § 409-h;

(ii) Determine whether the needs of the respondent can be met through placement in a foster family home and, if not, whether placement of the respondent in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the respondent as specified in the respondent's permanency plan; and

(iii) Approve or disapprove the placement of the respondent in a qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the respondent in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the

court may only approve the placement of the respondent in the qualified residential treatment program if:

(A) the court finds, and states in the written order that:

(1) circumstances exist that necessitate the continued placement of the respondent in the qualified residential treatment program;

(2) there is not an alternative setting available that can meet the respondent's needs in a less restrictive environment; and

(3) that it would be contrary to the welfare of the respondent to be placed in a less restrictive setting and that continued placement in the qualified residential treatment program is in the respondent's best interest; and

(B) the court's written order states the specific reasons why the court has made the findings required pursuant to clause (A) of this subparagraph.

(iv) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 756-b(3)(a).

At the conclusion of the review, if the court disapproves placement of the respondent in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the respondent and direct the local social services district to make such other arrangements for the respondent's care and welfare that is in the best interest of the respondent and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 756-b(3)(b).

The court may, on its own motion, or the motion of any of the parties or the attorney for the respondent, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(a)(iii)(A) of this section and provide such written order to the parties and the attorney for the respondent expeditiously, but no later than five days. FCA § 756-b(4).

Documentation of the court's determination pursuant to this section shall be recorded in the respondent's case record. FCA § 756-b(5).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such respondent, including but not limited to the respondent's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 756-b(6).

7. Permanency Hearing

A "Permanency hearing" is "[a] hearing held in accordance with [FCA §754(2)(b) or FCA §756-a] for the purpose of reviewing the foster care status of the respondent and the appropriateness of the permanency plan developed by the social services official on behalf of such respondent." FCA §712(f).

If the court places the respondent and "determines that reasonable efforts are not

required because of one of the grounds set forth above, a permanency hearing shall be held within thirty days of the finding of the court that such efforts are not required. At the permanency hearing, the court shall determine the appropriateness of the permanency plan prepared by the social services official which shall include whether and when the child:
(A) will be returned to the parent;
(B) should be placed for adoption with the social services official filing a petition for termination of parental rights;
(C) should be referred for legal guardianship;
(D) should be placed permanently with a fit and willing relative; or
(E) should be placed in another planned permanent living arrangement with significant connection to adult willing to be permanency resource if respondent is age sixteen or older and if requirements of FCA §756-a(d)(iv)(E) have been met.

The social services official shall thereafter make reasonable efforts to place the child in a timely manner and to complete whatever steps are necessary to finalize the permanent placement of the child as set forth in the permanency plan approved by the court. If reasonable efforts are determined by the court not to be required because of one of the grounds set forth in this paragraph, the social services official may file a petition for termination of parental rights in accordance with [SSL §384-b]." FCA §754(2)(b).

"For the purpose of this section, in determining reasonable efforts to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern." FCA §754(2)(c).

"The foster parent caring for the child or any pre-adoptive parent or relative providing care for the respondent shall be provided with notice of any permanency hearing held pursuant to this article by the social services official. Such foster parent, pre-adoptive parent or relative shall be afforded an opportunity to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and opportunity to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the child to appear at a permanency hearing shall constitute a waiver of the opportunity to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to appear be a ground for the invalidation of any order issued by the court pursuant to this section." FCA §741-a.

Presumably, "[t]he provisions of [§745] shall apply at such permanency hearing." *See* FCA §756-a(c). Thus, "[o]nly evidence that is material and relevant may be admitted," FCA §745(a), and the court's decision "must be based on a preponderance of the evidence." FCA §745(b).

Where the respondent remains placed in a qualified residential treatment program, the commissioner of the local social services district with legal custody of the respondent shall submit evidence at the permanency hearing with respect to the respondent: (i) demonstrating that ongoing assessment of the strengths and needs of the respondent continues to support the determination that the needs of the respondent cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment, and that the placement is

consistent with the short-term and long-term goals of the respondent, as specified in the respondent's permanency plan; (ii) documenting the specific treatment or service needs that will be met for the respondent in the placement and the length of time the respondent is expected to need the treatment or services; and (iii) documenting the efforts made by the local social services district with legal custody of the respondent to prepare the respondent to return home, or to be placed with a fit and willing relative, legal guardian or adoptive parent, or in a foster family home. FCA § 756-a(h).

Representation Standards

NYSBA Standards, Standard D-9 (“The attorney’s representation continues throughout the period of placement, supervision or adjournment in contemplation of dismissal. The attorney must monitor the case, receive relevant reports, and initiate appropriate modification, enforcement or other action in the interests of the child”).

NYSBA Standards Standard E-1 (“The attorney should review all written orders to ensure that they conform to the court’s verbal orders and statutorily required findings and notices. The attorney should file a sealing motion if appropriate”).

NYSBA Standards, Standard E-2 (“The attorney should discuss each order and its consequences with the child”).

NYSBA Standards, Standard E-3 (“The attorney should monitor the implementation of the court’s orders and communicate to the responsible agency and, if necessary, the court, any non-compliance”).

NYSBA Standards, Standard E-4 (“Whenever appropriate, after consulting with the child, the attorney should assist in the filing of a notice of claim, obtain counsel for clients who were abused or injured in foster care, and for clients who were removed in violation of their constitutional rights, and investigate bringing suit for damages for the client. The attorney for the child is obligated to protect all of the child’s legal rights even if the attorney is not able to represent the child in another forum”).

XIV. Appeals

"If the court has entered a dispositional order pursuant to section seven hundred fifty-four it shall be the duty of the [child's attorney] to promptly advise such respondent and if his parent or other person responsible for his care is not the petitioner, such parent or other person responsible for his care, in writing of his right to appeal to the appropriate appellate division of the supreme court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony and the right to apply for leave to appeal as a poor person if he is unable to pay the cost of an appeal. It shall be the further duty of [the child's attorney] to explain to the respondent and if his parent or other person responsible for his care is not the petitioner, such parent or person responsible for his care, the procedures for instituting an appeal, the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process." FCA §760(1); *but see Matter of Brian J.M.*, 227 AD2d 910, 643 NYS2d 269 (4th Dept. 1996) (petitioner could not appeal from original placement order because that order granted relief sought by petitioner and thus petitioner was not an aggrieved party).

"It shall also be the duty of [the child's attorney] to ascertain whether the respondent wishes to appeal and, if so, to serve and file the necessary notice of appeal." FCA §760(2).

"If the respondent has been permitted to waive the appointment of [an attorney] pursuant to [FCA §249-a], it shall be the duty of the court to provide the notice and explanation pursuant to subdivision one and, if the respondent indicates that he wishes to appeal, the clerk of the court shall file and serve the notice of appeal." FCA §760(3).

Representation Standards

NYSBA Standards, Standard F-1 ("The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If, after such consultation, the child wishes to appeal the order and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal").

NYSBA Standards, Standard F-2 ("If the attorney determines that he or she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged or replaced as soon as possible").

NYSBA Standards, Standard F-3 ("The attorney should participate in an appeal filed by another party unless discharged").

NYSBA Standards, Standard F-4 ("When the decision is received, the attorney should explain the outcome of the case to the child").

NYSBA Standards, Standard F-5 ("The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have").

XV. Post-Dispositional Proceedings

A. Motion for Post-Dispositional Relief

1. New Hearing

"On its own motion or on motion of any interested person acting on behalf of the respondent, the court may for good cause grant a new fact-finding or dispositional hearing under this article." FCA §761.

2. Staying, Modifying, Setting Aside or Vacating Order

"For good cause, the court on its own motion or on motion of any interested person acting on behalf of the respondent may stay execution of, arrest, set aside, modify or vacate any order issued in the course of a proceeding under this article." FCA §762.

3. Procedure

"Notice of motion under sections seven hundred sixty-one or seven hundred sixty-two, including the court's own motion, shall be served upon parties and any agency or institution having custody of the child not less than seven days prior to the return date of the motion. The persons on whom the notice of motion is served shall answer the motion not less than two days before the return date. On examining the motion and answer and, in its discretion, after hearing argument, the court shall enter an order, granting or denying the motion." FCA §763; *see Matter of Brian J.M.*, 227 AD2d 910, 643 NYS2d 269 (4th Dept. 1996) (court may act on its own motion without a hearing, but must serve notice of motion upon parties and upon any agency or institution having custody of child).

B. Petition to Terminate Placement

1. Filing and Service of Petition

"Any parent or guardian or duly authorized agency or next friend of a person placed under section seven hundred fifty-six may petition to the court for an order terminating the placement. *See Matter of Andrew B.*, 128 AD3d 1513 (4th Dept. 2015) (where order extending placement provided that respondent was not to be discharged from foster care without court's permission, agency improperly held in contempt without hearing when it failed to return respondent to foster care after he threatened foster mother and police and was arrested and incarcerated; agency raised valid defense that situation changed when respondent was arrested, submitted evidence that it contacted numerous foster homes and group homes but none would accept respondent because of past violent and disruptive behavior in foster care, neither mother nor friends or family were willing to accept him, and agency sought to terminate placement rather than ignore order). The petition must be verified and must show: (a) that an application for release of the respondent was made to the duly authorized agency with which the child was placed; (b) that the application was denied or was not granted within thirty days from the day application was made; and (c) the grounds for the petition." FCA §764.

"A copy of a petition under section seven hundred sixty-four shall be served

promptly upon the duly authorized agency or the institution having custody of the person, whose duty it is to file an answer to the petition within five days from the day of service." FCA §765.

2. Hearing

"The court shall promptly examine the petition and answer. If the court concludes that a hearing should be had, it may proceed upon due notice to all concerned to hear the facts and determine whether continued placement serves the purposes of this article. If the court concludes that a hearing need not be had, it shall enter an order granting or denying the petition." FCA §766; *see Matter of Brian J.M.*, 227 AD2d 910 (court may not dismiss petition after granting hearing and prior to conducting it).

3. Orders

"If the court determines after hearing that continued placement serves the purposes of this article, it shall deny the petition. The court may, on its own motion, reduce the duration of the placement, change the agency in which the child is placed, or direct the agency to make such other arrangements for the person's care and welfare as the facts of the case may require." FCA §767(a); *see Matter of Charles Frederick M.*, 228 AD2d 601, 644 NYS2d 758 (2d Dept. 1996) (DSS petition denied where, although sixteen-year-old respondent had been missing for a year and might be living in Kentucky with father, and was no longer subject to compulsory education law, family court could still supervise respondent until he turned eighteen, and he had problems other than truancy that justified continued supervision until additional information could be gathered).

"If the court determines after hearing that continued placement does not serve the purposes of this article, the court shall discharge the person from the custody of the agency and may place the person on probation or under the supervision of the court." FCA §767(b).

4. Successive Petitions

"If a petition under [§764] is denied, it may not be renewed for a period of ninety days after the denial, unless the order of denial permits renewal at an earlier time." FCA §768.

C. Discontinuation of Treatment

"If an authorized agency in which a person is placed under [§756] (a) discontinues or suspends its work; or (b) is unwilling to continue to care for the person for the reason that support by the state of New York or one of its political subdivisions has been discontinued; or (c) so fundamentally alters its program that the person can no longer benefit from it, the person shall be returned by the agency to the court which entered the order of placement." FCA §771.

"If a person is returned to the court under [§771], the court may make any order that might have been made at the time the order of placement was made, except that the maximum duration authorized for any such order shall be decreased by the time spent in placement." FCA §772.

D. Petition For Transfer

1. Filing of Petition

Any institution, society or agency in which a person was placed under [§756] may petition to the court which made the order of placement for transfer of that person to a society or agency, governed or controlled by persons of the same religious faith or persuasion as that of the child, where practicable, or, if not practicable, to some other suitable institution, or to some other suitable institution on the ground that (a) the presence of such person is seriously detrimental to the welfare of the applicant institution, society, agency or other persons in its care, or (b) after placement by the court was released on parole or probation from such institution, society or agency and a term or condition of the release was willfully violated. The petition shall be verified by an officer of the applicant institution, society or agency and shall specify the act or acts bringing the person within this section. FCA §773.

2. Issuance and Service of Process

"On receiving a petition under [§773] of this part, the court may proceed under [§§ 737, 738 or 739] of this article with respect to the issuance of a summons or warrant. Due notice of the petition and a copy of the petition shall also be served personally or by mail upon the office of the locality chargeable for the support of the person involved and upon the person involved and his or her parents and other persons." FCA §774.

3. Order on Hearing

After hearing a petition under [§773], the court may: (i) dismiss the petition; (ii) grant the petition, making such placement, if the court was authorized to make such placement upon the original adjudication; or (iii) terminate the prior order of placement and either discharge the respondent or place him on probation." FCA §775(a).

"If the court grants the petition and orders placement, the respondent shall thereupon be transferred to the custody of the person, agency or institution provided by the court's order." FCA §775(b).

E. Violations of Dispositional Orders

1. Suspended Judgment

A respondent brought before the court for failure to comply with reasonable terms and conditions of an order of suspended judgment shall be subject to FCA §779-a. If, after hearing, the court determines by competent proof that the respondent without just cause failed to comply with such terms and conditions, the court may adjourn the matter for a new dispositional hearing in accordance with FCA §749(b) or (c). The court may revoke the order of suspended judgment and proceed to make any order that might have been made at the time judgment was suspended." FCA §776.

2. Placement at Home

"If a person placed in his own home subject to orders of the court leaves home without the court's permission, he may be brought before the court and if, after hearing,

the court is satisfied by competent proof that the respondent left home without just cause, the court may revoke the order of placement and proceed to make any order that might have been made at the time the order of placement was made. It may also continue the order of placement and, on due notice and after hearing, enter an order of protection for the duration of the placement." FCA §777.

3. Placement with Agency

If a person is placed in the custody of a suitable institution in accord with FCA §756 and leaves the institution without permission of the superintendent or person in charge and without permission of the court, and if, after hearing, the court is satisfied by competent proof that the respondent left the institution without just cause, the court may revoke the order of placement and proceed to make any order that might have been made at the time the order of placement was made, or any order authorized under §756. FCA §778; *See Matter of Bianca S.*, 36 Misc3d 478 (Fam. Ct., Monroe Co., 2012) (after finding pursuant to FCA §778 that respondent violated PINS placement order, court could issue order placing respondent beyond 18th birthday); *Matter of Vanessa S.*, 20 AD3d 924, 797 NYS2d 683 (4th Dept. 2005) (no hearing required by §778).

If a child placed pursuant to this article in the custody of a commissioner of social services or an authorized agency shall run away from the custody of such commissioner or authorized agency, any peace officer, acting pursuant to his special duties, or police officer may apprehend, restrain, and return such child to such location as such commissioner shall direct or to such authorized agency and it shall be the duty of any such officer to assist any representative of the commissioner or agency to take into custody any such child upon the request of such representative. FCA §718(c).

4. Probation

A respondent who is placed on probation in accordance with FCA 757 shall remain under the legal jurisdiction of the court pending expiration or termination of the period of probation. FCA §779(a). The probation service shall supervise the respondent during the period of such legal jurisdiction. FCA §779(b).

A respondent brought before the court for failure to comply with reasonable terms and conditions of an order of probation issued under FCA §757 shall be subject to FCA §779-a. If, after a hearing, the court determines by competent proof that the respondent without just cause failed to comply with such terms and conditions, the court may adjourn the matter for a new dispositional hearing in accordance with FCA §749(b) or (c). The respondent and parent or other person legally responsible must be advised of the respondent's right to remain silent. FCA §741(a); *Matter of Daniel XX.*, 149 A.D.3d 1231 (3d Dept. 2017) (in violation of probation proceeding, dispositional order vacated because court did not apprise respondent of right to remain silent). Due process requires that the parties be given an opportunity to present evidence. *Compare Matter of Casey VV.*, 3 AD3d 785, 772 NYS2d 107 (3rd Dept. 2004) *with Matter of Arsenio M.*, 51 AD3d 670, 858 NYS2d 245 (2d Dept. 2008) (respondent's due process rights not violated). FCA §779(c).

The court may revoke the order of probation and proceed to make any order that might have been made at the time the order of probation was entered. FCA §779(c); *see Matter of Corey WW.*, 93 AD3d 1130, 941 NYS2d 761 (3d Dept. 2012) (reversible

error where court failed to advise respondent of his right to remain silent prior to accepting admissions to violations of probation); *Matter of Crystal A.*, 11 AD3d 897, 782 NYS2d 474 (4th Dept. 2004) (family court not required to advise respondent of possible dispositions before respondent admitted to violating probation); *Matter of Brittny MM.*, 51 AD3d 1303, 858 NYS2d 815 (3rd Dept. 2008), *lv denied* 11 NY3d 713 (family court erred in placing respondent for additional period of 12 months upon finding of violation of order of probation; under §779, court may revoke order of probation and proceed to make any order that might have been made at time order of probation was entered, but, here, order of probation was made pursuant to FCA §767 upon petition to terminate placement, and authorized dispositions in that context are continuing order of placement, with or without modifications, or placing child under probation or court supervision); *Matter of Sean T.*, 302 AD2d 990, 755 NYS2d 153 (4th Dept. 2003) (respondent did not willfully violate probation where the terms and conditions were modified to require that respondent reside with his mother in Rochester rather than with his grandmother in Syracuse, but his mother expressly agreed that respondent could leave for Syracuse with his grandmother to participate in a football tournament and could return to Rochester approximately six days later, respondent reported during that time to his probation officer in Syracuse, and respondent and his grandmother were advised by a probation officer that jurisdiction over probation was in Onondaga County and that respondent would violate probation if he returned to Rochester).

5. Petition And Hearing In Suspended Judgment And Probation Cases

If, at any time during the period of probation, the petitioner, probation service, or appropriate presentment agency has reasonable cause to believe the respondent has violated a condition of the disposition, the petitioner, probation service, or presentment agency may file a violation petition. FCA §779-a(a). *See Matter of Michael S.*, 100 AD3d 1530, 953 NYS2d 919 (4th Dept. 2012) (where allegations not filed before probation expired, court lost authority to enter new order).

The petition must be verified and subscribed by the petitioner, probation service or presentment agency. The petition must specify the condition or conditions violated and a reasonable description of the date, time, place and specific manner in which the violation occurred. Non-hearsay allegations of the factual part of the petition or of any supporting depositions must establish, if true, every violation charged. FCA §779-a(b).

Upon the filing of a violation petition, the court must promptly take reasonable and appropriate action to cause the respondent to appear before it for the purpose of enabling the court to make a final determination with respect to the alleged delinquency. Where the respondent is on probation, the time for prompt court action shall not be construed against the probation service when the respondent has absconded from probation supervision and the respondent's whereabouts are unknown. The court must be notified promptly of the circumstances of any such probationers. FCA §779-a(c).

If the petition satisfies the requirements in FCA §779-a(b), the period of probation or suspended judgment shall be interrupted as of the date of the filing of the petition. Such interruption shall continue until a final determination of the petition or until such time as the respondent reaches the maximum age of acceptance into placement with the Commissioner of Social Services. If the court dismisses the petition, the period of

interruption shall be credited to the period of probation or suspended judgment. FCA §779-a(d).

The court may not revoke the order unless the court has found by competent proof that the respondent has violated a condition of the order in an important respect and without just cause and that the respondent has had an opportunity to be heard. The respondent is entitled to a hearing promptly after a violation petition has been filed. The respondent is entitled to counsel at all stages of the proceeding and may not waive representation by counsel except as provided in FCA §249-a. FCA §779-a(e)(i).

At the time of the respondent's first post-filing appearance, the court must advise the respondent of the contents of the petition and furnish a copy to the respondent; advise the respondent that he/she is entitled to counsel at all stages of the proceeding and appoint an attorney pursuant to FCA §249 if independent legal representation is not available to the respondent. If practicable, the court shall appoint the same attorney who represented the respondent in the original PINS proceedings; and determine whether the respondent should be released or detained pursuant to FCA §720. FCA §779-a(e)(ii). Upon request, the court shall grant a reasonable adjournment to the respondent to prepare for the hearing. FCA §779-a(e)(iii).

At the hearing, the court may receive any evidence that is relevant, competent and material. The respondent may cross-examine witnesses and present evidence on his/her own behalf. The court's determination must be based upon competent evidence. FCA §779-a(e)(iv).

At the conclusion of the hearing, the court may adjourn the matter for a new dispositional hearing in accordance with FCA § 749(b) or (c). The court may revoke, continue or modify the order. If the court revokes the order, it shall order a different disposition pursuant to FCA § 754(1) and shall make findings in accordance with § 754(2). If the court continues the order, it shall dismiss the violation petition. FCA §779-a(e)(v).

6. Order of Protection

"If any person is brought before the court for failure to comply with the terms and conditions of an order of protection properly issued under this article and applicable to him and if, after hearing, the court is satisfied by competent proof that that person without just cause failed to comply with such terms and conditions, the court may modify or revoke the order of protection, or commit said person, if he willfully violated the order, to jail for a term not to exceed six months, or both. The court may suspend an order of commitment under this section on condition that the said person comply with the order of protection." FCA §780.

Upon a violation of the order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with FCA §842-a. FCA §780-a.

7. Criminal Contempt

The respondent cannot be charged with contempt, under either Article 750 of the Judiciary Law or the Penal Law, based on behavior that violates a dispositional order. *See, e.g.*, *Matter of Naquan J.*, 284 AD2d 1, 727 NYS2d 124 (2d Dept. 2001).

F. Extension of Placement/Permanency Hearing

1. Filing of Petition

"In any case in which the child has been placed pursuant to [§756(a)(iii)], the child, the person with whom the child has been placed or the commissioner of social services may petition the court to extend such placement, as provided for in this section. Such petition shall be filed at least fifteen days prior to the expiration of the initial placement and at least thirty days prior to the expiration of the period of any additional placement authorized pursuant to this section, except for good cause shown, but in no event shall such petition be filed after the original expiration date." FCA §756-a(a); *see Matter of Natalie B.*, 32 AD3d 1323, 821 NYS2d 722 (4th Dept. 2006) (good cause found where petition was filed eleven days late because petitioner did not initially believe extension would be necessary); *Matter of Kacey H.*, 223 AD2d 876, 636 NYS2d 214 (3rd Dept. 1996) (good cause for seven-day delay found where delay was caused by number of factors, including caseworker's family emergency and desire of agency personnel to conduct conference prior to finalizing plans for respondent's placement). Placement cannot be extended after the initial placement has expired, since the court has lost jurisdiction. *People ex rel. Schinitsky v. Cohen*, 34 AD2d 1020, 312 NYS2d 1011 (2d Dept. 1970); *Matter of Jairy R. v. Jeffrey H.*, 34 Misc3d 448, 934 NYS2d 688 (Fam. Ct., Queens Co., 2011), *rev'd on other grounds* 102 AD3d 132, 955 NYS2d 90 (court refuses to order Commissioner to file petition to extend lapsed placement since petition may not be filed after expiration date of prior order of placement, and courts may not compel public official to perform discretionary acts involving exercise of reasoned judgment).

However, the extension request usually will be joined with a request for a permanency hearing. "Notwithstanding any provision of law to the contrary, the initial permanency hearing shall be held within twelve months of the date the child was placed into care pursuant to section seven hundred fifty-six of this article and no later than every twelve months thereafter. For the purposes of this section, the date the child was placed into care shall be sixty days after the child was removed from his or her home in accordance with the provisions of this section." FCA §756-a(e). When the petition seeks a permanency hearing, it must be filed at least sixty days prior to the expiration of one year following the respondent's entry into foster care, 22 NYCRR §205.67(d)(3), a deadline that, needless to say, can fall on a date before, or after, the date that is sixty days before expiration of the court-ordered placement. Accordingly, the petition seeking both an extension of placement and a permanency hearing must be filed by the earlier of the two deadlines. In those unusual cases in which a permanency hearing has been held prior to disposition, it makes sense for the court either to order a short placement, or hold another permanency hearing at disposition, so that extensions and permanency hearings are placed on the same schedule.

"The permanency petition shall include, but not be limited to, the following: the date by which the permanency hearing must be held; the date by which any subsequent permanency petition must be filed; the proposed permanency goal for the child; the reasonable efforts, if any, undertaken to achieve the child's return to his or her parents and other permanency goal; the visitation plan for the child and his or her sibling or

siblings and, if parental rights have not been terminated, for his or her parent or parents; and current information regarding the status of services ordered by the court to be provided, as well as other services that have been provided, to the child and his or her parent or parents." 22 NYCRR §205.67(d)(3). The petition "shall be accompanied by the most recent service plan containing, at minimum: the child's permanency goal and projected time-frame for its achievement; the reasonable efforts that have been undertaken and are planned to achieve the goal; impediments, if any, that have been encountered in achieving the goal; the services required to achieve the goal; and a plan for the release or conditional release of the child, including information regarding steps to be taken to enroll the child in a school or, as applicable, vocational program." 22 NYCRR §205.67(d)(4).

2. Temporary Extensions

"Pending final determination of a petition to extend such placement filed in accordance with the provisions of this section, the court may, on its own motion or at the request of the petitioner or respondent, enter one or more temporary orders extending a period of placement. The court may order additional temporary extensions only as authorized in this section." FCA §756-a(f); *see Matter of Charles B.*, 209 AD2d 895, 619 NYS2d 205 (3rd Dept. 1994) (although no temporary extension order was issued, the court, by continuing the proceeding to a date after expiration of the initial placement, necessarily chose to extend the placement; "[t]hat the orders entered by Family Court herein were oral and described the relief granted therein as an adjournment, instead of using the words 'temporary order of extension', were merely matters of form, not substance, and should not deprive the court of jurisdiction").

3. Permanency Hearing

The court shall conduct a permanency hearing concerning the need for continuing the placement. The child, the person with whom the child has been placed and the commissioner of social services shall be notified of the hearing and have the opportunity to be heard. FCA §756-a(b). The provisions of FCA §745 shall apply at the hearing. FCA §756-a(c). Thus, "[o]nly evidence that is material and relevant may be admitted," FCA §745(a), and the court's decision "must be based on a preponderance of the evidence." FCA §745(b).

If the petition is filed within thirty days prior to the expiration of the period of placement, the court shall first determine at such permanency hearing whether good cause has been shown. If good cause is not shown, the court shall dismiss the petition. FCA §756-a(c).

The court shall consult with respondent in an age-appropriate manner regarding the permanency plan. If the respondent is age sixteen or older and the requested permanency plan is placement in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent, the court must ask the respondent about his/her desired permanency outcome. FCA §756-a(e).

"At the conclusion of the first permanency hearing the court may, in its discretion, order one extension of the placement for not more than six months[.]" FCA §756-a(d)(i).

"At the conclusion of the second permanency hearing, the court may, in its

discretion, order one extension of placement for not more than four months unless: (A) The attorney for the child, at the request of the child, seeks an additional length of stay for the child in such program. If a request is made pursuant to this subparagraph, the court shall determine whether to grant such request based on the best interest of the child; or (B) The court finds that extenuating circumstances exists that necessitate the child be placed out of the home. FCA §756-a(d)(ii). The statute does not make clear how long an extension upon the child's request may extend, but it is worth noting that according to FCA §756-a(g), placement may be extended until the child's twenty-first birthday with the child's consent.

If the court orders an extension of placement, the court must consider and determine in its order:

(i) where appropriate, that reasonable efforts were made to make it possible for the child to safely return to his or her home, or if the permanency plan for the child is adoption, guardianship or some other permanent living arrangement other than reunification with the parent or parents of the child, reasonable efforts are being made to make and finalize such alternate permanent placement;

(ii) in the case of a child who has attained the age of fourteen, (A) the services needed, if any, to assist the child to make the transition from foster care to successful adulthood; and (B)(1) that the permanency plan developed for the child, and any revision or addition to the plan, shall be developed in consultation with the child and, at the option of the child, with up to two members of the child's permanency planning team who are selected by the child and who are not a foster parent of, or case worker, case planner or case manager for, the child, except that the local commissioner of social services with custody of the child may reject an individual selected by the child if the commissioner has good cause to believe that the individual would not act in the best interests of the child, and (2) that one individual selected by the child may be designated to be the child's advisor and, as necessary, advocate, with respect to the application of the reasonable and prudent parent standard;

(iii) in the case of a child placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the child;

(iv) whether and when the child:

(A) will be returned to the parent;

(B) should be placed for adoption with the social services official filing a petition for termination of parental rights;

(C) should be referred for legal guardianship;

(D) should be placed permanently with a fit and willing relative; or

(E) should be placed in another planned permanent living arrangement with significant connection to adult willing to be permanency resource if respondent is age sixteen or older, and agency has documented to court intensive, ongoing, and, as of date of hearing, unsuccessful efforts made to return respondent home or secure placement with fit and willing relative including adult siblings, legal guardian, or adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, and steps being taken to ensure that respondent's foster family home or child care facility is following federal reasonable and prudent parent standard and respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with respondent

in age-appropriate manner about opportunities to participate in activities, and agency has documented to court and court has determined that there are compelling reasons for determining that it continues to not be in best interest of respondent to return home, be referred for termination of parental rights and placed for adoption, be placed with fit and willing relative, or be placed with legal guardian, and court has made determination explaining why, as of date of hearing, another planned living arrangement with significant connection to adult willing to be permanency resource is best permanency plan; and

(v) where child will not be returned home, appropriate in-state and out-of-state placements.

FCA §756-a(d-1).

4. Successive Extensions/Permanency Hearings

"Successive extensions of placement under this section may be granted only as authorized in this section, provided, however no placement may be made or continued beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday." FCA §756-a(g).

5. Propriety of Extension

Compare Matter of Christopher H., 125 AD2d 569, 509 NYS2d 637 (2d Dept. 1986) (family court properly denied respondent's own application for extension of his placement to avoid returning to his parents; none of the goals which underlie placement would be advanced by an extension where respondent's application was based on desire to receive custodial care and not individualized treatment) and

Matter of S. S., 6 Misc3d 1031(A), 800 NYS2d 356 (Fam. Ct., Orange Co., 2005) (court terminates placement and directs respondent's release to custody of his aunt and uncle where deterioration in respondent's behavior was result of OCFS's failure to effectuate its own plan, and respondent will benefit from appropriate counseling in permanent home environment; "the purpose of a permanency plan is to find a secure and safe, and hopefully loving, environment outside of agency placement")

with

Matter of Kacey H., 223 AD2d 876, 636 NYS2d 214 (3rd Dept. 1996) (extension appropriate where respondent's behavior had not improved since initial placement, and respondent continued to act in a manipulative and deceitful fashion by engaging in behavior such as stealing, leaving facility without permission and participating in prank involving false reports to 911 emergency telephone number) and

Matter of Charles BB., 179 AD2d 904, 579 NYS2d 195 (3rd Dept. 1992) (extension upheld where clinical update reflected two serious incidents in which respondent caused $5,000 in damage to a school van and threatened to injure himself with a piece of glass, and disruptive behavior had been exhibited by respondent in several other incidents)

G. Re-Entry Into Foster Care By Former Foster Care Youth

Under FCA § 756-a(i), a youth who was formerly a respondent shall be eligible to file a motion pursuant to FCA Article Ten-B and may be subsequently placed into foster care, in a supervised setting as defined in SSL § 371(22) or placement in a foster

family home, which shall include a kinship placement or a placement with fictive kin.

For purposes of Article Ten-B, “Former foster care youth” shall mean a youth: (i) who has attained the age of eighteen but is under the age of twenty-one, and who had been discharged from a foster care setting on or after attaining the age of eighteen due to a failure to consent to continuation in foster care or attaining the age of sixteen, but who is or is likely to be homeless unless returned to foster care; and (ii) a youth placed in foster care with a local social services district or authorized agency pursuant to FCA Article Three, Seven, Ten, Ten-A or Ten-C, or SSL §358-a, or freed for adoption in accordance with FCA §631 or SSL §383-c, 384 or 384-b but not yet been adopted, or placed with the Office of Children and Family Services (OCFS) as a juvenile delinquent for a non-secure level of care pursuant to FCA Article Three. FCA §1091(a)(1).

“Foster care setting” shall not include placements in a limited secure or secure level of care with the OCFS; or a limited secure level of care where the placement was made in a county that has an approved “close to home” program pursuant to SSL §404. Provided however, a youth who was previously placed in a limited secure or secure level of care but was subsequently transferred to a non-secure level of care may still be eligible to re-enter if such youth was ultimately released from a non-secure setting. FCA §1091(a)(2).

A motion to return a former foster care youth to the custody of the social services district from which the youth was most recently discharged, or, in the case of a youth previously placed with the OCFS, to be placed in the custody of the social services district of the child’s residence, or, in the case of a child freed for adoption, the social services district or authorized agency into whose custody and guardianship such child has been placed, may be made by such former foster care youth, or by the applicable official of the local social services district, authorized agency or the OCFS upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care. FCA §1091(b).

With respect to a former foster care youth discharged on or after his or her eighteenth birthday, the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday. However, during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, such motion shall be heard and determined on an expedited basis. Further, a former foster care youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to this section and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of such state of emergency. Subsequent to a former foster youth’s return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the COVID-19 pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal Social Security Act to support the youth’s care, and the family court shall hear and determine such motions on 0an expedited basis. FCA §1091(c)(1).

With respect to a former foster care youth discharged prior to his or her eighteenth birthday, the court shall not entertain a motion filed after his or her twentieth birthday. However, during the state of emergency declared pursuant to Executive Order 202 of 2020, or any extension or subsequent order issued, such former foster youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion in accordance with paragraph one of this subdivision and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of the state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the COVID-19 pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal social security act to support the youth's care, and the family court shall hear and determine such motions on an expedited basis. FCA §1091(c)(2).

A motion made pursuant to this article by the applicable official of the local social services district or authorized agency or the OCFS shall be made by order to show cause. Such motion shall show by affidavit or other evidence that: (1) the former foster care youth has no reasonable alternative to foster care; (2) the former foster care youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless evidence is submitted that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth; (3) re-entry into foster care is in the best interests of the former foster care youth; (4) the former foster care youth consents to the re-entry into foster care; and (5) in the case of a former foster youth discharged from foster care on or after attaining the age of sixteen, the youth is or is likely to be homeless unless returned to foster care. FCA §1091(d).

A motion made by a former foster care youth shall be made by order to show cause on ten days' notice to the applicable official of the local social services district or authorized agency or the OCFS. Such motion shall show by affidavit or other evidence that: (1) the requirements outlined in paragraphs one, two, three, four and, if applicable, paragraph five of subdivision (d) of this section are met; and (2) the applicable official of the local social services district or authorized agency or the OCFS consents to the re-entry of such former foster care youth, or such applicable official refuses to consent to the re-entry of such former foster care youth. FCA §1091(e); *see Matter of K.U.*, 70 Misc.3d 928 (Fam. Ct., Bronx Co., 2020) (child's motion denied where he was incarcerated and facing felony charges and potential mandatory minimum prison term of five years and maximum term of twenty-five years; criminal defense counsel indicated that judge in criminal case was not granting youthful offender status; and court had no information indicating child could be released from jail if it ordered return to foster care).

If at any time during the pendency of a proceeding brought pursuant to this article, the court finds a compelling reason that it is in the best interests of the former foster care youth to be returned immediately to the custody of the applicable local commissioner of social services or official of the applicable authorized agency or the

OCFS, pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of such local commissioner of social services or other official. FCA §1091(f)(1).

Where the applicable official of the local social services district or authorized agency or the OCFS has refused to consent to the re-entry of a former foster care youth, the court shall grant a motion made pursuant to subdivision (e) of this section if the court finds and states in writing that the refusal is unreasonable. For purposes of this article, a court shall find that a refusal to allow a former foster care youth to re-enter care is unreasonable if: (i) the youth has no reasonable alternative to foster care; (ii) the youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless the court finds a compelling reason that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth; and (iii) re-entry into foster care is in the best interests of the former foster care youth. FCA §1091(f)(2).

Upon making a determination on a motion where a motion has previously been granted pursuant to this article, and upon making the applicable findings required by this article, the court shall grant the motion to return a former foster care youth to the custody of the applicable local commissioner of social services or official of the applicable authorized agency or the OCFS (i) upon finding that there is a compelling reason for such former foster care youth to return to care; (ii) if the court has not previously granted a subsequent motion for such former foster care youth to return to care pursuant to this paragraph; and (iii) upon consideration of the former foster care youth's compliance with previous orders of the court, including the youth's previous participation in an appropriate educational or vocational program, if applicable. FCA §1091(f)(3).

H. Special Immigrant Juvenile Status

A child may petition the United States Citizenship and Immigration Services for Special Immigrant Juvenile status. An alien is eligible for classification as a special immigrant if the alien: (1) Is under twenty-one years of age; (2) Is unmarried; (3) has been declared dependent on a juvenile court located in the United States or has been legally committed to or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; (4) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence. The child also must obtain consent from the Secretary of Homeland Security. *See* 8 U.S.C. §1101(a)(27)(J); *see also Matter of Marisol N.H.*, 115 AD3d 185, 979 NYS2d 643 (2d Dept. 2014) (family court has statutory authority to appoint biological parent to be guardian in proceeding brought for purpose of pursuing special immigrant juvenile status); *Matter of Marcelina M.-G.*, 112 AD3d 100 (2d Dept. 2013) (statute requires only finding that reunification is not viable with one parent; here, child established that reunification with father in Honduras was not viable due to abandonment and that it would not be in her best interests to return to Honduras); *Matter of Sing W.C.*, 83 AD3d 84 (2d Dept. 2011) (in

guardianship proceeding commenced for purpose of facilitating application for special immigrant juvenile status by person over age of eighteen, Second Department holds that family court had authority under FCA §255 to direct child protective agency to conduct investigation or home study with respect to prospective guardian).

Representation Standards

NYSBA Standards, Standard C-6 ("The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant and what impact this might have on the development of the case. Undocumented children … may be eligible for Special Immigrant Juvenile Status (SIJS) under the Federal Immigration and Naturalization Act. The attorney for the child should be familiar with this statute in order to determine whether the young person is eligible for SIJS. If the young person may be SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect the child with appropriate immigration resources so that the child can obtain a green card").

XVI. Legal Effect of PINS Adjudication and Confidentiality of Records

A. Legal Effect

"No adjudication under this article may be denominated a conviction, and no person adjudicated a person in need of supervision under this article shall be denominated a criminal by reason of such adjudication." FCA §781.

"No adjudication under this article shall operate as a forfeiture of any right or privilege or disqualify any person from subsequently holding public office or receiving any license granted by public authority." FCA §782.

B. Use of Records in Other Courts

"Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or his interests in any other court. FCA §783; *see Green v. Montgomery*, 95 NY2d 693, 723 NYS2d 744 (2001) (statutory privilege applied despite supreme court's technical failure to send case to family court for final disposition; however, plaintiff waived the privilege by commencing a civil suit alleging that the police had used excessive force in apprehending him and placing at issue the very conduct for which he had been adjudicated a juvenile delinquent); *Holyoke Mutual Insurance Co. v. Jason B.*, 184 AD2d 550, 585 NYS2d 61 (2d Dept. 1992) (while citing §§ 380.1 and 381.2, court refuses to admit delinquency records in insurance company's action seeking to deny coverage on grounds that juvenile's actions were intentional); *People v. Brailsford*, 106 AD2d 648, 482 NYS2d 907 (2d Dept. 1985) (prosecutor could not inquire as to existence of family court record or fact that defendant had been declared a juvenile delinquent and had been the subject of a PINS proceeding, but was entitled to cross-examine defendant regarding underlying facts and circumstances which led to defendant's involvement with family court).

"Another court, in imposing sentence upon an adult after conviction, may receive and consider the records and information on file with the family court concerning such person when he was a child." FCA §783.

C. Use of Police Records

"All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted." FCA §784.

D. Expungement/Sealing

Use of records in other court.

Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him or her to the court or

to any officer thereof in any stage of the proceeding is admissible as evidence against him or her or his or her interests in any other court. FCA § 783(a).

Scope and method of expungement.

For purposes of this section, "expungement" shall mean that all official records and papers, including judgments and orders of the court, but not including public court decisions or opinions or records and briefs on appeal, relating to the arrest, prosecution and court proceedings and records of the probation service and designated lead agency, including all duplicates or copies thereof, on file with the court, police department and law enforcement agency, probation service, designated lead agency and presentment agency, if any, shall be destroyed and, except for records sealed as provided in paragraphs (v) and (vi) of subdivision (c) of this section, shall not be made available to any person or public or private agency. Provided, however, that foster care and preventive service records maintained by social services departments relating to a proceeding under this article shall not be subject to expungement or sealing under this section and shall be held confidential in accordance with article six of the Social Services Law. FCA § 783(b).

Automatic expungement when proceeding is terminated in favor of respondent: Notification by clerk of court.

Upon termination of a proceeding under this article in favor of the respondent, the clerk of the court shall immediately notify and direct the directors of the appropriate probation department, designated lead agency pursuant to FCA § 735, a local educational agency if an official of such agency was the petitioner pursuant to FCA § 733 and, if a presentment agency represented the petitioner in the proceeding, such agency, that the proceeding has terminated in favor of the respondent and that the records, if any, of such action or proceeding on file with such offices shall be expunged. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency or petitioner pursuant to FCA § 733, the notice shall also be sent to the appropriate police department or law enforcement agency.

Upon receipt of such notification, the records shall be expunged in accordance with subdivision (b) of this section. The attorney for the respondent shall be notified by the clerk of the court in writing of the date and agencies and departments to which such notifications were sent. FCA § 783(c)(i).

Proceedings considered terminated in favor of respondent.

For the purposes of this section, a proceeding under this article shall be considered terminated in favor of a respondent where the proceeding has been:

(A) diverted prior to the filing of a petition pursuant to FCA § 735(g) or subsequent to the filing of a petition pursuant to FCA § 742(b); or

(B) withdrawn or dismissed for failure to prosecute, or for any other reason at any stage; or

(C) dismissed following an adjournment in contemplation of dismissal pursuant to FCA § 749(a); or (D) resulted in an adjudication where the only finding was for a violation of former Penal Law § 221.05 or § 230.00; provided, however, that with respect to findings under this paragraph, the expungement required by this section shall not take place until the conclusion of the period of any disposition or extension under this article. FCA § 783(c)(ii).

Diversion cases.

If, with respect to a respondent who had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the designated lead agency diverts a case either prior to or subsequent to the filing of a petition under this article, the designated lead agency shall notify the appropriate probation service and police department or law enforcement agency in writing of such diversion. Such notification may be on a form prescribed by the chief administrator of the courts.

Upon receipt of such notification, the probation service and police department or law enforcement agency shall expunge any records in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court. FCA § 783(c)(iii).

Petitioner/agency election not to file.

If, following the referral of a proceeding under this article for the filing of a petition, the petitioner or, if represented by a presentment agency, such agency, elects not to file a petition under this article, the petitioner or, if applicable, the presentment agency, shall notify the appropriate probation service and designated lead agency of such determination. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the notification shall also be sent to the appropriate police department or law enforcement agency.

Upon receipt of such notification, the records shall be expunged in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court, provided, however, that the designated lead agency may have access to its own records in accordance with paragraph (v) of this subdivision. FCA § 783(c)(iv).

Designated lead agency sealing.

Where a proceeding has been diverted pursuant to subparagraph (A) of paragraph (ii) of this subdivision or where a proceeding has been referred for the filing of a petition but the potential petitioner or, if represented by a presentment agency, such agency, elects not to file a petition in accordance with paragraph (iv) of this subdivision, upon receipt of written notice the designated lead agency shall seal any records related to the proceeding under this section that are in its possession, but shall have access to its own records solely for the following purposes:

(A) where there is continuing or subsequent contact with the child under this article; or

(B) where the information is necessary for such department to determine what services had been arranged or provided to the family or where the commissioner determines that the information is necessary in order for the commissioner of such department to comply with SSL § 422-a. FCA § 783(c)(v).

Availability of record to juvenile and parent/person legally responsible, and inadmissibility of statements.

Records expunged or sealed under this section shall be made available to the juvenile or his or her agent and, where the petitioner or potential petitioner is a parent or other person legally responsible for the juvenile's care, such parent or other person. No statement made to a designated lead agency by the juvenile or his or her parent or

other person legally responsible that is contained in a record expunged or sealed under this section shall be admissible in any court proceeding, except upon the consent or at the request, respectively, of the juvenile or his or her parent or other person legally responsible for the juvenile's care. FCA § 783(c)(vi).

Proceedings terminated prior to effective date of legislation: motion/application for relief.

A respondent in whose favor a proceeding was terminated prior to the effective date of this paragraph may, upon motion, apply to the court, upon not less than twenty days notice to the petitioner or (where the petitioner is represented by a presentment agency) such agency, for an order granting the relief set forth in paragraph (i) of this subdivision.

Where a proceeding under this article was terminated in favor of the respondent in accordance with paragraph (iii) or (iv) of this subdivision prior to the effective date of this paragraph, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a notification as described in such paragraphs granting the relief set forth therein and such notification shall be granted. FCA § 783(c)(vii).

Motion to expunge after an adjudication/disposition.

If an action has resulted in an adjudication and disposition under this article, the court may, in the interest of justice and upon motion of the respondent, order the expungement of the records and proceedings. FCA § 783(d)(i).

Such motion must be in writing and may be filed at any time subsequent to the conclusion of the disposition, including, but not limited to, the expiration of the period of placement, suspended judgment, order of protection or probation or any extension thereof. Notice of such motion shall be served not less than eight days prior to the return date of the motion upon the petitioner or, if the petitioner was represented by a presentment agency, such agency. Answering affidavits shall be served at least two days before the return date. FCA § 783(d)(ii).

The court shall set forth in a written order its reasons for granting or denying the motion. If the court grants the motion, all court records, as well as all records in the possession of the designated lead agency, the probation service, the presentment agency, if any, and, if the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or if the police or law enforcement agency was the referring agency or petitioner pursuant to FCA § 733, the appropriate police or law enforcement agency, shall be expunged in accordance with subdivision (b) of this section. FCA § 783(d)(iii).

Post-twenty-first birthday automatic expungement of court records.

All records under this article shall be automatically expunged upon the respondent's twenty-first birthday unless earlier expunged under this section, provided that expungement under this paragraph shall not take place until the conclusion of the period of any disposition or extension under this article. FCA § 783(e).

Expungement of court records; inherent power.

Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records. FCA § 783(f); s*ee Matter of Todd H.,* 49 NY2d 1022, 429 NYS2d 401 (1980); *Matter of Dorothy D.*, 49 NY2d 212, 424 NYS2d 890 (1980).