

# **DISCOVERY IN ARTICLE 10 AND RELATED MATTERS**

## **SUPPLEMENTAL MATERIALS**

**Submitted by:  
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Special Assistant Public Defender,  
Monroe County Public Defenders Office**

**and**

**Emma S. Ketteringham, Esq.  
Managing Attorney, Family Defense Practice  
Bronx Defenders**

# **DISCOVERY IN ARTICLE 10/TPR/ CUSTODY PROCEEDINGS**

## **Supplementary Materials Sample Motions, Briefs and Orders to Show Cause for Discovery**

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**NOTICE FOR DISCOVERY AND  
INSPECTION IN ARTICLE 10  
CASES**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, Part

In the Matter of

CHILD'S NAME 1 (DOB)  
CHILD'S NAME 2 (DOB)  
CHILD'S NAME 3 (DOB)  
CHILD'S NAME 4 (DOB)

Children under Eighteen Years of Age

Alleged to be Neglected by

CLIENT'S NAME

Respondent.

**NOTICE FOR DISCOVERY  
AND INSPECTION**

Docket No. NN-00000/12  
Docket No. NN-00000/12  
Docket No. NN-00000/12  
Docket No. NN-00000/12

**COUNSEL:**

PLEASE TAKE NOTICE that pursuant to Section 1038 of the Family Court Act; Section 3101, Section 3102, Rule 3120, and Rule 3122-a of the Civil Practice Law and Rules; and Section 409-e of the Social Services Law; and Title 18, Section 428 of the Compilation of Codes, Rules and Regulations of the State of New York; the (non-)respondent, CLIENT'S NAME (hereinafter "parent"), demands that,

The Administration of Children's Services,  
a Child Protective Agency,  
with offices at 150 Williams Street,  
New York, New York,  
(hereinafter "ACS"); and,

AFC NAME,  
the Attorney for the Child(ren), with offices at  
Legal Aid Society  
Juvenile Rights Division  
900 Sheridan Avenue  
Bronx, NY 10451



(hereinafter "Attorney(s) for the Child(ren)");

produce and permit discovery by his or her attorneys, or another acting on their behalf, of the following documents for inspection, copying, and reproduction:

1. Any and all records, which have not yet been provided to undersigned counsel, concerning the child(ren) CHILD'S NAME 1 (DOB), CHILD'S NAME 2 (DOB), CHILD'S NAME 3 (DOB) and CHILD'S NAME 4 (DOB) (collectively "the child(ren)"), and/or concerning the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible, made, kept, or secured by ACS, and/or its agent, and/or the Attorney(s) for the Child(ren), including, but not limited to:
  - a. All investigation and family services progress notes, evaluations, oral report transmissions, Child Protective Specialist and/or Emergency Children's Services narratives, Uniform Case Records, Family Assessment and Service Plans, Child Safety Conference reports and notes, Permanency Hearing Reports, service plans, service plan reviews, including, but not limited to, all invitations to participate in service plan reviews, all attendance sheets for Child Safety Conferences, for service plan reviews, and/or for other periodic meetings, certificates of completion, incident reports, domestic incident reports, school records, medical reports, including all documentation concerning body checks of the child(ren), dental records, and any other records, written or electronic, concerning the child(ren) and/or the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;
  - b. All handwritten, printed, and electronic records, concerning the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible,

including, but not limited to, notes, including all notes in the black book, field notes, caseworker narrative, emails, memoranda, and all other records, handwritten, printed, and electronic, including records kept on mobile electronic devices, made, kept or secured by ACS, and/or its agent, and kept or secured by the Attorney(s) for the Child(ren);

- c. All periodic assessments and/or follow up reports to the State Central Register, including, but not limited to, all information in the written report, a record of the final disposition of the report, including services offered and services accepted, the plan for rehabilitative treatment, clearances, forms, reports and assessments, concerning the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;
- d. All correspondence sent to or on behalf of the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible, including, but not limited to, all certified mail returned unclaimed and all receipts for accepted certified mail;
- e. All written referrals made to, or on behalf of, the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;
- f. All records concerning visitation between the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible, including, but not limited to, all visitation logs, visitation sign-in sheets, visitation attendance logs, and narratives concerning visitation;
- g. All records concerning substance use and/or drug treatment, including, but not limited to, toxicology records, drug test results, laboratory records, attendance

records, receipts, all records concerning counseling, mental health treatment, including, but not limited to, psychological evaluations, psychosocial, and/or psychiatric evaluations, concerning the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;

2. Any and all records that ACS or the Attorney(s) for the Child(ren) may offer as evidence at any hearing under this docket, and, pursuant to Civil Practice Law and Rules Rule 3122-a, any and all certified business records that ACS or the Attorney(s) for the Child(ren) may offer as evidence at any hearing under this docket;
3. Copies and/or originals of any and all statements made by the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;
4. Any and all records, documents, recordings, memorandum, statements and/or other information in the possession or control of ACS, and/or its agent, and/or the Attorney(s) for the Child(ren), or other third parties that would be likely to release said information to ACS, and/or its agent, and/or the Attorney(s) for the Child(ren), upon request, that tend to disprove or prove any allegation(s) against the parent(s) and/or person(s) alleged to be persons legally responsible, including, but not limited to, evidence of contact or of failure to maintain contact with the child(ren);
5. Any and all records, documents, recordings, memorandum, statements or other information in the possession or control of the ACS, and/or its agent, and/or the Attorney(s) for the Child(ren), received by, or provided by, the New York City Police Department and/or District Attorney's Office, concerning the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible;

6. Copies and/or originals of any and all medical records, scans, kodachromes, slides, films, x-rays, photographs, typed and/or handwritten notes, emails, correspondence, and/or other recorded communications, concerning the child(ren), the child(ren)'s parent(s) and/or person(s) alleged to be persons legally responsible.

#### **DEMAND FOR PRIVILEGE LOG**

PLEASE TAKE FURTHER NOTICE that the undersigned hereby demands that you provide a privilege log describing redacted and/or withheld records and/or entries, and describing your justification for such redaction and/or withheld records and/or entries.

#### **DEMAND FOR NAMES AND ADDRESSES OF WITNESSES**

PLEASE TAKE FURTHER NOTICE that the undersigned hereby demands that you serve the following upon him/her, within twenty (20) days of this demand:

1. A list of names, addresses and telephone numbers of all persons who:
  - a. May testify at the fact-finding, disposition, and/or any other hearing in this matter; and
  - b. Claim to have first-hand knowledge of the issues, which will be reviewed by the Court at the fact-finding, disposition, and any other hearing in this matter.

#### **DEMAND FOR EXPERT WITNESS INFORMATION**

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 3101(d), the undersigned hereby demands that you provide, within twenty (20) days of this demand, the following information and material:

1. The name and addresses of each person that you expect to call as an expert witness at fact finding or disposition or any other hearing in this matter; and
2. Identify in reasonable detail the subject matter on which each expert is expected to testify; and
3. Describe the substance of the facts and opinions on which each expert is expected to testify; and
4. Identify the qualifications of each expert witness; and
5. Provide a summary of the grounds of each expert opinion; and
6. Identify the date or dates each expert performed his or her function; and
7. Identify the materials received by each expert in the performance of his or her function; and
8. Provide copies of any expert reports that you intend to introduce into evidence at fact finding or disposition or any other hearing in this matter.

#### **CONTINUING DEMAND**

PLEASE TAKE FURTHER NOTICE that this discovery demand continues throughout the pendency of these proceedings. Pursuant to CPLR Section 3101(h), the parent demands that parties shall amend or supplement a response previously given to this demand promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete.

These documents are to be produced within twenty (20) days of this demand, at the office of the undersigned at 9:30 a.m., at which time they will be physically inspected, copied or mechanically reproduced, and then returned.

Dated: Bronx, New York  
MONTH DAY, YEAR

---

ATTORNEY'S NAME, Esq.  
Counsel for CLIENT'S NAME  
The Bronx Defenders  
860 Courtlandt Avenue  
Bronx, NY 10451  
(718) 838-7878

To:

ACS ATTORNEY, Esq.  
Administration for Children's Services  
Family Court Legal Services- Bronx  
900 Sheridan Avenue, 6<sup>th</sup> Floor  
Bronx, NY 10451  
(718) 590-5261

AFC NAME,  
Attorney for the Child(ren)  
Legal Aid Society  
Juvenile Rights Division  
900 Sheridan Avenue  
Bronx, NY 10451  
(718) 579-8078

# **DEMAND FOR DISCOVERY AND INSPECTION IN TERMINATION PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK: COUNTY OF KINGS

-----X  
In the Matter of the Application of MERCYFIRST  
for the Custody and Guardianship of the persons of

Docket Nos: B-18524-29/10

**DEMAND FOR DISCOVERY  
AND INSPECTION**

T R, KR GG,  
K R, T  
R, and K  
R,

Minors under eighteen years of age pursuant to  
Section 384-b of the Social Services Law of the  
State of New York

-----X

TO: PETITIONER MERCYFIRST

PLEASE TAKE NOTICE that the undersigned attorney for respondent C R hereby serves  
the following demands upon you, pursuant to New York Civil Practice Law and Rules §§ 3101  
and 3120 et seq., and the Family Court Act § 1038(b), returnable at the office of the  
BROOKLYN FAMILY DEFENSE PROJECT, 177 Livingston Street, Suite 700, Brooklyn, NY  
11201, on the 20th day of January, 2011, at 9:30 a.m.

PLEASE TAKE FURTHER NOTICE that CPLR § 3101(h) provides that a party shall  
amend or supplement a response previously given to a request for disclosure promptly upon the  
party's thereafter obtaining information that the response was incorrect or incomplete when  
made, or that the response, though correct and complete when made, no longer is correct and  
complete, and the circumstances are such that a failure to amend or supplement the response  
would be materially misleading.

1. Set forth in writing and under oath the names, addresses and telephone numbers of each  
person claimed by you to be a witness in this proceeding. If no such witnesses are known to the



petitioner, so state in the sworn reply to this demand. The undersigned will object upon trial to the testimony of any witnesses not so identified.

2. Set forth the following:

- i. the name and address and telephone number of each person you expect to call as an expert witness at the disposition of this action;
- ii. the qualifications of each such expert witness;
- iii. in reasonable detail, the subject matter on which each expert is expected to testify;
- iv. the substance of the facts and opinions on which each expert is expected to testify; and
- v. a summary of the grounds for each expert's opinion.

3. Petitioner is required to produce and/or permit respondent to inspect and copy the following:

- i. Any and all psychiatric, psychological or social work records of the subject children or their mother made or kept by MercyFirst, its agents, employees, and sub-contractors, concerning or pertaining to said children or their mother, including but not limited to all reports, evaluations, test results, charts, memoranda, progress notes, and all similar documents.
- ii. Each and every document, record, or report, which petitioner will seek to introduce at the trial of this matter, including but not limited to: case records, court ordered investigations, police reports, social workers' reports, hospital records, medical records, psychiatric records, dental records, laboratory reports, test results, x-rays, photographs, and videotapes.
- iii. Any and all medical records made or kept by MercyFirst, its agents, employees and subcontractors, concerning or pertaining to the subject child or his mother, including but not limited to all reports, evaluations, test results, charts, memoranda, diagnostic and progress notes, and all similar documents.

4. Please produce, without limitation, any signed statements, unsigned statements, and any other form of statement such as tape recordings or recordings by others of such a statement, by

the petitioner or respondent or by any other party or witness that will be relied upon or introduced at trial.

Dated: Brooklyn, New York  
December 31, 2010

By:

ZABRINA ALEGUIRE, ESQ.  
BROOKLYN FAMILY DEFENSE PROJECT  
LEGAL SERVICES NYC  
Attorneys for Respondent Mother  
177 Livingston Street  
Brooklyn, New York 11201  
(347) 592-2548

TO: IRA ERAS, ESQ.  
WARREN & WARREN, P.C.  
Attorney for Petitioner  
185 Montague Street  
Brooklyn, NY 11201  
Fax (718) 852-3069

**DEMAND FOR DISCOVERY AND  
INSPECTION IN ARTICLE 6  
PROCEEDING**

FAMILY COURT STATE OF NEW YORK  
COUNTY OF MONROE

In the matter of

\_\_\_\_ (DOB: \_\_\_\_\_)  
\_\_\_\_ (DOB: \_\_\_\_\_),

Docket No. NN-\_\_\_\_\_

(A) Child(ren) Under the Age of Eighteen Years  
Alleged to be Neglected by

DEMAND FOR DISCOVERY  
AND INSPECTION

\_\_\_\_ (DOB: \_\_\_\_\_) (and)  
\_\_\_\_ (DOB: \_\_\_\_\_),  
Respondent(s)

To: \_\_\_\_\_, Esq., Deputy County Attorney  
Department of Law, Children's Services Unit  
50 W. Main St., Suite 3130, Rochester, NY 14614

PLEASE TAKE NOTICE, that pursuant to FCA § 1038 and CPLR Article 31, you are hereby required to provide the information demanded pursuant to the discovery requests set forth herein. The information must be provided to the undersigned attorney at the Monroe County Public Defender's Office, 10 N. Fitzhugh St., Rochester, NY 14614, within twenty (20) days of service of this demand. Please be advised that this demand must be amended or supplemented by you in conformance with CPLR § 3101(h).

I. STATEMENTS

Pursuant to CPLR § 3101(e), Respondent, \_\_\_\_\_, hereby demands that you disclose to the undersigned attorney copies of all statements, whether signed or unsigned, of the Respondent, the agents, servants or employees of the Respondent, in your possession or control; if you have no such statements in your possession or control, state the same in writing.

II. EXPERTS

Pursuant to CPLR § 3101(d)(1)(i), Respondent, \_\_\_\_\_ hereby demands that you identify each person whom you expect to call as an expert witness at trial, and that you disclose the following in reasonable detail:

1. The subject matter on which each expert is expected to testify;
2. The substance of the facts and opinions on which each expert is expected to testify;
3. The qualifications of each expert witness, including but not limited to: educational background, degrees, licenses, certifications, states in which each expert has such licenses or certifications, each state where such

individual is actively licensed and/or engaged in practice, name and addresses of each hospital, medical institution or agency at which an internship and/or residency were served and the dates;

4. A summary of the grounds for each expert's opinion, including but not limited to all data, statistics, studies, surveys, reports, test results, analyses, x-rays and all other documents or oral communications relied upon by each expert;

5. Identify what information and documents were reviewed by each expert prior to the formation of each expert's opinion together with the source of such information and each document. Provide copies of all such identified documents;

6. Each expert's publications and memberships in professional organizations and societies.

### III. PHOTOGRAPHS AND OTHER VISUAL MEDIA

Pursuant to CPLR §§ 3101(i) and 3120, and FCA § 1038(b), Respondent \_\_\_\_\_ hereby demands that you produce to the undersigned attorney all films, photographs, video tapes or audio tapes, DVDs, CDs, or any other electronic recordings, including transcripts or memoranda thereof, in your possession and/or control, pertaining to the incidents which are the subject of this proceeding, for inspection and photocopying.

### IV. WITNESSES

Pursuant to CPLR § 3101 and applicable case law, Respondent \_\_\_\_\_ hereby demands that you identify to the undersigned attorney the names and addresses of each and every fact witness to the incident(s) which are the subject of this action.

### V. DHS RECORDS

Pursuant CPLR § 3120 and FCA § 1038(b), Respondent \_\_\_\_\_ hereby demands that you produce to the undersigned attorney the following documents for inspection and photocopying:

1. Any and all Child Protective Services records regarding the Respondent \_\_\_\_\_ and his or her child(ren), including but not limited to all progress notes, correspondence, hand written notes, medical reports, psychological reports, educational records and reports, summaries of conversations and contact with the Respondent and/or the children, summaries of conversations and contact with the foster parent(s) caring for the child(ren), and photographs of the child(ren).

2. Any and all Child Protective Services records pertaining to communications and/or meetings between employees of Child Protective Services pertaining to Respondent \_\_\_\_\_ and his/her child(ren), including but not limited to records pertaining to communications and/or meetings between employees assigned to intake/after hours, investigation and management units, and between case managers, senior caseworkers, casework supervisors and administrators;

3. Any and all Foster Care records pertaining to the Respondent's child(ren)'s foster care placement, including but not limited to records pertaining to communications and/or meetings between Foster Care Unit employees and Child Protective Services Unit employees concerning Respondent \_\_\_\_\_ and his/her child(ren); records pertaining to communications and/or meetings between Foster Care Unit employees and the Respondent; records pertaining to communications and/or meetings between Foster Care Unit employees, Child Protective Services employees, and/or the foster parent(s) providing care for the Respondent's child(ren); and records pertaining to medical care received by the child(ren) while in foster care.

## VI. MEDICAL RECORDS

Pursuant to CPLR § 3120 Respondent \_\_\_\_\_ demands that you disclose to the undersigned attorney any and all documents pertaining to medical, psychiatric, or substance abuse reports of the Respondent and his/her children in your possession or control.

DATED: \_\_\_\_\_, 2015  
Rochester, New York

\_\_\_\_\_, Esq.  
Monroe County PD's Office  
Attorney for Respondent \_\_\_\_\_  
10 N. Fitzhugh St.  
Rochester, NY 14614  
585-753-\_\_\_\_

cc. \_\_\_\_\_, Attorney for Child(ren)  
\_\_\_\_\_, Attorney for \_\_\_\_\_

**DEMAND FOR BILL OF  
PARTICULARS IN TERMINATION  
PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK: COUNTY OF KINGS

-----X  
In the Matter of the Application of MERCYFIRST  
for the Custody and Guardianship of the persons of

Docket Nos: B-18524-25/10,  
B-18527-29/10

T R,  
K R, K R,  
T R, and K  
R,

**DEMAND FOR A  
BILL OF PARTICULARS**

Minors under eighteen years of age pursuant to  
Section 384-b of the Social Services Law of the  
State of New York.

-----X  
PLEASE TAKE NOTICE that respondent mother C R, by her attorney, ZABRINA  
ALEGUIRE, BROOKLYN FAMILY DEFENSE PROJECT, LEGAL SERVICES NYC, 177  
Livingston Street, Brooklyn, New York, 11201, hereby demands, pursuant to § 3041 and Rule  
3042 the New York Civil Practice Law and Rules, that you serve the undersigned attorney by  
9:30 a.m. on the 31<sup>st</sup> day of January, 2011, with a verified bill of particulars as to the allegations  
of the petitions herein as follows:

**With respect to paragraph eighteen (18) of the petitions:**

1. State with specificity the dates that petitioner contends constitute the "period of more than one year" following the children's placement in foster care when Ms. R failed "to maintain substantial contact with and to plan for the future of" the subject children "although physically and financially able to do so."
2. State with specificity what actions or omissions by Ms. R are alleged to have constituted her failure to maintain substantial contact with her children.
3. State with specificity what actions or omissions by Ms. R are alleged to have constituted her failure to plan for the future of her children.



4. State with specificity what efforts made by the petitioner constitute the “diligent efforts . . . to encourage and strengthen the parental relationship.”

**With respect to paragraph nineteen (19) of the petitions:**

5. State with specificity the efforts and dates of the efforts through which the agency “assessed the needs of the natural mother and established a plan through which she may secure the return of her child[ren].”

6. State the date and method of notice, if any, given to the mother of any meetings during which the aforementioned reunification plan was established. Detail what, if any, involvement the mother had in this planning.

**With respect to paragraphs twenty (20) through twenty-four (24) of the petitions:**

7. Provide the dates that referrals were given to the respondent, the names and locations of any and all service providers to which the respondent was referred, and the method through which these referrals were communicated to the respondent for a parenting skills training program, individual therapy, a domestic violence prevention program, a substance abuse program, and random drug screenings.

**With respect to paragraph twenty-seven (27) of the petitions:**

8. State with specificity the “parent-child visitation schedule [that] was established and provided to the natural mother.” Provide the date(s) on which the schedule was set, the date(s) that the schedule was communicated to the mother, and the method(s) by which the schedule was communicated to the mother.

9. State what, if any, efforts were made by the agency to arrange visitation.

10. State with specificity the dates, locations, and duration of all visits recorded by the agency between the respondent mother and her children since their placement in foster care.

With respect to paragraph twenty-eight (28) of the petitions:

11. State with specificity the "schedule of caseworker-parent meetings" established by the caseworker and how this was communicated to the respondent. State with specificity what individual(s) scheduled and attended the caseworker-parent meetings, the dates of these meetings, and the substance, or planned agendas, of the meetings.

12. State with specificity how the "natural mother was encouraged to attend these meetings." Provide the dates upon which the respondent attended scheduled meetings.

Yours truly,

---

ZABRINA ALEGUIRE, ESQ.  
BROOKLYN FAMILY DEFENSE PROJECT  
LEGAL SERVICES NYC  
Attorneys for Respondent Mother  
177 Livingston Street, Suite 700  
Brooklyn, NY 11201  
(347) 592-2548

Dated: Brooklyn, New York  
December 31, 2010

TO: IRA ERAS, ESQ.  
WARREN & WARREN, P.C.  
Attorney for Petitioner  
185 Montague Street  
Brooklyn, NY 11201  
Fax (718) 852-3069

**DEMAND FOR BILL OF  
PARTICULARS IN ARTICLE 6  
PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE

In the Matter of a Custody/Visitation Proceeding

Docket No. V-\_\_\_\_

\_\_\_\_\_  
-against-                      Petitioner,

DEMAND FOR  
BILL OF PARTICULARS

\_\_\_\_\_  
Respondent.

PLEASE TAKE NOTICE, that the Petitioner hereby requires that you serve upon the undersigned attorney for Respondent, within 30 days after the service of this Demand, a verified Bill of Particulars hereinafter as required pursuant to CPLR §3042(a). Please further take note of your continuing obligation to supplement your responses.

1. Regarding the allegations in paragraph 11A:

- a. In what month and year did Respondent "elect" to discontinue medication?
- b. What was the name of the "mental health professional" and where did Respondent receive services from the "mental health professional"?
- c. Identify the prescribed medication that was allegedly discontinued.

2. Regarding the allegations in paragraph 11B:

- a. In what month and year did Respondent "place the child in a Pre-K program in the Sodus area without consulting or advising Petitioner of same"?
- b. In what month and year did Petitioner receive notice that the child was enrolled in a Pre-K program?
- c. How was Petitioner notified that the child was enrolled in a Pre-K program?
- d. Who notified Petitioner that the child was enrolled in a Pre-K program?

3. Regarding the allegations in paragraph 11C:

- a. Identify the document(s) supporting Petitioner's belief that he is "still not listed as a contact for emergency purposes with the Pre-K program."

4. Regarding the allegations in paragraph 11F:

- a. In what month(s) and year(s) did Respondent respond that she "punished" the child or that "it is 'taken care of'"?

- b. Identify "each occurrence" that Petitioner was "made aware of", including the day, month and year of each occurrence.
  - c. When was the Petitioner made aware of "each occurrence"?
  - d. Who made Petitioner aware of "each occurrence"?
  - e. What kind of elaboration "as to the scope of the punishment" was Respondent supposed to give to Petitioner?
  - f. What kind of elaboration of "what is done to constructively correct" the child was Respondent supposed to give to Petitioner?
5. Regarding the allegations in paragraph 11G:
  - a. In what month(s) and year(s) did Petitioner raise any issues regarding "minor health care issues" of the child to Respondent?
6. Regarding the allegations in paragraph 11H:
  - a. Identify the exact dates on which Petitioner "repeatedly emailed Respondent about the likely need for the very long running 'cold' to be checked out with the doctor"?
  - b. Identify the month and year in which the "very long running 'cold' of the child occurred?
7. Regarding the allegations in paragraph 11I and 11J:
  - a. Identify the basis for Petitioner's belief that medical records were "erroneously" sent to Respondent.
  - b. Identify the month and year in which Petitioner requested that Respondent provide him with a copy of the medical records.
  - c. Identify the means by which Petitioner conveyed the request to Respondent.
8. Regarding the allegations in paragraph 11N:
  - a. Identify each incident in which Respondent "unnecessarily involves the police in exchanges of the child"?
  - b. Identify the month and year of each incident.
9. Regarding the allegations in paragraph 11P:
  - a. Identify the month and year in which the police report(s) referred to in the allegation was generated?
  - b. Identify every "responding officer" who appeared at an exchange, and the police force with whom the "responding officer" was associated.
10. Regarding the allegations in paragraph 11R:
  - a. Identify the year(s) in which the Respondent allegedly denied Petitioner "all contact between Christmas Day to almost the second week of January"?
  - b. On what date exactly did Petitioner resume his contact with the child prior to "almost the second week of January"?

11. Regarding the allegations in paragraph 11S:
  - a. In what month and year did Petitioner and Respondent's mother get "into a verbal argument" in which she told Petitioner "she has more rights than him."
  - b. Where did the "verbal argument" occur?
  - c. Who was present during the "verbal argument" besides Petitioner and Respondent's mother?
12. Regarding the allegations in paragraph 11V:
  - a. In what month and year did Respondent depart from New York State "without offering for Petitioner to have the child in his care"?
13. Regarding the allegations in paragraph 11X:
  - a. In what month and year did Respondent allegedly subject the child "to either a slap or struck him in some manner" as alleged in the paragraph?
  - b. Who was present during the alleged incident?
14. Regarding the allegations in paragraph 11Y:
  - a. Identify the exact date on which Respondent left her parents' residence?
  - b. Identify the number of days, weeks, months, etc. that elapsed between the time Respondent left her parents' residence and the time she provided Petitioner an address where the child resided?
  - c. What was the address given to Petitioner?
15. Regarding the allegations in paragraph 11Z:
  - a. Identify the month(s) and year(s) in which Respondent has "attempted to hide from Petitioner"?
  - b. Identify the last time Respondent has "attempted to hide from Petitioner"?
  - c. What does Petitioner allege Respondent does in her alleged attempts "to hide" from the Petitioner?
16. Regarding the allegations in paragraph 11HH:
  - a. At what times do Petitioner and the child attend Catholic mass on the weekends?
  - b. Identify the exact dates on which Respondent has called during the time Petitioner attends Catholic to speak to the child?



**DEMAND FOR  
INTERROGATORIES IN ARTICLE  
6 PROCEEDING**



STATE OF NEW YORK COUNTY OF MONROE  
FAMILY COURT

---

In the Matter of a Proceeding Under  
Article 6 of the Family Court Act

-against-                      Petitioner,

Docket No.  
DEMAND FOR  
INTERROGATORIES

Respondent.

---

PLEASE TAKE NOTICE, that the Petitioner hereby requires that you serve upon the undersigned attorney for Petitioner, within 20 days after the service of this Notice, verified answers to the Interrogatories hereinafter as required pursuant to CPLR §3130-3134. Please further take note of your continuing obligation to supplement your responses.

DEFINITIONS: When used in the following Interrogatories the terms "fact or circumstance" shall require the response to include the date, place and names, addresses, and phone numbers of all participants or witnesses.

1. List your complete address for the last five years.
  - a. Describe your current residence and what facilities you have available for care of the child(ren)?
  - b. If you intend on moving, please describe what your plans are for a new residence?

c. If you have complaints or concerns about Petitioner's residence, please explain the nature of the concerns.

2. List the names of each person who has resided in the same residence as you during the last three years, and provide their present address and telephone number.

a. If currently residing with you, please indicate if they have ever been convicted of a crime and if so, please list the crime, and the court involved.

b. If currently living with you, please indicate if they have within the last 3 years been evaluated or treated for substance abuse and if so, the agency involved.

c. If currently living with you, please indicate if they have ever been the subject of an order of protection or a child/protective referral and if so, what court or agency was involved?

d. If currently living with you, list any children they have and what the custodial/visitation arrangements they have with these children? Provide the name and address of the child(ren)'s other parent.

3. Provide your Social Security number.

4. Provide a copy of your driver's license as of today's date.

5. Provide your Public Assistance and Medicaid numbers and the name of your current worker and office address.

6. List the name and address of any of your spouses and dates of marriage and divorce.
7. Please list the names, dates of birth, and addresses for the last four years of any of your children.
8. Provide the name and address of your children's pediatrician and every doctor, counselor or specialist seen in the last two years.
  - a. For each child listed, please specify the child's present school, teachers or day care.
  - b. For each child listed, specify any extra-curricular activities that the child is involved with and the schedule for such activities.
9. Provide the name, address of each of the other parents/custodian of any such children.
  - a. With regard to each child so listed in #7, specify what present support and visitation arrangements exist, provide the caption and court where any proceeding was had concerning any such child.
10. Please list each and every court legal proceeding, civil or criminal, you have been involved in during the last four years.

11. Please provide a list of any child protective referrals made concerning you, your children, or persons with whom you have resided.
  - a. Specify the date and the County where made, the nature of the referral, and whether it was indicated or unfounded.
12. Please list the names and addresses of any counselors, mental health professionals, psychiatrists, psychologists, whom you have seen in the last three years.
13. List any arrests or convictions you have had, providing dates, police/sheriff's office, and court involved.
  - a. If you are currently on probation or parole, provide the name and address of the officer you report to.
14. What is your education and training?
15. List each fact or circumstance upon which you intend to rely upon to demonstrate your greater ability or greater fitness to act as custodial parent.

16. List each fact or circumstance upon which you intend to rely upon to show unfitness of Petitioner as a parent.
17. For the last year, indicate the hours and days that you regularly cared for the child.
18. For the last year, indicate the number of times you spoke with or met any of the child's teachers/day care providers, specify the names of whom you spoke with.
19. Please specify any special training you have had in child rearing.
20. For the last year, indicate the number of times you attended any medical appointments for the child, specify the names of any doctors met with.
21. List names and addresses of all babysitters of the child while you are at work and/or during your absence.
- a. Please specify what child care arrangements you will make if you have custody.
22. List the names and address of your employer for the last ten years and for each job, specify your wages, your immediate supervisor, and the reason for termination.
- a. Please specify what your current work schedule is.

b. If you anticipate that your work schedule will change in any manner in the next year, please indicate what the new schedule will be.

c. What has your work schedule been for the last 3 years?

23. If there is any allegation of violence which you attribute to Petitioner, please specify the date and place of occurrence and the name and address of any witnesses.

a. Please list any doctors, or medical providers that treated any alleged injuries.

b. Please indicate whether any photographs were taken of any injuries. If so, please attach copies.

24. If there is any allegation of alcohol or substance abuse by Petitioner, please specify with particularity the basis for such allegation and the names and address of any witnesses.

25. Do you believe that Petitioner has been a good parent? If not, please specify with particularity the reasons why.

26. Please specify any reason why you feel the child should not have extensive contact with Petitioner.

a. Please specify what you have done to facilitate contact or encourage the

child(ren) to have a good relationship with Petitioner.

b. What are you proposing for the contact time with Petitioner?

27. Provide the names, address and phone numbers of every witness you intend to call in connection with this proceeding.

a. For each witness, specify what their relationship is with you.

b. For each witness, indicate the nature of the expected testimony.

DATED:

\_\_\_\_\_  
Attorney name

TO:

**NOTICE TO ADMIT IN ARTICLE  
10 PROCEEDINGS**



FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, Part 2

-----X  
In the Matter of

██████████  
A Child Under Eighteen Years of Age  
Alleged to Be Neglected By

Docket No. NN-██████████

NOTICE TO ADMIT

██████████  
Respondent.  
-----X

Dear Ms. Alli:

PLEASE TAKE NOTICE that you are hereby requested, pursuant to Section 3123 of the New York Civil Practice Law and Rules, to give the undersigned within twenty days after service thereof, a written admission of the following relevant matters of fact;

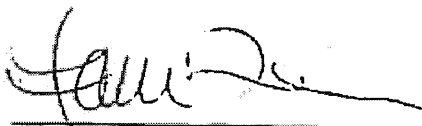
AND PLEASE TAKE FURTHER NOTICE, that your failure to respond to this Notice to Admit within the statutory twenty days will be deemed an admission of the facts set forth below:

1. Admit or deny that on January 27, 2014, Respondent ██████████ (Ms. ██████████), entered an inpatient drug treatment program, the Pregnant Women and Infant Treatment Program at Su Casa, Lower Eastside Center (hereinafter "the Program").
2. Admit or deny that the Program is designed to meet the needs of pregnant women with opioid addiction.
3. Admit or deny that the Program provides its clients with intensive inpatient drug treatment.
4. Admit or deny that the Program assists its clients in learning how to bond with and care for their children.
5. Admit or deny that during Ms. ██████████'s pregnancy with her son - subject child ██████████ - the Petitioner Administration for Children's Services (hereinafter "ACS") was not actively supervising Ms. ██████████.
6. Admit or deny that during Ms. ██████████'s pregnancy with her son ██████████, ACS did not make referrals for Ms. ██████████.
7. Admit or deny that ACS did not refer Ms. ██████████ to the Program.

8. Admit or deny that at the time that Ms. [REDACTED]'s whereabouts became known to ACS, during her pregnancy with her son [REDACTED], she was already enrolled in the Program.
9. Admit or deny that subject child [REDACTED] was born on March 29, 2014.
10. Admit or deny that ACS filed the above-captioned Family Court Act Article 10 Neglect Petition against Ms. [REDACTED] on behalf of her son [REDACTED] (hereinafter "the Petition") on April 3, 2014.
11. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS had the opportunity to investigate Ms. [REDACTED]'s compliance with and progress in the Program.
12. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received reports from the Program regarding Ms. [REDACTED]'s compliance in the Program.
13. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received reports from the Program specifically stating that Ms. [REDACTED] was participating in the following groups at the Program: Relapse Prevention, Anger Management, Spirituality, Stages of Change.
14. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received reports from the Program specifically stating that Ms. [REDACTED] was also participating in individual counseling sessions with [REDACTED], MSW, CASAC at the Program.
15. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received reports from the Program specifically stating that the Program had referred Ms. [REDACTED] to a parenting class at Henry Street Settlement.
16. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received reports from the Program specifically stating that Ms. [REDACTED] was compliant with all aspects of the Program.
17. Admit or deny that after January 27, 2014 (the date that Ms. [REDACTED] entered the Program) and prior to April 3, 2014 (the date of the filing of the Petition), ACS received no reports from the Program stating that Ms. [REDACTED] was not compliant with the Program.

18. Admit or deny that ACS Child Protective Specialist Ms. [REDACTED] swore to the truth of the contents of the Petition to her knowledge, except as to those matters therein stated to be alleged upon information and belief.
19. Admit or deny that CPS Abbate signed the Petition.
20. Admit or deny that CPS [REDACTED] signed the Petition in front of Notary Public [REDACTED].
21. Admit or deny that the portion of paragraph 1 of the Petition that states that Ms. [REDACTED] "is not regularly and voluntarily in a program" was false at the time CPS [REDACTED] signed the Petition.
22. Admit or deny that the Petition does not include any information about Ms. [REDACTED]'s engagement and participation in the Program.
23. Admit or deny that from February 26, 2014 until April 3, 2014 (the date of the filing of the Petition), Ms. [REDACTED] visited her daughter, [REDACTED], weekly at the foster care agency office.
24. Admit or deny that the Petition does not include any information about Ms. [REDACTED]'s visits with her daughter [REDACTED] after February 26, 2014 and before April 3, 2014 (the date of the filing of the Petition).
25. Admit or deny that approximately two years have passed since the Bronx Family Court made a finding of neglect on August 22, 2012 against Ms. [REDACTED] for her daughter [REDACTED] (Docket No. NN-[REDACTED]).

Dated: July 25, 2014  
Bronx, New York



Attorney for Respondent [REDACTED]  
The Bronx Defenders  
360 E. 161<sup>st</sup> Street  
Bronx, New York 10451  
(718) 838-7878

TO:

[REDACTED], Esq.  
Attorney for ACS  
Family Court Legal Services  
900 Sheridan Avenue, 6<sup>th</sup> Floor  
Bronx, NY 10451

CC:

[REDACTED], Esq.  
Attorney for [REDACTED]  
180 East 162<sup>nd</sup> Street, 1E  
Bronx, NY 10451

**NOTICE OF DEPOSITION IN  
ARTICLE 10 PROCEEDING  
AND  
SUBPOENEA AD TESTIFICADUM**

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, Part 9

In the Matter of:

[REDACTED]  
A Child Under Eighteen Years  
of Age Alleged to Be Abused By,

[REDACTED]  
Respondent.

Docket No. NA-[REDACTED]

**NOTICE OF DEPOSITION**

To:

[REDACTED]  
Administration for Children Services Division of Legal Services  
900 Sheridan Ave. #6B  
Bronx, NY 10451

[REDACTED]  
Legal Aid Society, Juvenile Rights Practice  
900 Sheridan Ave. Room 6C-12  
Bronx, NY 10451

PLEASE TAKE NOTICE that, pursuant to Article 31 of the Civil Practice Law and Rules, Respondent [REDACTED], by her undersigned counsel, will take the deposition upon oral examination of [REDACTED], M.D., before a notary public, who is not an attorney or employee of an attorney for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of consanguinity or affinity to any party herein, at 9:30 am on April 6, 2015, at the offices of Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004.

PLEASE TAKE FURTHER NOTICE that the above deposition will be recorded by  
stenographic recording.

Dated: New York, New York  
March 13, 2015

FRIED, FRANK, HARRIS, SHRIVER  
& JACOBSON LLP

By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

One New York Plaza  
New York, New York 10004-1980  
(212) 859-8000

Attorneys for Respondent  
\_\_\_\_\_

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, Part 9

In the Matter of:

[REDACTED]  
A Child Under Eighteen Years  
of Age Alleged to Be Abused By,

[REDACTED],  
Respondent.

Docket No. NA [REDACTED]

**SUBPOENA AD  
TESTIFICANDUM**

THE PEOPLE OF THE STATE OF NEW YORK

TO: [REDACTED], M.D.  
The City of New York  
Office of the Chief Medical Examiner  
520 First Avenue  
New York, NY 10016

WE COMMAND YOU, [REDACTED], M.D., all business and excuses being laid aside, appear and attend before a notary public or other person authorized to administer oaths at the offices of Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004, on Monday, April 6, 2015, at 9:30 a.m., and at any recessed or adjourned date, to give testimony in this action on the part of Respondent [REDACTED]. The deposition will be taken upon oral examination and will be recorded by stenographic recording.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.



PLEASE TAKE NOTICE that disclosure is being sought from you because, on information and belief, you possess information material and necessary in this action not reasonably available from any of the parties.

Dated: New York, New York  
March 13, 2015

FRIED, FRANK, HARRIS, SHRIVER  
& JACOBSON LLP

By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

One New York Plaza  
New York, New York 10004-1980  
(212) 859-8000

Attorneys for Respondent  
\_\_\_\_\_

**KINGS COUNTY FAMILY COURT  
DECISION ON RESPONDENT'S  
RIGHT TO DEPOSITION**

At a term of the Family Court of the  
State of New York, held in and for the City  
of New York, County of Kings, 330 Jay Street,  
Brooklyn, New York on the 27 of  
April, 2015

P R E S E N T:

HON. BARBARA SALINITRO, J.F.C.

-----X  
In the Matter of

ARIELLA B [REDACTED]  
DAVID B [REDACTED]  
JULIUS B [REDACTED]

Docket No.: [REDACTED]

Children Under Eighteen Years of Age  
Alleged to be Neglected by

DECISION AND ORDER

JOSEPH B [REDACTED]  
DONNA B [REDACTED],

Respondents.

-----X  
SALINITRO, J.:

OPINION OF THE COURT

PROCEDURAL HISTORY

On October 21, 2013, under Docket Numbers [REDACTED] the Administration for  
Children's Services (hereinafter "Petitioning Agency"), filed petitions pursuant to New York State  
Family Court Act (hereinafter "FCA") § 1012 against Joseph B [REDACTED] (hereinafter "Respondent  
Father") with respect to David B [REDACTED] (hereinafter "David"), born on December 4, 2011, Ariella  
B [REDACTED] (hereinafter "Ariela"), born on December 3, 2009, and Julius B [REDACTED] (hereinafter "Julius"),  
born on November 16, 2010, (hereinafter collectively "subject children"), alleging neglect. See

*Petitions* (Rhau, 10/21/13), Kings County Family Court Docket Numbers [REDACTED] On December 13, 2013, the Honorable Steven Z. Mostofsky (hereinafter "Judge Mostofsky") directed that the oral report transmittal and case record in the matter were to be provided to all counsel by no later than December 19, 2013.<sup>1</sup> *See Unified Court Management System* (Mostofsky, J., 12/13/13), Kings County Family Court Docket Numbers [REDACTED] On February 12, 2014, the Respondent Father served a discovery demand upon the Petitioning Agency. *See Demand for Discovery and Inspection* (Ramey, 02/12/14), Kings County Family Court Docket Numbers [REDACTED] On February 13, 2014, such discovery demand was filed with the court. *See id.* On March 6, 2014, in response to the Respondent Father's discovery demand, the Petitioning Agency served the Respondent Father with a trial witness and exhibit list. *See Witness and Exhibit List* (Rhau, 03/06/14), *Unified Court Management System* (Olshansky, J., 12/13/13), Kings County Family Court Docket Numbers [REDACTED].

On March 6, 2014, the case was transferred to the Honorable Emily M. Olshansky (hereinafter "Judge Olshansky"). *See Unified Court Management System* (Olshansky, J., 03/06/14), Kings County Family Court Docket Numbers [REDACTED] On March 27, 2014, a trial in the matter commenced before Judge Olshansky. *See Unified Court Management System* (Olshansky, J., 03/27/14), Kings County Family Court Docket Numbers [REDACTED] On August 27, 2014, the Petitioning Agency filed and served an order to show cause to amend the petitions. *See Order to Show Cause* (Olshansky, J., 08/27/14), *Unified Court Management System* (Olshansky, J., 12/13/13), Kings County Family Court Docket Numbers [REDACTED] On September 8, 2014, Judge Olshansky declared a mistrial, and granted the Petitioning Agency's order to show cause to

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<sup>1</sup> The Court presumes that discovery was provided as directed.

file amended petitions, adding Donna B. [REDACTED] (hereinafter "Respondent Mother") as a respondent. *See Unified Court Management System* (Olshansky, J., 09/08/14), Kings County Family Court Docket Numbers [REDACTED]; *see also Amended Petitions* (Schwab, 08/27/14), Kings County Family Court Docket Numbers [REDACTED]. On December 19, 2014, within an affirmation attached to an order to show cause seeking the subject children's remand, the Petitioning Agency noticed the Respondent Father that pursuant to FCA §1051(b), they would be seeking to conform the pleadings to the proof. *See Order to Show Cause* (Olshansky, J., 12/19/14), Kings County Family Court Docket Numbers [REDACTED]; *see also Aff.* (Schwab, 12/19/14), Kings County Family Court Docket Numbers [REDACTED].

On February 2, 2015, due to Judge Olshansky's reassignment to New York County Family Court, this case was transferred to the Court. *See Unified Court Management System*, Kings County Family Court Docket Numbers [REDACTED]. On March 2, 2015, the Respondent Father served the Petitioning Agency with a Notice of Deposition, calling for case worker Trudy Kelly's (hereinafter "Ms. Kelly") deposition to take place on March 26, 2015. *See Notice of Deposition* (Chakrabarti, 03/02/15), Kings County Family Court Docket Numbers [REDACTED]. On March 23, 2015, the Petitioning Agency submitted for signature, an order to show cause seeking, pursuant to New York State Civil Procedure Law and Rules (hereinafter "CPLR") §3103(a), a protective order prohibiting the Respondent Father from deposing Ms. Kelly. *See Order to Show Cause* (O'Shea, J., 03/23/15), Kings County Family Court Docket Numbers [REDACTED]; *see also Aff.* (Schwab, 03/23/15), Kings County Family Court Docket Numbers [REDACTED]. On that same date, the Honorable Ann E. O'Shea (hereinafter "Judge O'Shea") signed the Petitioning Agency's order to show cause. *See id.* Pursuant to CPLR §3103(b), by operation of law, the Petitioning Agency's

order to show cause for a protective order provided for a temporary stay of the March 26, 2015 deposition pending a decision on the order to show cause. *See* N.Y. C.P.L.R. §3103(b) (McKinney's 2015). On March 26, 2015, the parties appeared before the Court, the Court set a schedule for responsive papers, and the Court reserved decision. *See Unified Court Management System* (Salinitro, J., 03/26/15), Kings County Family Court Docket Numbers [REDACTED]. On that same date, the Attorney for the Children stated on the record that she was taking no position with regards to the Petitioning Agency's order to show cause. *See id.* On March 31, 2015, the Respondent Mother filed responsive papers, taking no position on the Petitioning Agency's application. *See Aff. for Respondent Mother* (McKnight, 03/30/15), Queens County Family Court Docket Numbers [REDACTED]. Also on March 31, 2015, the Respondent Father filed opposition papers. *See Resp't's Opp'n to Pet'r's Aff. Requesting Protective Order* (Lissy, 03/31/15), Queens County Family Court Docket Numbers [REDACTED]. The Petitioning Agency did not file reply papers. *See generally* Kings County Family Court Docket Numbers [REDACTED]. For the reasons set forth hereinafter, the Court denies the Petitioning Agency's order to show cause:

The purpose behind the New York State Family Court Act's (hereinafter "FCA") Article 10 is to strike a balance between prescribing procedures to protect children from physical, mental, or emotional harm while observing due process of law regarding when the state may intrude upon the sanctity of family life to ensure a child's daily needs are appropriately met. *See* N.Y. FAM. CT. ACT ART. 10 (McKinney's 2015); *see also* N.Y. FAM. CT. ACT § 1011 (McKinney's 2015); *Matter of Maria C.*, 118 A.D.3d 874, 874 (2d Dep't 2014); *Matter of Brianna L.*, 103 A.D.3d 181, 186-87 (2d Dep't 2012); *Matter of Maureen G.*, 103 Misc. 2d 109, 113 (Richmond Cty. Fam. Ct. Feb. 7, 1980); *Matter of Margery Karr*, 66 Misc. 2d 912, 917 (Richmond Cty. Fam. Ct. May 20, 1971). In that

context, FCA §1038 governs the discovery process in child protective proceedings, authorizing liberal disclosure. *See* N.Y. FAM. CT. ACT § 1038 (McKinney's 2015). Moreover, FCA §1038 applies New York State Civil Practice Law and Rules (hereinafter "CPLR") Article 31 to those proceedings unless otherwise proscribed by FCA Article 10. *See* N.Y. FAM. CT. ACT § 1038(d) (McKinney's 2015). CPLR Article 31 provides for liberal disclosure of all material and necessary information. *See e.g.* N.Y. C.P.L.R. ART. 31 (McKinney's 2015); N.Y. C.P.L.R. 3101(a) (McKinney's 2015) ("There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."); *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-408 (1968) (holding information sought in action material and necessary, and noting information sought in good faith for possible use at trial should be considered material to action). "[B]road disclosure is a significant safeguard against erroneous determinations in such sensitive matters [as child protective proceedings] and helps to ensure that determinations affecting a child's welfare will be based on the most complete record possible." *Matter of Tricia K.*, 160 Misc. 2d 935, 936 (Kings Cty. Fam. Ct. Apr. 15, 1994).

After an action is commenced, a party may take any person's deposition testimony orally or upon written questions.<sup>2</sup> *See* N.Y. C.P.L.R. §3102(a) (McKinney's 2015) ("Disclosure devices ... depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission."); *see also* N.Y. C.P.L.R. §3106(a) (McKinney's 2015). A party seeking to take a non-party's oral deposition must serve a subpoena upon that non-party, along

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<sup>2</sup> *See Matter of Tricia K.*, 160 Misc. 2d at 937 ("[The CPLR] indisputably [sic] authorize[s] the deposition of eyewitnesses with respect to the events at issue in a civil lawsuit.").

with a Notice of Deposition, at least twenty days prior to the deposition. *See* N.Y. C.P.L.R. §3106(b) (McKinney's 2015); *see also* N.Y. C.P.L.R. §3107 (McKinney's 2015). Moreover, where a party seeks disclosure from a non-party, that party must provide notice "stating the circumstances or reasons such disclosure is sought or required." N.Y. C.P.L.R. §3101(a)(4) (McKinney's 2015). Pursuant to CPLR §3103, a party opposing the deposition may move for the imposition of a protective order.<sup>3 4</sup> *See* N.Y. C.P.L.R. §3103 (McKinney's 2015). CPLR §3103(a) states:

"The court may at any time on its own initiative, or on motion of any party or of any person from whom *or about whom* discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

N.Y. C.P.L.R. §3103(a) (McKinney's 2015). CPLR §3103(b) provides for a temporary stay of the discovery in dispute pending the outcome of the order to show cause or motion brought for such relief.<sup>5</sup> *See* N.Y. C.P.L.R. §3103(b) (McKinney's 2015) ("Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute."). Under CPLR §3103, a court may issue all appropriate orders with respect to the discovery in dispute designed to prevent abuse. *See* N.Y. C.P.L.R. §3103 (McKinney's 2015); *see e.g. Meyer v. Staten Island University Hospital*, 106 A.D.3d

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<sup>3</sup> Where a protective order is sought, the moving party must notify the subpoenaed person that the deposition is stayed. *See* N.Y. C.P.L.R. §3106(b) (McKinney's 2015).

<sup>4</sup> *Cf. Matter of John H.*, 56 A.D.3d 1024, 1026 (3d Dep't 2008) (where Petitioning Agency did not move for protective order, attorney for the child permitted to depose case worker).

<sup>5</sup> By comparison, CPLR §3214(b) is the mechanism by which to seek a complete stay of the discovery in dispute. *See* N.Y. C.P.L.R. §3214(b) (McKinney's 2015). However, such a stay applies only when a motion to dismiss or a motion for summary judgment has been tendered, unless such a motion was brought premised on issues regarding service. *See id.*



704, 704 (2d Dep't 2013) (finding Supreme Court correctly granted protective order where information not subject to disclosure). Under FCA §1038(d), in its analysis regarding whether or not to grant a protective order, "the court shall consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from the discovery." N.Y. FAM. CT. ACT § 1038(d) (McKinney's 2015).

In the instant case, on December 13, 2013, Judge Mostofsky directed the Petitioning Agency to disclose discovery no later than December 19, 2013. After having received said discovery, on February 13, 2014, the Respondent Father served the Petitioning Agency with a discovery demand. On March 6, 2014, in response to the Respondent Father's discovery demand, the Petitioning Agency served the Respondent Father with a trial witness and exhibit list which did not include Ms. Kelly's name. On December 19, 2014, the Petitioning Agency identified Ms. Kelly as an individual with information about the case,<sup>6</sup> and noticed the Respondent Father that they were seeking to conform the pleadings to the proof. There is no indication that the Petitioning Agency ever served updated discovery.

The Petitioning Agency has acknowledged that they were properly served with a Notice of Deposition to depose their client. *See Unified Case Management System* (Salinitro, J., 03/24/15), Queens County Family Court Docket Numbers NN-290-22/13. However, no subpoena<sup>7</sup> was served

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<sup>6</sup> As aforementioned, within an affirmation attached to an order to show cause seeking the subject children's remand. *See Order to Show Cause* (Olshansky, J., 12/19/14), , Kings County Family Court Docket Numbers [REDACTED]; *see also Aff.* (Schwab, 12/19/14), , Kings County Family Court Docket Numbers [REDACTED]

<sup>7</sup> Had the Respondent Father served a subpoena for Ms. Kelly's deposition, along with their Notice of Deposition, pursuant to CPLR §2304, the Petitioning Agency could have also moved to quash the subpoena. *See N.Y. C.P.L.R. §2304* (McKinney's 2015).

upon the Petitioning Agency, along with their Notice of Deposition, and the Notice of Deposition does not comply with CPLR §3101(a)(4)'s notice requirement. N.Y. CPLR §3106 (McKinney's 2015); *see also* N.Y. C.P.L.R. §3101(4) (McKinney's 2015). In its discretion, the Court chooses to disregard the Respondent Father's "technical infirmity." *E.g. Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 582-83 (2010) (holding that defect in service could be disregarded under CPLR §2001); *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, (2d Dep't 2008) (affirming Supreme Court's disregard under CPLR §2001 of omission of deposition transcript signature page from motion papers). There is no prejudice to the Petitioning Agency since they were served with the Notice of Deposition calling for Ms. Kelly's deposition 24 (twenty-four) days in advance of the deposition date, had announced their intention to conform the pleadings to the proof based upon Ms. Kelly's knowledge, and both the Petitioning Agency and Ms. Kelly, their client, were fully aware of why such deposition testimony might be sought in connection with the case.<sup>4</sup>

Specifically, with respect to the relief requested within the Petitioning Agency's order to show cause, the Court finds that there is no reason for a protective order prohibiting Ms. Kelly's deposition from going forward. The Petitioning Agency has failed to establish unreasonable annoyance, expense, embarrassment, disadvantage, or any other prejudice them or the courts in regards to the discovery in dispute. *See* N.Y. C.P.L.R. §3103(a) (McKinney's 2015). Moreover, the Petitioning Agency has failed to identify any potential harm to the subject children from the requested discovery. *See* N.Y. FAM. CT. ACT § 1038(d) (McKinney's 2015). In their papers, the Respondent Father maintains that the Petitioning Agency's lackluster response to discovery, along

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<sup>4</sup> CPLR 3104(a)(4)'s notice requirement "was meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required." *Kapon v. Koch*, 23 N.Y.3d 32, 39 (2014)

with their aim to conform the pleadings to the proof, creates a need for the Respondent Father to depose Ms. Kelly as part of their case's preparation. Any possible argument of prejudice or delay can be counterbalanced by the fact that the Petitioning Agency moved to amend their pleadings mid-trial, and subsequently within the body of a separate order to show cause filed in December, 2014, identified a witness not previously disclosed to the Respondent Father.<sup>9</sup> The Respondent Father is entitled to properly prepare his case in advance of trial. To that end, the Court is troubled by the Petitioning Agency's and the Respondent Father's failure to comply with the CPLR during the course of the proceedings in this matter and finds that both parties bear some of the blame for the current discovery debacle. In sum, the Court finds that there is no basis for a protective order preventing the Respondent Father from deposing the case worker, who has knowledge about the case, and who will likely be a witness against him at trial, when she will be questioned extensively about her investigation of, and familiarity with, the case. *See* CPLR §3102(a) (McKinney's 2015); *see also* N.Y. C.P.L.R. §3106(a) (McKinney's 2015).

The Petitioning Agency's argument that as "special proceedings" to which CPLR §408 applies, the family court is somehow exempted from comprehensive disclosure without leave of the court, is misguided. Although there is no Second Department case law on point, at least one appellate division has ruled that New York State Family Court Act's Article 10's provisions override any discovery limitations regarding special proceedings as set forth within CPLR §408. *See Matter of John H.*, 56 A.D.3d 1024, 1026 (3d Dep't 2008). Notwithstanding, it has always been the family

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<sup>9</sup> The Petitioning Agency argues that the Respondent Father waited until the eve of trial to notice Ms. Kelly for deposition. As previously mentioned, it was not until December, 2014 when the Petitioning Agency identified Ms. Kelly as a witness and there is no indication that thereafter the Petitioning Agency provided the Respondent Father with any additional discovery with regards to Ms. Kelly, or any additional discovery at all. Thus, conceivably prompting the Respondent Father's Notice of Deposition.

court's pattern and practice to allow discovery to move forward without the court's specific direction or approval in the spirit of fairness and good faith, unless there was some sort of abuse which required court intervention. In any event, were court permission necessary for the requested deposition, this Court would find that the deposition should proceed.<sup>10</sup> Moreover, the Petitioning Agency's argument that absent special circumstances, depositions are inappropriate in child protective proceedings is flawed and, in any event, outdated. As aforementioned, child protective proceedings are civil cases subject to liberal disclosure. So long as a party can show that a non-party's deposition is material, relevant, and necessary, and will assist in trial preparation, that deposition may proceed. *See Kapon v. Koch*, 23 N.Y.3d 32 (2014). Accordingly, the Petitioning Agency's order to show cause for a protective order prohibiting Ms. Kelly from being deposed is denied.

**ADJUDGED**, that the Petitioning Agency has failed to establish unreasonable annoyance, expense, embarrassment, disadvantage, or any other prejudice to them or the courts in regards to the discovery in dispute; and it is further,

**ADJUDGED**, that the Petitioning Agency has failed to identify any potential harm to the subject children from the requested discovery; and it is further,

**ADJUDGED**, the Respondent Father has demonstrated that his need for the requested material, relevant, and necessary discovery to assist in the preparation of the case, is appropriate; and it is therefore,

**ORDERED**, that the Petitioning Agency's order to show cause for a protective order prohibiting Ms. Kelly from being deposed is denied; and it is further,

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<sup>10</sup> The Court notes parenthetically that many times, depositions lead to settlements in lawsuits.

ORDERED, that the temporary stay of Ms. Kelly's deposition incident to this application for a protective order expires as of the date of this determination; and it is further,

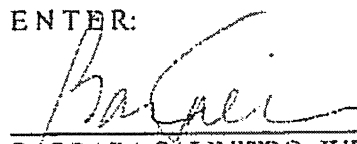
ORDERED, that Ms. Kelly's deposition shall proceed at a date and time convenient to the parties, but in any event no later than April 21, 2015; and, it is further,

ORDERED, that the fact-finding date in Part 10 on April 13, 2015 is hereby vacated; and it is further,

ORDERED, that the parties are to be ready to proceed to trial in Part 10 on May 18, 2015 at 2:30 P.M., the second scheduled trial date.

This constitutes the decision, opinion, and order of the Court.

ENTER:

  
BARBARA SALINITRO, JUDGE  
FAMILY COURT - QUEENS COUNTY

Dated: Jamaica, New York  
April 9, 2015

**MOTION FOR EXAMINATION OF  
CHILD PURSUANT TO ARTICLE**

**10**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, Part 2

In the Matter of

[REDACTED] ([REDACTED])

Children under Eighteen Years of Age

Alleged to be Neglected by

[REDACTED]

Respondent.

NOTICE OF MOTION

Docket No. NN-[REDACTED]

PLEASE TAKE NOTICE that upon the annexed affirmation of [REDACTED], Esq., dated August 16, 2013, and upon all papers and proceedings previously filed and had herein, respondent Mr. [REDACTED] will move this Court in in Part 2 of Bronx Family Court on August \_\_\_\_, 2013 at \_\_\_\_ or as soon thereafter as the case can be heard, for an Order:

- A. Allowing, pursuant to Family Court Act § 1038(c), for Dr. [REDACTED] to observe supervised visitation between the subject child [REDACTED] and her father, [REDACTED];
- B. Allowing, pursuant to Family Court Act § 1038(c), for Dr. [REDACTED] to meet with and interview the subject child, [REDACTED];
- C. Such other and further relief as the Court deems just and proper.

Dated: Bronx, NY  
August 16, 2013

[REDACTED], Esq.  
The Bronx Defenders  
Counsel for [REDACTED]  
360 E. 161<sup>st</sup> Street  
Bronx, NY 10451

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, Part 2

In the Matter of

[REDACTED] ([REDACTED])

Children under Eighteen Years of Age

Alleged to be Neglected by

[REDACTED]

Respondent.

**AFFIRMATION**

Docket No. NN-[REDACTED]

PATRICK CLARK, Esq., an attorney authorized to practice law in the State of New York, affirms, under penalty of perjury, the following:

1. I am the attorney of record, from the Bronx Defenders, for [REDACTED] Respondent herein, and I am fully familiar with all papers and prior proceedings previously heretofore and herein.
2. This affirmation is in support of Respondent's Motion under Family Court Act § 1038(c) to have a psychologist of his observe his visitation with [REDACTED] and, if necessary, interview her. This affirmation is based upon personal knowledge and upon information and belief.

Pertinent Procedural History

3. On March 11, 2013, Petitioner Administration for Children's Services of the City of New York ("ACS") filed the instant neglect petition naming [REDACTED] as a respondent.
4. On March 11, 2013, Mr. [REDACTED] appeared and accepted service of the petition, and the undersigned accepted assignment to represent Mr. [REDACTED].
5. Fact finding was scheduled for June 26, 2013, before the Honorable Erik Pitchal. On that date, Mr. [REDACTED] submitted to the Family Court's jurisdiction under Family Court Act § 1051(a). On the basis of Mr. [REDACTED] submission, the Court found that Mr. [REDACTED] inflicted excessive corporal punishment on his daughter, [REDACTED].
6. The case stands adjourned until September 12, 2013 for a dispositional hearing, at which Mr. [REDACTED] will request that this Court release his daughter to his care.



Mr. ██████ Requests that, Prior to Disposition, ██████ be Assessed by a Psychologist who has Professional Expertise in Working with Families from Sierra Leone

7. At disposition, this Court must assess whether it is in ██████'s best interest to be released to her father or remain in foster care. See Family Court Act § 1052(b)(i)(A). If this Court releases ██████ to Mr. ██████, it must determine whether or not supervision of the family is necessary. See Family Court Act § 1054.
8. Mr. ██████'s position is that it is in his daughter's best interest to be returned to his care. Beyond the question of whether Mr. ██████ has gained insight into accepted child discipline methods through his completion of a parenting class and an anger management class, this Court should also consider at disposition the specific harms to ██████'s cultural identity to being placed in foster care, being that she has recently immigrated from Sierra Leone and is now placed outside of both her family and broader cultural community. In assessing best interests, this Court should also have the opportunity to consider evidence of the ██████ family's strengths as discussed by an individual with expertise in psychology, family therapy and a professional history of working with immigrants from Sierra Leone.
9. In order for Mr. ██████ to prepare for disposition, he requests that this Court order that ██████ be made available for an interview and for visitation observation by Dr. ██████. See Curriculum Vitae of Adeyinka Akinsulure-Smith, attached as Exhibit A. Dr. ██████, a Professor of Psychology at City College of New York, has extensive experience working with both families that have child welfare involvement and with Sierra Leonean nationals.
10. Upon information and belief, in order to form an expert opinion, Dr. ██████ has indicated a preference for interacting with ██████. Specifically, if authorized by this Court, Dr. ██████ would observe visitation between Mr. ██████ and ██████ at Episcopal Social Services and, if necessary, interview ██████.
11. Section 1038(c) of the Family Court Act requires that this Court, before directing that a child be made available for examination by a psychologist, "consider the need of the respondent or child's attorney for such an examination in the preparation of the case and the potential harm to the child from the examination."
12. In this case, there is a strong need for Mr. ██████ to have a psychologist who has worked with Sierra Leonean migrants observe visits and, if she deems it necessary, interview his daughter. Such an examination will allow Mr. ██████ to present evidence before this Court that is relevant and specifically tailored to ██████'s best interests as a recent immigrant to the United States.
13. There is a very low possibility that ██████ would suffer any potential harm from Dr. ██████ interviewing her or observing visits with her father. The proposed examination is not invasive—it is not a sex abuse examination, it is not another type of physical examination. It is simply observation of visits and, if necessary, an interview. Additionally, as is clear from her curriculum vitae, Dr. ██████ has extensive

experience working as a therapist for children and survivors of trauma. Based on Dr. [REDACTED]'s professional background, this Court can expect that Dr. [REDACTED] will interact with [REDACTED] in a sensitive and appropriate manner.

WHEREFORE, the affiant requests that the foregoing motions be granted and requests such other and further relief as this Court may deem just and proper.

Dated: August 16, 2013  
Bronx, New York

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[REDACTED]  
THE BRONX DEFENDERS  
Attorneys for Mr. [REDACTED]  
360 E. 161<sup>st</sup> Street  
Bronx, New York 10451  
(718) 838-7878

**MOTION TO COMPELL OR  
PRECLUDE IN TERMINATION  
PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK; COUNTY OF KINGS

-----X  
In the Matter of the Application of  
MERCYFIRST

Docket Nos: B-18524-29/10

for the Custody and Guardianship of  
the persons of

**NOTICE OF MOTION**  
**TO COMPEL OR**

SM, SS

**PRECLUDE**

Minors under eighteen years of age pursuant to  
Section 384-b of the Social Services Law of the  
State of New York  
-----X

PLEASE TAKE NOTICE that upon the annexed affirmation of GABRIEL FREIMAN, ESQ. affirmed on the 29th day of December, 2010, and upon all papers and proceedings heretofore filed herein, a motion will be made to this Court, at KINGS COUNTY FAMILY COURT, located at 330 Jay Street, Brooklyn, New York, at Part 4 on the 12th day of January, 2010, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to New York Civil Practice Law and Rules Sections 3042(c) and 3042(d): (1) compelling Petitioner to immediately provide a response to Respondent's Demand for a Bill of Particulars; or precluding Petitioner from producing in evidence any documents or testimony for the period of March 2001 through to the present; and (2) sanctioning Petitioner for willful failure to produce the Bill of Particulars.

All answers and supporting papers shall be submitted to all parties and the Court pursuant to New York Civil Practice Laws and Rules Section 2214(b) and therefore shall be submitted no later than January 8, 2010.

Dated: Brooklyn, New York  
December 30, 2010

\_\_\_\_\_  
GABRIEL FREIMAN, ESQ.  
Attorney for Respondent LS

BROOKLYN FAMILY DEFENSE PROJECT  
LEGAL SERVICES NYC  
177 Livingston Street, 7<sup>th</sup> Floor  
Brooklyn, NY 11201  
(347) 592-2546

TO: Raymond L. Colón, Esq.  
Attorney for Petitioner  
Coalition for Hispanic Family Services  
233 Broadway, 5<sup>th</sup> Floor  
New York, NY 10279

Amy Serlin, Esq  
Legal Aid Society – Juvenile Rights Practice  
111 Livingston Street, 8<sup>th</sup> Floor  
Brooklyn, NY 11201

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK; COUNTY OF KINGS

-----X  
In the Matter of the Application of  
COALITION FOR HISPANIC FAMILY  
SERVICES

Docket Nos: B-17270-71/09

for the Custody and Guardianship of  
the persons of

SM, SS

**AFFIRMATION IN SUPPORT  
OF MOTION TO COMPEL OR  
PRECLUDE**

Minors under eighteen years of age pursuant to  
Section 384-b of the Social Services Law of the  
State of New York  
-----X

GABRIEL FREIMAN, an attorney admitted to practice under the laws of the State of  
New York, hereby says, under penalty of perjury:

1. I am an attorney with the BROOKLYN FAMILY DEFENSE PROJECT – LEGAL  
SERVICES FOR NEW YORK CITY, 177 Livingston Street, Brooklyn, NY, the attorneys of  
record for LS, Respondent, in the above-captioned proceeding. As such, I am fully familiar with  
the facts and circumstances of this case.
2. I make this affirmation in support of Ms. S's motion for an order, pursuant to C.P.L.R.  
§ 3042(c) and § 3042(d), (1) compelling Petitioner to immediately provide a Bill of Particulars or  
precluding Petitioner from producing in evidence concerning matters that would have been  
disclosed in the bill of particulars that occurred from the period of March 2001 through to the  
present and (2) ordering Petitioner to pay Ms. S's costs related to this motion.
3. On July 8, 2009, the Petitioner The Coalition for Hispanic Family Services filed a  
petition against Linda S seeking guardianship and custody of Ms. S's daughters S S, (DOB  
March 28, 2001), and S M (DOB March 27, 2002). The petition alleges that Ms. S's conduct  
concerning her daughter constitutes permanent neglect and that Ms. S has a mental illness that

makes it likely that her daughters would be neglected in her care. *See* Petition dated June 24, 2009 (Exhibit A).

4. On September 30, 2009, I served by U.S. Mail a Demand for a Bill of Particulars pursuant to Section 3041 of the Civil Practice Law and Rules and Section 165(a) of the Family Court Act on Petitioner. Under C.P.L.R. § 3042(a), Petitioner was required to produce a bill of particulars within 30 days of service.

5. Respondent's Demand for a Bill of Particulars sought specific information concerning Petitioner's allegations against Respondent. In particular, the Demand requested that Petitioner state the specific conduct and time periods upon which Petitioner bases its allegations. *See* Demand for a Bill of Particulars (Exhibit B).

6. Petitioner failed to provide a bill of particulars within the statutorily required 30 days.

7. On November 10, 2009, I called Raymond A. Colón, Petitioner's attorney, and left a message informing him of my intention to file a motion to compel if he did not provide a bill of particulars by November 20, 2009. I also sent Mr. Colón an email stating my intentions. Several hours later, Mr. Colón sent a reply email stating that he would try to provide the bill of particulars by the next week.

8. On November 11, 2009, I sent an email asking Mr. Colón to state how much time he would need to produce the bill of particulars. Later that same day, Mr. Colón responded in an email that he would like until December 4, 2009. In a subsequent email, I agreed to that deadline.

9. On December 4, 2009, Mr. Colón did not provide the promised bill of particulars. On that day, his paralegal, Lesly A. Miranda, emailed me and requested another week "to gather additional information" necessary to answer the bill of particulars. In response, I agreed via

email to extend the deadline to December 11, 2009 but made it clear that I could not accept any further extensions. Ms. Miranda replied to my email, indicating that it had been received by Mr. Colón's office.

10. By December 18, 2009, I had still not received the bill of particulars despite having mailed the original demand on September 30, 2009. Consequently, on December 18, I sent Mr. Colón an email briefly summarizing the timeline discussed above and informing him of my intention to file a motion to compel that would also possibly seek preclusion and costs. In the same message, I also asked him to inform me if the bill of particulars was ready.

11. To date, I have not received the bill of particulars although I have made repeated efforts to do so without judicial intervention.

12. Petitioner is seeking a court order terminating Ms. S's rights to her daughters based on boilerplate petitions that state the legal standard without alleging specific facts. Presumably, Petitioner would only have filed the instant suit if it had specific information consistent with the allegations contained in its petition. However, due to Petitioner's failure to provide a Bill of Particulars, Respondent's counsel lacks the ability to make an informed assessment of Petitioner's allegations. Petitioner's failure to produce the requested Bill despite several extensions severely limits Ms. S's ability to meaningfully participate in the court conference scheduled for January 12, 2010, and, as such, interferes with Ms. S's ability to defend her constitutional liberty interest in the care and custody of her children. *See Santosky v. Kramer*, 455 U.S. 745 (1982). The failure to produce a Bill of Particulars despite ample time to do so raises questions concerning whether Petitioner has filed a meritorious suit and whether this suit is being pursued in good faith.

13. This Court should direct Petitioner to provide the Bill of Particulars immediately and



no later than January 19, 2010, at 9:30 a.m.. In the event that the Bill of Particulars is not produced by January 19, 2010, the Court should conditionally preclude petitioner from producing in evidence matters that would have been disclosed in the bill of particulars until such time as a complete Bill is provided.

14. Additionally, this Court should impose financial sanctions in the form of costs on Petitioner's counsel for willfully failing to provide a timely response to Respondent's Demand for a Bill of Particulars. *Deborah K. v. Gerald P.*, N.Y.L.J., Jan. 4, 1991, at 29 (N.Y. Fam. Ct. 1991) (threatening monetary sanctions if the petitioner Department of Social Services and plaintiff Deborah K. continued to refuse to comply with properly served discovery requests absent "due cause"); *Nassau County Dept. of Social Services ex rel. Lisa G. v. F.G.*, 146 Misc.2d 588, 591-93, 551 N.Y.S.2d 730, 732-33 (N.Y. Fam. Ct. 1989) (imposing sanctions consisting of motion costs and attorney's fees on County Attorney whose bill of particulars lacked sufficient specificity in light of Attorney's ability to provide specific facts); *but see Matter of C.L.*, N.Y.L.J., Feb. 3, 1995, p. 30, col. 3 (N.Y. Fam. Ct. 1995).

WHEREFORE, I respectfully request that the court issue the relief requested herein.

Dated: Brooklyn, New York  
December 29, 2010

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Gabriel Freiman

To: Raymond L. Colón, Esq.  
Attorney for Petitioner  
Coalition for Hispanic Family Services  
233 Broadway, 5<sup>th</sup> Floor  
New York, NY 10279

Amy Serlin, Esq  
Legal Aid Society – Juvenile Rights Practice

111 Livingston Street, 8<sup>th</sup> Floor  
Brooklyn, NY 11201

**ORDER TO SHOW CAUSE FOR  
OCFS RECORDS IN ARTICLE 10  
PROCEEDING**

STATE OF NEW YORK COUNTY OF MONROE  
FAMILY COURT

In the Matter of a Proceeding Under Article 6  
of the Family Court Act

\_\_\_\_\_

Docket No.

Petitioner

-against-

ORDER TO SHOW CAUSE

\_\_\_\_\_

Respondent

\_\_\_\_\_  
Upon the annexed affirmation of Adele M. Fine, Esq., counsel for Petitioner,  
\_\_\_\_\_, and upon all of the papers and proceedings had herein; let the Respondent,  
\_\_\_\_\_, and the Monroe County Department of Human Services, Child Protective  
Services; show cause at a term of this Court to be held on the \_\_\_\_ day of \_\_\_\_\_, 2014, at the  
Hall of Justice, Rochester, New York, at \_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day or as soon  
thereafter as counsel may be heard, why an Order should not be made:

1. Requiring an agent of the Monroe County Department of Health and Human  
Services, Child Protective Services, to deliver to the Clerk of the Family Court on or before the  
\_\_\_\_ day of \_\_\_\_\_, 2014, at \_\_\_\_ o'clock in the \_\_\_\_\_ noon, all records pertaining to  
investigations that resulted in "indicated" reports of child abuse and maltreatment against  
\_\_\_\_\_, DOB \_\_\_\_\_, including but not limited to case worker progress notes, intake  
referrals, summaries, photographs, police reports, and any other records pertaining such

investigation, in compliance with a subpoena duces tecum served upon the aforementioned agency under separate cover and attached hereto for the Court's review; and

2. Permitting Adele M. Fine, Esq., counsel to the Petitioner, to examine said records and to have access to the information contained therein for use in connection with the above-captioned proceedings; and

3. Issuing a subpoena to the investigating caseworker(s), \_\_\_\_\_, and/or other persons employed by the Monroe County Department of Health and Human Services, Child Protective Services, who are identified in the records sought herein, and whose testimony in this proceeding will assist the Court in determining the issues at hand, and directing said aforementioned persons to appear, disclose information to counsel and testify concerning information that was learned during the course of the investigation that resulted in the "indicated" report(s) identified in the child protective records; and

4. For such other and further relief as the Court may deem just and proper; and it is further

ORDERED that sufficient reason appearing therefore, let service of the Order to Show Cause, together with the supporting papers be 1) personally made 2) via facsimile or 3) by mail to: (all counsel for parties; DHS, 111 Westfall Road, Rochester, NY 14620 and County Law Dept., Children's Services Unit, 50 W. Main St., Suite 3130, Rochester, NY 14614) on or before the \_\_\_\_\_ day of \_\_\_\_\_, 2014, be deemed good and sufficient.

Dated: \_\_\_\_\_, 2014  
Rochester, New York

\_\_\_\_\_  
Hon. \_\_\_\_\_, Family Court Judge

STATE OF NEW YORK    COUNTY OF MONROE  
FAMILY COURT

\_\_\_\_\_  
In the Matter of a Proceeding Under Article 6  
of the Family Court Act

\_\_\_\_\_  
-against-

Petitioner

Docket No.

ATTORNEY'S  
AFFIRMATION

\_\_\_\_\_  
Respondent

\_\_\_\_\_  
Adele M. Fine, Esq., an attorney duly admitted to practice law in the State of New York,  
affirms as follows:

1. I am an attorney employed by the Monroe County Public Defender's Office,  
representing the Petitioner in this case. I make this affirmation in support of Petitioner's request  
for child protective records related to any indicated referrals against the Respondent, \_\_\_\_\_.

I am familiar with the facts and circumstances of this case.

2. Pursuant to CPLR 2307, a subpoena for the release of municipal records must be  
signed by a judge of the Court in which the action is triable, on notice to the department having  
custody of the records. Under Fam. Law section 651-a, child protective records pertaining to  
"indicated" CPS referrals are admissible in custody/visitation proceedings.

3. Under Social Services Law sec. 422 subd. 4(A)(e) the Department must comply  
with the subpoena if the Court determines that such information is necessary for the  
determination of an issue before the Court.

3. This case is a custody proceeding in which the petitioner has alleged that, among  
other things, the children have witnessed and been exposed to instances of domestic violence in

the residence of their father, which resulted in an indicated CPS report against him. Petitioner further alleges that the ongoing domestic violence in father's home makes him less fit than Petitioner to care for the children, and that the father's home environment is unsafe and inappropriate for the children. Petitioner is requesting that the current order be modified and that she be granted sole custody and primary physical residence of the children.

4. Furthermore, pursuant to the 1034 report ordered by the Court and disclosed to counsel for the parties, there is an indicated report on file with the State Central Register against the Respondent herein.

5. The information sought is available only through DHS Child Protective Services, and is material to the allegations of changed circumstances alleged in Petitioner's custody modification petition.

6. Upon information and belief, the Monroe County DHS caseworker who investigated the CPS referral was \_\_\_\_\_. Her testimony concerning the indicated CPS referral bears directly in the unsafe and inappropriate home environment to which the children have been exposed in the father's home. The records may disclose that other CPS employees also investigated the allegations. Petitioner seeks an order requiring their testimony as well, according to identities disclosed in the CPS records.

WHEREFORE, Petitioner respectfully requests that the Court make a finding that the records sought from DHS Child Protective Services are necessary for the determination of an issue before the Court, and grant Petitioner's request for an Order mandating that DHS, Child Protective Services comply with a subpoena duces tecum for the disclosure of the records identified herein.

Dated: \_\_\_\_\_  
Rochester, New York

Affirmed under penalty of perjury:

\_\_\_\_\_  
Adele M. Fine, Esq.  
Monroe County Public Defender's Office



STATE OF NEW YORK COUNTY OF MONROE  
FAMILY COURT

In the Matter of a Proceeding Under Article 6  
of the Family Court Act

\_\_\_\_\_

Petitioner

Docket No.

-against-

ORDER

\_\_\_\_\_

Respondent

An Order to Show Cause having been filed and served requesting the production of certified copies of Child Protective Services records pertaining to indicated CPS reports against the Respondent herein, \_\_\_\_\_; and all counsel and the Monroe County Department of Human Services, Child Protective Services, and its attorneys having received proper notice of the relief requested in the Order to Show Cause; and the Court having heard the arguments of counsel for the parties, namely, \_\_\_\_\_; and the Court having considered the pleadings and prior proceedings; and the Court having found pursuant to Soc. Serv. Law sec. 422 4(A)(e) that the records sought are necessary for the determination of an issue before the Court; it is therefore

ORDERED, that the Monroe County Department of Human Services, Child Protective Services shall immediately produce to the Clerk of the Family Court certified copies of all records pertaining to any investigations that resulted in indicated reports against the Respondent herein, \_\_\_\_\_; and it is further

ORDERED, that the records are to be produced to the Court for in camera inspection and then to counsel for review solely in connection with these proceedings.

Dated: \_\_\_\_\_, 2014  
Rochester, New York

Hon. \_\_\_\_\_

STATE OF NEW YORK COUNTY OF MONROE  
FAMILY COURT

In the Matter of a Proceeding Under Article 6  
of the Family Court Act

\_\_\_\_\_

-against-

Petitioner

Docket No.

JUDICIAL SUBPOENA  
DUCES TECUM

\_\_\_\_\_

Respondent

TO: Department of Human Services Peter Essley, Esq.  
Child Protective Services Monroe County Dept. of Law, Children's Services  
111 Westfall Road 50 W. Main St., Suite 3130  
Rochester, NY 14620 Rochester, NY 14614

YOU ARE HEREBY NOTIFIED, that all business and other matters being laid aside, you are ordered to appear and attend before the Hon. \_\_\_\_\_, Family Court Judge, at the Third Floor Hall of Justice, Rochester, New York, on the \_\_\_\_ day of \_\_\_\_\_, 2014, at \_\_\_\_ o'clock in the \_\_\_\_ noon, and on any date thereafter, to give testimony in this case on behalf of the Petitioner, \_\_\_\_\_, and that you bring with you, at the aforesaid time and place:

All records of the Monroe County Department of Health and Human Services, Child Protective Services, pertaining to the investigation of indicated reports of child abuse and maltreatment involving \_\_\_\_\_, DOB \_\_\_\_\_, from \_\_\_\_\_ to \_\_\_\_\_, now in your custody, and all other books or papers regarding the above-named person which you have in your possession.

The records have been found necessary to the determination of a custody proceeding pending in this Court pursuant to SSL sec. 422 4(A)(e) and FCA sec. 651-(a). Kindly certify the records pursuant to CPLR secs. 2307 and 4518 to avoid having a custodian personally testify at Court. A copy of any records may be provided if it is certified as a complete and accurate document. All records are to be delivered to the Clerk of Family Court, Room 360, Hall of Justice, Rochester, New York, on or before \_\_\_\_\_ on \_\_\_\_\_;

Failure to comply with this subpoena is punishable as a contempt of Court and may make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

Dated: \_\_\_\_\_  
Rochester, New York

Hon. \_\_\_\_\_ Family Court Judge

**KINGS COUNTY DECISION ON  
RESPONDENT'S RIGHT TO OCFS  
RECORDS IN ARTICLE 6  
PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
KINGS COUNTY: PART 8

-----X  
In the Matter of

ANGELINA D [REDACTED]  
YASMINE D [REDACTED]  
KRISTINA D [REDACTED]  
ZOWIE D [REDACTED]  
PRIYA D [REDACTED]

FILE NO: [REDACTED]  
DOCKET NOS. [REDACTED]

DECISION ON RESPONDENT'S  
ORDER TO SHOW CAUSE TO  
COMPEL DISCOVERY  
MOTION 3

Children Under the Age of Eighteen  
Years Old Alleged to be Neglected by

JOSEPH D [REDACTED]

Respondent

-----X  
PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

ILANA GRUEBEL, J.:

This child protective proceeding is mid-fact finding with allegations that the father inflicted acts of violence against the mother, including but not limited to, the father's choking the mother with the children present and he inflicted acts of violence against the children. There are no visits with any of the children except the youngest toddler because the attorney for the children argues that the children are afraid to see the father. The immediate evidentiary issue before the Court is the father's application dated April 9, 2014 requesting the disclosure of the investigative notes and child protective report made about the allegations against him. Some of these allegations have already been testified about by the case worker and the non-respondent mother. The testifying case worker, SP, created such records and reports, and the documents are sought by counsel for the father to fully prepare for cross examination of the worker. If such records are not produced counsel for the father seeks to preclude ACS from offering any evidence regarding information contained in the report and records, and striking all the testimony of the case worker SP if the records are not disclosed. ACS, in a written submission dated April 17, 2014, opposes the motion in its totality arguing that the worker should be allowed to continue her testimony, that none of her testimony be stricken, and that the request for the disclosure for the records be denied because ACS argues that they are sealed pursuant to SSL §422 (A)(4) and

(5). Counsel for the father submitted a reply to ACS opposition, dated April 24, 2014. The attorney for the children took no position.

This Court has conducted a careful analysis of the statutes, regulations, related case law, as well as considered the specific facts of this case, (both as to the administrative circumstances under which this legal issue arises, as well as the severity of the allegations involving excessive corporeal punishment and domestic violence). After considering the above factors, along with the Court's obligation under *parens patriae* to ensure that the Court have all material relevant and competent evidence and testimony concerning the safety and well being of children, before making a determination concerning whether children have been neglected or are at imminent risk of being neglected, the Court directs that the records and reports be provided to the Court for an in camera inspection to determine what materials if any should be redacted. See Social Services Law §§372(4) & 422(4)(A)(e).

Social Services Law Section 422 (A) requires the sealing of unfounded report and disclosure only to limited persons. It is clear such is to protect the rights of the subject of the report, in this case the non-respondent mother. It is noteworthy that, although the Court extended the submission date on this motion to ensure that the mother could assert her right to have the records remained sealed, she did not, nor did she affirmatively waive such rights. However, it is significant to the Court that the mother is testifying on behalf of ACS, offering testimony in support of the child protective petition allegations of domestic violence and corporeal punishment against the father. Further the investigating case worker has already testified about the investigation, which should have been memorialized in ACS records (both those records which have already been produced and those sought to be disclosed). Thus the mother and ACS have already revealed the contents of the records and reports that are confidential. Although the statutes and regulations do not provide for a waiver of such confidentiality, it appears that the factual circumstances in which this issue arises makes their disclosures germane. It's to ensure the integrity of the child protective fact finding hearing, to allow the all counsel a full opportunity to cross examine witnesses, which necessitates the disclosure of the records.

Counsels each seek to argue to what extent the relevant statutes and regulations limit disclosure of investigative reports and records that are unfounded. However, it is clear the circumstances for which they were written; to protect people's confidentiality. Social Services Law Section 422(A)(4) and (5) are written to keep unfounded records confidential, and to make them available only to a specifically enumerated individuals, agencies, the court and other delineated entities. See Matter of Evan E., 114 A.D.3d 149 (3<sup>rd</sup> Dept. 2013) (where the Family Court was prohibited from disclosing confidential records to CASA.) The Court however, is allowed access to such records if it determines is necessary for an issue before the Court. Social Services Law §422(4)(A)(e). Similarly, Social Services Law Section 372(4)(a) requires that records be kept confidential but permits disclosure on a limited basis. Specifically the records "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other

proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination." see also Catherine C. v. Albany Cty. Dept. Of Social Svs., 38 A.D.3d 959 (3<sup>rd</sup> Dept. 2007); Matter of Sarah FF., 18 A.D.3d 1072 (3<sup>rd</sup> Dept. 2005); Matter of Michelle HH., 18 A.D.3d 1075 (3<sup>rd</sup> Dept. 2005); see also Matter of Carla L., 45 A.D.2d 375 (which required that disclosure be limited to what is necessary and with adequate safeguards to limit as much as possible the unnecessary loss of confidentiality); Matter of Damien H., 268 A.D2d 475 (2<sup>nd</sup> Dept. 2000); Matter of Maria S., 43 Misc.3d 689 (Bx. Family Ct. 2014). The Court finds inapposite cases where disclosure of confidential records are sought as part of discovery in civil litigation. See Bibbins v. Sayegh, 611/13 NYLJ1202665356597 (Westchester Sup. Ct 7/17/2014); Selapack v. Iroquois Central School District, 17 A.D.3d 1169 (4<sup>th</sup> Dept. 2005).

Based on the specific facts of this proceeding and the legal posture of the matter being mid fact finding, the Court orders that the records sought to be disclosed shall be provided to the Court no later than 8/29/2014 12noon for an in camera inspection. Such records will be provided timely to all counsel before the continued trial date of September 2, 2014.

8/28/2014

  
Hon. Hana Gruebci

**ORDER TO SHOW CAUSE FOR  
CHILD'S MENTAL HEALTH  
RECORDS IN ARTICLE 6  
PROCEEDING**



FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, PART

-----X  
In the Matter of

Children Under Eighteen Years of Age  
Alleged to be Abused by:

Docket No.  
ORDER TO SHOW CAUSE

Respondent.  
-----X

Upon the annexed Affirmation of XXXXXXXXXXXX, of The Bronx Defenders, 360 East 161<sup>st</sup> Street, Bronx, NY, 10451, dated March 6, 2015, and upon all the pleadings and proceedings heretofore and herein:

LET XXXXXXXXXXXX, XXXXXXXXXXXX, Esq., of Counsel to the Administration for Children's Services (ACS), XXXXXXXXXXXX, Esq., attorney for the subject child, show cause before this Court on the \_\_\_ day of April, 2015, at the Family Court of the State of New York, Part 12 thereof, 900 Sheridan Avenue, Bronx, New York 10451, at \_\_\_\_ a.m./p.m., or as soon thereafter as counsel can be heard, why an Order should not be entered pursuant to Family Court Act 153, 1038, C.P.L.R. 2302(a), 2306, 2307, 2308(b), 42 U.S.C. 290ee-2 et seq., and 42 C.F.R. subpart B 2.61 et seq.:

- 1) Directing the release of the mental health records of XXXXXXXXXXXX, relating to the diagnosis and treatment of the mental health of XXXXXXXXXXXX;
- 2) Finding the interests of justice significantly outweigh the need for confidentiality;

- 3) Granting Respondent leave to subpoena agents and employees of such mental health provider XXXXXXXXXXXXXXXXXXXX;
- 4) Providing further relief as may be just and proper

SUFFICIENT CAUSE THEREFORE APPEARING, it is hereby ORDERED that service of this Order to Show Cause and the supporting papers annexed hereto upon the parties to this proceeding on or before \_\_\_\_ p.m. on the \_\_\_\_ day of April, 2015, by personal service, email or fax, would be deemed good and sufficient; and it is further

ORDERED, that XXXXXXXXXXXXXXXXXXXX produce the records pertaining to the mental health treatment of XXXXXXXXXXXXXXXXXXXX on the return date of this application.

Dated: April \_\_\_, 2015  
Bronx, New York

HONORABLE XXXXXXXXXXXXX

To: CLERK OF THE COURT

XXXXXXXXXXXXX, Esq.  
The Administration for Children's Services  
Family Court Legal Services  
900 Sheridan Avenue, 6<sup>th</sup> Floor  
Bronx, New York 10451

XXXXXXXXXXXXX, Esq.  
The Legal Aid Society – Juvenile Rights Division  
Family Court Legal Services  
900 Sheridan Avenue, 6<sup>th</sup> Floor  
Bronx, New York 10451

XXXXXXXXXXXXX  
901 Sheridan Avenue  
Bronx, NY 10451

XXXXXXXXXXXXX  
Risk Management Division  
XXXXXXXXXXXXX, suite XX  
Bronx, NY 10457

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, PART 12

-----X  
In the Matter of

Children Under Eighteen Years of Age  
Alleged to be Abused by:

Docket No.  
AFFIRMATION IN SUPPORT

Respondent.

-----X

XXXXXXXXXXXXXXXXXX, an attorney duly authorized to practice law in the State of New York,  
hereby affirms under penalty of perjury:

- 1) I am an attorney at Bronx Defenders, the counsel of record for XXXXXXXXXXXX, the  
respondent father herein, and I am fully familiar with the pleadings and prior proceedings  
heretofore filed or had herein.
- 2) I submit this affirmation in support of Respondent's Order to Show Cause.
- 3) This affirmation is based upon personal knowledge and upon information and belief, the  
sources of which include XXXXXXXX, XXXXXXXXXXXX, and a review of my case record,  
including the progress notes provided to me by Petitioner's counsel.
- 4) The matter is presently adjourned to May 7, 2015, to Part 12 of this Court for a fact-  
finding.

**FACTUAL/ PROCEDURAL HISTORY**

- 5) On December 1, 2014 the Administration for Children's Services ("ACS") filed the  
instant petition, alleging that the child XXXXXXXXXXXX is a neglected child, based on an  
alleged act of excessive corporal punishment by XXXXXXXXXXXXXXXXXXXX.
- 6) On December 1, 2014, The Bronx Defenders accepted assignment to represent Mr.  
XXXXXXX.

- 7) Upon information and belief, the source being **Family Services Progress Notes**, and the respondent parents, XXXXX has a long history of aggressive behavior and periodic hospitalizations at XXXXXXXXX Hospital.
- 8) In particular, upon information and belief, the source being **Family Services Progress Notes**, on or about September 1, 2014, XXXX and her mother, XXXXX, were engaged in a verbal dispute when XXXX began throwing objects in the house, pushing her mother, and threatening to break the T.V.
- 9) Upon information and belief, as a result XXXX's behavior, the police were called, and upon arriving at the scene, transported XXXX to XXXXX Hospital, where she was kept for approximately one week.
- 10) Upon information and belief, the source being **Family Services Progress Notes**, on or about November 22, 2014, the respondent mother, XXXXX, called the police because XXXX got upset and began to throw her teddy bears on the floor and to punch the walls in their home.
- 11) Upon information and belief, on or about November 22, 2014, the police transported XXX to XXXXXXX Hospital.
- 12) Upon information and belief, XXX has been hospitalized on at least four occasions since June of 2014.

### ARGUMENT

- 13) The release of psychiatric and psychological records is governed by Federal HIPAA requirements, 45 C.F.R. § 160, 164, and New York's Mental Hygiene Law § 33.13.
- 14) Upon information and belief, XXXXXXXX HOSPITAL is a "facility" within the meaning of NY Mental Hygiene Law § 33.13(a) as defined in, but not limited to, NY Mental Hygiene Law § 1.03(6). Upon information and belief, XXXXXXXX HOSPITAL is a "covered entity" within the meaning of the Health Insurance Portability and Accountability Act [HIPAA], 45 C.F.R. § 164.512(e)(1)(i), as defined in, but not limited to, HIPPA § 160.103.
- 15) Upon information and belief, XXXXXXXX HOSPITAL maintains records of health information of XXXXXXXX (DOB XXXXXX), as defined in, but not limited to, 45 C.F.R. § 160.103, and NY Mental Hygiene Law § 1.03(6).
- 16) Upon information and belief, these records contain medical and health information pertaining to the diagnosis of and treatment pertaining to the mental health of XXXXXXXX (DOB XXXXXX).
- 17) Upon information and belief, there is no other known competent source for the information contained in the records of XXXXXXXX HOSPITAL.
- 18) In order for protected clinical records to be released without consent of the patient, a court must find that the interests of justice significantly outweigh the need for confidentiality. N.Y. C.L.S. Men. Hyg. §33.13(c)(1), (7); see also 42 C.F.R. §2.64(e)(1); 45 C.F.R. § 164.512(e)(1)(i).
- 19) Pursuant to Family Court Act, a court must weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery." FCA § 1038(d).

- 20) When a Court find the interests of justice significantly outweigh a patient's privacy interests, the Court must define the scope of that disclosure, limiting the disclosure to what is necessary for the movant's legitimate purposes, N.Y. C.L.S. Men. Hyg § 33.13(f).
- 21) Finally, there must be a showing that the information sought is unavailable through other sources. See 42 C.F.R. Section 2.64 (d); In re Maximo, 710 N.Y.S.2d 864 (Fam. Ct., Kings Co., 2000)
- 22) In the context of children protective proceedings, Courts consistently find that good cause exists for disclosure, and that the interests of justice significantly outweigh the need for confidentiality, when the movant is able to articulate a clear link between the information sought and the issues to be determined. See, e.g., Hickox v. Hickox, 64 A.D.2d 412 (1st Dept 1978); Matter of Dwayne G., 97 Misc. 2d 233 (Fam. Ct. Kings Co. 1978).
- 23) Importantly, if the records sought are material and necessary to assist a Respondent in the preparation and defense of his case, Courts recognize that disclosure is proper. See e.g., In re B., Children, 886 N.Y.S.2d 70 (Fam. Ct. Kings Co. 2009); cf. In re Imman H., 845 N.Y.S.2d 517 (2d. Dep't 2008) (Denying the respondent mother's motion for the child's psychiatric records because the mother did not demonstrate that the records were needed for the preparation of her case.).
- 24) In the instant case, Mr. XXXX has clearly met this burden. Establishing that XXXX has a history of severe mental health issues, accompanied by aggressive behavior, goes to the heart of Mr. XXXX's defense in the current neglect proceedings.
- 25) Furthermore, Mr. XXXXX has clearly articulated the basis for believing that the XXXXXX Hospital Records will contain such information, has asserted that there is no

other known competent source for the information, and has limited the timeline of the request to what is necessary to prove his defense.

- 26) In addition, the records would be protected from re-disclosure through the issuance of a qualified protective order. See CPLR § 3103(a) (Establishing that a court may fashion protective orders “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”).
- 27) In contrast, a denial of this request would heavily impact Mr. XXXXXX’s ability to present an adequate defense, thereby implicating Mr. XXXXXX’s Constitutional due process interests. See, e.g., In re Kayla S., 998 N.Y.S.2d 824, 826 (Fam. Ct. Bronx Co. 2014) (Explaining that the liberal disclosure rules of FCA § 1038 “reflects a legislative policy that full and complete due process rights must be accorded before a family may be separated by court order. It also evinces the Legislature’s recognition that broad disclosure is a significant safeguard against erroneous determinations in such sensitive matters.”).
- 1) Consequently, Respondent respectfully requests that the Court enter an order either directing the release of the records of XXXXXX HOSPITAL relating to the diagnosis and treatment of the mental health of XXXXXXXX.
- 2) Finally, Petitioner also respectfully requests that the Court enter an order granting Petitioner leave to subpoena agents and employees of XXXXXX HOSPITAL to testify regarding contact with XXXXXXXX.
- 3) WHEREFORE, Petitioner prays that this Court enter an order



- a) Directing the release of the mental health records of XXXXXXXX HOSPITAL relating to the diagnosis and treatment of the mental health of XXXXXXXX from September 1, 2013 through December 1, 2014.
- b) Finding that the interests of justice significantly outweigh the need for confidentiality;
- c) Granting Petitioner leave to subpoena agents and employees of such XXXXXXXX HOSPITAL; and
- d) For such other and further relief as may seem just and proper.

WHEREFORE, it is respectfully requested that the Court order the relief requested herein.

Dated: April \_\_\_\_, 2015  
Bronx, New York

---

XXXXXXXXXX  
THE BRONX DEFENDERS  
Attorneys for Mr. XXXXX  
360 East 161st Street  
Bronx, New York 10451  
(718) 838-7878

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, PART 12  
-----X

In the Matter of

Docket No.

Children Under Eighteen Years of Age

QUALIFIED PROTECTIVE  
ORDER

Alleged to be Abused by:

Respondent.  
-----X

**PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION**

This matter having come before the Court by motion by the Administration for Children's Services for the entry of a protective order (the "Order") limiting the review, copying, dissemination, and filing of confidential documents and information to be produced by any party and their respective counsel or by any non-party in the course in this action (the "Action") to the extent set forth below; and good cause having been shown therefore:

**IT IS HEREBY ORDERED THAT:**

1. This Order is entered to facilitate the production, exchange, and discovery of documents and information that the Respondent, Petitioner, and the Attorney for the Child in this Action (collectively, the "Parties") agree merit confidential treatment.
2. This Order shall apply and govern the Mental Health Records of the Subject Child, XXXXXXXX
3. Except by Order of the Court the mental health records shall not be furnished, shown, or disclosed to any person or entity except to:
  - a. The Parties;
  - b. Counsel for the Parties in this Action and their associated supervisors and attorneys, paralegals, and other professional personnel (including support staff), who have been advised by such counsel of their obligations hereunder;
  - c. Expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this Action or to give testimony with respect to the subject matter of this Action at any hearing or proceeding in this Action; provided, however that such Confidential Information is furnished, shown, or disclosed in accordance with paragraph 4 of this Order;

- d. Social workers and parent advocates associated with a Party and involved in this Action;
  - e. The Court and court personnel in this Action;
  - f. An officer before whom a deposition is taken in this Action, including stenographic reporters and any necessary secretarial, clerical, or other personnel of such officer;
  - g. Any other person agreed to by the Parties.
4. Any person receiving the Records shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms of this Order.
  5. Extracts and summaries of the Mental Health Records shall also be treated as confidential in accordance with the provisions of this Order.
  6. The production of these Records shall in no way constitute a waiver of any Party's right to object to the disclosure or production of any other information in this Action or any other Action.
  7. This Order shall continue to be binding after the conclusion of the Action, except that any Party may seek the written permission of the Respondent, or Respondent's counsel, with respect to the dissolution or modification of the Order.
  8. Nothing in this Order shall be deemed to waive any privilege recognized by law, nor shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.
  9. Nothing in this Order shall be deemed to waive any Party's statutory rights to the disclosed Records, nor any such rights provided by regulation.
  10. Nothing in this Order shall prohibit or interfere with the ability of counsel for any Party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any Party or its affiliate(s) in connection with any other matters.
  11. This Order may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek to agree to different or additional protection for any particular material information.

IT IS SO ORDERED.

Dated: April \_\_ 2015

By: \_\_\_\_\_

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, Part 12

-----X  
In the Matter of:

A Child Under Eighteen Years of Age  
Alleged to be Neglected by:

JUDICIAL SUBPOENA  
DUCES TECUM

Docket No:

,  
Respondent.

-----X  
TO: XXXXXX Hospital  
Risk Management Division  
XXXXXXX, suite XX  
Bronx, NY 10457

YOU ARE HEREBY COMMANDED, that all business and excuses laid aside, to appear and attend before an Honorable Valerie Pells of the Family Court of the Bronx, Part 9, at 900 Sheridan Ave St, Bronx, NY, within seven (7) days of receipt of this subpoena, and at any recessed or adjourned date thereafter to give testimony in the above-mentioned case and to bring with you:

ALL MENTAL HEALTH RECORDS PERTAINING TO XXXXXXXX (D.O.B.  
6/12/1998) FROM \_\_\_\_\_ THROUGH \_\_\_\_\_.

The records must be properly certified and delegated; the certification must bear an original signature of the head of your hospital or agency of the person delegated to certify records. All records must be delivered by hand messenger or mailed to the attorney at the address below.

Pursuant to CPLR 2303, a copy of this subpoena shall be served, in the manner set forth in CPLR 2103, upon each party before (DATE RETURNABLE) Failure to comply with this subpoena is punishable as a criminal contempt of court and may make you liable to pay a monetary fine and/or face imprisonment.

So Ordered. Date:

\_\_\_\_\_  
XXXXXX, Esq.  
Attorney for the Respondent  
The Bronx Defenders  
360 East 161<sup>st</sup> Street  
Bronx, NY 10451  
(718) 838-7878

\_\_\_\_\_  
XXXXXXX  
JUDGE OF THE FAMILY COURT

**CERTIFICATION AS A BUSINESS RECORD**

I, \_\_\_\_\_, the \_\_\_\_\_, of  
(Name of Certifying Official) (Title of Certifying Official)

\_\_\_\_\_, hereby certify that the record  
(Name of Institution)

attached is in the custody of and is the full and complete record of the condition, act,  
transaction, occurrence or events of this institution concerning XXXXXX (DOB XXXXXX).

I further certify that this record was made in the regular course of business of this Institution and  
that it is the regular course of business of this Institution to make such record. I further certify  
that such record was made at the time of the condition, act, transaction, occurrence or events  
described therein, or within a reasonable time thereafter.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Certifying Official

**DELEGATION OF AUTHORITY**

I, \_\_\_\_\_, the \_\_\_\_\_,  
(Name of Certifying Official/Authorized Employee) (Title of Certifying Official/Authorized Employee)

of \_\_\_\_\_, am a responsible employee of  
(Name of Institution)

this Institution and have been delegated authority to certify records by

\_\_\_\_\_, \_\_\_\_\_, the head of this  
(Name of Head of Institution) (Title of Head of Institution)

institution, according to Rule 4518 of the New York Civil Practice Law and Rules.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Head of Institution

\_\_\_\_\_  
Signature of Certifying Official/Authorized Employee

**MOTION OF MENTAL HEALTH  
RECORDS OF ADULT  
RESPONDENT IN ARTICLE 6  
PROCEEDING AND  
SUBPOENA DUCES TECUM**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE

In the Matter of a Proceeding under Article 6  
of the Family Court Act

\_\_\_\_\_,

Petitioner

Docket No. V-\_\_\_\_\_

-against-

\_\_\_\_\_,

Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE that a motion will be made for the relief specified herein in connection with the above-captioned action as follows:

MOVING PARTY: Petitioner, \_\_\_\_\_

DATE, TIME & PLACE  
OF MOTION:

May \_\_\_\_\_ at 9:00 a.m. or as soon thereafter as counsel may be heard, at Monroe County Family Court, Hall of Justice, 99 Exchange Blvd, 3<sup>rd</sup> floor, Rochester, New York

RELIEF SOUGHT:

Directing that the annexed Judicial Subpoena Duces Tecum be signed and served upon \_\_\_\_\_, Unity Health, 100 Pinewild Dr., Suite 2A, Rochester, NY 14606, for the production of any and all records concerning the past and present treatment of \_\_\_\_\_ (DOB \_\_\_\_\_), including but not limited to: inpatient records, outpatient records, mental health records, notes, reports, bills and the like from January 1, 2008 to date.

SUPPORTING PAPERS:

Affirmation of Adele M. Fine, Assistant Public Defender

Dated: \_\_\_\_\_  
Rochester, New York

\_\_\_\_\_  
Adele M. Fine, Esq., Assistant Public Defender  
Attorney for Petitioner, \_\_\_\_\_  
Monroe County Public Defender's Office  
10 N. Fitzhugh St., Rochester, New York 14614  
Telephone: 585-753-4210



TO:

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE

\_\_\_\_\_  
In the Matter of a Proceeding under Article 6  
of the Family Court Act

\_\_\_\_\_  
Petitioner

Docket No. V-

-against-

AFFIRMATION

\_\_\_\_\_  
Respondent

ADELE M. FINE, ESQ., an attorney admitted to practice law in the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am an attorney employed by the Monroe County Public Defender's Office. I represent the Petitioner, \_\_\_\_, in the above-referenced proceeding. As such, I am familiar with the facts and circumstances set forth herein. I make this affirmation in support of Ms. \_\_\_\_ motion for mental health records pertaining to Mr. \_\_\_\_\_.
2. In Ms. \_\_\_\_'s supplemental petition for custody of the parties' son, \_\_\_\_, she alleges that the Respondent father suffers from a mental illness, namely obsessive compulsive disorder, which interferes with his ability to parent the parties' child.
3. Ms. \_\_\_\_ alleges that Mr. \_\_\_\_ is abnormally germ phobic, and engages in compulsive behaviors on a routine basis that he is unable to control.
4. In her supplemental petition, Ms. \_\_\_\_ further alleges that the Respondent has been recommended to take medication for his mental health problems, but he refuses to do so.
5. At a prior court appearance, Mr. \_\_\_\_ confirmed that he receives mental health counseling from \_\_\_\_\_.
6. The records of \_\_\_\_ are relevant to confirm the allegations in Ms. \_\_\_\_'s petitions. While Ms. \_\_\_\_ is prepared to testify as to her observations of Respondent's compulsive behaviors and how they impacted his care of the parties' child, she is not qualified to give a medical explanation for those behaviors. Only the records from Mr. \_\_\_\_'s therapist provide that explanation.
7. Furthermore, while Ms. \_\_\_\_ may testify as to admissions Mr. \_\_\_\_ made concerning his refusal to take medications recommended as part of his treatment for his mental illness, she is not qualified to explain what those medications are, whether they were in fact recommended, and the

consequences of Mr. \_\_\_\_'s failure to take the medications on his behaviors.

8. The mental health records requested by Ms. \_\_\_\_ are therefore necessary to prove Ms. \_\_\_\_'s allegation that Mr. \_\_\_\_'s mental health diagnosis makes him less fit to be the child's primary custodian, and that it is not in the child's best interests to award custody of him to Mr. \_\_\_\_ given the type of mental illness he has.

WHEREFORE, it is respectfully requested that the Court grant the relief in the Notice of Motion annexed hereto.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Adele M. Fine, Esq.

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE

In the Matter of a Proceeding under Article 6  
of the Family Court Act

\_\_\_\_\_

Petitioner

Docket No. V-

-against-

SUBPOENA DUCES TECUM

\_\_\_\_\_

Respondent

TO:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear, produce and attend before Ms. Julie A. Gordon, Esq., Family Court Referee, Second Floor, Hall of Justice, Rochester, NY 14614 on June 13, 2011 at 10:00 am and at any recessed or adjourned date to give testimony in this action on the part of the Petitioner, \_\_\_\_\_ and that you bring with you, and produce at the time and place aforesaid, a certain:

Any and all records concerning the past and present treatment of \_\_\_\_\_, DOB 12/15/63, including without limitation: in-patient records, outpatient records, mental health records, notes, reports, bills and the like for the period January 22, 2008 to date;

Please note that your appearance is not required at this time. Please be sure that the records are certified. Deliver Records to the Clerk of Family Court at the address below on or before \_\_\_\_\_.

Delivery address: Lorcen Nash, Clerk of Family Court  
Room 360, Hall of Justice  
Rochester, New York 14614

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

WITNESS, Julie A. Gordon, Esq., Family Court Referee at Rochester, NY the \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Julie A. Gordon, Esq., Family Court Referee

**ORDER TO SHOW CAUSE FOR  
SUBSTANCE ABUSE RECORDS OF  
ADULT RESPONDENT IN  
ARTICLE 6 PROCEEDING**

**JUDICIAL SUBPOENA DUCES  
TECUM**

**ORDER TO PRODUCE RECORDS**

- 7) Upon information and belief, the source being **Family Services Progress Notes**, and the respondent parents, XXXXX has a long history of aggressive behavior and periodic hospitalizations at XXXXXXXXX Hospital.
- 8) In particular, upon information and belief, the source being **Family Services Progress Notes**, on or about September 1, 2014, XXXX and her mother, XXXXX, were engaged in a verbal dispute when XXXX began throwing objects in the house, pushing her mother, and threatening to break the T.V.
- 9) Upon information and belief, as a result XXXX's behavior, the police were called, and upon arriving at the scene, transported XXXX to XXXXX Hospital, where she was kept for approximately one week.
- 10) Upon information and belief, the source being **Family Services Progress Notes**, on or about November 22, 2014, the respondent mother, XXXXX, called the police because XXXX got upset and began to throw her teddy bears on the floor and to punch the walls in their home.
- 11) Upon information and belief, on or about November 22, 2014, the police transported XXX to XXXXXXX Hospital.
- 12) Upon information and belief, XXX has been hospitalized on at least four occasions since June of 2014.

### ARGUMENT

- 13) The release of psychiatric and psychological records is governed by Federal HIPAA requirements, 45 C.F.R. § 160, 164, and New York's Mental Hygiene Law § 33.13.
- 14) Upon information and belief, XXXXXXXX HOSPITAL is a "facility" within the meaning of NY Mental Hygiene Law § 33.13(a) as defined in, but not limited to, NY Mental Hygiene Law § 1.03(6). Upon information and belief, XXXXXXXX HOSPITAL is a "covered entity" within the meaning of the Health Insurance Portability and Accountability Act [HIPAA], 45 C.F.R. § 164.512(e)(1)(i), as defined in, but not limited to, HIPPA § 160.103.
- 15) Upon information and belief, XXXXXXXX HOSPITAL maintains records of health information of XXXXXXXX (DOB XXXXXX), as defined in, but not limited to, 45 C.F.R. § 160.103, and NY Mental Hygiene Law § 1.03(6).
- 16) Upon information and belief, these records contain medical and health information pertaining to the diagnosis of and treatment pertaining to the mental health of XXXXXXXX (DOB XXXXXXXX).
- 17) Upon information and belief, there is no other known competent source for the information contained in the records of XXXXXXXX HOSPITAL.
- 18) In order for protected clinical records to be released without consent of the patient, a court must find that the interests of justice significantly outweigh the need for confidentiality. N.Y. C.L.S. Men. Hyg. §33.13(c)(1), (7); see also 42 C.F.R. §2.64(e)(1); 45 C.F.R. § 164.512(e)(1)(i).
- 19) Pursuant to Family Court Act, a court must weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery." FCA § 1038(d).

- 20) When a Court find the interests of justice significantly outweigh a patient's privacy interests, the Court must define the scope of that disclosure, limiting the disclosure to what is necessary for the movant's legitimate purposes, N.Y. C.L.S. Men. Hyg § 33.13(f).
- 21) Finally, there must be a showing that the information sought is unavailable through other sources. See 42 C.F.R. Section 2.64 (d); In re Maximo, 710 N.Y.S.2d 864 (Fam. Ct., Kings Co., 2000)
- 22) In the context of children protective proceedings, Courts consistently find that good cause exists for disclosure, and that the interests of justice significantly outweigh the need for confidentiality, when the movant is able to articulate a clear link between the information sought and the issues to be determined. See, e.g., Hickox v. Hickox, 64 A.D.2d 412 (1st Dept 1978); Matter of Dwayne G., 97 Misc. 2d 233 (Fam. Ct. Kings Co. 1978).
- 23) Importantly, if the records sought are material and necessary to assist a Respondent in the preparation and defense of his case, Courts recognize that disclosure is proper. See e.g., In re B., Children, 886 N.Y.S.2d 70 (Fam. Ct. Kings Co. 2009); cf. In re Imman H., 845 N.Y.S.2d 517 (2d. Dep't 2008) (Denying the respondent mother's motion for the child's psychiatric records because the mother did not demonstrate that the records were needed for the preparation of her case.).
- 24) In the instant case, Mr. XXXX has clearly met this burden. Establishing that XXXX has a history of severe mental health issues, accompanied by aggressive behavior, goes to the heart of Mr. XXXX's defense in the current neglect proceedings.
- 25) Furthermore, Mr. XXXXX has clearly articulated the basis for believing that the XXXXXX Hospital Records will contain such information, has asserted that there is no



other known competent source for the information, and has limited the timeline of the request to what is necessary to prove his defense.

- 26) In addition, the records would be protected from re-disclosure through the issuance of a qualified protective order. See CPLR § 3103(a) (Establishing that a court may fashion protective orders “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”).
- 27) In contrast, a denial of this request would heavily impact Mr. XXXXXX’s ability to present an adequate defense, thereby implicating Mr. XXXXXX’s Constitutional due process interests. See, e.g., In re Kayla S., 998 N.Y.S.2d 824, 826 (Fam. Ct. Bronx Co. 2014) (Explaining that the liberal disclosure rules of FCA § 1038 “reflects a legislative policy that full and complete due process rights must be accorded before a family may be separated by court order. It also evinces the Legislature’s recognition that broad disclosure is a significant safeguard against erroneous determinations in such sensitive matters.”).
- 1) Consequently, Respondent respectfully requests that the Court enter an order either directing the release of the records of XXXXXX HOSPITAL relating to the diagnosis and treatment of the mental health of XXXXXXXX.
- 2) Finally, Petitioner also respectfully requests that the Court enter an order granting Petitioner leave to subpoena agents and employees of XXXXXX HOSPITAL to testify regarding contact with XXXXXXXX.
- 3) WHEREFORE, Petitioner prays that this Court enter an order

- a) Directing the release of the mental health records of XXXXXXXX HOSPITAL relating to the diagnosis and treatment of the mental health of XXXXXXXX from September 1, 2013 through December 1, 2014.
- b) Finding that the interests of justice significantly outweigh the need for confidentiality;
- c) Granting Petitioner leave to subpoena agents and employees of such XXXXXXXX HOSPITAL; and
- d) For such other and further relief as may seem just and proper.

WHEREFORE, it is respectfully requested that the Court order the relief requested herein.

Dated: April \_\_\_\_, 2015  
Bronx, New York

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XXXXXXXXXX  
THE BRONX DEFENDERS  
Attorneys for Mr. XXXXX  
360 East 161st Street  
Bronx, New York 10451  
(718) 838-7878

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK, COUNTY OF BRONX, PART 12  
-----X

In the Matter of

Docket No.

Children Under Eighteen Years of Age

QUALIFIED PROTECTIVE  
ORDER

Alleged to be Abused by:

Respondent.  
-----X

**PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION**

This matter having come before the Court by motion by the Administration for Children's Services for the entry of a protective order (the "Order") limiting the review, copying, dissemination, and filing of confidential documents and information to be produced by any party and their respective counsel or by any non-party in the course in this action (the "Action") to the extent set forth below; and good cause having been shown therefore:

**IT IS HEREBY ORDERED THAT:**

1. This Order is entered to facilitate the production, exchange, and discovery of documents and information that the Respondent, Petitioner, and the Attorney for the Child in this Action (collectively, the "Parties") agree merit confidential treatment.
2. This Order shall apply and govern the Mental Health Records of the Subject Child, XXXXXXXX
3. Except by Order of the Court the mental health records shall not be furnished, shown, or disclosed to any person or entity except to:
  - a. The Parties;
  - b. Counsel for the Parties in this Action and their associated supervisors and attorneys, paralegals, and other professional personnel (including support staff), who have been advised by such counsel of their obligations hereunder;
  - c. Expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this Action or to give testimony with respect to the subject matter of this Action at any hearing or proceeding in this Action; provided, however that such Confidential Information is furnished, shown, or disclosed in accordance with paragraph 4 of this Order;

- d. Social workers and parent advocates associated with a Party and involved in this Action;
  - e. The Court and court personnel in this Action;
  - f. An officer before whom a deposition is taken in this Action, including stenographic reporters and any necessary secretarial, clerical, or other personnel of such officer;
  - g. Any other person agreed to by the Parties.
4. Any person receiving the Records shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms of this Order.
  5. Extracts and summaries of the Mental Health Records shall also be treated as confidential in accordance with the provisions of this Order.
  6. The production of these Records shall in no way constitute a waiver of any Party's right to object to the disclosure or production of any other information in this Action or any other Action.
  7. This Order shall continue to be binding after the conclusion of the Action, except that any Party may seek the written permission of the Respondent, or Respondent's counsel, with respect to the dissolution or modification of the Order.
  8. Nothing in this Order shall be deemed to waive any privilege recognized by law, nor shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.
  9. Nothing in this Order shall be deemed to waive any Party's statutory rights to the disclosed Records, nor any such rights provided by regulation.
  10. Nothing in this Order shall prohibit or interfere with the ability of counsel for any Party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any Party or its affiliate(s) in connection with any other matters.
  11. This Order may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek to agree to different or additional protection for any particular material information.

IT IS SO ORDERED.

Dated: April \_\_ 2015

By: \_\_\_\_\_

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, Part 12

-----X  
In the Matter of:

A Child Under Eighteen Years of Age  
Alleged to be Neglected by:

JUDICIAL SUBPOENA  
DUCES TECUM

Docket No:

,  
Respondent.

-----X  
TO: XXXXXX Hospital  
Risk Management Division  
XXXXXXX, suite XX  
Bronx, NY 10457

YOU ARE HEREBY COMMANDED, that all business and excuses laid aside, to appear and attend before an Honorable Valerie Pells of the Family Court of the Bronx, Part 9, at 900 Sheridan Ave St, Bronx, NY, within seven (7) days of receipt of this subpoena, and at any recessed or adjourned date thereafter to give testimony in the above-mentioned case and to bring with you:

ALL MENTAL HEALTH RECORDS PERTAINING TO XXXXXXXX (D.O.B.  
6/12/1998) FROM \_\_\_\_\_ THROUGH \_\_\_\_\_.

The records must be properly certified and delegated; the certification must bear an original signature of the head of your hospital or agency of the person delegated to certify records. All records must be delivered by hand messenger or mailed to the attorney at the address below.

Pursuant to CPLR 2303, a copy of this subpoena shall be served, in the manner set forth in CPLR 2103, upon each party before (DATE RETURNABLE) Failure to comply with this subpoena is punishable as a criminal contempt of court and may make you liable to pay a monetary fine and/or face imprisonment.

So Ordered. Date:

\_\_\_\_\_  
XXXXXX, Esq.  
Attorney for the Respondent  
The Bronx Defenders  
360 East 161<sup>st</sup> Street  
Bronx, NY 10451  
(718) 838-7878

\_\_\_\_\_  
XXXXXXX  
JUDGE OF THE FAMILY COURT

**CERTIFICATION AS A BUSINESS RECORD**

I, \_\_\_\_\_, the \_\_\_\_\_, of  
(Name of Certifying Official) (Title of Certifying Official)

\_\_\_\_\_, hereby certify that the record  
(Name of Institution)

attached is in the custody of and is the full and complete record of the condition, act,  
transaction, occurrence or events of this institution concerning XXXXXX (DOB XXXXXX).

I further certify that this record was made in the regular course of business of this Institution and  
that it is the regular course of business of this Institution to make such record. I further certify  
that such record was made at the time of the condition, act, transaction, occurrence or events  
described therein, or within a reasonable time thereafter.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Certifying Official

**OPPOSITION TO OMNIBUS  
DEMAND FOR DISCLOSURE  
FROM RESPONDENT IN ARTICLE  
10 PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
In the Matter of

RESPONSE TO OMNIBUS  
DEMAND FOR DISCLOSURE

Children Under the Age of Eighteen Years  
Alleged to be Neglected/Abused by

Docket No. [REDACTED]

Respondents.  
-----X

Pursuant to Article 4 and 31 of the New York Civil Practice Law and Rules (the "CPLR"), and Section 1038 of the Family Court Act, Respondent, (the "Respondent"), hereby responds and objects to Petitioner's Omnibus Demand For Disclosure, dated January 24, 2012 (the "Omnibus Demand"):

**RESPONDENT'S GENERAL OBJECTIONS TO PETITIONER'S OMNIBUS DEMAND  
FOR DISCLOSURE**

1. Respondent objects to the Omnibus Demand to the extent it purports to impose obligations beyond those required by the Family Court Act or CPLR.
2. Respondent objects to the Omnibus Demand because Petitioner has not been granted leave of court authorizing this disclosure. According to CPLR 408, in special proceedings, "[l]eave of court shall be required for disclosure except for a notice under section 3123." In New York, Article 10 proceedings are "special proceedings." *See In re CPS ex rel. Brandon G.*, 2004 NY Slip Op 51513U, 2 (N.Y. Fam. Ct. 2004) ("[P]roceedings brought under Article 10 of the Family Court Act are considered special proceedings and as such are governed by Article 4 of the CPLR. Moreover, section 408 of that same article requires leave of court for disclosure 'except for a notice under section 3123.'"); *See also Lisa W. v. Seine W.*, 2005 NY



Slip Op 51782U (N.Y. Fam. Ct. 2005) ("custody proceedings are considered 'special proceedings' and as such are governed by article 4 of the Civil Practice Law and Rules ... Unlike discovery requests made pursuant to article 31, which provides for 'disclosure by stipulation or upon notice without leave of court,' article 4 provides that 'leave of court shall be required for disclosure' in a special proceeding").

3. Any documents Respondent produces in response to the Omnibus Demand will be produced without waiving any objections regarding the use of them in any subsequent proceeding or trial in this or any other action, including, but not limited to, objections based on relevance, privilege, or admissibility.

4. Respondent objects to the Omnibus Demand to the extent it seeks documents that are not in the possession, custody, or control of Respondent.

**RESPONDENT'S SPECIFIC OBJECTIONS AND RESPONSES TO PETITIONER'S  
NOTICE FOR DISCOVERY AND INSPECTION**

Subject to and without waiving any of the General Objections listed above, Respondent responds and objects to the specific Document Requests in Petitioner's Notice For Discovery and Inspection as follows:

**Demand No. 1:** Any and all medical records, reports, or evaluations as to the subject children, Lameek J [REDACTED] and Serenity B [REDACTED], within the custody or control of the Respondent, Paula J [REDACTED], or her attorneys and agents.

**Response No. 1:** Respondent objects to this request as overly broad, and unduly burdensome.

Respondent also objects to this request because, as set forth above, CPLR 408, requires Petitioner to seek leave of court authorizing this disclosure. While Section 1038(b) of the Family Court Act explicitly mandates disclosure of relevant documentary evidence by the petitioner upon request by a respondent or attorney for a subject child, it does not require the same burden of production on respondent. .

**Demand No. 2:** Any and all school records, reports, or evaluations as to the subject children, Lameek J. [REDACTED] and Serenity B. [REDACTED], within the custody or control of the Respondent, Paula J. [REDACTED], or her attorneys or agents.

**Response No. 2:** Respondent objects to this request as overly broad, and unduly burdensome.

Respondent further objects to this request because the terms "school records," "reports," or "evaluations," are vague and ambiguous. Respondent also objects to this request because, as set forth above, CPLR 408 requires Petitioner to seek leave of court authorizing this disclosure.

While Section 1038(b) of the Family Court Act explicitly mandates disclosure of relevant documentary evidence by the petitioner upon request by a respondent or attorney for a subject child, it does not require the same burden of production on respondent.

**Demand No. 3:** Any documents, reports and any other records in the custody or control of the Respondent, the subject children, and/or her attorney that relate to the fact finding hearing which is intended to be introduced at such hearing.

**Response No. 3:** Respondent does not object to responding to this demand. However, Respondent does not presently intend to enter any documents into evidence. Respondent reserves the right to supplement this response if she later decides to enter documentary evidence.

**RESPONDENT'S RESPONSE TO PETITIONER'S DEMAND FOR NAMES AND ADDRESSES AND TELEPHONE NUMBERS OF WITNESSES**

**Demand No. 1:** Please furnish a list of the names, addresses and telephone numbers and titles of all persons intended to be called as witnesses.

**Response No. 1:** Respondent does not object to responding to this demand. However,

Respondent does not presently intend to call any witnesses. Respondent reserves the right to supplement this response if she decides to call witnesses.

**RESPONDENT'S RESPONSES AND OBJECTIONS TO PETITIONER'S DEMAND FOR EXPERT WITNESS INFORMATION**

**Demands Nos. 1 – 5:** Multiple demands pertaining to expert witnesses that the respondent may intend to call, their contact information and the nature and basis of the expert opinion they would offer.

**Responses Nos. 1 – 5:** Respondent does not object to responding to these demands. However, Respondent has not yet retained any expert witness(es) to testify at trial and/or provide an opinion on any issue in this case. To the extent that Respondent retains or employs an expert for these purposes, Respondent reserves the right to supplement or amend these responses and objections at any time prior to the trial of this action, and will at that time produce any and all information responsive to these demands.

**Demand No. 6:** Provide the name, address, telephone number and title of any other person you consulted as an expert on any issue in the case.

**Response No. 6:** Respondent objects to Paragraph 6 of the Demand for Expert Witness Information because it improperly requests information relating to “any other person you consulted as an expert on any issue in the case.” CPLR 3101(d) is limited to persons “whom the party expects to call as an expert witness at trial.” Information relating to persons “consulted” who are not expected to be called as an expert witness at trial is beyond the scope of CPLR 3101(d).

**RESPONDENT’S OBJECTIONS TO PETITIONER’S NOTICE TO PRODUCE  
PARTY’S STATEMENT**

**Demand:** Please disclose for copying any statement, signed or unsigned, recorded or videotaped, or oral and reduced to a writing, or recorded in a record or notes in the possession, custody, or control of the Respondent, or her attorney which was actually or allegedly made by or claimed to be taken from the Respondent.

**Response:** Respondent objects to the Notice To Produce Party’s Statement because it is an improper request under CPLR 3101(e) and is overly broad and vague and unduly burdensome. According to CPLR 3101(e), “[a] party may obtain a copy of his own statement.” Petitioner does not request its “own statement” but rather statements “actually or allegedly made by or

claimed to be taken from the Respondent." This demand improperly requests information not authorized for disclosure by CPLR 3101 or any other provision of the CPLR or FCA.

Dated: , 2012

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Esq.  
BROOKLYN FAMILY DEFENSE PROJECT  
Attorney for PAULA J. [REDACTED]  
177 Livingston St. Suite 700  
Brooklyn, New York 11201  
(347) 592-2519

TO: , Esq.  
Special Assistant Corporation Counsel  
Attorney for Petitioner  
330 Jay Street, 12<sup>th</sup> floor  
Brooklyn, NY 11201

CC: , Esq.  
Attorney for the Children  
111 Livingston Street, 8<sup>th</sup> floor  
Brooklyn, NY 11201

**AFFIRMATION IN OPPOSITION  
TO PETITIONER'S DEMAND FOR  
SOCIAL WORKER'S NOTES WHO  
IS PART OF THE LEGAL TEAM  
IN AN ARTICLE 10 PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, CITY OF NEW YORK, PART 14

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

Children Under Eighteen Years of Age  
Alleged to be Neglected by

[REDACTED]

**AFFIRMATION IN  
OPPOSITION TO MOTION**

Docket No.: NA-[REDACTED]  
NA-[REDACTED]

Respondent.

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Rebecca Oyama, Esq., an attorney authorized to practice law in the State of New York, affirms, under penalty of perjury, the following:

1. I am the attorney of record, from The Bronx Defenders for [REDACTED], the respondent mother, and I am fully familiar with all papers and proceedings previously filed and had herein.
2. I make this Affirmation in Opposition to the June 16, 2014, Notice of Motion filed by counsel for the Administration for Children's Services ("the Petitioner"), seeking to compel Ms. [REDACTED]'s counsel to disclose all case related documents in their possession pursuant to CPLR §3124.

**PERTINENT PROCEDURAL AND FACTUAL HISTORY**

3. On November 28, 2011, ACS filed a neglect petition against Ms. [REDACTED] in Bronx Family Court. On that date, the Honorable Gayle P. Roberts remanded the children, [REDACTED] and [REDACTED] to the custody of the Administration for Children's Services ("ACS").
4. On April 19, 2012, ACS filed an abuse petition in Bronx Family Court against [REDACTED] and withdrew the neglect petition and a remand of the children was entered on the abuse docket.
5. On November 7, 2013, Ms. [REDACTED] gave birth to [REDACTED].
6. On November 13, 2013, ACS filed a derivative abuse petition against Ms. [REDACTED].

7. On June 13, 2014, petitioner sent an email to the undersigned asking for discovery. The email did not constitute a proper discovery request pursuant to CPLR § 3120; the email neither referenced a previous discovery demand nor stated the specific documents petitioner sought. Indeed, at no point during the 3 years that this case has been pending of this case has petitioner ever served respondent mother's counsel with a proper discovery demand pursuant to CPLR § 3120.
8. On June 13, 2014, counsel for Ms. [REDACTED] emailed petitioner to inform him that Bronx Defenders had no discoverable material to provide at this time.
9. On June 13, 2014, Petitioner asked if The Bronx Defenders had assigned a social worker to Ms. [REDACTED]. Despite having no obligation to provide this information, counsel told petitioner that The Bronx Defenders had assigned two social workers to work with Ms. [REDACTED]. When Petitioner asked why notes belonging to the social workers had not been provided, counsel for Ms. [REDACTED] explained to Petitioner that communications between the social workers and Ms. [REDACTED] and other notes taken at the direction of the attorney were not discoverable and protected by attorney client privilege and attorney work product.
10. On June 16, 2014, Petitioner filed a motion to compel Ms. [REDACTED]' counsel to disclose all documents in their possession related to her case.

### LEGAL ARGUMENT

#### **I. Petitioner cannot compel discovery because it did not provide the requisite discovery notice pursuant to §3120 and thus a motion to compel is improper.**

11. CPLR §3120 provides that any party may serve a notice on another party to "produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served." CPLR §3120(1)(i).
12. The discovery notice must specify the time, place and manner of making the discovery and must identify the items to be discovered, providing a description and category for each item. CPLR §3120(2).
13. Petitioner did not provide Respondent with a discovery notice specifying the time, place and manner of discovery or the specific documents he sought.
14. Therefore, pursuant to §3120(2), Petitioner cannot compel Respondent's counsel to provide the documents in Respondent's possession.
15. CPLR §3124 states that if a person "fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR §3124.

16. A motion to compel is premature when a request for discovery pursuant to §3120 has not been made.
17. This neglect case was filed on November 13, 2013. On January 30, 2014, the case was set down for trial on June 17, 2014.
18. On May 8, 2014, this Court ordered that in the event ACS planned to file a summary judgment motion on this case, it must do so by May 19, 2014. Despite the Court's order, ACS attempted to file a motion for summary judgment on May 30, 2014, however was told to file an order to show cause seeking permission to file it, given the late filing. On June 2, 2014 on consent of all parties, ACS was permitted to file the summary judgment motion. As a result, the date of June 17, 2014 was vacated (as to the fact-finding only). At no point between Nov. 13, 2013 and the initial trial date of June 17, 2014, did Petitioner serve a discovery demand pursuant to CPLR §3120. Nor did it make any informal requests for discovery. It was not until ACS emailed respondent mother's counsel on June 13, 2014 – eight months after the filing of the derivative petition as to Gavin, that ACS made any attempt to request discovery of any kind from respondent mother.
19. To date, ACS still has not served respondent mother's counsel with any formal discovery demand pursuant to the CPLR.

**II. Even if Petitioner *had* provided notice pursuant to § 3120(2), social workers who act as part of an attorneys legal team are considered agents of the attorney and thus all communications, work product, and material made in anticipation of litigation are encompassed under the protections of the attorney-client privilege.**

**A. Material is not discoverable if it falls within the exceptions defined by CPLR § 3101.**

20. It is well settled that CPLR 3101 must be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968).
21. There are however, outlined in the CPLR, a number of exceptions to the general policy of liberal disclosure. “The CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials.” The latter are immune unless there is “substantial need and no other method to obtain such disclosure.” *Spectrum Sys. Int'l Corp. v. Chem Bank*, 78 N.Y.2d 371, 376-377 (1991).
22. Work-product includes “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible” things. See Hickman v. Taylor, 329 U.S. 495 (1947).



23. Litigation materials include material "prepared in contemplation of litigation by non-lawyers and lawyers acting in a non-legal capacity." Beller v. William Penn Life Ins. Co. of New York, 15 Misc.3d 350 (Sup. Ct. 2007).
24. Privileged work-product, litigation material, and/or confidential communication materials are not obtainable by an opposing party because they are protected under the CPLR. Annotated notes of C.P.L.R. 3101 (McKinney's).
25. These categorical protections allow a lawyer to work on a client's behalf "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel....[Otherwise], much of what is now put down in writing would remain unwritten." Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

**B. Communications between a client and an attorney's agent are clearly privileged.**

26. The exceptions to the general rule of liberal discovery go beyond simply the conversations and work done by an attorney assigned to a given case, but extend to agents who act as members of the attorney's legal team so long as they are acting at the direction of the attorney.
27. An agent of an attorney is one that: acts under the supervision or direction of an attorney (Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 316-317 (Sup. Ct. 2007)); is necessary to facilitate communication between the attorney and client (People v. Doe, 99 Misc. 2d 411, 415 (Sup. Ct. 1979) (internal quotation marks omitted); Mileski v. Locker, 14 Misc. 2d 252, 255-256 (Sup. Ct. 1958)); or has a relationship with the client's attorney that reasonably leads the client to expect confidentiality (Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99 (Sup. Ct. 2003)).
28. "Exception to the general rule that communications made between defendant and counsel in known presence of third party are not privileged exists for statements made by client to attorney's employees or in their presence because clients have reasonable expectation that such statements will be used solely for their benefit and remain confidential. McKinney's CPLR 4503(a)." People v. Osorio, 550 N.Y.S.2d 612, 614-15 (1989).
29. "The scope of the agency privilege, which allows communications to counsel by one serving as an agent of either attorney or client to be protected under attorney-client privilege, is not defined by the third parties' employment or function, but rather depends on whether the client had an expectation of confidentiality under the circumstances." Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, (Sup. Ct. 2003).
30. In addition, when a client makes statements to attorney's agents or to a third party in the attorney's presence, clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. CPLR § 4503(a). See People v. Osorio, 550 N.Y.S.2d 612, 614-15 (1989). If clients expect that their statements will be confidential, § 3101(d) limits discovery of those statements.

**C. Work done by an attorney's agent or employees acting at the direction of the attorney, is privileged under the CPLR §3101 work-product exceptions.**

31. An agent of an attorney is one that acts under the supervision or direction of an attorney (Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 316-317 (Sup. Ct. 2007); is necessary to facilitate communication between the attorney and client (People v. Doe, 99 Misc. 2d 411, 415 (Sup. Ct. 1979) (internal quotation marks omitted); Mileski v. Locker, 14 Misc. 2d 252, 255-256 (Sup. Ct. 1958)); or has a relationship with the client's attorney that reasonably leads the client to expect confidentiality (Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99 (Sup. Ct. 2003)).
32. A social worker acts as the attorney's agent if he/she is employed by the attorney to assist in litigation. For instance, when a law guardian in a Family Court proceeding sought out and employed a social worker to determine a child's best interests, the social worker was deemed a "representative" of the infant for the purposes of [the § 3101] statute. Lenny McN., 183 A.D.2d, at 629. The social worker's materials only lose privileged immunity if the client chooses to have the social worker testify as a witness and thus waives that privilege.
33. A mental health expert is considered an attorney agent if the attorney consulted him to assist in analyzing or preparing the case as an adjunct to the lawyer's strategic thought processes (Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 490 (1st Dep't 2010) (internal quotation marks and citation omitted). See, e.g., Lisa W. v. Seine W., 9 Misc.3d 1125(A) (Fam. Ct. 2005) ("A mental health professional retained by an attorney is that party's 'representative' for purposes of CPLR 3101(d)(2) and 3101(c).").
34. On the other hand, a mental health expert is not an agent of the attorney if a client sought out the mental health expert on his or her own, rather than at the advice and direction of the client's attorney. See Murray v. Bd. Of Educ. Of City of New York, 199 F.R.D. 154, 156-157 (S.D.N.Y. 2001).
35. An investigator acts as the attorney's agent if the professional relationship between investigator and attorney is such that the investigator conducts his investigation pursuant to the attorney's guidance and direction. In re Connecticut, 179 Misc. 2d 623, 627 (Co. Ct., Nassau Co. 1999).
36. If an attorney's agent prepares materials to assist with litigation, those materials are also covered by the § 3101 work-product exceptions. See Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 116 (Sup. Ct. 2003) (Work-product rule "applies to documents prepared principally or exclusively to assist in anticipated or ongoing litigation," when party is aware the document might be useful in the event of litigation); Matter of Rosalie S., 172 Misc. 2d 176, 177 (Fam. Ct. 1997) (work product included a report from a psychologist because Family Court had hired ' to assist the respondent parent); Matter of People v. Edney, 39 N.Y.2d 620 (1 ("An attorney may consult a psychiatrist to obtain advice concerning the ef

an insanity plea and the product of such a consultation is protected by the work product doctrine.”)

37. Moreover, Family Court has specifically recognized that if social workers are hired by attorneys their communication with clients are protected by the attorney-client privilege, and their work is immune from disclosure as attorney work product or material prepared in anticipation of litigation. See also Renee B. v. Michael B., 227 A.D.2d 315 (1st Dep’t 1996) (internal citations omitted). (“The child’s communications with the law guardian, *as well as with the social worker hired by the law guardian*, implicate the attorney-client privilege...and thus, the subpoena[] demanding the testimony of the...social worker [was] properly quashed.”) (emphasis added).
38. Furthermore, documents covered by attorney-client privilege need not exclusively contain references to legal concerns. Fields v. First Liberty Ins. Corp., 38 Misc. 3d 431 (Sup. Ct. 2012) (“The attorney-client privilege is not lost because the documents also contain or refer to some nonlegal concerns”).
- D. Ms. [REDACTED] and Ms. [REDACTED] are agents of Ms. [REDACTED]’ attorney and members of Ms. [REDACTED]’ legal team thus their communications with Ms. [REDACTED] are privileged and their work product is immune from discovery as attorney work-product and material prepared in anticipation of litigation.**
39. Like social workers hired by Attorney’s for Children from the Legal Aid Society in child welfare cases Ms. [REDACTED] and Ms. [REDACTED] are social workers hired and employed by the The Bronx Defenders, which provides legal counsel to Ms. [REDACTED]. Social workers have clearly been determined to be attorney’s agents in child welfare cases. See Lenny McN., 183 A.D.2d, at 629. Both Ms. [REDACTED] and Ms. [REDACTED] are part of Ms. [REDACTED]’ legal team and they are acting under the supervision and direction of Ms. [REDACTED]’ attorneys. In addition, Ms. [REDACTED] has a reasonable expectation that all communications between herself and her legal team will remain confidential. Ms. [REDACTED] and Ms. [REDACTED] are part of that legal team.
40. As part of their role on the legal team, Ms. [REDACTED] and Ms. [REDACTED] act as de facto investigators, gathering facts about Ms. [REDACTED]’ case “pursuant to the attorney’s guidance and direction.” See In re Connecticut, 179 Misc. 2d 623, 627 (Co. Ct., Nassau Co. 1999).
41. Neither Ms. [REDACTED] nor Ms. [REDACTED] provide clinical services or acted in the capacity of clinical therapist for Ms. [REDACTED].
42. Petitioner misses the point and completely miscomprehends Ms. [REDACTED]’s arguments that because §1046 (vii) of the FCA provides that privilege in a neglect or abuse case child protective proceeding does not apply, the notes of Ms. [REDACTED] and Ms. [REDACTED] are discoverable. Ms. [REDACTED] does not assert that such a privilege applies here. She asserts that the notes of Ms. [REDACTED] and Ms. [REDACTED], social

workers consulting on her legal case and working at the direction of her lawyers are privileged attorney-client communications and constitute attorney-client work product.

43. In addition, Ms. [REDACTED] has not called Ms. [REDACTED] or Ms. [REDACTED] to act as witnesses, so she has not consented to waiving the attorney-client privilege attached to their communication. See In re Cravath, 110 N.Y.S. 454 (Ct. of Gen. Sess, 1908).

For all the foregoing reasons, counsel for Ms. [REDACTED] respectfully requests that the Court deny the instant motion in its entirety and cease to compel discovery of privileged information now and for all future discovery requests, may they be proper or not proper.

Dated: Bronx, NY  
July 24, 2014

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Counsel for [REDACTED]  
The Bronx Defenders  
360 East 161st Street  
Bronx, NY 10451

**AFFIRMATION IN OPPOSITION  
TO DEMAND FOR RESPONDENT  
TO SUBMIT TO A PRE-TRIAL  
MENTAL HEALTH EXAMINATION**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, CITY OF NEW YORK, PART 12

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In the Matter of

[REDACTED],

A Child Under 18 Years of Age Alleged to  
be Neglected by

AFFIRMATION IN OPPOSITION  
TO MOTION

Docket No.: NN-[REDACTED]-13

[REDACTED],

Respondent.

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[REDACTED], ESQ., an attorney authorized to practice law in the State of New York,  
affirms, under penalty of perjury, the following:

1. I am the attorney of record, from the Bronx Defenders for [REDACTED]  
[REDACTED] ("Ms. [REDACTED]"), the respondent mother herein, and I am fully familiar with  
all papers and proceedings previously filed and had herein.
2. I make this Affirmation in Opposition to the July 8, 2013 Notice of Motion filed by  
counsel for the subject child, [REDACTED], seeking to compel the respondent  
mother to submit to a pre-fact-finding psychological examination pursuant to Family  
Court Act (FCA) § 251 and § 1038(d), and Civil Practice Law and Rules § 3121(a).

PERTINENT PROCEDURAL AND FACTUAL HISTORY

3. On June 20, 2013, the Administration for Children's Services ("ACS") filed a petition

alleging neglect of [REDACTED] (DOB: 2/28/2012) by [REDACTED].

4. On June 20, 2013, at the initial appearance, Ms. [REDACTED] requested a hearing pursuant to Family Court Act (FCA) § 1027; the Court remanded the Subject Child, [REDACTED] pending hearing on this preliminary matter.
5. On June 24, 25, and 26, 2013, the hearing pursuant to FCA § 1027 was commenced and continued.
6. On July 2, 2013 the FCA § 1027 hearing was again adjourned because the undersigned counsel had heard from Ms. [REDACTED], who could not be present for said proceeding on that date consented that I represent to the Court that she was going to seek emergency treatment.
7. On July 3, 2013 Ms. [REDACTED] was present and she withdrew her application for a FCA § 1027 hearing. Counsel for the subject child made an oral application to the Court to order Ms. [REDACTED] to submit to a pre-fact-finding mental health evaluation. The Court ordered that any such application be made in writing. Accordingly, the Court made a scheduling order for such motion.
8. On July 8, 2013, counsel for the subject child followed through with a Notice of Motion and Affirmation in Support of his request that the Court compel the respondent mother to submit to a pre-fact-finding psychological examination, which examination would be used in the fact finding on this matter.

## LEGAL ARGUMENT

I. The Court is without jurisdiction to order a mental health evaluation for use at fact finding in order to prove Allegations against Respondent, [REDACTED], and absent statutory authority, Respondent, [REDACTED], should not be compelled to complete a pre-trial mental health evaluation to be used to prove allegations made against her.

The Court in Matter of Commissioner of Social Services on Behalf of Verena E., 163 Misc.2d 464,466 (Family Court, Kings County 1994), unmistakably held that the court does *not* "have the authority in a child-protective proceeding under Article Ten of the Family Court Act to order a pre-trial mental health examination which could then be used by the petitioner to establish the allegations of neglect against the respondent." See also Matter of Sebastian M., NYLJ 1-9-97 p. 29 c. 5 vol. 217 (Family Court, Kings County 1997). This is the law which is unfailingly followed in all family courts in this state. Indeed this rule of law is followed in good part because our legislature has in many provisions expressed that there should be certain limitations for discovery in advance of fact finding in Article Ten matters. Such provisions are borne out below.

Family Court Act Section 1038-a provides that a petitioning party or attorney for a child may ask for nontestimonial evidence of a respondent provided that the court reviewing any such request find probable cause that the evidence is reasonably related to establishing the allegations in a petition and provided there not be an unreasonable intrusion to the person. According to F.C.A. Section 1038(d),



the provisions and limitations of the CPLR apply and a respondent with exposure to rendering nontestimonial evidence may seek a protective order requiring a court to consider the need of the party for the discovery to assist in the preparation of a petitioner's case. Under Family Court Act Section 1047 provides that reports prepared for use by a family court making an order are confidential and cannot be used prior to the conclusion of a fact finding.

The use of any pre-trial mental health evaluation is not explicitly authorized by Article Ten of the Family Court Act. Matter of Commissioner of Social Services on Behalf of Verena E., 163 Misc.2d at 466.; Matter of Sebastian M., NYLJ 1-9-97 p. 29 c. 5 vol. 217 (Family Court, Kings County 1997). The rule does not provide for any exception that attorney for the minor child would want to have.

Additionally, the legislative intent of Article Ten cannot be read to permit the court to compel respondents to undergo a mental health evaluation, and have the content of such post-petition, pre-fact-finding evaluation used against the respondent to help prove the allegations of neglect. See Id. at 467. Article Ten was amended in 1987, and FCA § 1038-a was added to the statute, giving the court authority to "order a respondent to provide nontestimonial evidence, only if the court finds probable cause that the evidence is reasonably related to establishing the allegations in a petition filed pursuant to this article." FCA § 1038-a. Matter of Commissioner of Social Services on Behalf of Verena E. cites the legislative history of FCA § 1038-a in support of the position that FCA § 1038-a was intended to exclude testimonial evidence that would come from a pre-trial mental health evaluation: "It is doubtful that [such] an order would withstand appellate review' were it to direct a respondent to

submit to a medical examination at a preliminary stage of a proceeding relating to abuse or neglect.”

Matter of Commissioner of Social Services on Behalf of Verena E., 163 Misc.2d at 467 (citing McKinney’s 1987 Session Laws of New York, pp. 2565-6).

It is to be noted that Family Court Act § 1038(d), which applies article thirty-one of the Civil Practice Law and Rules to Article Ten (enacted in 1990), is specifically limited by FCA § 1038-a. In Matter of Sebastian M., the court states that:

“When FCA 1038(d) was enacted, the legislature did not remove the proscriptions on nontestimonial evidence from FCA 1038-a, therefore, mental examinations of respondents under CPLR 3121...are not available as discovery devices through FCA 1038(d). The Commissioner may not avail himself of the discovery tools in CPLR 3121 to gain what is denied under FCA 1038-a.” Matter of Sebastian M., NYLJ 1-9-97 p. 29 c. 5 vol. 217 (Family Court, Kings County 1997).

Thus, the legislative intent leads to the same conclusion: that a respondent cannot be compelled to submit to such an examination under Article Ten of the Family Court Act.

FCA § 1038(d) is also limited by FCA § 1047(b). FCA § 1047(b), permitting the introduction of reports in disposition, states that such reports “may not be furnished to the court prior to the completion of a fact-finding hearing...” FCA § 1047(b); Matter of Commissioner of Social Services on Behalf of Verena E., 163 Misc.2d at 466-67. While a mental health evaluation may be appropriate evidence to

introduce during a dispositional hearing, where the best interests of the child govern, the respondent should not be ordered to submit to a mental health evaluation that can be used to prove the neglect allegations against her. Any mental health evaluation compelled post-petition should be subject to FCA § 1047(b), and should not be admitted to prove the allegations against the respondent. Matter of Sebastian M., NYLJ 1-9-97 p. 29 c. 5 vol. 217 (Family Court, Kings County 1997).

Respondents in Article Ten proceedings are entitled to due process. FCA § 1011; In re Tequan R., 43 A.D.3d 673, 679 (1st Dept. 2007). As stated by the Court in Matter of Commissioner of Social Services on Behalf of Verena E., "In child-protective proceedings,...it is the burden of the accuser to prove, by a preponderance of the evidence, that the allegations are true before the stigma of neglect attaches. The respondent should not be compelled by the court to facilitate her own adjudication of neglect." Id. at 467. If the petitioner cannot prove the allegations without additional evidence compelled post-petition from the respondent, the petitioner has failed to meet the burden of proof. If the petitioner meets its burden and the respondent is found neglectful, a post-petition mental health evaluation may well be considered at a dispositional hearing.

Nevertheless, counsel for the subject child seeks to compel [REDACTED] to undergo an extensive evaluation, for the purposes of using that evaluation during the fact-finding hearing. See Affirmation in Support, ¶20. Any mental health evaluation compelled by this court cannot, as a matter of law, be introduced as evidence to assist the petitioner in proving the allegations of neglect. Counsel for the

subject child argues that "ACS and the attorney for the child will be at a severe disadvantage at fact-finding without an updated expert opinion." See Affirmation in Support, ¶20. This statement presumes that the petitioner and respondent are otherwise similarly situated before the court. This is not the case in a neglect proceeding where a parent has been brought before the court involuntarily to defend herself against allegations of neglect. ACS has the burden of proving neglect by a preponderance of the evidence during the fact-finding hearing. FCA § 1046(b)(i); see also Matter of Commissioner of Social Services on Behalf of Verena E., 163 Misc.2d at 467. The court should not compel [REDACTED] to undergo a mental health evaluation, if at all, until fact-finding is complete.

**II. The case at bar is inapposite to any exception delineated in case law offered by counsel for the child. This case is not appropriate for such order.**

Where the courts have decided to order a pre-trial mental health evaluation, it has been limited to cases where: 1) The respondent's mental health status is "sufficiently in controversy;" 2) "the proposed psychiatric examination will serve the purposes of an Article 10 proceeding;" 3) the evaluation is "material to preparation of petitioner's case;" and 4) the evaluation is "necessary as unobtainable from another source." Matter of Debra W., (Bronx County Family Court 2010) (citing In Matter of Tyler S., 192 Misc.2d at 732-33. In Matter of Debra W., the respondent's outrageous and contumacious conduct called her mental health into question; the petitioner had little choice other than to ask for such extraordinary relief

In stark contrast to cases cited by Counsel, here, [REDACTED]'s mental health status is not sufficiently in controversy and an extensive mental health evaluation is available from another source, Dr.

[REDACTED] provided the court with a comprehensive evaluation less than two years ago.

Nobody in this case has denied that this evaluation exists.

**A. Ms. [REDACTED]'s Mental Health is Not in Controversy. Therefore the Court Should Not Compel the Mental Health Evaluation as Required by C.P.L.R. § 3121(a).**

When C.P.L.R. § 3121(a) applies, the court may only order an examination of a party's mental health, when her mental health "...is sufficiently in controversy...." In Matter of Tyler S., 192 Misc.2d at 732.

Where the disputed facts in a neglect petition do not revolve around a disagreement regarding the respondent's mental health diagnoses, the court should not compel a pre-trial mental health evaluation.

The neglect petition in this case alleges an unclean living situation, failure to consistently participate in mental health services, and statements of anger to shelter and agency workers, and the subject child and his siblings. See Petition. The allegations of neglect in the petition cite to mental health diagnoses. See id. ¶ 2(A). The factual disputes in this case revolve around what services Ms. [REDACTED] has engaged in, the condition of her home, whether Ms. [REDACTED] is taking medication, and if so, how regularly, whether Ms. [REDACTED] yelled and cursed at workers and the subject children, and if so, whether these behaviors rise to the level of neglect. See Petition. The fact that Ms. [REDACTED] has mental health diagnoses and is prescribed medication is not in controversy. The Respondent does not claim that the diagnoses cited in the neglect petition were made in error. As such, presuming C.P.L.R. § 3121(a) applies to this situation,

the requirement that mental health be sufficiently in controversy, is not met in this case.

**B. A Comprehensive Mental Health Evaluation is Available from Another Source—the Evaluation of Dr. [REDACTED]—Therefore, the Court Should Not Compel Ms. [REDACTED] to Submit to a Second Mental Health Evaluation.**

In the cases where a pre-fact-finding mental health evaluation has been ordered, a comprehensive mental health evaluation has been entirely unavailable from other sources. There is no case law where the court has compelled a mental health evaluation when a comprehensive evaluation was available to the court. There was no other source of meaningful information about the respondent parent's mental health status in any of the cases counsel for the subject child cites to. In Matter of Tyler S., 192 Misc.2d 733 (Family Court, Kings County 2002); Matter of CPS, 5 Misc.3d 1020(A) (Family Court, Suffolk County 2004); Matter of M. Children, 171 Misc.2d 838 (Family Court, Kings County 1997); Matter of Debra W., (Bronx County Family Court 2010).

The court is without the power to expand the rule that that has emerged from the existing case law by granting a request to compel a pre-trial mental health evaluation when a comprehensive, reliable, court ordered mental health evaluation already exists. A mental health evaluation may not be compelled where ACS or the child's attorney argues an updated evaluation would be helpful to prove the allegations against the respondent. If ever, pre-trial mental health evaluations may be ordered only when there is truly no alternative source of this information.

Compelling Ms. Murphy to undergo a pre-fact-finding mental health evaluation would go beyond the scope of all available precedent and expand the limited circumstances where the courts have permitted a pre-trial mental health evaluation as she meaningfully participated in a comprehensive court ordered evaluation that is available to counsel and this court. In this case, the court has access to an extensive 19 page mental health evaluation conducted less than two years ago by [REDACTED] Ph.D. See Clinical Report. The clinical report performed by Dr. [REDACTED] relies upon numerous diverse sources of information to inform his evaluation: 1) a clinical interview with Ms. [REDACTED]; 2) multiple psychological tests of the mother; 3) observation of Ms. [REDACTED] and the children; 4) letters from a clinical psychologist who has provided psychiatric treatment to Ms. [REDACTED]; 5) letters from a psychiatric nurse practitioner who has knowledge of Ms. [REDACTED]'s medication and has administered drug tests for Ms. [REDACTED]; 6) phone conversations with a treating psychiatric nurse practitioner; 7) phone conversation with a licensed social worker who has treated Ms. [REDACTED]; 8) letter from a licensed social worker who has treated Ms. [REDACTED]; 9) note from counseling service with knowledge of prescribed medications; 10) a report from Cardinal McCloskey Services; 11) letters from [REDACTED] Hospital; 12) drug screens for Ms. [REDACTED]; 13) 2010 permanency hearing report; 14) NYPD domestic incident reports; 15) Florida social services investigative reports; 16) records from [REDACTED] Affiliates Inc., including an Adult History form completed by Ms. [REDACTED] and a 2009 psychological evaluation; 17) 2009 Mental Health Assessment of Ms. [REDACTED] by the [REDACTED] Center of Central Florida; 18) Discharge Treatment Plan and Summary by the Community Counseling Center of Central Florida; 19) letter from Family Case Manager in Florida; 20) 2009 report from [REDACTED] Counseling Center; 21) 2009 Comprehensive Behavioral Health Assessment; 22) 2008 [REDACTED] Healthcare

psycho-diagnostic evaluation; 23) 2008 Integrated Health and Substance Abuse intake screening; 24) a predisposition study from 2009 for child [REDACTED]; 25) letter from [REDACTED] Homeless of Central Florida; 26) certification of completion of Parenting Skills class; 27) certification of completion of Making Change Parenting Program; and 28) court documents related to Ms. [REDACTED]. See Clinical Report, 1-7.

A mental health evaluation that is less than two years old can be relied upon by the court. In re Majerae T., 74 A.D.3d 1784, 1786 (4th Dept. 2010). In In re Majerae T., the court found that a mental health evaluation could be utilized six years after it was completed where there was no evidence presented that her mental health condition had significantly changed. Id. at 1786. The extremely comprehensive Clinical Report completed less than two years ago for Ms. [REDACTED] is not sufficiently out of date to justify compelling Ms. [REDACTED] to undergo another extensive mental health evaluation. She has already meaningfully participated in a mental health evaluation.

C. The Facts of Ms. [REDACTED]'s Case Are Distinguishable From the Extreme Facts in the Cases Where a Pre-Trial Mental Health Evaluation was Ordered

If the court has any authority to order a pre-trial mental health evaluation, it is only in rare cases where the respondent parent exhibits extreme behavior that calls into question her mental health status, and the court has no reliable source of mental health information for the parent. In Matter of Tyler S., 192 Misc.2d 732-33.



In Matter of Tyler S., the Court ordered a mental health evaluation where the mother was witnessed "apparently hallucinating, slapping at herself and reprimanding [the subject child] to 'stop you're making it crawl on me.'" Id. at 731. Further, "[a] neighbor informed the officers that the respondent mother recently knocked on his door at two in the morning, to inform him that she 'had been playing hide and seek with her cat and placed the cat in the freezer.'" Id. at 733. Additionally, "hospital staff observed the respondent pull a remote control wire out of the wall and attempt to hit [the subject child] with it." Id. at 731. In this extreme case, where there was no comprehensive mental health evaluation available for the respondent mother, the court ordered a pre-trial mental health evaluation. The facts of that case do not apply to Ms. Murphy, who has previously undergone an extensive mental health evaluation and does not present with mental health issues comparable to the respondent mother in that case.

In Matter of CPS, 5 Misc.3d 1020(A) (Family Court, Suffolk County 2004), the respondent mother had expressed that unknown persons had implanted a cellular phone and speakers in her head, and she was receiving instructions from them that told her what to do. Matter of CPS, 5 Misc.3d 1020(A) at 1. Further, she complained that her family was plotting to kidnap the subject child, and were poisoning her. Id. In that case there was no other available mental health evaluation and the respondent mother had never agreed to participate in a meaningful evaluation in the past. Id. at 2.

Matter of M. Children, 171 Misc.2d 838, provides no facts about the case to inform this court's decision.

In Matter of Debra W., one of the subject children suffered from severe medical issues, was abducted from the hospital by the mother who lacked necessary medical supplies and was returned to the hospital approximately six months later, the child having lost twenty percent of his body weight. Matter of Debra W., (Bronx County Family Court 2010). The mother also refused to produce her four other children and would provide no information about their location, even after she was arrested pursuant to a warrant from this court. Id. The respondent made unsubstantiated claims that one of the subject children had stopped breathing during a visit subsequent to the children's remand, physically assaulted the foster parent, and tried to abduct the subject child from the agency. Id. There was no previous mental health evaluation of the respondent mother in this case. Id.

In each of the cases cited by counsel for the subject child in support of an order compelling a mental health evaluation of Ms. [REDACTED] the parent has exhibited extreme behavior and there was no mental health evaluation available for the respondent parent. In those cases, where issues of mental health were sufficiently in controversy, the court had no reliable documentation of the respondent's mental health status to rely upon, much less a 19 page report citing almost 30 sources of information that is less than two years old.

WHEREFORE, affiant respectfully requests that the Court deny the instant motion in its entirety.

Dated: Bronx, NY  
July \_\_\_\_, 2013

[REDACTED]  
[REDACTED]  
Counsel for [REDACTED]

**AFFIRMATION IN OPPOSITION  
TO PETITIONER'S MOTION FOR  
RESPONDENT'S MENTAL  
HEALTH RECORDS IN  
ARTICLE 10 PROCEEDING**

FAMILY COURT OF THE STATE OF NEW YORK  
CITY OF NEW YORK; COUNTY OF KINGS

-----X  
In the Matter of the Application of  
COALITION FOR HISPANIC FAMILY  
SERVICES

Docket Nos: B-/09

for the Custody and Guardianship of  
the persons of

BABY GIRL S. A/K/A S-M

-----M-S

**AFFIRMATION IN  
OPPOSITION TO  
PETITIONER'S MOTION  
FOR RECORDS**

Minors under eighteen years of age pursuant to  
Section 384-b of the Social Services Law of the  
State of New York

-----X  
GABRIEL FREIMAN, an attorney admitted to practice under the laws of the State of  
New York, hereby says, under penalty of perjury:

1. I am an attorney with the BROOKLYN FAMILY DEFENSE PROJECT – LEGAL SERVICES FOR NEW YORK CITY, 177 Livingston Street, Brooklyn, NY, the attorneys of record for LINDA S., Respondent, in the above-captioned proceeding. As such, I am fully familiar with the facts and circumstances of this case.
2. I make this affirmation in opposition to of petitioner's January 28, 2011 motion for psychiatric, psychological, and mental health records from Young Adult Institute ("YAI"), Bushwick Mental Health Center, and Roberto Clemente Center relating to my client Linda S.. I make this affirmation on information and belief, the sources of which include a review of the Family Court file, and conversations with my client.
3. On July 8, 2009, the Petitioner The Coalition for Hispanic Family Services filed a petition against Linda S. seeking guardianship and custody of Ms. S.'s daughters Stephanie S., (DOB 2001), and Shakira M. (DOB 2002). The petition alleges that Ms. S.'s conduct concerning

her daughter constitutes permanent neglect and that Ms. S. has a mental illness that makes it likely that her daughters would be neglected in her care. *See* Exhibit A, attached to Petitioner's January 28, 2011 Order to Show Cause. The Agency filed a supplemental petition on December 14, 2009, adding the words "or mental retardation" to their second cause of action. *See* Exhibit B, attached to Petitioner's January 28, 2011 Order to Show Cause.

4. On July 12, 2010, Ms. S. filed a motion to dismiss Petitioner's Second Cause of Action for failure to state a claim, pursuant to Civil Practice Law and Rules ("C.P.L.R.") Sections 3013 and 3211. Ms. S. also requested a stay of this Court's May 24, 2010 order directing Linda S. to submit to psychological and psychiatric evaluations to be conducted by the Mental Health Services of Kings County Family Court and an order directing petitioner to refrain from seeking ongoing discovery with respect to the Second Cause of Action until such time as the Court determined the motion to dismiss.

5. On July 15, 2010, the matter was heard before the Honorable Susan Danoff of Kings County Family Court. After extensive oral argument, the Court granted respondent's request for a stay of the May 24, 2010 order directing a mental health evaluation pending the Court's decision on the respondent's motion to dismiss. *See* Order dated July 15, 2010 attached hereto as Exhibit A.

#### ARGUMENT

The Coalition for Hispanic Family Services' ("the Agency") January 28, 2011 Order to Show Cause seeks access to Respondent Linda S.'s psychiatric, psychological, and mental health records. In requesting such information, Petitioner seeks to re-litigate an issue that was extensively argued before this Court on July 15, 2010, and which Petitioner lost when this this

Court issued its stay. Petitioner's effort to obtain these materials is foreclosed by this Court's July 15, 2010 order. For that reason, Petitioner's motion should be denied.

Petitioner's motion is filed in the context of their suit to terminate Ms. S.'s parental rights to two of her natural born children. The Agency's petition asserts two separate claims, the second of which is at issue here. Under Social Services Law § 384-b, Petitioner seeks to terminate Ms. S.'s parental rights on the grounds of "Mental Illness or Mental Retardation." *See* January 28, 2011 Affirmation of Raymond L. Colon (hereinafter "Colon Affirmation") at ¶ 4 and Exh. A. Petitioner's motion seeks psychiatric, psychological, and mental health records in furtherance of this second cause of action. *Id.* at ¶ 22.

A motion to dismiss Petitioner's mental health cause of action under Civil Practice Law and Rules ("C.P.L.R.") § 3211(a)(7) for failure to state a claim under New York law is currently pending before the Court. In conjunction with the filing of the motion to dismiss, Respondent moved for a stay of all discovery relating to that cause of action, including any evaluation by the Kings County Mental Health Services, until the Court decided the motion. On July 15, 2010, this Court ordered the stay requested by Ms. S.. Since the motion to dismiss Petitioner's second cause of action is still pending, the court ordered stay remains in effect.

The Court's July 15, 2010 stay squarely prohibits the discovery sought by Petitioner's motion. The relevance of the mental health records at issue is restricted to prosecution of Petitioner's second cause of action, should that claim survive the motion to dismiss.<sup>1</sup> The

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<sup>1</sup> To the extent Petitioner asserts that Ms. S.'s mental health records relate to their first cause of action, for permanent neglect, that argument wholly lacks merit. First, Petitioner filed a Bill of Particulars in support of its permanent neglect claim, which laid out, in great detail, Petitioner's alleged basis for the claim. *See* Bill of Particulars dated February 25, 2010 attached hereto as Exhibit B. Nowhere does the Bill of Particulars, or the Complaint, even suggest that Ms. S.'s mental health bears on the permanent neglect claim. *See id.* Any such argument now would be no more than a feeble attempt to improperly circumvent this Court's stay order. Second, Petitioner's Bill of Particulars makes clear that its permanent neglect claim is based on the time period July 2008-July 2009. *See id.* ¶ 2. Petitioner reiterated its intended use of this time period at our December 15, 2010 pre-trial hearing. None of the records sought by Petitioner in this motion relate to the time period at issue in the permanent

mischaracterize Ms. S.'s actions with regard to this issue. While Petitioner asserts that Ms. S. has "steadfastly refused" to appear for her appointment with the King's County Family Court's Mental Health Services Division, Colon Affirmation, at ¶15, the truth of the matter is that the July 19, 2010 appointment was stayed by this Court's July 15 order, and Ms. S., in not attending that appointment, was simply complying with the order. Nonetheless, Petitioner's lack of deference to this Court's order does not change the fact that the order governs the disposition of this motion.

Petitioner's motion relies on support that is entirely inapposite. Both the provisions of the Family Court Act and the case law put forth by Petitioner suggest a fundamental misunderstanding of 1) the fact that the Court has already issued a stay of all discovery related to the Mental Health claim and 2) the basis for the Court's order. Family Court Act §1046(a)(vii) merely states that certain privileges, such as physician-patient and psychologist-client, cannot be used as a basis to suppress otherwise admissible evidence. FCA §1046(a)(vii). The only three cases cited by petitioner also focus on this stray issue of using privilege to suppress evidence.<sup>2</sup> In relying on these sources, Petitioner attacks a straw man. Ms. S. has never in the course of this litigation asserted that such a privilege prevented Petitioner from any discovery, nor is the Court's July 15 stay based on any privilege.<sup>3</sup> Further, in none of the three cases was evidence sought over an order *staying discovery* from the trial court. In fact, the trial court in *Rockland County* had *ordered the production of evidence* and the producing party appealed to the Second

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<sup>2</sup> The Second Department's decision in *Rockland County* lacks relevance here not only because it focuses on the effect of privilege on the admissibility of evidence, but also because it solely addresses "the unique question" of "whether Family Court Act § 1046 (a) (vii) applies to a nonparty parent at a fact-finding hearing in a child protective proceeding." *Rockland County Dept. of Social Services v. Brian McM.*, 193 A.D.2d 121, 122 (2d Dep't 1993). Ms. S. is, of course, a party to this action.

<sup>3</sup> Family Court Act §1038 is equally unrelated. Any discovery sought by virtue of that statute is subject to protective orders from the court preventing such disclosure, just like the stay issued here. See FCA Section 1038(d).

Department, putting that case even farther afield. *Rockland County Dept. of Social Services v. Brian McM.*, 193 A.D.2d 121, 123 (2d Dep't 1993). And the court in the *Matter of Steven F.*, did not even grant the petitioner access to the medical records it sought, never mind overrule a stay of discovery. 460 N.Y.S.2d 856 859 (Fam. Ct. Queens Co. 1982). Put simply, Petitioner provides no relevant support for its motion.

The primary deficiency with Petitioner's motion is that it is premature. As Respondent made clear in the motion to dismiss, "[i]f Petitioner's claim survives this motion to dismiss, the Agency would, of course, be entitled to full and fair discovery at that point." Memorandum of Law in Support of Linda S.'s Motion to Dismiss, at 8, n.2. Respondent freely concedes that the same holds true today. Thus, denying Petitioner's motion will not prejudice the Agency in any way. Should the Agency be allowed to proceed on its second claim, it will do so with access to any discovery to which it is legitimately entitled. Until the motion to dismiss is decided, however, Petitioner is not entitled to these records. The Court's July 15, 2010 order makes that plain and is the death knell for Petitioner's motion. The Court heard all of Petitioner's arguments on this issue before ordering the stay. Petitioner now seeks a second bite at the apple, but in light of the Court's order, it must suffer the same fate as the first.

WHEREFORE, I respectfully request that the court issue the relief requested herein.

Dated: Brooklyn, New York  
March 14, 2011

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