THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Dispositional Proceedings

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DISPOSITIONAL PROCEEDINGS

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REMAND/PAROLE STATUS OF RESPONDENT

Under principles of equal protection, juvenile who has violated condition of release is entitled to be treated no worse than criminal defendant. Under CPL § 530.60, an order releasing a defendant cannot be revoked except where the court has found, upon a formal hearing, that the defendant has committed specified acts, such as a felony offense, intimidating a victim or witness, tampering with a witness, violating an order of protection, or persistently and willfully failing to appear after notice of scheduled appearances in the case before the court.
With respect to technical violations, *see* Executive Law §§ 259 and 259-i and Penal Law §§ 70.40 and 70.45, as amended by Chapter 427 of the Laws of 2021 (legislative memo notes that New York reincarcerates more people on parole for technical parole violations like missing appointment with parole officer, being late for curfew, or testing positive for alcohol than any state except Illinois; that only 14% of parolees who were reincarcerated were returned to prison because they were convicted of new crime; and that black people are incarcerated in New York City jails for technical parole violations at more than 12 times rate of whites).

So argue that non-violent misconduct, such as truancy and even curfew violations, is not sufficient ground for detention even when release conditions have been violated, particularly when respondent has record of timely appearances in court.
Matter of Jeffrey C., 47 A.D.3d 433 (1st Dept. 2008) (family court should have substituted PINS adjudication: “While the Probation Department report indicates that appellant did not follow curfew and had several school absences, the court should have

required the department to monitor appellant 'to assure that he attends school regularly and obeys a curfew,' without adding the stigma of a juvenile delinquent adjudication"); *Matter of Anthony M.*, 47 A.D.3d 434 (1st Dept. 2008) (conditional discharge replaced with ACD despite fact that the respondent had been absent from or late to school on several occasions).

If court is hostile to notion that violations will go unpunished, remind court that it can add to or change conditions of release, and/or take respondent's violations into account at disposition.

COURT-ORDERED REPORTS (FCA § 351.1)

Following determination that respondent committed crime and prior to dispositional hearing, **court shall order probation investigation and may order diagnostic assessment.**

People v. Shearer, 213 A.D.3d 699 (2d Dept. 2023) (court had no authority to rely on previous presentence report from other case)

No reason to think investigation requirement cannot be waived, or satisfied via presentation of other evidence, where respondent has plea-bargained for immediate disposition:

In re Christopher R., 235 A.D.2d 299 (1st Dept. 1997) (no error where court proceeded to disposition without written probation report, but took testimony from probation officer and admitted extensive mental health study).

Following determination that respondent committed designated felony act and prior to dispositional hearing, court shall order probation investigation and diagnostic assessment.

Child shall not be placed in accord with FCA § 353.3 unless court ordered probation investigation prior to dispositional hearing.

Child shall not be placed in accord with FCA § 353.4 (transfer to OMH or OMRDD) unless court ordered diagnostic assessment prior to hearing.

PROBATION INVESTIGATION AND REPORT (FCA § 351.1, 9 NYCRR §§ 350.6, 350.7)

Investigation of legal history: gathering of available, relevant and reliable information from official records relative to, *inter alia*, arrests; previous conduct and complaints; adjudications; dispositions; period of time served in placement facility; and warrants. Investigating officer shall not gather information as to matters terminated in favor of respondent as per sealing statutes. Officer may gather independent legal information voluntarily received from other sources (such as respondent, family members, victims, schools or police) as to past behavior. Probation history includes relevant information related to prior contact(s) with courts and probation, detention, pretrial release, and supervision, concerning respondent's previous and present compliance with

diversion/supervision plans and conditions. Placement and institutional history includes information from institutional officials concerning respondent's previous and present adjustment in residential/incarceration settings.
Report: summary analysis of legal history shall be prepared in paragraph form, and contain dates of petitions/offenses; courts; fact findings and dates; dispositions and dates; as permissible, prior and pending intake-diversion matters; and pre-dispositional supervision compliance in present case.

Investigation of current offense/act: original charge/petition allegation, plea and adjudication; any current orders of protection; date and nature of offense; arresting officer's statement; victim statement(s), including domestic incident reports (DIRs); witness statements; respondent's written statement at time of arrest; status of any co-respondent cases; and all other pertinent information.
Report: shall synthesize information obtained from court documents, law enforcement agencies, respondent and any other relevant and reliable sources. When information is available, this shall include: date, time, place, and description of offense/act; use of force/forcible compulsion; weapons/dangerous instruments; injuries to victim(s); damage to or loss of property; whether respondent was under influence of alcohol and/ or drugs; name(s), age(s), and address(es) of accomplices/co-respondents/co-defendants, and their role(s) in the offense/act; for sex offense cases, victim's age at time of offense/act, nature and length of offense conduct, and type of sexual contact and whether it occurred over or under clothing; arresting officer statement regarding respondent's behavior at time of taking into custody (for example, resistance, escape, denial), and whether respondent was under influence of alcohol and/or drugs; respondent's description of offense/act and events leading to commission of offense/act; respondent’s acceptance of responsibility and perception of impact/consequences of offense/behavior for victim(s), community, respondent, and others; and any statement by respondent related to reasons for committing offense(s), and future behavior, including willingness to seek treatment, and, where respondent declines to discuss current offense/act, whether on advice of counsel or on own volition, this shall be noted in report.

Investigation of social circumstances: including, inter alia, systems involvement with respondent’s family (i.e., local department of social services, police, probation, Federal immigration); family and home situation; citizenship and, if applicable, alien status; community and neighborhood environment; peer/associate relationships, including any gang involvement; educational status and vocational skills; violent behavior in home or community; access to weapons; other social circumstances that constitute criminogenic risk, needs, and protective factors; significant patterns of which court should be aware, such as assaultive behavior, chemical dependency, domestic violence, endangering or other reckless behavior, mental health concerns or sexual offending; history of running away; child neglect/abuse; appropriate use of parental authority and attitudes toward child and his/her behavior; consistency and appropriateness of caring, rewards, discipline, and supervision in home; positive adult relationships and social support networks; significant family conflict, or safety concerns affecting respondent or other persons in home (i.e., violence or abuse); school adjustment, academic performance

and conduct/special needs; previous social assistance provided by voluntary or public agencies and response of youth to assistance; and detention or other residential placement history, and youth's adjustment to placement.
Where out-of-home placement is being considered, probation shall consult with social services, as appropriate, and where feasible shall address: whether continuation in respondent's home is contrary to best interest of respondent; whether efforts were made prior to dispositional hearing to prevent or eliminate need for removal of respondent from his/her home; and whether there is placement within proximity to respondent's family, school, and community.
Report: shall contain above-referenced information, and concise description of current aspects of respondent's personal and community relationships that are of significance to respondent's present or future functioning in community and ability to lead law-abiding life.

Investigation of victim information: each victim's age at time of offense, gender, special needs or disabling conditions, and relationship to respondent; pertinent information relative to victim's version of offense/act; victim impact statement(s), including physical, psychological, or economic injuries, damages, and out-of-pocket losses; violence or threatening behavior, or other safety concerns related to victim(s) or victim(s)' family; any order of protection issued against respondent; restitution or reparation sought; victim's view toward disposition; and other relevant and reliable information of which court should be aware, including, where appropriate, information as to other individuals who may have been victimized by respondent.
Probation shall communicate with each victim and inform him/her of right to seek restitution or reparation, and attempt to secure victim impact statement(s). Probation may seek to communicate with victim's advocate or victim service provider to gather additional victim information. When victim is a minor or is otherwise unable to assist, and in cases resulting in death or serious injury, investigation shall include gathering of information from family member(s), guardian(s), or significant other(s).
Report: shall contain above-referenced information, and analysis of victim information. If information not available, reason(s) shall be stated in report. Report shall not include address or phone number of any victim or victim family member.

In-person interview shall be held with respondent, directed toward obtaining and clarifying relevant information and making observations of respondent's behavior, attitudes and character. During or prior to in-person interview, probation shall obtain appropriate consent(s) for release of information and then gather the information made available. On case-by-case basis, where respondent resides in distant jurisdiction and exigent circumstances exist, other type of interview may be substituted for in-person interview.

Right To Counsel
People v. Brinkley, 174 A.D.3d 1159 (3d Dept. 2019) (in light of non-adversarial nature of routine presentence interview by probation officer, interview does not constitute critical stage of proceedings); *see also Matter of Jose D.*, 66 N.Y.2d 638 (1985) (*Miranda* warnings not required at pre-disposition mental health examination; exam not

"critical stage" of proceeding); *People v. Andres Fernandez*, 210 A.D.3d 693 (2d Dept. 2022), *lv denied* 39 N.Y.3d 1072 (no right to counsel violation during presentencing interview).

Investigating probation officer shall conduct interview with parent(s)/guardian(s) to gather information regarding their perspective of: child and family background, important life events, and hardships; medical and psychological concerns or disabilities, including trauma, treatment, counseling, and suicidal history; school history, including achievements or problems; home environment, including family relationships and conflicts, behavior and discipline issues, and positive or negative neighborhood influences; their ability and willingness to provide appropriate supervision, including problems parent is experiencing; identification of other supportive adults available to assist; most appropriate disposition and impacts of such disposition on child and family; other relevant information that may impact court's decision-making; and, where probation supervision is being considered, how they will assist in meeting identified goals of supervision plan.
Report: shall contain relevant and reliable information obtained from parent/guardian during investigation.

Other interviews, with complainant, arresting police officer, family members and/or other persons or agencies when deemed necessary for obtaining additional and clarifying information which is likely to influence recommendation or court disposition/treatment. Where source requests "confidentiality," probation shall explain that request can be made to court to except information from disclosure, but that court may disclose any or all parts of report.

Verification of information: every reasonable effort shall be made to verify date of birth; place of birth; citizenship; alien status of respondent (if foreign-born, and where verification of status has not been achieved, steps taken to verify shall be noted in narrative section of report); current address, and where applicable in case of current detention, homelessness, or residence change, the intended address; legal history; present offense; victim's damages/out of pocket financial loss/injuries sustained; any matter court directs to be included; and, when likely to have a bearing on recommendation or court disposition/treatment, living arrangements, including names of members of household, and their relationship to respondent, mental and physical health, treatment providers, current educational level and status, and any other factor deemed relevant by investigating probation officer.

Preservation of materials: investigating officer shall document method(s), source(s), and date(s) of receipt of information, and information, including copies of verification documents, shall be retained in official case record.
Assessment and recommendation: investigating officer shall assess respondent's risk of recidivism, criminogenic need areas, and protective factors (assets/strengths) related to legal history, family and environment, education and employment, physical and mental health, attitudes and cognitive skills; where restitution is sought and probation or conditional discharge is being considered, shall assess respondent's ability to pay

restitution; shall consider availability of appropriate community and institutional supervision and treatment resources to address specific risks and needs that must be targeted to reduce risk of re-offending.

Report: evaluative analysis is not restatement of facts but a synthesis of significant information in report. No new information is to be introduced in analysis. This section shall contain brief opening statement of matter before court and any specific legal considerations for disposition; provide succinct analysis, relevant to decision-making, of probation officer's assessment and conclusions from information gathered; and contain analysis of legal history, including present offense/act, impact of present offense/act on victim(s) and community, analysis of past and present behavior patterns as they contribute to current legal situation, analysis of current social circumstances and triggers as they contribute to current legal situation, analysis of risk factors and potential for future recidivism, analysis of criminogenic need areas, analysis of any current or prior participation in services to address criminogenic needs, availability of community, family, and individual protective factors and treatment resources to address criminogenic risk and needs, and assessment of potential for lawful behavior.

Report's recommendation section shall contain statement concerning type of court disposition recommended, which shall be consistent with law, and shall flow logically from evaluative analysis. When probation supervision or conditional discharge is recommended, any special conditions shall flow from evaluative analysis and, in accordance with law, support reparation, public safety and offender accountability, shall be specific to offense/act and offender, and shall focus on criminogenic risk reduction, offender compliance with State and Federal laws, measures to ameliorate conduct which gave rise to offense/petition or prevent incarceration or placement, and/or address social, educational, vocational, and treatment needs. Probation may recommend the length of a term of probation supervision.

Request to except portions of report from disclosure: report shall specify any portions for which exception from disclosure is requested and probation officer's rationale for exception. These portions shall be submitted in separate section of report in manner independent of body of report, but made a part thereof. Exceptions shall be requested where a source has requested confidentiality; disclosure would endanger safety of person; disclosure would not be relevant to proper disposition; diagnostic opinion might seriously disrupt program of rehabilitation; or disclosure would not be in interest of justice.

DIAGNOSTIC ASSESSMENT (FCA § 351.1)

Diagnostic assessment shall include, but not be limited to, psychological tests and psychiatric interviews to determine mental capacity and achievement, emotional stability and mental disabilities, and clinical assessment of situational factors that may have contributed to act(s).

When feasible, **expert opinion shall be rendered as to risk** presented by juvenile to others or himself, with recommendation as to need for restrictive placement.

Court also may order mental health or medical examination pursuant to FCA § 251.
See Matter of Jose Luis Q., 64 A.D.2d 600 (1st Dept. 1978) (new dispositional hearing where restrictive placement ordered without neurological exam and encephalogram to aid in determining whether respondent had brain damage and in formulating treatment plan).

Right To Counsel
Matter of Jose D., 66 N.Y.2d 638 (1985) (*Miranda* warnings not required at pre-disposition mental health examination; exam not "critical stage" of proceeding).
In *Jose D.*, court stated that dispositional process satisfies constitutional standards in part because of respondent's "right to cross-examine and submit a counter psychiatric study or other evidence." When LAS funds are not available for retaining expert, argue that *Jose D.* not applicable and assessment is critical stage. *See also State v. Schmidt*, 962 N.W.2d 612 (N.D. 2021) (although there is Sixth Amendment right to counsel in formulating approach to presentence mental health examination, right is satisfied when counsel is given notice and opportunity to consult with defendant prior to examination).

ACCESS TO REPORTS (FCA § 351.1)

Prior To Dispositional Hearing
Diagnostic assessments and probation investigation reports shall be submitted to court and made available by court for inspection and copying by presentment agency and respondent at least five court days prior to commencement of dispositional hearing.
See Matter of Julio "SS", 210 A.D.2d 762 (3d Dept. 1994) (reversible error where child's attorney was denied access to probation report prior to dispositional hearing); *see also People v. Ortega*, 148 A.D.3d 467 (1st Dept. 2017) (resentencing ordered where defense was denied 24-hour adjournment to review presentence report, which had not been provided in advance of sentencing date).

Appeal
Reports shall be made available by court for inspection and copying by presentment agency and respondent in connection with any appeal in case.

Confidentiality
Reports or memoranda prepared or obtained by probation service for purpose of dispositional hearing shall be deemed confidential information furnished to court and be subject to disclosure solely in accordance with this section or as otherwise provided for by law.
See People v. Fishel, 128 A.D.3d 15 (3d Dept. 2015) (confidentiality provisions in CPL § 390.50(1) violated by conditions of probation providing that copy of presentence investigation report would be made available upon request to any agency or individual involved in evaluation, treatment or rehabilitation of defendant if request were deemed appropriate by Probation, and requiring defendant to consent to release of PSI to any sex offender treatment provider).

Victim impact statement (*see also* CPL § 380.50) shall be made available to victim or victim's family by presentment agency prior to disposition.

OTHER DISCOVERY

Matter of Jasmine G., 35 A.D.3d 604 (2d Dept. 2006) (no error where court ordered Probation to provide certain materials relating to "Probation Assessment Tool" to counsel for all parties);
Matter of Michael J., 180 Misc.2d 538 (Fam. Ct., Monroe Co., 1999) (given substantial liberty interest, respondent in extension of placement proceeding entitled pursuant to FCA § 165(a) to CPLR discovery as to bases for extension request; citing OCFS failure to respond to demand for bill of particulars, demand to produce and demand for expert witnesses, or seek protective order, court makes conditional orders of preclusion and gives agency 10 days to comply);
9 NYCRR § 348.7 (Accessibility of case records).

PRESIDING JUDGE (FCA § 340.2)

Judge who presides at fact-finding hearing or accepts admission shall preside at any subsequent hearing in proceeding, including but not limited to dispositional hearing.
But: Family Court rules shall provide for assignment of proceeding to another Family Court judge when appropriate judge cannot preside:
(a) by reason of illness, disability, vacation or no longer being judge of Family Court in that county; or
(b) by reason of removal from proceeding due to bias, prejudice or similar grounds; or
(c) not practicable for judge to preside.
Above provisions shall not be waived.
See Matter of Richard R., 123 A.D.3d 1043 (2d Dept. 2014) (court did not err in declaring mistrial and re-commencing hearing when case was reassigned upon retirement of previous judge).

VENUE (FCA § 302.3)

And: except in designated felony proceeding, after entering fact-finding and prior to commencement of dispositional hearing, court may, in its discretion and for good cause shown, order that proceeding be transferred to county in which respondent resides. Court shall not order transfer unless it grants respondent and presentment agency opportunity to state on record whether each approves or disapproves of transfer and reasons therefor.

TIME OF DISPOSITIONAL HEARING (FCA § 350.1)

Respondent Detained Upon Non-Designated Felony Finding
Hearing shall commence not more than ten days after entry of fact-finding order, except as provided below.

Respondent Not Detained Or Detained Upon Designated Felony Finding
Hearing shall commence not more than fifty days after entry of fact-finding order, except as provided below.
Matter of Frederick Y., 199 A.D.2d 887 (3rd Dept. 1993) (no violation where court rendered fact-finding decision more than 60 days [see CPLR §4213(c)] after hearing, but dispositional hearing was held within 50 days after decision; respondent's remedy was to request a decision from the court after the 60-day delay or commence an article 78 proceeding to compel the issuance of a decision);
Matter of Roshon P., 182 A.D.2d 346 (2d Dept. 1992), *lv denied* 80 N.Y.2d 762 (time starts running upon entry of *written* order).
Note: if respondent has been found to have committed solely a violation as defined in PL § 10.00(3), respondent shall not be detained pending disposition. *See also* FCA § 352.2(4).

Hearing need only commence, not conclude, before deadline
Matter of Richard R., 123 A.D.3d 1043 (2d Dept. 2014) (statute sets time limits only for commencement of hearing, not completion).

Adjournments
Court may adjourn hearing:
(a) on own motion or motion of presentment agency for good cause shown for not more than ten days; or
(b) on motion by respondent for good cause shown for not more than thirty days.
In re Malik H., 107 A.D.3d 447 (1st Dept. 2013) (no error in denial of respondent's belated request for adjournment to call psychologist and psychiatrist to testify since testimony would have been cumulative in light of reports admitted into evidence).
Successive motions to adjourn beyond statutory limits shall not be granted in absence of showing, on record, of special circumstances, which shall not include calendar congestion or status of court's docket or backlog.
Court shall state on record reason for adjournment.

Removal Cases (FCA § 350.2)
Date of filing of removal order in family court deemed to be date of entry of fact-finding order.
Clerk of court shall calendar appearance, to be held within seven days from date order of removal filed, at which court shall schedule dispositional hearing in accordance with § 350.1 and determine other issues properly before it.

Remedy For Violation
Matter of Jose R., 83 N.Y.2d 388 (1994) (dismissal is not statutorily required remedy for delays, but "[i]n unusual circumstances where the juvenile is not solely responsible for the delay, the Family Court retains the authority to dismiss").
Matter of Joseph H., 39 A.D.3d 896 (3d Dept. 2007) (no violation of "flexible standard" where dispositional hearing commenced in November and concluded in following February);

Matter of Julu LL., 217 A.D.2d 749 (3rd Dept. 1995) (dismissal ordered where court adjourned case for 47 days while respondent was in detention).
Note: If the family court does order dismissal, the presentment agency may not appeal. *Matter of Leon H.*, 83 N.Y.2d 834 (1994).

EVIDENCE AT DISPOSITIONAL HEARING (FCA § 350.3)

Only evidence that is material and relevant may be admitted.
Adjudication must be based on preponderance of evidence.

Victim Impact Statement
The victim has the right to make a statement with regard to any matter relevant to the question of disposition. If the victim chooses to make a statement, he/she shall notify the court at least ten days prior to the date of the hearing. The court shall notify the respondent no less than seven days prior to the hearing of the victim's intent to make a statement. The victim shall not be made aware of the final disposition of the case.
Commonwealth v. McGonagle, 88 N.E.3d 1128 (Mass. 2018) (no constitutional infirmity arising from judge's consideration of victim impact statement in non-capital case involving no risk that jury would put statement to improper use, or from victim's statutory right to recommend sentence).

PROCEDURE AT DISPOSITIONAL HEARING (FCA § 350.4)

Presentment agency shall appear.

Respondent's right to appear
FCA § 341.2(1) (respondent and counsel shall be personally present at any hearing); FCA § 341.2(3) (respondent's parent or other person responsible for care shall be present at hearing, but court shall not be prevented from proceeding by absence of such person if reasonable and substantial effort has been made to notify person and respondent and counsel are present).
See People v. Cutler, 173 A.D.3d 1269 (3d Dept. 2019) (court erred in sentencing defendant in absentia where court warned defendant orally and in writing that it would sentence him in absentia if he failed to appear, but, when defendant did fail to appear, court did not conduct inquiry into reason for absence and consider whether defendant could be located within reasonable period of time); *but see Chaparro v. State*, 497 P.3d 1187 (Nev. 2021) (defendant's right to be present not violated where sentencing hearing was conducted by audiovisual transmission over Zoom videoconferencing platform due to administrative orders forbidding in-person hearings because of COVID-19 pandemic, and there was no showing that defendant was prevented from presenting argument or evidence)..

Order of hearing shall be as follows:

Probation Statement

Court, with consent of parties, may direct probation to summarize investigation report, and, in its discretion, deliver further statement concerning advisability of specific dispositional alternatives.

Presentation of Witnesses
Court may in its discretion call witnesses, including preparer of probation reports or diagnostic studies, to offer evidence concerning advisability of specific dispositional alternatives. Witnesses may be cross-examined by presentment agency and respondent.
Presentment agency may call witnesses to offer such evidence, including preparer of probation report or diagnostic study.
Respondent may call witnesses to offer such evidence, including preparer of probation report or diagnostic study.
Court may permit presentment agency or respondent to offer **rebuttal or surrebuttal evidence** as court may deem appropriate.

The victim shall be allowed to make an oral or written statement.
Legislature has not expressly allowed for cross-examination, but when victim has testified to damaging new facts and could be challenged effectively, invocation of respondent's due process right of confrontation may be appropriate. Relevancy-based objections also should be considered.

Final Statements
Presentment agency may deliver statement concerning advisability of specific dispositional alternatives.
Respondent may deliver such a statement. *See United States v. Moreno*, 809 F.3d 766 (3d Cir. 2016) (prosecutor improperly permitted to cross-examine defendant immediately after defendant exercised right to speak or present information in effort to mitigate sentence);
Court shall permit rebuttal statements by presentment agency and respondent.

Risk Assessment Instrument
Court shall give due consideration to results of risk assessment instrument/process when determining disposition.

Court shall then consider case and enter order.

VIOLATION-LEVEL OFFENSES

Where an order of fact-finding that includes solely a violation as defined in PL § 10.00(3) committed by a juvenile at least sixteen years of age has been entered pursuant to FCA § 345.1, there shall be a rebuttable presumption that the court shall refer the case to the probation service for adjustment services, dismiss the case pursuant to FCA § 352.1(2) or adjourn the case in contemplation of dismissal pursuant to FCA § 315.3. FCA § 345.1(3); *see also* FCA § 320.6(2).

DISMISSAL OF PETITION

If court determines that respondent does not require supervision, treatment or confinement, petition shall be dismissed [FCA § 352.1(2)]:
Matter of Ejiro A., 268 A.D.2d 428 (2d Dept. 2000) (dismissal where respondent found guilty of criminal possession of weapon in fourth degree);
Matter of Kyung C., 169 A.D.2d 721 (2d Dept. 1991) (only evidence was Probation report stating that assault was isolated event and respondent received adequate supervision from parents);
Matter of Jens P., 159 A.D.2d 707 (2d Dept. 1990);
Matter of Kenroy C., 55 Misc.3d 535 (Fam. Ct., Kings Co., 2017) (court dismissed petition after admission to reckless endangerment where respondent played with illegal fireworks in public and caused injury to complainant; court noted, inter alia, that respondent had no other contacts with juvenile justice system; that respondent had excellent school attendance and was passing all his classes; that respondent presented no behavioral issues in home; that although respondent had recent school suspension, it was first time being suspended and was for infraction within broad category of "disruptive behaviors"; that use of illegal fireworks around July 4th holiday is quintessential type of "risky" behavior adolescents are known for and consistent with their brain development; that respondent showed remorse; that teenager who lives in poverty and is black or Latino is much more likely to be arrested for these types of incidents that white middle or upper-class counterparts, and adolescents are overrepresented statistically in virtually every category of reckless behavior).

Remember: Written motion to dismiss in furtherance of justice may be made at disposition (FCA § 315.2).

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (FCA § 315.3)

Where facts are favorable but court will not order dismissal, ACD should be sought. (ACD not authorized if court makes designated felony fact-finding.)

Violation-level offenses: where order of fact-finding that includes solely a violation as defined in PL § 10.00(3) committed by juvenile at least sixteen years of age has been entered pursuant to FCA § 345.1, there shall be a rebuttable presumption that court shall adjourn case in contemplation of dismissal, refer case to probation service for adjustment services pursuant to FCA § 320.6, or dismiss case pursuant to FCA § 352.1(2).

Case law alludes to, *inter alia*, non-violent nature of offense; lack of other arrests; absence of behavioral problems at home or in school or substance abuse history; admission of guilt and show of remorse; extracurricular awards and activities; and availability of probation-supervised ACD).

Useful cases:

Matter of Brian M., 185 A.D.3d 691 (2d Dept. 2020) (ACD ordered in criminal mischief case where it was respondent's first contact with court system, he took responsibility for actions, and record demonstrated that he had learned from his mistakes);
Matter of Maximo M., 184 A.D.3d 780 (2d Dept. 2020) (ACD ordered where respondent, ten years old at the time, touched vagina of then four-year-old complainant over complainant's clothing; it was respondent's first contact with court system; he took responsibility for actions and expressed remorse; and he voluntarily participated in counseling and maintained strong academic and school attendance record);
Matter of Nijuel J., 169 A.D.3d 681 (2d Dept. 2019) (ACD should have been ordered where respondent admitted to criminal possession of a weapon after bringing firearm to school, but it was respondent's first contact with court system, and he took responsibility for actions and learned from mistakes, readily complied with supervision imposed by court and by father, garnered praise from Probation Department and school officials, had commendable academic and school attendance record and mentored fellow students, and posed minimal risk to community);
Matter of Nigel H., 136 A.D.3d 1033 (2d Dept. 2016) (foster child in arson case was honor student, and had no criminal history and no problems in foster home or at school, notwithstanding prior physical abuse and neglect by biological parents; therapist and fire marshal described him as remorseful and at low risk for reoffending; and he continued to receive services and monitoring in foster care);
In re Clarissa V., 117 A.D.3d 494 (1st Dept. 2014) (admission to menacing in third degree; respondent had truancy issues, but was employed, being treated for depression, and generally making progress);
In re Eric M., 114 A.D.3d 489 (1st Dept. 2014) (admission to unlawful possession of weapon - BB gun - by persons under 16);
In re Juan P., 114 A.D.3d 466 (1st Dept. 2014) (fact-findings of forcible touching and sexual abuse in third degree; if ACD not appropriate for respondent, "one wonders whether there is any juvenile charged with misdemeanor sexual abuse who would qualify for an ACD");
In re Israel M., 57 A.D.3d 274 (1st Dept. 2008) (fact-findings of assault in second degree and menacing in third degree involving use of knife by accomplice to scare complainant while "play fighting");
In re Joel J., 33 A.D.3d 344 (1st Dept. 2006) (placement order reversed; child should not be stigmatized as juvenile delinquent because of shortcomings of family, and it "is fairly obvious here that the court placed [respondent] with OCFS on the basis of his family history and living situation. The court's decision lacked any discussion of the crime");
In re Justin Charles H., 9 A.D.3d 316 (1st Dept. 2004) (fact-finding of reckless endangerment in second degree; throwing pennies at train and accidentally hitting conductor in face was act of thoughtlessness committed by adolescent fooling around with friends after party on weekend night).

PINS SUBSTITUTION (FCA § 311.4)

Before fact-finding, court may, with consent of presentment agency and respondent, substitute PINS petition for JD petition. (Note: automatic substitution for sex trafficking victims.)

At conclusion of dispositional hearing, court may substitute PINS petition without consent of presentment agency.

Useful cases:
Matter of Kayla F., 122 A.D.3d 1399 (4th Dept. 2014) (respondent, found guilty of third-degree assault, demonstrated no danger to community at large and could have received same placement as PINS, and conduct was consistent with PINS behavior, not juvenile delinquency);
Matter of Dylan P., 121 A.D.3d 1118 (2d Dept. 2014) (argument between respondent and mother led to respondent damaging television; respondent had no prior delinquency finding and accepted responsibility, mother played active and positive role in respondent's life, respondent improving in area of curfew violations and school absences, and court could have required Probation or other agency to monitor school attendance and curfew "without adding the stigma of a juvenile delinquent adjudication");
In re Jeffrey C., 47 A.D.3d 433 (1st Dept. 2008), *lv denied* 10 N.Y.3d 707 (respondent may have overreacted in altercation with brother, but outburst appears to have been response to heat of moment and provocation by older brother, respondent had no prior delinquency or PINS findings and no reports of alcohol or illegal drug use, and, while respondent did not follow curfew and had several school absences, court could have required Probation to monitor respondent's behavior without adding stigma of juvenile delinquent adjudication);
In re Devon R., 278 A.D.2d 15 (1st Dept. 2000), *lv denied* 96 N.Y.2d 707 (2001) (PINS substitution warranted where eight-year-old sodomy respondent needed psychiatric treatment).

Judge may substitute PINS even though judge in other county made fact-finding:
Matter of Michael OO., 37 A.D.3d 1002 (3rd Dept. 2007).

FIGHTING PLACEMENT RECOMMENDATION

Least restrictive alternative [FCA § 352.2(2)(a)]:
Court shall consider needs and best interests of respondent as well as need for protection of community. Except where respondent committed designated felony act (governed by FCA § 353.5), court shall order least restrictive available alternative which is consistent with needs and best interests of respondent and need for protection of community.
Note that PINS who are sixteen years of age or older cannot be placed unless the court determines and states in its order that special circumstances exist to warrant placement. FCA § 754(1)(c).

Argue no valid basis for deviation from risk assessment instrument [FCA § 352.2(2)(f)(2)]:
Residential placement order shall state:
(i) level of risk youth assessed at pursuant to risk assessment instrument; and
(ii) if youth placed in higher level of placement than appears warranted based on risk assessment instrument and process, particular reasons why placement was determined to be necessary for protection of community and consistent with needs and best interests of respondent; and
(iii) that less restrictive alternative consistent with needs and best interests of respondent and need for protection of community not available.

Useful case law:
In re Roemaine Q., 154 A.D.3d 427 (1st Dept. 2017) (placement overturned, and level three probation ordered, where weapon 13-year-old respondent possessed was BB gun and he did not use it to commit act of violence, and probation is what presentment agency recommended at dispositional hearing);
Matter of Jacob A.T., 126 A.D.3d 1550 (4th Dept. 2015) (placement order reversed in three cases where respondent's home environment was "toxic" and he had mental health issues that required treatment, but he had recently been staying with family friend who had known him since birth and had petitioned for custody and there had been no new arrests during that time, and friend was able to devote significant time to supervising respondent and he and woman with whom he lived would help with supervision);
Matter of Tianna W., 108 A.D.3d 948 (3d Dept. 2013) (placement upheld, but admitted act of criminal mischief would not, by itself, warrant placement);
Matter of Genny J., 78 A.D.3d 1181 (2d Dept. 2010) (placement order reversed and probation ordered where Probation and presentment agency recommended probation and background facts were favorable);
Matter of David F., 69 A.D.3d 720 (2d Dept. 2010) (placement order reversed and probation ordered where Probation recommended probation and respondent was accepted into program that offered community-based services, including intensive counseling, and reports from former counselor and detention facility were favorable);
Matter of Shourik D., 65 A.D.3d 1042 (2d Dept. 2009) (where respondent placed with OCFS despite positive psychiatric report that recommended education and outpatient treatment, praised 95 grade-point average in school and noted strong family connections, matter remanded for new dispositional hearing);
In re Joel J., 33 A.D.3d 344 (1st Dept. 2006) (placement order reversed and ACD ordered; child should not be stigmatized as juvenile delinquent because of shortcomings of family and it "is fairly obvious here that the court placed [respondent] with OCFS on the basis of his family history and living situation. The court's decision lacked any discussion of the crime");
Matter of Jose B., 71 A.D.2d 551 (1st Dept. 1979) (new hearing ordered where respondent had been treated by psychiatrist who expressed view that respondent had responded positively to treatment and it was better not to separate him from home and concerned and interested mother);

Matter of John H., 48 A.D.2d 879 (2d Dept. 1975) (secure placement inappropriate where Probation failed to make effort to follow psychiatrist's recommendation regarding individual psychotherapy, family counseling, temporary placement with other family member, and nonsecure placement if non-placement plan were not feasible).

Fighting restrictive/secure or limited secure placement:
In re Nicolette R., 9 A.D.3d 270 (1st Dept. 2004), *lv denied*, 3 N.Y.3d 610 (in prostitution case, placement in limited secure OCFS facility not least restrictive alternative where respondent in need of specialized services not available at OCFS facility, and, while family court found flight risk, appropriate security measures were provided at available residential facility and transfer to more secure facility was possible);
Matter of Jorge F., 215 A.D.2d 296 (1st Dept. 1995) (restrictive placement changed to limited secure where respondent had "made considerable progress toward rehabilitation in the less constrictive setting where he has been receiving treatment");
Matter of Cecil L., 71 A.D.2d 917 (2d Dept. 1979) (restrictive placement overturned where court psychiatrist testified that if respondent agreed to treatment, court should consider less punitive alternatives recommended by other doctors and that further evaluation of respondent should be conducted to assess alternatives psychiatrist had not considered);
Matter of Jose Luis Q., 64 A.D.2d 600 (1st Dept. 1978) (new dispositional hearing where restrictive placement ordered without neurological exam and encephalogram to aid in determining whether respondent had brain damage and in formulating treatment plan);
Matter of Demetrius A., 58 Misc.3d 682 (Fam. Ct., Kings Co., 2017) (court places respondent, who had previously been placed in non-secure facility and been re-arrested within six months of release, in non-secure facility again, noting lack of evidence that respondent had ever left or attempted to leave facility without permission and respondent's positive behavior while in placement; that rehabilitative services and programming model is same in limited secure as in non-secure; that facility's failure to change youth's behavior does not mean it will not succeed the second time; and that adolescents often require lessons to be repeated multiple times before they are absorbed given continuing development of adolescent brain through teenage years).

OTHER DEFENSE ARGUMENTS AT HEARING

New arrest not probative unless factual details presented:
People v. Kolata, 119 A.D.3d 1376 (4th Dept. 2014) (defendant denied due process when court imposed sentence based on mere fact of post-plea arrest without conducting inquiry to satisfy itself there was legitimate basis for arrest);
United States v. Windless, 719 F.3d 415 (5th Cir. 2013) (court may not rely on bare arrest records that state charge but do not provide details regarding alleged conduct);
United States v. Berry, 553 F.3d 273 (3rd Cir. 2009) (court violated due process by considering prior arrests where facts were not established by preponderance of evidence).

Charge dismissed at trial on merits may not be considered:

People v. Brown, 113 A.D.3d 785 (2d Dept. 2014), *lv denied*, 23 N.Y.3d 1018 (re-sentencing ordered where remarks made by court demonstrated that it improperly considered crime of which defendant was acquitted);
People v. Sheppard, 107 A.D.3d 1237 (3d Dept. 2013), *lv denied*, 22 N.Y.3d 1203 (judge erred in allowing deceased's mother to give statement describing defendant as "killer" who "got away with murder" where defendant was convicted only on possession of weapon charge supported by evidence not related to homicide charges);
People v. Black, 33 A.D.3d 338 (1st Dept. 2006) (judge erred in relying on counts of which defendant was acquitted; court rejects People's argument that judge properly considered conduct proved by preponderance of evidence since jury found conduct was justified);
Michigan v. Beck, 939 N.W.2d 213 (Mich. 2019), *cert denied* 140 S.Ct. 1243 (after jury acquits defendant, judge violates due process by taking that crime into consideration when sentencing for other crime; court notes that *Watts* - cited below - did not address due process issue);
but see United States v. Watts, 519 U.S. 148 (1997) (jury's verdict of acquittal does not prevent sentencing court from considering conduct underlying acquitted charge, so long as that conduct has been proved by preponderance of the evidence).

Opinions regarding likelihood of future criminal conduct:
United States v. Cossey, 632 F.3d 82 (2d Cir. 2011) (court erred in relying on own scientific theories of human nature);
People v. Clarke, 286 A.D.2d 208 (1st Dept. 2001), *lv denied*, 97 N.Y.2d 640, (pre-sentencing report stated defendant was "dangerously aggressive and violent," and that, "[a]s evidenced by his actions herein, the defendant is a dangerously aggressive and violent individual with a callous indifference to human life," but assessment was not substantiated by investigation and was based on appraisal of crime rather than evaluation of defendant);
People v. Irwin, 19 Misc.3d 1118(A) (Onondaga County Ct., 2008) (court strikes from report certain "clinical conclusions," including opinion regarding defendant's "lack of insight and inability to resist the impulse to offend against children," that probation officer lacked qualifications to make);
People v. Boice, 6 Misc.3d 1014(A) (County Ct., Chemung Co., 2004) (court strikes probation officer's conclusion that defendant is sociopath, a diagnosis not generally understood that should be left to qualified professionals).

Consideration of lack of remorse:
Compare State v. Bryant, 198 N.E.3d 68 (Ohio 2022) (a defendant's outburst or other courtroom misbehavior may not result in increased sentence, and defendant's outburst could not properly be construed as motivated by or evincing no remorse);
State v. Angel M., 255 A.3d 801 (Conn. 2020) (although court observed that admitting guilt and apologizing would pose dilemma for defendant because of desire to appeal, but that doing so would be "most helpful" to victims, court stated on record that defendant would not be penalized for invoking constitutionally protected right to maintain innocence; availability of sentence reduction to one who admits responsibility is not equivalent of increase in sentence for one who does not) and

State v. Willey, 44 A.3d 431 (N.H. 2012) (when defendant maintains innocence throughout criminal process, silence at trial or sentencing may not be considered lack of remorse since defendant risks incriminating himself if he expresses remorse) *with*
People v. Hicks, 98 N.Y.2d 185 (2002) (where defendant agreed in plea bargain that he would "truthfully answer all questions asked of [him] by the Court" and "truthfully answer all questions asked of [him] by the Probation Department," and that if he violated condition, court was not bound by its promises and defendant could not withdraw plea, court properly enhanced sentence after defendant lied to Probation by denying guilt);
United States v. Martinucci, 561 F.3d 533 (2d Cir. 2009) (in child pornography case, court properly cited lack of remorse when defendant denied at sentencing conduct he admitted at guilty plea) and
Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000) (*Alford* plea did not imply promise by State that petitioner would never have to acknowledge responsibility for crime or that State viewed him as innocent).
Note: Post-admission assertions of innocence also create risk that court will vacate admission over respondent's objection: *People v. Burroughs*, 171 A.D.3d 482 (1st Dept. 2019), *lv denied* 33 N.Y.3d 1067 (court did not err in vacating plea without defendant's consent where defendant's continued litigation of validity of charges was incompatible with plea).

Consideration of inaccurate/unreliable Information violates due process:
People v. Hansen, 99 N.Y.2d 339 (2003) (sentencing scheme must ensure that information is "reliable and accurate" and that defendant has opportunity to respond to facts upon which court may base decision);
United States v. Doe, 938 F.3d 15 (2d Cir. 2019) (judge's material misapprehension of fact is ground for vacating sentence because it may constitute denial of due process, especially when defendant lacks opportunity to reply);
People v. Washington, 170 A.D.3d 1608 (4th Dept. 2019), *lv denied* 33 N.Y.3d 1036 (officer's reference to defendant as "sociopath" redacted from all copies of presentence report);
People v. McKnight, 129 A.D.3d 1459 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 932 (court erred in sentencing defendant on basis of untrue assumptions regarding defendant having been involved in "more than 40 residential burglaries");
People v. Francis, 100 A.D.3d 1017 (2d Dept. 2012) (re-sentencing ordered where court speculated that robbery defendant attempted to kidnap complainant and intended to burglarize residence);
People v. Barnes, 60 A.D.3d 861 (2d Dept. 2009) (re-sentencing ordered where court considered drug sale conviction that did not exist; to establish due process violation, defendant not required to show sentence enhancement was based solely on purported prior conviction);
People v. Orengo, 286 A.D.2d 344 (2d Dept. 2001) (court's remarks showed sentence was based solely on circumstances of crime and not on incorrect information);
State v. Belcher, _A.3d_, 2022 WL 200040 (Conn. 2022) (court's expressed view that defendant was "charter member" of mythical group of teenage "superpredators" denied defendant due process at sentencing).

Overreliance on hearsay evidence violates due process right of confrontation:
People v. Deere, 214 A.D.3d 1266 (3d Dept. 2023) (violation may not be established solely with hearsay);
United States v. Sutton, 916 F.3d 1134 (8th Cir. 2019) (due process violation found where government introduced videos and transcripts of police interrogations of three witnesses who did not testify, and district court relied almost exclusively on that evidence in revoking supervised release);
United States v. Pimental-Lopez, 859 F.3d 1134 (9th Cir. 2016) (witnesses' hearsay statements not sufficiently corroborated to provide minimal indicia of reliability and merit consideration by sentencing court);
United States v. Jarvis, 2004 WL 603466 (9th Cir. 2004) (only evidence of supervised release violations was police report).

Protection against self-incrimination
Mitchell v. United States, 526 U.S. 314 (1999) (sentencing court could not draw adverse inference from defendant's silence in determining facts relating to crime; neither guilty plea nor statements at plea colloquy functioned as waiver of right to remain silent at sentencing);
State v. Willey, 44 A.3d 431 (N.H. 2012) (when defendant maintains innocence throughout criminal process, silence at trial or sentencing may not be considered lack of remorse since defendant risks incriminating himself if he expresses remorse);
State v. Blake, 958 A.2d 1236 (Conn. 2008) (where defendant claimed he could not exercise right to make statement at sentencing upon violation of probation until new charges arising from violation had been resolved, court properly declined to delay proceeding and instead suggested it would order that any statements made by defendant could not be used against him at another trial, and prosecutor agreed not to use any statements made by defendant).

ORDER UPON HEARING (FCA §§ 352.1, 352.2)

Upon conclusion of hearing, if court determines that respondent requires supervision, treatment or confinement, court shall enter finding that respondent is a juvenile delinquent and enter an appropriate dispositional order pursuant to FCA § 352.2:
(a) conditionally discharging respondent (FCA § 353.1); or
(b) putting respondent on probation (FCA § 353.2);
(c) placing respondent in accord with FCA § 353.3; or
(d) placing respondent in accord with FCA § 353.4; or
(e) placing respondent under restrictive placement in accord with FCA § 353.5

Order shall state reasons for disposition, including, in case of restrictive placement, specific findings of fact required in § 353.5 (see below).

Findings re Risk Assessment Instrument
Any residential placement order shall state:
(i) level of risk youth was assessed at pursuant to risk assessment instrument; and

(ii) if youth placed in higher level of placement than appears warranted based on risk assessment instrument and process, particular reasons why placement was determined to be necessary for protection of community and consistent with needs and best interests of respondent; and
(iii) that less restrictive alternative consistent with needs and best interests of respondent and need for protection of community is not available.

Designated Felony Cases (FCA § 353.5)
Where court has made designated felony fact-finding, order shall be made within twenty days of conclusion of dispositional hearing and include finding based on preponderance of evidence as to whether respondent does or does not require restrictive placement. Court shall make specific written findings of fact as to each statutory element governing restrictive placement determination.
If restrictive placement not ordered, court shall enter any other order of disposition in FCA § 352.2 and state grounds for order.

Violation-Level Offenses
Where the adjudication is for a violation defined in PL § 10.00(3) and if the presumption in FCA § 345.1(3) has been rebutted, the court may only issue an order conditionally discharging the respondent. The court shall not order detention, probation or placement of such a youth.

ORDER OF PROTECTION (FCA § 352.3)

Upon issuance of dispositional or ACD order, court may enter order of protection against respondent for good cause shown.

Order may require that respondent:
(a) stay away from home, school, business or place of employment of victim; or
(b) refrain from harassing, intimidating, threatening or otherwise interfering with victim and specifically named members of family or household of victim; or
(c) refrain from intentionally injuring or killing, without justification, companion animal respondent knows to be owned, possessed, leased, kept or held by person protected by order or minor child residing in person's household.
See People v. Dolan, 140 A.D.3d 1681 (4th Dept. 2016) (order prohibiting sex crime defendant from having “unsupervised contact with any child under the age of 17 years of age,” improper to extent it prohibited contact with individuals under age 17 who were not victims or witnesses).

Order also may require that respondent refrain from engaging in conduct, against witness specifically named by court in order, that would constitute intimidation of a witness or attempt thereof, provided that court makes finding that respondent did previously, or is likely to in future, intimidate or attempt to intimidate such witness in such manner.

Order shall remain in effect for period specified by court, but shall not exceed period specified in order of disposition or ACD.

CONDITIONAL DISCHARGE (FCA § 353.1)

Court may conditionally discharge respondent if court, having regard for nature and circumstances of crime and history, character and condition of respondent, is of opinion that, consistent with needs and best interests of respondent and need for protection of community, neither public interest nor ends of justice would be served by placement and that probation supervision is not appropriate.

Maximum period shall not exceed one year.

Respondent shall be released without placement or probation supervision but subject to such conditions as court may determine and specify in order.

Court may modify or enlarge conditions at any time prior to expiration or termination of period of conditional discharge. Such action may not be taken unless respondent is personally present, except that respondent need not be present if modification consists solely of elimination or relaxation of condition.

Court may, as condition of order, require that respondent:
(a) attend school regularly and obey all rules and regulations of school;
(b) obey all reasonable commands of parent or other person legally responsible for respondent's care;
(c) abstain from visiting designated places or associating with named individuals;
(d) avoid injurious or vicious activities;
(e) co-operate with mental health, social services or other appropriate community facility or agency to which respondent is referred;
(f) make restitution or perform services for public good (FCA § 353.6), provided respondent is over ten years of age;
(g) Except when respondent has been assigned to OCFS facility, in cases wherein the record indicates that consumption of alcohol by respondent may have been contributing factor, attend and complete alcohol awareness program.
(h) comply with other reasonable conditions as court shall determine to be necessary or appropriate to ameliorate conduct which gave rise to filing of petition or prevent placement with DSS or OCFS.
Where record indicates respondent qualifies as eligible person and has been adjudicated for eligible offense (SSL § 458-i), court may require respondent to attend and complete education reform program.

Respondent must be given written copy of conditions at time order is issued or modified, provided that whenever respondent has not been personally present at time of modification, court shall notify respondent in writing within twenty days after modification, specifying nature of elimination or relaxation of condition and effective date thereof. Copy of conditions must be filed with and become part of record of case.

Finding that respondent committed additional crime while conditional discharge in effect constitutes ground for revocation of order irrespective of whether such fact is condition of order.

PROBATION (FCA § 353.2)

Court may order period of probation if court, having regard for nature and circumstances of crime and history, character and condition of respondent, is of opinion that:
(a) placement is not or may not be necessary;
(b) respondent is in need of guidance, training or other assistance which can be effectively administered through probation; and
(c) such disposition is consistent with needs and best interests of respondent and need for protection of community.

Maximum period shall not exceed two years. If court finds at conclusion of original period and after hearing that exceptional circumstances require additional year of probation, court may continue probation for additional year.

Advocate for shortest possible term of probation, which reduces risk of violation/placement:
In re Ramon B., 83 A.D.3d 623 (1st Dept. 2011) (18 months reduced to 12 months given underlying offense and favorable aspects of respondent's background).

Probation may extend beyond 18th birthday:
Matter of Carliesha C., 17 A.D.3d 1057 (4th Dept. 2005) (probation order may extend beyond respondent's 18th birthday).

Court may, as condition of order, require that respondent:
(a) attend school regularly and obey all rules and regulations of school;
(b) obey all reasonable commands of parent or other person legally responsible for respondent's care;
(c) abstain from visiting designated places or associating with named individuals;
(d) avoid injurious or vicious activities;
(e) co-operate with mental health, social services or other appropriate community facility or agency to which respondent is referred;
(f) make restitution or perform services for public good (FCA § 353.6), provided respondent is over ten years of age;
(g) Except when respondent has been assigned to OCFS facility, in cases wherein the record indicates that consumption of alcohol by respondent may have been contributing factor, attend and complete alcohol awareness program.
(h) comply with other reasonable conditions as court shall determine to be necessary or appropriate to ameliorate conduct which gave rise to filing of petition or prevent placement with DSS or OCFS.
Court may further require that respondent:

(a) meet with probation officer when directed to do so by officer and permit officer to visit respondent at home or elsewhere;
(b) permit probation officer to obtain information from any person or agency from whom respondent is receiving or was directed to receive diagnosis, treatment or counseling;
(c) permit probation officer to obtain information from respondent's school;
(d) co-operate with probation officer in seeking to obtain and in accepting employment, and supply records and reports of earnings to officer when requested to do so;
(e) obtain permission from probation officer for any absence from respondent's residence in excess of two weeks; and
(f) with consent of OCFS, spend specified portion of probation period, not exceeding one year, in non-secure OCFS facility.

Respondent must be given written copy of conditions at time of order. Copy of conditions must be filed with and become part of record of case.

Finding that respondent committed additional crime while probation in effect constitutes ground for revocation of order irrespective of whether such fact is condition of order.

But argue that "no-arrest" condition is impermissible as it does not require proof of guilt.
People v. Johnson, 173 A.D.3d 1446 (3d Dept. 2019) (evidence that defendant had been arrested twice, without proof as to underlying acts, did not establish that defendant failed to obey federal, state and local laws).

Condition requiring consent to search must be in service of rehabilitation.
Compare People v. Hale, 93 N.Y.2d 454 (1999) (defendant's offense was drug-related and one way to encourage defendant to stay free of drugs was to hold out possibility he would be checked up on) *with People v. Acuna*, 195 A.D.3d 854 (2d Dept. 2021) (court strikes condition of probation requiring defendant to consent to search by probation officer of person, vehicle, and place of abode, and seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon or contraband found, where there was no indication that condition was reasonably related to rehabilitation or necessary to ensure that defendant would lead law-abiding life); *People v. Saraceni*, 153 A.D.3d 1559 (4th Dept. 2017), *lv denied* 30 N.Y.3d 913 (conditions requiring defendant to, inter alia, waive Fourth Amendment right protecting him from unreasonable searches and seizures of person, home, and personal property, and submit to chemical tests of breath, blood, or urine, were improper in absence of evidence defendant was under influence of alcohol or drugs when he committed offense or had history of drug or alcohol abuse) and *People v. Mead*, 133 A.D.3d 1257 (4th Dept. 2015) (condition requiring consent to search of home invalid where defendant had no history of drug or alcohol abuse).

Computers: generally, blanket use prohibition not permissible.
United States v. Eaglin, 913 F.3d 88 (2d Cir. 2019) (virtual ban on Internet access and prohibition on viewing or possessing adult pornography was unreasonable; although

Internet access through smart phones and other devices undeniably offers potential for wrongdoing, to consign individual to a life virtually without access to Internet is to exile that individual from society); *People v.* Salvador, 83 Cal.App.5th 57 (Cal. Ct. App., 6th Dist., 2022) (condition which prohibited defendant from accessing internet without prior approval from probation officer was unconstitutionally overbroad; "Access to some part of the Internet is so necessary and frequent as a part of daily life that it may become unduly burdensome to obtain a probation officer's approval for every use of it. With respect to some offenses - e.g., possession or distribution of child pornography - such a burdensome condition might be justified or necessary."); *People v. Schaffner*, 5 Misc.3d 5 (App. Term, 9th & 10th Jud. Dist., 2004); *People v. Rocco*, 309 A.D.3d 882 (2d Dept. 2003).

Gangs:
United States v. Washington, 893 F.3d 1076 (8th Cir. 2018) (condition unconstitutionally vague where it stated that defendant "must not knowingly associate with any member, prospect, or associate member of any gang without the prior approval of the United States Probation Office," and that if "defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of a gang, the Court will presume that this association was for the purpose of participating in gang activities"; prohibition failed to define "gang" or "associate member" of gang, and could apply to "incidental contacts" with gang members);
In re Edward B., 10 Cal.App.5th 1228 (Cal. Ct. App., 1st Dist., 2017) (condition providing that juvenile "shall not knowingly associate with anyone known to the minor to be a gang member or associated with a gang, or anyone who the [probation officer] informs the minor to be, a gang member or associated with a gang," not related to offense or preventing future criminality);
United States v. Johnson, 626 F.3d 1085 (9th Cir. 2010) (condition prohibiting association with persons associated with gang improperly included not only those involved in gang's criminal activities, but also those who may have had only social connection to gang member);
United States v. Green, 618 F.3d 120 (2d Cir. 2010) (condition barring defendant from associating with criminal street gang was proper, but condition prohibiting "wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs" was unconstitutionally vague).

School trespass:
In re G.B., 24 Cal.App.5th 464 (Cal. Ct. App., 1st Dist., 2018) (court narrows condition requiring juvenile to stay away from any school campus unless enrolled to be consistent with state law prohibiting persons from visiting school grounds without notifying school authorities).

Electronic monitoring:
People v. Fitch, 170 A.D.3d 1572 (4th Dept. 2019), *reargument denied* 173 A.D.3d 1722, *lv denied* 33 N.Y.3d 1069 (probation condition requiring defendant to submit to electronic monitoring and pay related fees stricken where court did not find that

defendant or his actions posed threat to public safety, but electronic monitoring condition connected to probationer control or surveillance might be appropriate).

Respondent must raise challenge to probation condition in appeal from dispositional order; cannot wait until appeal from new disposition resulting from violation.
People v. Limoncelli, 21 Misc.3d 135(A) (App. Term, 9th & 10th Jud. Dist., 2008).

Transfer for supervision:
Where respondent resides in another jurisdiction within the state at the time of the order of disposition, or, after probation disposition is pronounced, relocates to another jurisdiction within the state, the court shall transfer probation supervision to the probation department in the jurisdiction in which respondent resides. Upon completion of the transfer of probation supervision, the probation department in the receiving jurisdiction shall assume all powers and duties of the probation department in the jurisdiction of the court which placed the probationer on probation. Any transfer under this subdivision must be in accordance with rules adopted by the commissioner of the Division of Criminal Justice Services. FCA § 176(1).
The court in the receiving jurisdiction shall hear any proceedings to enforce or modify the order of probation, unless the receiving court determines that there is good cause to return the proceeding to the sending court for adjudication, in which case the proceeding shall be returned to the sending court for adjudication. FCA § 176(2).
"Jurisdiction" shall mean a county or the city of New York. FCA § 176(3).

PLACEMENT UPON MISDEMEANOR OR FELONY ADJUDICATION (FCA § 353.3)

Federal Title IV-E Funding-Related Determinations (FCA § 352.2)
(1) Reasonable Efforts
When placing respondent with Commissioner of Social Services, or with OCFS for placement with authorized agency or class of authorized agencies or in OCFS facility eligible for federal Title IV-E reimbursement, court shall determine in order:
That continuation in home would be contrary to best interests of respondent or, if not contrary to best interests, would be contrary to need for protection of community; and
That where appropriate, and where consistent with need for protection of community, reasonable efforts were made prior to date of dispositional hearing to prevent or eliminate need for removal from home, or if child was removed prior to hearing, where appropriate and where consistent with need for safety of community, whether reasonable efforts were made to make it possible for child to safely return home. If court determines that reasonable efforts were not made but lack of such efforts was appropriate, or consistent with need for protection of community, or both, court order shall include such finding; and
(2) Children Over Sixteen
Court shall determine in order, in case of child who has attained age of sixteen, services needed, if any, to assist child to make transition from foster care to independent living.

(3) Reasonable efforts <u>not</u> required where court determines (must state findings in order) that:

Parent of respondent has subjected respondent to aggravated circumstances (defined in FCA § 301.2), to wit:

• parent has been convicted of specified homicide crime and victim was another child of parent, provided that parent acted voluntarily in committing crime;

• parent has been convicted of attempt to commit specified homicide, or criminal solicitation, conspiracy or criminal facilitation for conspiring, soliciting or facilitating such homicide, and victim or intended victim was child or another child of parent.

• parent has been convicted of specified assault and commission of crime resulted in serious physical injury to respondent or another child of parent;

• parent has been convicted in other jurisdiction of offense which includes all essential elements of aforementioned crime, and victim was respondent or another child of parent; or

• parental rights of parent to sibling (sibling shall include half-sibling) of respondent have been involuntarily terminated;

<u>unless</u> court determines that providing reasonable efforts would be in best interests of and not contrary to health and safety of child, and would likely result in reunification of parent and child in foreseeable future.

(4) Schedule Permanency Hearing (FCA 352.2)

If court determines that reasonable efforts not required:

Permanency hearing shall be held pursuant to FCA § 355.5 within thirty days of finding that such efforts not required.

Social services official or OCFS shall, subsequent to permanency hearing, make reasonable efforts to place respondent in timely manner and complete steps necessary to finalize permanent placement as set forth in permanency plan approved by court.

Social services official may file petition for termination of parental rights.

In determining and making reasonable efforts, respondent's health and safety shall be paramount concern.

Placement Options

In accordance with FCA § 352.2, the court may place the respondent in his or her own home or in the custody of a suitable relative or other suitable private person or the commissioner of the local social services district or the Office of Children and Family Services pursuant to Article 19-G of the Executive Law, subject to the orders of the court.

In NYC “Close to Home” district, court may only place respondent:

(i) in custody of Commissioner of Social Services for placement in non-secure level of care; or placement in limited secure level of care; or placement in either non-secure or limited secure level of care, as determined by Commissioner; or

(ii) in custody of OCFS for placement in secure level of care.

Where respondent placed with Commissioner for Close to Home, court may direct Commissioner to provide services necessary to meet needs of respondent, provided that services are authorized or required to be made available pursuant to approved Close to Home plan.

If court finds respondent is sexually exploited child, court may place respondent in available long-term safe house.

Period of Placement
If respondent has committed felony, initial period of placement shall not exceed eighteen months.
If respondent has committed misdemeanor, initial period of placement shall not exceed twelve months.

Six-Month Minimum in Felony Cases
After finding that respondent committed felony, court may, in its discretion, order that respondent be confined in residential facility for minimum period set by order, not to exceed six months.

Initial placement beginning, or extending beyond, 18th birthday permitted
Matter of Robert J., 2 N.Y.3d 339 (2004); *In re Jude F.*, 291 A.D.2d 165 (2d Dept. 2002).

Provisions for routine medical, dental and mental health services and treatment (FCA § 355.4)
At conclusion of dispositional hearing, court shall inquire as to whether parents or legal guardian of youth, if present, will consent for OCFS or DSS to provide routine medical, dental and mental health services and treatment.
Where no medical consent has been obtained prior to order of disposition, placement order shall be deemed to grant consent for OCFS or DSS to provide for routine medical, dental and mental health services and treatment to the youth.
Routine medical, dental and mental health services and treatment defined to mean any routine diagnosis or treatment, including without limitation the administration of medications or nutrition, extraction of bodily fluids for analysis, and dental care performed with local anesthetic. Routine mental health treatment shall not include psychiatric administration of medication unless it is part of ongoing mental health plan or otherwise authorized by law.
At any time during placement or at extension of placement hearing, parent or legal guardian may make motion objecting to routine medical, dental or mental health services and treatment being provided to youth as authorized under statute. Notice of motion shall be served on youth, presentment agency and OCFS not less than seven days prior to return date. Persons on whom notice of motion is served shall answer not less than two days before return date. On examining motion and answer, and after hearing argument in its discretion, court shall enter order granting or denying motion.
Nothing in statute precludes youth from consenting on his/her behalf to medical, dental or mental health service and treatment where otherwise authorized by law, or precludes OCFS from petitioning court pursuant to FCA § 233 (court-ordered medical services).

Detention Pending Placement in Facility
Court may direct detention for no more than thirty days after order of placement made, or, in city of one million or more, no more than fifteen days after order made.

Detention subject to fifteen-day extension pursuant to SSL § 398(3)(c).

Detention Time Credit
If respondent has been in detention pending disposition, initial period of placement shall be credited with and diminished by amount of time spent in detention prior to commencement of placement unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community.
Although criminal defendants automatically receive detention time credit without exception under PL § 70.30(3), and thus automatic credit should be given after a case has been removed to family court, it appears that the court has some discretion to deny credit, although we should argue that discretion is narrower than in non-removal cases. *Compare Matter of Warren W.*, 216 A.D.2d 225 (1st Dept. 1995) (awarding credit while citing Penal Law § 70.30[3]) *with In re William B.*, 247 A.D.2d 340 (1st Dept. 1998) and *Matter of Brian E.*, 242 A.D.2d 720 (2d Dept. 1997).

In any event, argue that equal protection requires application of the PL § 70.30(3) rule in juvenile delinquency proceedings.
In re W.M., 370 A.2d 519 (N.J. App. Div., 1977) ("In light of the litany of cases, all of which expand the rights of juveniles to those afforded their adult counterpart, we perceive no reason why the juvenile should not receive credit for time spent in custody…. Absent a cogent reason to treat the juvenile differently, we deem it a matter of fundamental fairness that the juvenile receive credit for predisposition custody").

Credit must be given for pre-fact-finding detention:
Matter of Wanji W., 305 A.D.2d 690 (2d Dept. 2003).
Credit must be given for time spent in detention prior to probation order, the violation of which led to placement.
Matter of Miranda C., 103 A.D.3d 891 (2d Dept. 2013).
Respondent must preserve via objection contention that court failed to make required findings justifying denial of credit.
In re Michael A., 151 A.D.3d 566 (1st Dept. 2017).

Tolling where respondent AWOL (Exec. Law § 510-b[7])
When child under OCFS jurisdiction is absent from facility or authorized agency without consent of director of facility or authorized agency, absence shall interrupt calculation of time of placement and interruption shall continue until return of child to facility or authorized agency in which child was placed. Time spent by child in custody from date of absence to date placement resumes shall be credited against time of placement if:
(a) Custody due to arrest or surrender based upon absence; or
(b) Custody arose from arrest or surrender on another charge which did not culminate in conviction, adjudication or adjustment.
Same tolling when child is placed with social services district (SSL § 398[3-a][b])
Failure to award proper credit may result in untimely filed extension petition:
Matter of Angel F., 273 A.D.2d 71 (1st Dept. 2000) (although OCFS asserted no knowledge of dismissal, it was aware of open case and tracking matter, and offered no explanation for failure to ascertain disposition and give credit).

Effect Of JO Sentence: PL § 70.05
The court shall provide that where a juvenile offender is under placement pursuant to FCA Article Three, any sentence to be served consecutively with such placement shall be served in a facility designated pursuant to PL § 70.20(4) prior to service of the placement in any previously designated facility.

Motion To Terminate Placement
Court may at any time conduct hearing under FCA § 355.1 concerning need for continuing placement.
Matter of Johnny S., 27 Misc.3d 537 (Fam. Ct., Kings Co., 2010) (given court's finding that treatment was necessary to address respondent's history of trauma, which was significant factor in need for placement, failure to provide appropriate treatment would constitute change of circumstances warranting new dispositional hearing).

Court may extend placement pursuant to FCA § 355.3 (see below).

Agency Report Prior To Release or Extension of Placement
Placement agency shall submit report to court, respondent's attorney of record, and presentment agency at conclusion of placement period. Report shall include recommendations and such supporting data as is appropriate.
Where placement agency not seeking extension of placement, report shall be submitted not later than thirty days prior to conclusion of placement.
Where agency seeking extension of placement and permanency hearing, report shall be submitted not later than sixty days prior to date on which permanency hearing must be held and shall be annexed to petition for permanency hearing and extension of placement.
Report shall contain plan for release, or conditional release, of respondent to custody of parent or other person legally responsible, to independent living or to another permanency alternative.
If respondent subject to Article Sixty-Five of Education Law elects to participate in educational program leading to high school diploma, plan shall include, but not be limited to, steps agency has taken and will be taking to facilitate enrollment of respondent in school or educational program leading to high school diploma following release, or, if release occurs during summer recess, upon commencement of next school term.
If respondent not subject to Article Sixty-Five and does not elect to participate in educational program leading to high school diploma, plan shall include, but not be limited to, steps agency has taken and will be taking to assist respondent to become gainfully employed or enrolled in vocational program following release.

Restitution/Services For Public Good
In its discretion, court may recommend restitution or require services for public good pursuant to FCA § 353.6 (see below).

CONDITIONAL RELEASE, AND RELEASE REVOCATION

(SSL § 398, 18 NYCRR § 431.19, 9 NYCRR Part 169)

Basis For Release

If case does not involve designated felony finding and court has not ordered minimum period of placement in felony case, youth may be conditionally released to aftercare whenever local social services district determines conditional release to be consistent with needs and best interests of youth; that suitable care and supervision can be provided, and that there is reasonable probability that youth can be conditionally released without endangering public safety.

Release shall be made in accordance with OCFS regulations (*see* 18 NYCRR § 431.19), and no youth shall be conditionally released while absent from facility or program without consent of director of facility or program, solely by reason of absence. SSL § 398(3-a)(a)(1); 18 NYCRR § 431.19(b) (absence without consent occurs when youth runs away or is otherwise absent without consent of the person(s) or facility in whose care youth has been placed).

Person To Whom Youth May Be Released

Youth shall be conditionally released to parent(s), relative or guardian, unless in opinion of district there is no suitable parent, relative or guardian to whom youth can be released, in which case, if suitable care cannot otherwise be secured, district may conditionally release youth to care of other suitable person; provided that where person has no legal relationship with youth, district shall advise person of procedures for obtaining custody or guardianship. SSL § 398(3-a)(a)(5); 18 NYCRR § 431.19(c); 18 NYCRR § 431.19(d) (where such youth is over age of 18, local social services district may conditionally release youth to either suitable person or to his or her own recognizance, provided there is at least one adult whom district has identified as primary support for youth, or a program, such as a transitional independent living support program, which will provide additional supports and services fo youth).

Continuing Responsibility Of Agency

It shall be condition of release that youth shall continue to be responsibility of district for period provided in order of placement. SSL § 398(3-a)(a)(2); 18 NYCRR § 431.19(e) (this includes youth whose release resource dies, is incarcerated or becomes otherwise incapacitated). District may provide clothing, services and other necessities for conditionally released youth, as may be required, including medical care and services not provided as medical assistance for needy persons. SSL § 398(3-a)(a)(3); 18 NYCRR § 431.19(e).

If youth is subject to article 65 of Education Law or elects to participate in educational program leading to high school diploma, youth shall be enrolled in school or educational program leading to high school diploma following release, or, if release occurs during summer recess, upon commencement of next school term. If youth is not subject to article 65, and does not elect to participate in educational program leading to high school diploma, steps shall be taken, to extent possible, to facilitate youth's gainful employment or enrollment in vocational program following release. SSL § 398(3-a)(a)(5); 18 NYCRR § 431.19(f)..

Conditions Of Release

Prior to release, youth must agree, in writing, to follow conditions and acknowledge that violation can result in modification of terms and conditions or revocation of release. Conditions shall be individualized and consistent with youth's needs and abilities and may include, but are not necessarily limited to: keeping daily schedule, which may include reasonable curfew, set by youth's aftercare worker or case manager; participating in programs and services as required; enrolling in or attending school or education program, or seeking employment or enrolling in and attending vocational program (see above); refraining from activities prohibited in conditions of release, including associating with person(s) whose influence would have detrimental effect; abstaining from use of alcoholic beverages, controlled substances, habit forming drugs not lawfully prescribed, or any other harmful or dangerous substance; reporting to the youth's case worker, as directed; not operating motor vehicle without a license; and adhering to any other requirements deemed appropriate by youth's aftercare worker or case manager. Youth shall endorse attestation to statement written in language accessible to youth, which indicates: that youth understands that he or she remains under custody of local social services district; and that violation of terms and conditions may lead to modification of terms or revocation of conditional release. 18 NYCRR § 431.19(f); *see also* 9 NYCRR § 169.1 (for youth placed with OCFS, also specifies associating with persons previously convicted of crime or having known criminal background; not committing act which would be crime if committed by adult; obeying reasonable commands of parents or other persons legally responsible for care and treatment; and not running away from lawful custody of parents or other lawful authorities).

Notice To Youth and Release Resource

Youth and parent, relative, guardian or other suitable person shall be oriented to conditions youth must follow, structure of conditional release program where relevant, and responsibilities of staff working with youth and family, and written documentation of conditions of release and verbal notice that violation may result in revocation of release. Copy of all materials shall be mailed to parent(s), relative, guardian or other suitable person to whom the youth is released, and provided in person where possible. 18 NYCRR § 431.19(g); *see also* 9 NYCRR 169.2.

Modification Of Conditions

Terms and conditions of release may be modified, as necessary. Aftercare worker shall document reasons why modification is necessary, including specific conditions to be added or deleted or conditions to be amended. All attempts by program or staff to support success of the conditional release and application of graduated sanctions to address concerns in community shall be documented. Any proposed modification must be reviewed and approved by aftercare worker supervisor in consultation with district case manager. Caseworker shall confer with youth and parent/guardian or release resource before modifying conditions. If youth is absent without consent and cannot be located, caseworker may modify conditions without conferring with youth. All modifications must be in writing and signed by youth and parent, relative, guardian or

other suitable person, where applicable, in same manner as original conditions. NYCRR § 431.19(h).

Grounds For Revocation Of Release

Social services district, pursuant to OCFS regulations, may cause youth to be returned to facility at any time within period of placement, where there is a violation of conditions of release or change of circumstances. SSL § 398(3-a)(a)(4); 18 NYCRR § 431.19(i) (revocation based on change of circumstances must be consistent with promoting welfare of youth and need to protect community).

Documentation Supporting Revocation

Aftercare worker shall prepare written recommendation to revoke, which shall specify factual circumstances requiring revocation, including: specific conditions violated and facts that demonstrate violation and use of graduated response by case worker or aftercare staff to avoid revocation where appropriate; or facts which demonstrate that revocation based on change of circumstances is consistent with promoting welfare of youth and need to protect community. Written recommendation shall be reviewed by youth's district case manager for final approval. 18 NYCRR § 431.19 (j)

Notice Of Hearing and Reasons For Revocation

District must provide youth, and for youth less than 18 years of age the youth's parents or guardians, with notice in manner set forth by OCFS at least 5 days prior to hearing, of reasons for revocation and opportunity for youth to be heard, including rights at hearing (see below).

Youth may be permitted to remain in community until opportunity to be heard occurs unless there are reasonable grounds to believe youth will not appear for any mandatory appearances.

Social services official of Close to Home district may issue warrant authorizing peace or police officer to apprehend youth and return youth to agency, or, in case of limited secure youth, to detention facility. District employee may be designated, without warrant, to apprehend youth.

And, any local social services commissioner or authorized representative may petition family court for warrant for return of youth to placement pending outcome of youth's opportunity to be heard.

18 NYCRR § 431.19(k); 9 NYCRR § 169.5 (also states, *inter alia*, that notice shall be given by hearing officer to releasee, releasee's attorney, and parents of releasee; and that notice shall inform parties of date and place of hearing, and name and address of hearing officer).

Timing Of And Procedure At Revocation Hearing.

If the youth has been returned to custody pending opportunity to be heard, hearing must take place within 20 days from date youth was taken into custody.

If youth has remained in community, hearing must take place within 20 days from date youth was provided notice of hearing.

Each party has right to be represented by counsel; to examine and present documentary evidence; to testify; to produce, compel attendance of, and examine witnesses; and to cross-examine witnesses.
Official presiding over hearing shall be attorney who is not employee of district or agency and shall be authorized by district to make determination. Hearing officer shall have all powers conferred by law to acquire attendance of witnesses and production of books and records and administer oaths and take testimony.
Verbatim record of hearing shall be made. Record shall be confidential, but may be examined by either party, including youth, parent, relative, guardian or other suitable person to whom youth was released, or designated legal representative.
18 NYCRR § 431.19(k); 9 NYCRR § 169.5 (also states, *inter alia*, that hearing officer shall be employed exclusively to conduct hearings; that office of OCFS counsel shall act as agency representative; that opportunity shall be afforded releasee or attorney, upon request, to examine copies of documentary evidence in possession of OCFS which it plans to introduce at hearing; and that releasee and parents or lawful guardian and legal counsel, OCFS counsel, witnesses of parties, witnesses who may be called by hearing officer, OCFS representatives and other persons admitted by hearing officer in his or her discretion); 9 NYCRR § 169.6 (also states, *inter alia*, that hearing officer shall make opening statement describing nature of proceeding, issues, and manner in which hearing will be conducted; that technical rules followed in court shall not apply but evidence must be relevant and material; that each party has right to examine opposing witnesses to extent necessary to assure that hearing officer is accurately informed of facts, and to offer evidence in rebuttal; that hearing officer may, in his or her discretion, order removal of person when presence of person interferes with orderly conduct of hearing; and that hearing may be adjourned by hearing officer for good cause on his or her own motion or at request of either party); 9 NYCRR § 169.7..

Revocation Hearing Decision
Hearing officer shall issue written decision, within four days following hearing, determining whether substantial evidence supports finding that there has been violation, or change of circumstances such that revocation is consistent with promoting welfare of youth and need to protect community.
If such finding is made, hearing officer shall consider whether revocation is in youth's best interest and necessary to protect community. If not, hearing officer must order youth’s continuation on aftercare, with or without modification of conditions, as hearing officer deems appropriate.
If substantial evidence does not support finding, hearing officer must order that youth be continued on aftercare without modification of conditions.
18 NYCRR § 431.19(k); 9 NYCRR § 169.8 (also states, *inter alia*, that hearing officer shall determine whether releasee has knowingly violated any conditions; that where substantial evidence is found, hearing officer shall order revocation of release; that written decision shall be served upon parties; and that notice of revocation of release shall be sent to Family Court).

Judicial Review

In letter transmitting decision, hearing officer shall make clear references to availability of judicial review, pursuant to CPLR article 78. 9 NYCRR § 169.9.

Voluntary Return
Youth who has received notice of revocation may waive right to be heard and voluntarily return to placement. Youth under age of 18 years may not waive right without first consulting with legal representative. Any waiver must be signed by youth, who must fully understand significance of act. 18 NYCRR § 431.19(l); 9 NYCRR § 169.10 (also states, *inter alia*, that when signing waiver, youth must be represented by attorney, who shall determine that youth is aware of significance of act).

TRANSFER FOR PLACEMENT WITH OMH OR OMRDD (FCA § 353.4)

If court finds respondent has mental illness, or intellectual or developmental disability, likely to result in serious harm to himself or others, court may issue order placing respondent with the Commissioner of Social Services or OCFS directing temporary transfer for admission of respondent to custody of either Commissioner of Mental Health or Commissioner of Developmental Disabilities, who shall arrange admission of respondent to appropriate facility of Department of Mental Hygiene.
See *In re Leopoldo Z.*, 78 Misc.2d 866 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to find or create suitable facility for delinquent child who was moderately retarded and had antisocial personality);
In re Graham S., 78 Misc.2d 351, 355 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to provide juvenile with "setting and treatment specifically recommended for his condition").

Director of hospital operated by OMH may, subject to Mental Hygiene Law § 951, transfer person admitted to hospital pursuant to this subdivision to residential treatment facility for children and youth, if care and treatment in such facility would more appropriately meet needs of respondent.

Respondent may be retained for care and treatment for period of up to one year and, whenever appropriate, shall be transferred back to placement agency. Within thirty days of transfer back, agency shall make application to court to conduct further dispositional hearing at which court may make any order authorized under FCA § 352.2, except that period of further order of disposition shall take into account period of placement hereunder.

"Likelihood to result in serious harm" shall mean: (a) substantial risk of physical harm to himself as manifested by threats or attempts at suicide or serious bodily harm or other conduct demonstrating he is dangerous to himself; or (b) substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious bodily harm.

No dispositional hearing at which proof of mental disability is to be offered shall be completed until appropriate Commissioner has been notified and afforded opportunity to be heard at hearing.

Order placing respondent in accordance with this section shall be based upon **clear and convincing evidence, which shall include testimony of two examining physicians** (FCA § 251).

If respondent has been in detention pending disposition, **initial period of placement shall be credited with and diminished by amount of time spent by respondent in detention prior to commencement of placement** unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community (see additional information in section on placements in misdemeanor and felony cases).

Transfer from restrictive placement

If restrictive placement ordered (*see* below), and court makes required finding, court may direct temporary transfer for period of up to one year. Commissioner shall arrange for admission to appropriate facility within thirty days of order, and Director of facility shall accept respondent for admission.

Respondent shall be retained for period designated by court. At any time prior to expiration of period, if facility director determines that child is no longer mentally ill or no longer in need of active treatment, agency shall make application to court for order transferring child back to OCFS. Not more than thirty days before expiration of period, there shall be hearing, at which time court may:

• extend temporary transfer for additional period of up to one year; or
• continue restrictive placement in custody of OCFS.

During temporary transfer, respondent shall continue to be under restrictive placement with OCFS. When respondent transferred back to OCFS, conditions of placement in FCA § 353.5 apply. Time spent by respondent in custody of Commissioner shall be credited and applied towards period of placement.

RESTRICTIVE PLACEMENT UPON DESIGNATED FELONY FINDING (FCA § 353.5)

In determining whether restrictive placement is required, court shall consider:

(a) needs and best interests of respondent;
(b) record and background of respondent, including but not limited to information disclosed in probation investigation and diagnostic assessment;
(c) nature and circumstances of offense, including whether injury was inflicted by respondent or another participant;
(d) need for protection of community; and
(e) age and physical condition of victim.

Court shall order restrictive placement in any case where respondent inflicted serious physical injury (Penal Law § 10.00) upon person sixty-two years of age or more.
Provision does not deny due process or equal protection: *Matter of Quinton A.*, 49 N.Y.2d 328 (1980).

Restrictive placement of youth found to have committed designated class A felony act (under FCA § 301.2[9], "Designated class A felony act" means designated felony act that would constitute class A felony if committed by adult).

Order shall provide that:
(i) respondent placed with OCFS for initial period of five years;
(ii) respondent initially confined in secure facility for specified period not less than twelve nor more than eighteen months;
(iii) after secure confinement, respondent placed in residential facility for period of twelve months; provided, however, that if OCFS concludes, based on needs and best interests of respondent and need for protection for community, that non-secure or limited secure level of care is appropriate for respondent who committed designated felony act when he/she was under sixteen years of age, OCFS shall file petition pursuant to FCA § 355.1 to have respondent placed with local Commissioner of Social Services.
Respondent may not be released from, or transferred to facility other than secure facility, or be released from residential facility, during minimum period.
Motion For Relief From Order
During first twelve months of placement, no motion, hearing or order pursuant to FCA § 355.1 permitted; provided, however, that motion to vacate may be made upon grounds in CPL § 440.10.

Restrictive placement of youth found to have committed designated felony act other than class A felony act
Order shall provide that:
(i) respondent placed with OCFS for initial period of three years;
(ii) respondent initially confined in secure facility for specified period not less than six nor more than twelve months;
(iii) after secure confinement, respondent placed in residential facility for period of not less than six nor more than twelve months; provided, however, that if OCFS concludes, based on needs and best interests of respondent and need for protection for community, that non-secure or limited secure level of care is appropriate, OCFS shall file petition pursuant to FCA § 355.1 to have respondent placed with local Commissioner of Social Services.
However, if youth found to have committed designated felony act on prior occasion, regardless of age at time of commission of prior act, five-year placement scheme and eighteen-month initial secure placement are required (in requiring eighteen months, statute refers to subd. (5) but apparently meant subd. (6)).

See Matter of Dwayne R., 124 Misc.2d 644 (Fam. Ct., Bronx Co., 1984) (prior finding need not be designated felony finding; finding may be of felony act that would have been designated felony had respondent been old enough).

Motion For Relief From Order
During first six months of placement, no motion, hearing or order pursuant to FCA § 355.1 permitted; provided, however, that motion to vacate may be made upon grounds in CPL § 440.10.

Home Visits
Not permitted during specified period of secure confinement or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in family.
Accompanied home visit required:
(A) while youth in secure facility;
(B) while youth confined in facility other than secure facility within six months after confinement in secure facility; and
(C) while youth confined in facility other than secure facility in excess of six months after confinement in secure facility unless two accompanied home visits have already occurred.
"Accompanied home visit" shall mean visit during which youth shall be accompanied at all times while outside facility by appropriate placement agency personnel.

Release From Confinement
Respondent may not be released from, or transferred to facility other than secure facility, or be released from residential facility, during minimum period.
After expiration of minimum period, respondent shall not be released from residential facility without written approval of placement agency.
Respondent shall be subject to intensive supervision whenever not in facility.
Respondent shall not be discharged from custody of placement agency during placement period.

Reports By Agency
Unless otherwise specified in order, placement agency shall report in writing to court not less than once every six months on status, adjustment and progress of respondent.

Extension of Placement
Upon expiration of initial period of placement, or any extension thereof, placement may be extended in accordance with FCA § 355.3 on petition of any party or placement agency, after dispositional hearing, for additional period not to exceed twelve months. No initial or extension of placement may continue beyond respondent's twenty-first birthday, or, for a class A designated felony committed when respondent was sixteen years of age or older, respondent's twenty-third birthday.

Detention Time Credit

If respondent in detention pending disposition, initial period shall be credited with and diminished by time in detention prior to commencement of placement unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community.
Although criminal defendants automatically receive detention time credit without exception under PL § 70.30(3), and thus automatic credit should be given after a case has been removed to family court, it appears that the court has some discretion to deny credit, although we should argue that discretion is narrower than in non-removal cases. *Compare Matter of Warren W.*, 216 A.D.2d 225 (1st Dept. 1995) (awarding credit while citing Penal Law § 70.30[3]) *with In re William B.*, 247 A.D.2d 340 (1st Dept. 1998) and *Matter of Brian E.*, 242 A.D.2d 720 (2d Dept. 1997).
In any event, argue that equal protection requires application of the PL § 70.30(3) rule in juvenile delinquency proceedings.
Credit must be given for pre-fact-finding detention:
Matter of Wanji W., 305 A.D.2d 690 (2d Dept. 2003).
Credit must be given for time spent in detention prior to probation order, the violation of which led to placement.
Matter of Miranda C., 103 A.D.3d 821 (2d Dept. 2013).
Respondent must preserve via objection contention that court failed to make required findings justifying denial of credit.
In re Michael A., 151 A.D.3d 566 (1st Dept. 2017).
If dispositional hearing adjourned on finding of special circumstances (FCA § 350.1), and restrictive placement ordered, additional adjournment shall be credited against term of secure confinement.

Placement agency shall retain power to continue confinement in secure or other residential facility beyond periods specified by court, within term of placement (FCA § 353.5(8)).

PLACEMENT IN QUALIFIED RESIDENTIAL TREATMENT PROGRAM

FCA § 353.7 shall apply when a respondent is placed on or after September 29, 2021 and resides in a non-secure setting that is a qualified residential treatment program, as defined in SSL § 409-h, and whose care and custody were transferred to a local social services district or the OCFS in accordance with this article. FCA § 353.7(1).

When a respondent is in the care and custody of a local social services district or the OCFS pursuant to this article, such social services district or office shall report any anticipated placement of the respondent into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the respondent, forthwith, but not later than one business day following either the decision to place the respondent in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district or OCFS

shall subsequently notify the court and the attorneys for the parties, including the attorney for the respondent, of the date the placement change occurred, such notice shall occur no later than one business day following the placement change. FCA § 353.7(2)(a).

When a respondent whose legal custody was transferred to a local social services district or the office of children and family services in accordance with this article resides in a qualified residential treatment program, and where such respondent's initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to paragraph (a) of this subdivision and motion of the local social services district or the OCFS with legal custody of the respondent, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3) of this section. Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the respondent in the qualified residential treatment program commenced. FCA § 353.7(2)(b).

Within sixty days of the start of a placement of a respondent referenced in subdivision (1) of this section in a qualified residential treatment program, the court shall:
(i) Consider the assessment, determination, and documentation made by the qualified individual pursuant t SSL § 409-h;
(ii) Determine whether the needs of the respondent can be met through placement in a foster family home and, if not, whether placement of the respondent in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the respondent as specified in the respondent's permanency plan; and
(iii) Approve or disapprove the placement of the respondent in a qualified residential treatment program. Provided that, where a qualified individual determines that the placement of the respondent in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the respondent in the qualified residential treatment program if: (A) the court finds, and states in the written order that: (1) circumstances exist that necessitate the continued placement of the respondent in the qualified residential treatment program; (2) there is not an alternative setting available that can meet the respondent's needs in a less restrictive environment; and (3) that continued placement in the qualified residential treatment program serves the respondent's needs and best interests or the need for protection of the community; and (B) the court's written order states the specific reasons why the court has made the findings required pursuant to clause (A) of this subparagraph.
(iv) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 353.7(3)(a).

At the conclusion of the review, if the court disapproves placement of the respondent in a qualified residential treatment program the court shall, on its own motion, determine a

schedule for the return of the respondent and direct the local social services district or OCFS to make such other arrangements for the respondent's care and welfare that is in the best interest of the respondent and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 353.7(3)(b).

The court may, on its own motion, or the motion of any of the parties or the attorney for the respondent, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(a)(iii)(A) of this section and provide such written order to the parties and the attorney for the respondent expeditiously, but no later than five days. FCA § 353.7(4).

Documentation of the court's determination pursuant to this section shall be recorded in the respondent's case record. FCA § 353.7(5).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such respondent, including but not limited to the respondent's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 353.7(6).

VINDICTIVE DISPOSITION AND DUE PROCESS

Under Due Process Clause of State Constitution, **presumption of vindictiveness applies where criminal defendant successfully appeals, and is retried, found guilty, and given harsher sentence than that imposed after initial conviction**. After new trial, court must give affirmative reasons concerning identifiable conduct on part of defendant occurring after time of original sentencing to justify higher sentence.
People v. Flowers, 28 N.Y.3d 536 (2016) (presumption of vindictiveness not applicable where defendant got same sentence upon re-conviction after reversal on appeal; no retaliatory conduct by court was apparent, nor was there indication that court relied on dismissed charges).

However, no presumption applies when defendant rejects plea offer, proceeds to trial for first time, and is given harsher sentence than plea offer. Given that *quid pro quo* of bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is anticipated that sentences handed out after trial may be more severe than those proposed in connection with plea.
Compare People v. Martinez, 26 N.Y.3d 196 (2015) (no presumption of vindictive sentencing where defendant rejected plea offer of 10 years' probation for single crime and, after being tried and convicted on multiple charges, was sentenced to 10 to 20

years' imprisonment; court imposed lawful sentence based on defendant's remorseless statement at sentencing hearing, heinous nature of crimes, and victim's sentencing statement, and rejection of plea offer required victim to testify about sexual abuse, which is legitimate basis for imposition of more severe sentence after trial).

Similarly, **a sentence is illegal if it has been enhanced because the accused turned down a plea deal and took the case to trial.**
People v. Ellerbee, 203 A.D.3d 1068 (2d Dept. 2022) (inference was raised that court punished defendant for going to trial where court, which expressed belief that it was sentencing defendant to maximum, stated before trial that defendant "should understand the way I operate is as follows: Before trial with me you get mercy; after trial you get justice");
People v. Hodge, 154 A.D.3d 963 (2d Dept. 2017) (sentence of seven years' imprisonment raised inference of impropriety where defendant, who had no prior felony convictions, rejected plea offer involving one year in prison, and co-defendant, who pleaded guilty to second degree burglary, was sentenced to six years' imprisonment to run concurrently with four-year sentence in other case, and court admonished defendant for putting elderly complainant through "ordeal" of trial even though defendant was caught "redhanded").

ADVOCATING FOR COURT-ORDERED TREATMENT/SERVICES IN PLACEMENT

Statutory support:
FCA § 353.3(2) (Where respondent placed with Commissioner for Close to Home, court may direct Commissioner to provide services necessary to meet needs of respondent, provided that services are authorized or required to be made available pursuant to approved Close to Home plan).
FCA § 255 ("It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act").
Reasonable Efforts Determination At Permanency/Extension of Placement Hearing: court must make reasonable efforts determinations, and consider and determine, *inter alia*, whether and when respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with relative, or placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource if respondent is age sixteen or older, and court must specify "the steps that must be taken by the agency with which the respondent is placed to implement the plan for release or conditional release . . . the adequacy of such plan and any modifications that should be made to such plan." FCA § 355.5(7).

Court may not specify facility or service provider:
Matter of James A., 50 A.D.3d 787 (2d Dept. 2008) (court exceeded authority under FCA § 255 by directing New York City Department of Education to provide

Individualized Education Plan, specifically naming Judge Rotenberg Center as placement, and encroached upon powers granted to DOE by Education Law §§ 4402 and 4404);
Matter of Kyle H., 297 A.D.2d 741 (2d Dept. 2002) (court erred in directing OCFS to place respondent in Tryon facility and provide in-patient substance-abuse treatment and counseling; under Executive Law § 504, OCFS has discretion to determine particular facility and treatment program).

But respondent has constitutional due process right to receive necessary and appropriate treatment and services to prevent serious physical or emotional harm. Thus, argue that court may order generally that respondent receive psychotherapy, substance abuse treatment and counseling, etc.

Useful caselaw:
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (when State takes person into custody and holds him against his will, Constitution imposes corresponding duty to assume responsibility for basic human needs such as food, clothing, shelter, medical care, and reasonable safety);
Matter of Lavette M., 35 N.Y.2d 136 (1974) (when State places PINS child in training school, it is for individualized treatment and not mere custodial care, and if proper and necessary treatment is not forthcoming, serious question of due process is raised and failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities);
Matter of Ellery C., 32 N.Y.2d 588 (1973) ("Proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision");
Usen v. Sipprell, 41 A.D.2d 251 (4th Dept. 1973) (pursuant to FCA § 255, court may solicit and order care, education, and treatment of PINS respondent that appropriately may be afforded by mental health officials);
Matter of Johnny S., 27 Misc.3d 537 (Fam. Ct., Kings Co., 2010) (court notes that conditions of placement may not be punitive or exclusively designed to incapacitate, and that order must include psychiatric or psychological treatment court finds is needed, and, in this case, orders psychiatric evaluation and necessary psychiatric care and psychological counseling by licensed professional on weekly basis at least, that, every 90 days, OCFS provide to court, presentment agency, attorney for child, and foster care agency/legal guardian, report on psychological and psychiatric services, including schedule of therapy sessions, summary of diagnosis and treatment, and schedule of medications with proof of informed consent by agency/guardian, whose representatives shall have access to physician prescribing medication; that OCFS inform agency/guardian of location of placement and provide agency staff access to respondent; and that OCFS provide to court, presentment agency, and attorney for child, monthly reports of disciplinary measures, including use of restraints, so court may assess whether placement continues to be in best interests of respondent given diagnosis of PTSD);
Matter of Nicholas M., 189 Misc.2d 318 (Fam. Ct., Onondaga Co., 2001) (so respondent would receive required special education services, court directs OCFS pursuant to FCA

§ 255 to have respondent evaluated with respect to need for speech language therapist and teacher of deaf);
Matter of Joseph I., 2001 WL 1328620 (Fam. Ct., Suffolk Co.) (court may direct OCFS to place respondent in certified substance abuse treatment program where he shall also be given psychotherapy, and to provide progress reports to court every 90 days; court may not designate particular facility or program, but may order generally that juvenile receive psychotherapy and substance abuse treatment and counseling).

RESTITUTION AND SERVICES FOR PUBLIC GOOD (FCA § 353.6)

Restitution
At conclusion of dispositional hearing in cases involving respondents over ten years of age, court may recommend as condition of placement, or order as a condition of probation or conditional discharge, restitution in amount representing fair and reasonable cost to replace property, repair damage caused by respondent, or provide victim with compensation for unreimbursed medical expenses. **Restitution not to exceed one thousand five hundred dollars.**
See Matter of Kenroy C., 55 Misc.3d 535 (Fam. Ct., Kings Co., 2017) (restitution for out-of-pocket medical expenses and clothing damage totaling almost $2,000 denied; court notes that it would not be consistent with goals of rehabilitation to order restitution).

In case of placement, court may recommend that respondent pay out of his/her own funds or earnings amount of replacement, damage or unreimbursed medical expenses, either in lump sum or in periodic payments in amounts set by agency with which he or she is placed.

In case of probation or conditional discharge, court may require that respondent pay out of his/her own funds or earnings amount of replacement, damage or unreimbursed medical expenses, either in lump sum or in periodic payments in amounts set by court.

Before ordering restitution, court must make finding as to monetary value based on documentary or other reliable evidence already in record or in victim impact statement. If such evidence is insufficient, or if respondent requests it, court must hold separate restitution hearing to determine what amount of restitution, if any, should be ordered.
People v. Lynch, 255 AD2d 1001 (4th Dept. 1998);
People v. Dunn, 224 A.D.2d 708 (2d Dept. 1996);
People v. Monette, 199 A.D.2d 589 (3rd Dept. 1993) (statements made by victim and insurance carrier were insufficient);
Matter of Richard "GG", 187 A.D.2d 846 (3rd Dept. 1992);
People v. Jackson, 180 A.D.2d 755 (2d Dept. 1992) (court's review of repair bill and defendant's reluctant consent to entry of civil judgment were insufficient).

No authority in Family Court Act for restitution order requiring someone other than respondent to pay, so argue that respondent's personal ability to pay must be established:

Term “respondent” “means person against whom juvenile delinquency petition is filed ....” FCA § 301.2(2). FCA § 353.6 contains no reference to respondent's parents or family, and their “funds or earnings.”

In any event, if respondent and/or family denies ability to pay, it must be established on record:
People v. Chiera, 255 A.D.2d 685 (3rd Dept. 1998);
People v. Christman, 265 A.D.2d 856 (4th Dept. 1999);
Matter of Jessie “GG”, 190 A.D.2d 916 (3rd Dept. 1993);
People v. Jackson, 180 A.D.2d 755 (2d Dept. 1992) (defendant stated he was unable to make restitution);
In re J.G., 434 P.3d 1108 (Cal. 2019) (court rejects respondent’s contention that juvenile court, in determining ability to pay restitution, violated federal law by considering SSI benefits, but, upon concession by People that it would be improper to contemplate social security funds as sole source of payment, remands for new ability to pay hearing that includes consideration of respondent’s future earning capacity and current financial circumstances).

Services For Public Good
In addition to or instead of restitution, court may order as condition of placement, probation, or conditional discharge, services for public good.
United States v. Parkins, 935 F.3d 63 (2d Cir. 2019) (federal courts should generally refrain from imposing more than 400 hours of community service as condition of supervised release, and defendant’s condition requiring 300 hours a year and total of 695 hours was not reasonably related to relevant sentencing factors and involved greater deprivation of liberty than needed to achieve purposes of sentencing);
Matter of Gabriel A., 12 A.D.3d 666 (2d Dept. 2004) (court upholds order placing respondent on probation and directing him to perform **400 hours** of community service).
Includes **services for maintenance and repair** in case of crime involving willful, malicious, or unlawful damage or destruction to real or personal property maintained as cemetery plot, grave, burial place, or other place of interment of human remains.

Court must take into consideration age and physical condition of respondent.

Rules and Regulations For Supervision in Placement
If court recommends restitution or requires services for public good in conjunction with order of non-restrictive placement, placement shall be made only to authorized agency, including OCFS, which has adopted rules and regulations for supervision of restitution or services, which rules and regulations, except in case of OCFS, shall be subject to approval of OCFS.
Such rules and regulations shall include, but not be limited to provisions:
Assuring that conditions of work, including wages, meet standards prescribed pursuant to Labor Law; affording coverage to respondent under Workers’ Compensation Law as employee of agency, department, division or institution; assuring that entity receiving services shall not utilize same to replace regular employees; and providing for reports to court not less frequently than every six months.

Reports to Court in Probation and Conditional Discharge Cases

If court requires restitution or services for public good as condition of probation or conditional discharge, it shall provide that agency or person supervise restitution or services and that such agency or person report to court not less frequently than every six months.

Upon written notice submitted by school district to court, and to probation or other agency which submits probation recommendations or reports to court, court may provide that school district shall supervise performance of services for public good.

Court, upon receipt of reports, may, on own motion or motion of agency, probation service or presentment agency, hold hearing pursuant to FCA § 355.1 to determine whether dispositional order should be modified.

HIV-RELATED TESTING IN SEX CRIME PROSECUTIONS (FCA § 347.1)

Eligible Cases

Where respondent found to have committed felony offense for which act of "sexual intercourse", "oral sexual conduct" or "anal sexual conduct," is essential element, court must, upon request of victim, order that respondent submit to HIV-related testing to be conducted by state, county, or local public health officer designated by order.

Term "victim" means person with whom respondent engaged in act of "sexual intercourse", "oral sexual conduct" or "anal sexual conduct," where such conduct was basis for finding.

Procedure For Request

Request by victim must be in writing, filed with court and provided by court to respondent and his/her counsel. Request must be filed with court prior to or within ten days after filing of fact-finding order, provided that, for good cause shown, court may permit request to be filed at any time prior to entry of order of disposition.

If victim is infant or incompetent person, application may be made by representative as defined in CPLR 1201. Application must state that: (a) applicant was victim of offense; and (b) applicant has been offered counseling by public health officer and been advised of (i) limitations on information to be obtained through HIV test; (ii) current scientific assessments of risk of transmission of HIV from exposure he/she may have experienced; and (iii) need for applicant to undergo HIV related testing to definitively determine HIV status.

Hearing

Court shall conduct hearing only if necessary to determine if applicant is victim. Test must be performed within fifteen days of date on which court ordered test, provided however that whenever respondent not tested within period prescribed by court, court must again order that respondent undergo test.

Confidentiality/Disclosure Of Test Results

Requests, related papers and orders, and papers or proceedings related thereto, shall be sealed by court and not made available for any purpose, except as may be

necessary for conduct of judicial proceedings directly related to provisions of this section. All proceedings on such requests shall be held in camera.
Test results, which shall not be disclosed to court, shall be communicated to respondent and victim named in order in accordance with Public Health Law § 2785-a.
Test results shall be disclosed subject to following limitations, which shall be specified in order:
(i) disclosure of confidential HIV-related information shall be limited to information necessary to fulfill purpose for which order granted;
(ii) disclosure shall be limited to person making application; redisclosure shall be permitted only to victim, victim's immediate family, guardian, physicians, attorneys, medical or mental health providers, and victim's past and future contacts to whom there was or is reasonable risk of HIV transmission; no disclosure to any other person or court.
Unless inconsistent with this section, order shall direct compliance with and conform to Article Twenty-Seven-F of Public Health Law. Order shall include measures to protect against disclosure to others of identity and HIV status of applicant and of person tested and may include such other measures as court deems necessary to protect confidential information.
Failure to comply with provisions of this section or Public Health Law § 2785-a shall not impair validity of order of disposition.
No information obtained pursuant to section or information derived therefrom may be used as evidence in criminal or civil proceeding against respondent which relates to events that were basis for adjudication, provided that nothing herein shall prevent prosecution of witness testifying in hearing held pursuant to this section for perjury.

SPECIAL IMMIGRANT JUVENILE STATUS

In *Matter of Keanu S.*, 167 A.D.3d 27 (2d Dept. 2018), the court declined to extend SIJS protections to a child who had been placed following a juvenile delinquency adjudication, holding that the circumstances did not satisfy the SIJS dependency requirement. The court noted that the respondent was not placed due to his status as an abused, neglected, or abandoned child, that his violent acts and misconduct resulted in painful and terrible consequences to victims, and that the respondent was, in effect, attempting to utilize his own misconduct as a means of meeting the dependency requirement.

EXTENSION OF NON-RESTRICTIVE PLACEMENT (FCA § 355.3)

Filing Deadline
Petition shall be filed by placement agency or person with whom respondent placed at least sixty days prior to expiration of period of placement, except for good cause shown, but in no event shall petition be filed after original expiration date.

Good cause need not be alleged in petition:
Matter of Joshua LL., 140 A.D.3d 1279 (3d Dept. 2016).

Examples of good cause:
Matter of Joshua LL., 140 A.D.3d 1279 (respondent experienced "good days" and "bad days" and "was on a streak where he was doing very well" and assumption was he would be discharged, but, within one month of anticipated discharge date, behavior began to unravel and father expressed concerns about readiness to return home);
Matter of Francis H., 253 A.D.2d 691 (1st Dept. 1998) (OCFS needed to await final determination of criminal proceeding which was expected to result in prison time but in fact resulted in probation);
Matter of Donald MM, 241 A.D.2d 634 (3d Dept. 1997) (series of bad acts committed by respondent after deadline for filing);
Matter of Loren S., 220 A.D.2d 857 (3d Dept. 1995) (arrest after deadline for filing).

Examples of no good cause:
Matter of Heriberto A., 198 A.D.2d 191 (1st Dept. 1993) (record did not demonstrate that juvenile's behavioral problems occurred after deadline).

Hearing
Court shall conduct hearing concerning need for continuing placement. Respondent, presentment agency and placement agency shall be notified of hearing and have opportunity to be heard thereat. If petition is untimely filed, court shall first determine at hearing whether good cause has been shown. If good cause not shown, court shall dismiss petition.

Evidence and Procedure At Hearing
Same as at dispositional hearing (FCA §§ 350.3, 350.4).

Pre- and Mid-Hearing Temporary Extensions
Pending final determination, court may, on own motion or at request of petitioner or respondent, enter one or more temporary orders extending placement for period not to exceed thirty days upon satisfactory proof showing probable cause for continuing placement and that temporary order is necessary.
Court may order additional temporary extensions, not to exceed total of fifteen days, if court unable to conclude hearing within thirty-day temporary extension period. In no event shall aggregate number of days in extensions total more than forty-five days. Petition shall be dismissed if decision not rendered within period of placement or temporary extension.

Order Upon Hearing
Court may, in its discretion, order extension for not more than one year.
Court must consider and determine in order:
that where appropriate, and where consistent with need for protection of community, **reasonable efforts** were made to make it possible for respondent to safely return to home;
in case of respondent sixteen or older, services needed, if any, to assist child to make transition from foster care to independent living; and

in case of child placed outside state, whether out-of-state placement continues to be appropriate and in best interests of child.

Successive Extensions
May be granted, but no placement may be made or continued beyond the respondent's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday except as provided for in FCA § 353.5(4) (restrictive placement for class A designated felony may extend to twenty-third birthday).
Matter of Gerry B., 15 Misc.3d 1134(A) (Fam. Ct., Queens Co., 2007) (respondent may revoke consent to extension beyond 18th birthday).

FOSTER CARE RE-ENTRY

Under FCA § 355.3(7), a youth who was formerly a respondent may be eligible to file a motion pursuant to FCA Article Ten-B and may be subsequently placed into foster care, in a supervised setting as defined in SSL § 371(22) or placement in a foster family home, which shall include a kinship placement or a placement with fictive kin.
For purposes of Article Ten-B, "Former foster care youth" shall mean a youth: (i) who has attained the age of eighteen but is under the age of twenty-one, and who had been discharged from a foster care setting on or after attaining the age of eighteen due to a failure to consent to continuation in foster care or attaining the age of sixteen, but who is or is likely to be homeless unless returned to foster care; and (ii) a youth placed in foster care with a local social services district or authorized agency pursuant to FCA Article Three, Seven, Ten, Ten-A or Ten-C, or SSL § 358-a, or freed for adoption in accordance with FCA § 631 or SSL § 383-c, 384 or 384-b but not yet been adopted, or placed with the Office of Children and Family Services (OCFS) as a juvenile delinquent for a non-secure level of care pursuant to FCA Article Three. FCA § 1091(a)(1).
"Foster care setting" shall not include placements in a limited secure or secure level of care with the OCFS; or a limited secure level of care where the placement was made in a county that has an approved "close to home" program pursuant to SSL §404. Provided however, a youth who was previously placed in a limited secure or secure level of care but was subsequently transferred to a non-secure level of care may still be eligible to re-enter if such youth was ultimately released from a non-secure setting. FCA § 1091(a)(2).
A motion to return a former foster care youth to the custody of the social services district from which the youth was most recently discharged, or, in the case of a youth previously placed with the OCFS, to be placed in the custody of the social services district of the child's residence, or, in the case of a child freed for adoption, the social services district or authorized agency into whose custody and guardianship such child has been placed, may be made by such former foster care youth, or by the applicable official of the local social services district, authorized agency or the OCFS upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care. FCA § 1091(b).
With respect to a former foster care youth discharged on or after his or her eighteenth birthday, the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's

eighteenth birthday. However, during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, such motion shall be heard and determined on an expedited basis. Further, a former foster care youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to this section and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of such state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the COVID-19 pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal Social Security Act to support the youth's care, and the family court shall hear and determine such motions on 0an expedited basis. FCA § 1091(c)(1).

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

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

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

If at any time during the pendency of a proceeding brought pursuant to this article, the court finds a compelling reason that it is in the best interests of the former foster care youth to be returned immediately to the custody of the applicable local commissioner of social services or official of the applicable authorized agency or the OCFS, pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of such local commissioner of social services or other official. FCA § 1091(f)(1).

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

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

PERMANENCY HEARING (FCA § 355.5)

In Which Cases Required

When respondent placed with agency and resides in foster home or non-secure facility. “Non-secure facility” means facility operated by authorized agency in accordance with operating certificate issued pursuant to Social Services Law, or OCFS facility other than secure or limited secure facility with capacity of twenty-five beds or less operated in accordance with Executive Law § 504, and does not include limited secure facility in Close to Home district.
But see Matter of Donovan Z., 6 Misc.3d 1023(A) (Fam. Ct., Monroe Co., 2005) (although statute does not require permanency hearing when youth placed in limited secure facility, court had authority to conduct hearing).

Timing
Initial hearing held no later than twelve months after respondent entered foster care. Hearing shall be held in conjunction with extension of placement hearing when initial placement was for twelve months or less. Subsequent hearings shall be held no later than every twelve months following initial twelve months in placement but in no event past respondent's twenty-first birthday, and shall be held in conjunction with extension of placement hearing.
Respondent shall be considered to have entered foster care sixty days after being removed from home pursuant to FCA Article Three.

Filing of Petition
Petition shall be filed by agency no later than sixty days prior to end of month in which hearing must be held.

Notice to Caretaker
Foster parent or pre-adoptive parent or relative providing care shall be provided with notice of hearing by placement agency. Such person shall have right to be heard at hearing; provided, however, no such person shall be construed to be party to hearing solely on basis of notice and right to be heard.
Failure of person to appear at hearing shall constitute waiver of right to be heard and such failure shall not cause delay of hearing or be ground for invalidation of order issued by court.

Qualified Residential Treatment Programs
Where the respondent remains placed in a qualified residential treatment program, the commissioner of the local social services district or the OCFS with legal custody of the respondent shall submit evidence at the permanency hearing with respect to the respondent: (a) demonstrating that ongoing assessment of the strengths and needs of the respondent cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals for the respondent, as specified in the respondent's permanency plan; (b) documenting the specific treatment and service needs that will be met for the respondent in the placement and the length of time the respondent is expected to need the treatment or services; and (c) documenting the efforts made by the local social services district or the office of children

and family services with legal custody of the respondent to prepare the respondent to return home, or to be placed with a fit and willing relative, legal guardian or adoptive parent, or in a foster family home. FCA § 355.5(10).

Order Upon Hearing

Court must consider and determine in order:

Where appropriate, that **reasonable efforts** were made to make it possible for respondent to return safely to home, or if permanency plan is adoption, guardianship or another permanent living arrangement other than reunification with parent or parents, that reasonable efforts were made to make and finalize alternate permanent placement including consideration of appropriate in-state and out-of-state placements;

In case of respondent fourteen or older, services needed, if any, to assist respondent to make transition from foster care to successful adulthood;

That **permanency plan** developed for respondent, and any revision or addition to plan, shall be developed in consultation with respondent and, at option of respondent, with up to two members of respondent's permanency planning team, selected by respondent, who are not foster parent of, or case worker, case planner or case manager for, respondent, except that commissioner of social services or OCFS commissioner with custody of respondent may reject individual selected by respondent if commissioner has good cause to believe individual would not act in best interests of respondent; and that one individual selected by respondent may be designated to be respondent's advisor and, as necessary, advocate, with respect to application of reasonable and prudent parent standard;

In case of respondent placed outside state, whether out-of-state placement continues to be appropriate and in best interests of respondent;

With regard to completion of placement: whether and when respondent:

(1) will be **returned to parent**;

(2) should be **placed for adoption** with local commissioner of social services filing petition for termination of parental rights;

(3) should be **referred for legal guardianship**;

(4) should be **placed permanently with fit and willing relative**; or

(5) should be **placed in another planned permanent living arrangement with significant connection to adult willing to be permanency resource** if respondent is age sixteen or older, and agency has documented to court intensive, ongoing, and, as of date of hearing, unsuccessful efforts made to return respondent home or secure placement with fit and willing relative including adult siblings, legal guardian, or adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, and steps being taken to ensure that respondent's foster family home or child care facility is following federal reasonable and prudent parent standard and respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with respondent in age-appropriate manner about opportunities to participate in activities, and agency has documented to court and court has determined that there are compelling reasons for determining that it continues to not be in best interest of respondent to return home, be referred for termination of parental rights and placed for adoption, be placed with fit and willing relative, or be placed with legal guardian, and court has made determination

explaining why, as of date of hearing, another planned living arrangement with significant connection to adult willing to be permanency resource is best permanency plan;
With regard to completion of placement, steps that must be taken by placement agency to implement plan for release or conditional release submitted pursuant to FCA § 353.3(7)(c), including consideration of appropriate in-state and out-of-state placements, adequacy of plan and modifications that should be made to plan.

At hearing, court shall consult with respondent in age-appropriate manner regarding permanency plan. If respondent is sixteen or older and requested permanency plan is placement in another planned permanent living arrangement with significant connection to adult willing to be permanency resource, court must ask respondent about desired permanency outcome.

Court shall not reduce or terminate placement prior to completion of period of placement ordered by court.

VIOLATIONS OF PROBATION OR CONDITIONAL DISCHARGE (FCA §§ 360.1, 360.2, 360.3)

Probation Supervision
Respondent remains under legal jurisdiction of court during period of order, and probation shall supervise respondent during that period.

Probation Search Order
If during period of probation court has reasonable cause to believe respondent has violated condition of probation order, it may issue search order directed to probation officer authorizing officer to search person of respondent or any personal property he/she owns or which is in his/her possession.
In executing order, probation officer may be assisted by police officer.

Violation Petition
If during period of probation or conditional discharge probation service has reasonable cause to believe respondent has violated condition, it may file petition of violation.
Petition must be verified and subscribed by probation or appropriate presentment agency. Petition must stipulate condition or conditions of order violated and reasonable description of time, place and manner in which violation occurred. *People v. Johnson*, 173 A.D.3d 1446 (3d Dept. 2019) (findings improper as to violations referenced in summary but not included as charged violations).
Non-hearsay allegations of factual part of petition or of supporting depositions must establish, if true, violation charged. *Matter of Markim Q.*, 22 A.D.3d 498 (2d Dept. 2005), *rev'd on other grounds* 7 N.Y.3d 405 (2006) (petition defective where school record was admissible under CPLR 4518 but not verified by person with knowledge of facts; Court of Appeals holds that insufficiency of nonhearsay allegations is not jurisdictional defect and may be cured by amendment and may not be raised for first time on appeal); *Matter of Jessica N.*, 264 A.D.2d 778 (2d Dept. 1999) (petition must provide reasonable

description of time and place and manner in which violation occurred); *see also People v. Kislowski*, 145 A.D.3d 1197 (3d Dept. 2016) (charge defective where petition failed to provide dates upon which defendant allegedly had contact with individual in violation of probation condition and record does not reflect that People provided defendant with additional details prior to violation hearing), *rev'd in part* 30 N.Y.3d 1006 (2017) (charge not found defective by Third Department, which identified four dates on which defendant allegedly "had contact with" convicted criminal, but did not include additional information, did not satisfy statutory requirement that petition provide time, place, and manner of alleged violation).

Detention In Absence of Violation Petition Is Prohibited
Matter of Jazmin A., 15 N.Y.3d 439 (2010) (Legislature did not empower court to order detention of juvenile probationer before filing of violation of probation petition).

Probation Violation May Not Be Raised Via FCA § 355.1 Motion To Vacate/Modify
Matter of Rayshawn P., 103 A.D.3d 31 (1st Dept. 2012).

Tolling
Period of probation or conditional discharge interrupted as of date of filing. Interruption shall continue until final determination by court upon hearing held in accordance with FCA § 360.3 or until respondent reaches maximum age of acceptance into OCFS facility.
If court determines there was no violation, period of interruption shall be credited to period of probation or conditional discharge.

Securing Respondent's Appearance
Court must promptly take reasonable and appropriate action to cause respondent to appear before it for purpose of enabling court to make determination with respect to alleged violation. Action may include issuance of summons under FCA § 312.1 or warrant under FCA § 312.2.

Presentment agency shall present petition in all stages of proceeding.

Initial Appearance of Respondent
Respondent entitled to counsel at all stages of proceeding and court shall advise him/her of such right at outset.
At respondent's first post-filing appearance, court must:
Advise respondent of contents of petition and furnish him/her with copy thereof;
Determine whether respondent should be released or detained pursuant to FCA § 320.5; and
Ask respondent whether he/she wishes to make statement with respect to violation. If respondent makes statement, court may accept it and base decision thereon.
Allocution provisions of FCA § 321.3 apply in determining whether statement should be accepted.
If court does not accept statement or respondent does not make statement, court shall proceed with hearing.

Upon request, court shall grant reasonable adjournment to respondent to enable him/her to prepare for hearing.

Hearing and Orders

Respondent may raise lack of capacity to proceed: *see* FCA § 322.1(1); *Matter of Lopez v. Evans*, 25 N.Y.3d 199 (2015) (violation of due process to conduct parole revocation hearing when parolee lacks competency to stand trial).

Respondent entitled to hearing promptly after violation petition filed.

Parker warnings and subsequent finding of deliberate absence required before court may proceed in respondent's absence. *People v. Callahan*, 134 A.D.3d 1432 (4th Dept. 2015); *but see Clarington v. State*, 314 So.3d 495 (Fla. Ct. App., 3d Dist., 2020), *appeal den'd* 2021 WL 1561346 (probation violation hearing could properly be conducted by use of remote technology with participants at separate locations; revocation proceeding cannot be equated to criminal prosecution for Confrontation Clause purposes, and State, as well as general public and victim, have significant interest in ensuring effective and expeditious administration of justice).

Court may not revoke order of probation or conditional discharge unless court has found that respondent violated condition of order and respondent has had opportunity to be heard. *People v. Songa*, 132 A.D.3d 1071 (3d Dept. 2015) (defendant should have been excused for failure to report where probation officer confirmed that probationer could be excused from scheduled meeting if officer spoke with probationer directly and acknowledged that defendant had called and left voice message that officer was unable to understand due to defendant's accent and because phone was "cutting in and out"; defendant acted in good faith in attempt to carry out reporting conditions of probation); *People v. Torres*, 5 A.D.3d 1097 (4th Dept. 2004) (finding at preliminary hearing did not support revocation of probation since standard at preliminary hearing is reasonable cause while standard at violation hearing is preponderance of the evidence).

Court may receive any relevant, competent and material evidence. Respondent may cross-examine witnesses and present evidence. *See Commonwealth v. Costa*, 2022 WL 2383313 (Mass. 2022) (absence of complainant, defendant's former fiancée, at probation violation hearing did not violate due process right to confront adverse witnesses, but inability to question her violated defendant's due process right to present defense); *People v. Vedder*, 172 A.D.3d 1539 (3d Dept. 2019) (statements of hearing witnesses regarding subject of testimony should be provided to defendant to extent they are necessary to afford opportunity to conduct meaningful cross-examination).

Unconstitutionally seized evidence may not be used as a basis upon which to revoke probation. *People v. Robinson*, 128 A.D.3d 1464 (4th Dept. 2015).

Given the given different standards of proof, a probation violation charge may be maintained after acquittal at trial as to the same charge. *United States v. Frederickson*, 988 F.3d 76 (1st Cir. 2021) (post-acquittal finding at supervised release revocation hearing permissible since standard of proof was lower); *People v. Thomas*, 163 A.D.3d 1293 (3d Dept. 2018), *lv denied* 32 N.Y.3d 1068.

At conclusion of hearing court may revoke, continue or modify order of probation or conditional discharge. Before revoking the order upon finding that a violation has occurred, the court must make a discretionary determination as to whether the facts warrant revocation. *People v. McCloud*, 205 A.D.2d 1024 (3d Dept. 1994); *see also*

United States v. Wilson, 939 F.3d 929 (8th Cir. 2019), *cert denied* 140 S.Ct. 1242 (imposition of sentence upon revocation of release was sanction rather than punishment for separate offense where combined initial and post-revocation sentences did not exceed statutory maximum, and thus separate prosecution could be commenced); *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017) (court may consider severity of conduct involved in violation, but must maintain premise that revocation of supervised release is punishment for original conviction; if violation may be basis for separate prosecution, issue of double jeopardy is raised if revocation were punishment for same offense).

If court revokes order, it shall order different disposition pursuant to FCA § 352.2, provided, however, that if the court finds a violation of an order of conditional discharge where the underlying finding had been for an act solely constituting a violation as defined in Penal Law § 10.00(3), the court may modify the conditions of the conditional discharge but may not order any other disposition under FCA § 352.2.

If court continues order of probation or conditional discharge, it shall dismiss violation petition. *In re Jaquiya F.*, 179 A.D.3d 525 (1st Dept. 2020) (court could not continue original probation order and also adjudicate respondent juvenile delinquent and place her on probation for three months).

With respect to technical violations, *see* Executive Law §§ 259 and 259-i and Penal Law §§ 70.40 and 70.45, as amended by Chapter 427 of the Laws of 2021 (legislative memo notes that New York reincarcerates more people on parole for technical parole violations like missing appointment with parole officer, being late for curfew, or testing positive for alcohol than any state except Illinois; that only 14% of parolees who were reincarcerated were returned to prison because they were convicted of new crime; and that black people are incarcerated in New York City jails for technical parole violations at more than 12 times rate of whites).

Violation Of Restitution Order

People v. Griffin, 143 A.D.3d 1000 (2d Dept. 2016), *lv denied* 28 N.Y.3d 1145 (if probationer cannot pay despite sufficient bona fide efforts to acquire resources, court must consider measures other than imprisonment).

MOTION FOR NEW HEARING (FCA § 355.1)

Upon showing of substantial change of circumstances, court may on own motion, or on motion of respondent or his/her parent or person responsible for his/her care, grant new fact-finding or dispositional hearing.

MOTION TO STAY, SET ASIDE, TERMINATE OR VACATE ORDER (FCA § 355.1)

Upon showing of substantial change of circumstances, court may on own motion, or on motion of respondent or his/her parent or person responsible for his/her care, stay execution of, set aside, modify, terminate or vacate order issued in Article Three proceeding.

Presentment agency may not move for relief.
Matter of E.M., 7 Misc.3d 1005(A) (Fam. Ct., Nassau Co., 2005).

Detention While Motion Pending Not Authorized
Matter of Rayshawn P., 103 A.D.3d 31 (1st Dept. 2012); *see Matter of Jazmin A.*, 15 N.Y.3d 439 (2010).

Statute May Be Used to Obtain Early Release From Placement or Probation, or Favorable Treatment At Close of Or After Expiration of Dispositional Period
e.g., People v. Pondi, 65 Misc.3d 1206(A) (County Ct., Sullivan Co., 2019) (early termination of probation ordered where defendant's early release "as a result of his stellar recovery efforts can only serve to enhance the public's faith in the justice system which has at its root the primary goal of rehabilitation back into society");
Matter of Emily P., 63 Misc.3d 755 (Fam. Ct., N.Y. Co., 2019) (court vacates dispositional order and dismisses petition, and orders sealing pursuant to FCA § 375.1 and expungement pursuant to FCA § 375.3, where respondent, a thirty-four-year-old accomplished forensic scientist about to commence a position with the United States Attorney's Office, was concerned about having to disclose information when questioned by current and prospective employers; court notes that there is nothing in statute or case law which precludes court from vacating dispositional order after its expiration, that relief will permit respondent to advance in career in public service unencumbered by delinquency adjudication, and that although Court of Appeals stated in Matter of Dorothy D. in dictum that expungement would not be appropriate in absence of respondent's "complete innocence," this dictum has not been consistently followed);
Matter of Amber F., 23 Misc.3d 1101(A) (Fam. Ct., Queens Co., 2009) (court vacates probation order and orders ACD where underlying assault was violent but respondent had no prior contacts with juvenile justice system; respondent admitted involvement in incident and expressed remorse and willingness to accept responsibility for actions; respondent's academic performance was above average and she expressed interest in pursuing medical education and had been volunteering at hospital 3 days a week; and respondent was over 16 and future violations of law would subject her to potential criminal prosecution);
Matter of S.S., 6 Misc.3d 1031(A) (Fam. Ct., Orange Co., 2005) (court terminates placement and directs release to respondent's aunt and uncle, noting that deterioration in respondent's behavior was result of OCFS's failure to effectuate its own plan; that respondent will benefit from counseling in permanent home environment; and that "the purpose of a permanency plan is to find a secure and safe, and hopefully loving, environment outside of agency placement");
but see Matter of Dazaeth S.-M., 204 A.D.3d 552 (1st Dept. 2022) (in sex crime case, motion to vacate and seal records denied; court notes that compliance with terms of conditional discharge alone was insufficient particularly where offense and completion of requirements of supervision were relatively recent, that respondent's interests were adequately protected by automatic confidentiality of Family Court records and fact that juvenile delinquency adjudications do not entail civil disabilities, that sealing could potentially impede use of records by law enforcement agencies, and that respondent did

not substantiate claim that adjudication might have adverse consequences for him in future).

Court also has inherent authority to correct mistakes or errors clerical in nature or where correction conforms record to truth.
People v. Richardson, 100 N.Y.2d 847 (2003).

Court may not use § 355.1 to prosecute violation of probation instead of specific statutory rules governing violations, and may not remand respondent.
In re Rayshawn P., 103 A.D.3d 31 (2d Dept. 2012).

MOTION BY PLACEMENT AGENCY TO SET ASIDE, MODIFY, VACATE OR TERMINATE ORDER (FCA § 355.1)

Placement order issued under FCA § 353.3 may, upon showing of substantial change of circumstances, be set aside, modified, vacated or terminated upon motion of Commissioner of Social Services or OCFS.

MOTION PROCEDURES (FCA § 355.2)

Motion must be in writing and state specific relief requested.
If motion based upon existence or occurrence of facts, papers must contain sworn allegations of fact that may be based upon personal knowledge of affiant, or upon information and belief if affidavit states sources of information and grounds of belief.
Notice of motion, including court's own motion, shall be served upon respondent, presentment agency and (as applicable) Commissioner of Social Services or OCFS. Motions shall be noticed in accordance with CPLR.
Each party to motion shall have right to oral argument and court shall conduct hearing to resolve any material question of fact.
Regardless of whether hearing conducted, court, upon determining motion, **must set forth on record** findings of fact, conclusions of law and reasons for determination.
If motion denied, motion requesting same or similar relief cannot be filed for ninety days after denial, unless order permits renewal at earlier time.

PETITION FOR TRANSFER FROM CLOSE TO HOME TO OCFS (FCA § 355.1)

Filing Of Petition
If social services district determines that placement in limited secure (assuming district has no limited secure level of care) or secure facility is appropriate and consistent with need for protection of community and needs and best interests of respondent, district shall file petition to transfer custody of respondent to OCFS, and shall provide copy of petition to OCFS, respondent, attorney for respondent and respondent's parent or legal guardian.

Argue that motion procedures and pleading requirements in FCA § 355.2 apply.

Timing Of Decision
Court shall render decision within 72 hours, excluding weekends and public holidays.
Statute does not make clear when clock starts running. Because deadline appears directly after reference to filing and service, **argue that clock starts running upon filing**.

Detention
Court may order that respondent be housed in local secure detention facility on interim basis pending final ruling on petition. **But period of detention limited by 72-hour decision deadline**.

Opportunity To Be Heard and Written Order
Court shall, after allowing OCFS and attorney for respondent opportunity to be heard after notice has been given, grant petition only if court determines, and states in written order, reasons why limited secure or secure placement is necessary and consistent with needs and best interests of respondent and need for protection of community.
In case of secure placement, court must determine and state in order that respondent needs secure level of placement because:
Respondent has been shown to be exceptionally dangerous to him/herself or to other persons. Exceptionally dangerous behavior may include, but is not limited to, one or more serious intentional assaults, sexual assaults or setting fires; or
Respondent has demonstrated by pattern of behavior that he/she needs more structured setting and district has considered appropriateness and availability of transfer to non-secure or limited secure facility. Such behavior may include, but is not limited to: disruptions in facility programs; continuously and maliciously destroying property; or repeatedly committing or inciting other youth to commit assaultive or destructive acts.

Argue that least restrictive alternative requirement applies since statute refers to "needs and best interests of the respondent" and "need for protection of the community," which is language used in connection with least restrictive alternative requirement.

PETITION FOR TRANSFER FROM OCFS TO CLOSE TO HOME

Filing Of Petition
OCFS may file petition to transfer to social services district respondent placed with OCFS pursuant to FCA § 353.3 or § 353.5. OCFS shall provide copy of petition to district, attorney for respondent and presentment agency.

Argue that motion procedures and pleading requirements in FCA § 355.2 apply.

Written Order
Court shall, after allowing district, attorney for respondent and presentment agency opportunity to be heard, grant petition unless court determines, and states in written

order, reasons why secure or limited secure placement is necessary and consistent with needs and best interests of respondent and need for protection of community.

EXPIRATION DATE OF NEW ORDER (FCA § 355.1)

Any new order shall not expire later than expiration date of original order.
In re Lorenzo A., 59 A.D.3d 441 (2d Dept. 2009).

DOUBLE JEOPARDY: RE-PROSECUTION AFTER APPEAL

Double jeopardy concerns are raised when a respondent who has been confined pursuant to a placement order obtains a new trial on appeal, is subsequently found guilty of the same offense, and is again placed.
People v. Jones, 171 A.D.3d 1249 (3d Dept. 2019), *lv denied* 33 N.Y.3d 1070 (any punishment already exacted upon defendant who succeeds in overturning conviction, and is subsequently convicted for same offense, must be fully credited toward sentence imposed upon new conviction).

APPEALS

By: Gary Solomon
Updated: 8/23

Table of Contents

I. Governing Statutes

Appeals in juvenile delinquency proceedings are governed in the first instance by FCA §§ 365.1 - 365.3. As to all matters not covered by those sections, FCA Article Eleven, and, where appropriate, the CPLR, govern. FCA §1118; *Matter of Jose R.*, 83 N.Y.2d 388, 610 N.Y.S.2d 937 (1994) (court rejects juvenile's argument that FCA Article Three does not provide for presentment agency appeal to Court of Appeals, and concludes that the Legislature intended to leave operative earlier court decisions applying CPLR Article 56).

II. Appeals To Appellate Division As Of Right

A. Respondent

The respondent can take an appeal to the Appellate Division as of right from any order of disposition. FCA §§ 365.1(1). *See Matter of Yamoussa M.*, 220 A.D.2d 138, 646 N.Y.S.2d 319 (1st Dept. 1996) (failure to appeal from original dispositional order precluded respondent from challenging original order when appealing from new disposition ordered after he violated probation).

An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing finding of delinquency, notwithstanding the fact that such finding is entered upon an admission made by the respondent, unless the respondent, upon an admission, expressly waives his right to appeal. FCA §330.2(6); *see also People v. Holz*, 35 N.Y.3d 55 (2020) (defendant has right to review of suppression order on appeal where order related only to a count satisfied by guilty plea, but not a count to which defendant pleaded guilty).

B. Presentment Agency

The presentment agency can take an appeal as of right from:

- an order dismissing the petition *prior to* the commencement of a fact-finding hearing. FCA §§ 365.1(2)(a). *See Matter of Leon H.*, 83 N.Y.2d 834, 601 N.Y.S.2d 158 (1994) (presentment agency could not appeal post-fact-finding dismissal on speedy disposition grounds); *Matter of Devon H.*, 225 A.D.2d 135, 650 N.Y.S.2d 120 (1st Dept. 1996) (presentment agency could appeal dismissal

after commencement of fact-finding hearing where family court re-opened suppression hearing during trial and granted suppression); *Matter of Lee M.*, 126 A.D.2d 645, 511 N.Y.S.2d 79 (2d Dept. 1987) (presentment agency could appeal from order dismissing certain counts of the petition since the separate counts could have been presented in separate petitions).

- an order of disposition, but only upon the ground that such order was invalid as a matter of law. FCA §365.1(2)(b). *Cf.* CPL §440.40 (People may appeal from sentence which is invalid as a matter of law).

Note: The family court has inherent power to correct a mistake or error in a dispositional order which is clerical in nature or results from the court's inadvertent misstatement. *See People v. Wright,* 56 N.Y.2d 613, 450 N.Y.S.2d 473 (1982).

- an order, entered before the commencement of the fact-finding hearing, suppressing evidence pursuant to FCA §330.2, provided that the presentment agency files a statement pursuant to FCA §330.2(9) (*i.e.*, statement alleging that deprivation of use of evidence has rendered available proof insufficient as a matter of law or so weak in its entirety that any reasonable possibility of proving allegations has been effectively destroyed). FCA §365.1(2)(c). *See Matter of Devon H.*, 225 A.D.2d 135. The taking of such an appeal constitutes a bar to prosecution of the case, at least in the absence of extraordinary circumstances, unless and until the order of suppression is overturned. FCA §330.2(10); *People v. McIntosh*, 80 N.Y.2d 87, 587 N.Y.S.2d 568 (1992) (since People withdrew appeal after filing required statement, prosecution was not barred); *Matter of Forte v. Supreme Court of the State of New York*, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979) (to allow People to seek superseding indictment would frustrate Legislature's purpose of discouraging frivolous appeals); *Matter of Yarter v. Winn,* 220 A.D.2d 1, 645 N.Y.S.2d 333 (3rd Dept. 1996), *appeal dism'd* 89 N.Y.2d 862, 653 N.Y.S.2d 284 (newly discovered evidence constituted exceptional circumstance permitting re-prosecution).

III. Appeals To Appellate Division By Permission

A. Respondent

The respondent can take an appeal in the discretion of the appropriate Appellate Division from any order. FCA §365.2.

B. Presentment Agency

Article Three contains no provision granting the presentment agency the right to take an appeal by permission. Although FCA §1112(a) provides that an appeal from any order under the Family Court Act may be appealed in the discretion of the Appellate Division, Article Three's appeals provisions supersede their counterparts in FCA Article Eleven, and, therefore, the presentment agency cannot take an appeal by permission. *See Matter of Leon H.*, 83 N.Y.2d 834. On the other hand, if the presentment agency does appeal from a dispositional order, the appeal brings up for review any nonfinal order which necessarily affects the final judgment. CPLR §5501(a)(1). *See Matter of Dora P.*, 68 A.D.2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979).

IV. Appeals By Other Aggrieved Parties

The Fourth Department held in *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept. 1992) that FCA §365.1 was designed to limit the presentment agency's ability to appeal, but not that of another aggrieved party to an order who would otherwise have standing to appeal pursuant to CPLR §5511. Since the New York State Division for Youth was a party to the dispositional order, which directed DFY to place the respondent at one of three specified sites, DFY had standing to appeal in *Lavar C. Cf. Matter of Ako L.L.*, 139 A.D.3d 1130 (3d Dept. 2016) (mother's appeal from dispositional order placing respondent on probation under father's supervision was moot).

V. Procedure

A. Notice Of Appeal

An appeal is taken by filing a written notice of appeal, in duplicate, with the clerk of the family court in which the order was entered. The clerk must endorse upon the notices the filing date and transmit the duplicate notice to the clerk of the appropriate Appellate Division. FCA §365.3(1), (4).

The respondent must also serve copy of notice upon presentment agency. FCA §365.3(2). The Presentment Agency must also serve respondent and the attorney who last appeared for respondent. FCA §365.3(3). *But see Matter of Delila M.*, 238 A.D.2d 342, 656 N.Y.S.2d 306 (2d Dept. 1997) (citing CPLR §5520(a), court holds that failure to serve respondent was not fatal defect); *Matter of Steven S.*, 234 A.D.2d 13, 650 N.Y.S.2d 156 (1st Dept. 1996) (same as *Delila M.*); CPLR §5520(a) (if appellant serves timely notice of appeal but neglects through mistake or excusable neglect to do another required act within time limit, court may grant extension of time to cure omission).

B. Time Of Appeal

1. Taking Appeal

An appeal must be "taken" - that is, the notice of appeal must be filed - by the earliest of the following dates: no later than thirty days after the adverse party serves the order from which the appeal is taken, ***or*** thirty days from receipt of the order by the appellant in court, ***or*** thirty-five days from the mailing of the order to the appellant by the clerk of court. FCA § 1113.

Service of an order by the court does *not* start the clock running unless two conditions are met: the order must contain the following statement: "Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or the child's attorney upon the appellant, whichever is earliest," ***and*** there is an official notation in the court record as to the date and manner of service. FCA §1113.

In New York, the statutory deadline for filing a notice of appeal in a civil proceeding (CPLR §5513[a]) has been treated as a "jurisdictional" matter. Thus, while there are statutory rules that extend the filing deadline in specific instances (*see, e.g.*, CPLR §1022), an untimely filing may not otherwise be excused. *Hecht v. City of New York*, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983); *Jones Sledzik Garneau & Nardone v. Schloss*, 37 A.D.3d 417, 829 N.Y.S.2d 230 (2d Dept. 2007) (time period for filing notice of appeal is jurisdictional and nonwaivable).

In criminal proceedings, a 30-day deadline applies as well. CPL §460.10. Prior to enactment of the Criminal Procedure Law, the general rule had been that, regardless of

the circumstances and equities, courts had no power to extend the time for taking an appeal. *People v. Dimmie*, 15 N.Y.2d 578, 255 N.Y.S.2d 95 (1964); *People v. Stottlemeyer*, 9 A.D.2d 1022, 194 N.Y.S.2d 101 (4th Dept. 1959). Now, however, CPL §460.30 contains an exception to the rule that is broader than any found in the CPLR. Under §460.30(1), a defendant may make a motion in an intermediate appellate court or in the Court of Appeals seeking an extension of time for filing a notice of appeal or application for leave to appeal. The motion must be made with due diligence after the time for the taking of the appeal has expired, and in any case not more than one year thereafter. The court may grant an extension to a date not more than thirty days after determination of the motion, "upon the ground that the failure to so file or make application in timely fashion resulted from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant." In *People v. Stevenson*, 176 A.D.2d 516, 574 N.Y.S.2d 707 (1st Dept. 1991), *lv denied* 79 N.Y.2d 832, the court, citing "unique circumstances," excused the untimely filing of a notice of appeal even though the defendant had made no motion pursuant to §460.30.

Arguably, the broad exception contained in CPL §460.30, which bears on the fundamental right to appeal, is applicable in juvenile delinquency proceedings on constitutional grounds. *See also People v. Syville*, 15 N.Y.3d 391 (2010) (criminal defendant must be allowed to seek relief by asserting that right to appeal was extinguished due solely to unconstitutionally deficient performance of counsel in failing to file timely notice of appeal).

2. Perfecting An Appeal

According to FCA §1121(7), an appeal must be perfected within 60 days of receipt of the transcript or within any different time prescribed by the Appellate Division. *See* 22 NYCRR 1250.9(a) ("Except where the court has directed that an appeal be perfected by a particular time, an appellant shall file [required documents] with the clerk within six months of the date of the notice of appeal or order granting leave to appeal")

and 1250.9(b) (provides for extensions of up to 60 and 30 days); *see also* 22 NYCRR 670.3(b) (provides for scheduling orders and active management in Second Department).

C. Assignment Of Counsel

The appointment of the child's attorney pursuant to FCA §249 shall continue without further court order or appointment where the attorney or the presentment agency files a notice of appeal. The attorney may be relieved upon application to the Appellate Division, and another attorney appointed. FCA §1120(b).

D. Fees

The fees required by CPLR §8002 are not required where the appellant or counsel certifies that the appellant has been assigned counsel pursuant to FCA §249 or is represented by a legal aid society or federally-funded legal services program for indigents. FCA §1118.

E. Preferences

Appeals from orders in Article Three proceedings shall be given preference and may be brought on for argument on such terms and conditions as the Appellate Division may direct. CPLR 5521.

F. Stays

The timely filing of a notice of appeal does not stay the order from which the appeal is taken. FCA §1114(a). A justice of the Appellate Division may stay execution of the order on such conditions, if any, as may be appropriate. FCA §1114(b).

G. Applicability Of CPLR

The provisions of the civil practice law and rules apply where appropriate. FCA §1118.

VI. Duties Of Trial Counsel

A. Consultation With Client Regarding Appeal

Upon the filing of a dispositional order:

- counsel must advise the client in writing of the right to appeal to the appropriate Appellate Division, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony, and the right to apply for leave

to appeal as a poor person if the client is unable to pay the cost of an appeal. FCA §1121(2).

- counsel must explain the procedures for instituting an appeal, the possible reasons upon which an appeal may be based, and the nature and possible consequences of the appellate process. FCA §1121(2). Included in this discussion should be the risks in making an argument that could result in a new trial and a more restrictive dispositional order. *See People v. Meran*, 143 A.D.3d 423 (1st Dept. 2016), *lv denied* 28 N.Y.3d 1074 (conviction affirmed where defendant asked court to affirm if error did not result in dismissal).
- counsel must ascertain whether the client wishes to appeal. FCA §1121(3).

B. Action Required On Behalf Of Client Who Wishes To Appeal

- counsel must serve and file the notice of appeal and, when necessary, apply for leave to appeal as a poor person. FCA §1121(3).
- when trial counsel does not intend to represent the client on appeal, counsel must, when appropriate, apply for assignment of appellate counsel for the client. FCA §1121(5).
- so that the client will be presumed eligible for poor person relief and for assignment of counsel on appeal without further motion in the appellate division, counsel also must file a certification of continued indigency and continued eligibility for appointment of counsel pursuant to FCA §1118, and such other documents as may be required by the appropriate appellate division. FCA §1121(3),(5).
- trial (now appellate) counsel must, no later than ten days after filing the notice of appeal, request preparation of the transcript of the proceedings, FCA §1121(6)(a), and counsel assigned or appointed for purposes of appeal must request the transcripts no later than ten days after receipt of notice of appointment. FCA §1121(6)(b).
- the transcript shall be completed within thirty days of receipt of the request**,** and, if the transcript is not completed within that time, the court reporter or the director of the transcription service must notify the administrative judge of the appropriate

judicial district, who shall establish procedures to effectuate the timely preparation of the transcript**,** and the appellate division may establish additional procedures to effectuate the timely preparation of transcripts. FCA §1121(7).

C. Reconstruction Of Record

After *People v. Parris*, 4 N.Y.3d 41, 790 N.Y.S.2d 421 (2004), it is clear that certain duties arise when counsel learns that transcripts have been lost or for some other reason cannot be obtained. Having held in the past that a loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction, the Court of Appeals concluded that, "where a significant portion of the minutes has been lost: (1) a reconstruction hearing should normally be available for a defendant appealing his conviction after trial, if the defendant has acted with reasonable diligence to mitigate the harm done by the mishap; but (2) a defendant who has pleaded guilty is entitled to a reconstruction hearing only where he can identify a ground for appeal that is based on something that occurred during the untranscribed proceeding." The court noted that, under the reasonable diligence requirement, a defendant should be diligent in maximizing the possibility that a reconstruction hearing can accomplish its purpose. At a minimum, the defendant should move for a reconstruction hearing promptly after learning that the minutes have been lost, and pursue promptly other available means of reconstruction, such as contacting the defendant's trial counsel, the prosecutor and the judge to jog their recollections and ask that they preserve whatever notes or other records of the proceedings might exist. "A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote - and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible."

VII. Dismissal Of Appeal

A. Mootness

A challenge on appeal to the initial disposition ordered by the family court will be rendered moot when the period covered by the dispositional order has elapsed before the appeal can be decided. *Matter of Shamasia M.*, 4 A.D.3d 359, 771 N.Y.S.2d 541 (2d Dept. 2004) (appeal from dispositional order moot where initial placement period had

expired and order extending placement had been entered); *Matter of Leonardo Q.*, 171 A.D.2d 563, 567 N.Y.S.2d 446 (1st Dept. 1991) (challenge to restrictive placement was moot where appellant had already completed the two six-month periods in secure and residential placement which was directed in the order). However, the appeal from the adjudication of delinquency, based on a challenge to the underlying fact-finding (or, it can be argued, based on a claim that the matter should have been dismissed at disposition), is not moot in light of the possible collateral consequences resulting from a delinquency adjudication (e.g., the use of delinquency records in criminal sentencing proceedings pursuant to FCA §381.2[2]). *Matter of Daniel H.*, 236 A.D.2d 874, 653 N.Y.S.2d 756 (4th Dept. 1997); *see also Matter of Brittny MM.*, 51 A.D.3d 1303, 858 N.Y.S.2d 815 (3rd Dept. 2008), *lv denied*, 11 N.Y.3d 713 (although respondent's PINS placement ended after appeal was filed, appeal not moot because finding that respondent violated probation, and resulting order of placement, may have collateral legal consequences).

B. Abandonment By Absconding Appellant

An appeal brought by a child who has absconded from placement is subject to dismissal as abandoned since the appellant is not available to obey the mandate of the court. This is referred to as the "fugitive disentitlement" doctrine. *Matter of Magdalene N.*, 180 A.D.2d 799, 580 N.Y.S.2d 435 (2d Dept. 1992); *see also People v. Del Rio*, 14 N.Y.2d 165, 250 N.Y.S.2d 257 (1964); *People v. Serrano*, 45 Misc.3d 69 (App. Term, 2d Dept., 2014) (appeal challenging plea dismissed where defendant had been deported, and, although defendant had served sentence, crime was serious case would be remitted if defendant prevailed); *People v. Reyes*, 292 A.D.2d 271, 738 N.Y.S.2d 850 (1st Dept. 2002), lv denied 98 N.Y.2d 701, 747 N.Y.S.2d 420 2002) (appeal dismissed where defendant had been deported and was not available to obey mandate of court in event of affirmance; regardless of whether defendant was "voluntarily" or "involuntarily" deported, he has become unavailable as a consequence of remaining in the United States for 4 years on a 3-month visa); *but see People v. Ventura*, 17 N.Y.3d 675 (2011) (Appellate Division abused discretion in dismissing appeals after defendant involuntarily deported; dismissals have been predicated on rationale that courts should not aid in deliberate evasion of justice through continued consideration of appeals, but in these

cases defendants were involuntarily removed from country, and they have greater need to avail themselves of appellate process in light of tremendous ramifications of deportation; court noted that disposition of the appellate issues would result in either affirmance or outright dismissal, and so continued legal participation of defendants would not be required); *People v. Taveras*, 10 N.Y.3d 227, 855 N.Y.S.2d 417 (2008) (doctrine did not apply where defendants were tried and sentenced in absentia, but were apprehended and returned to court's jurisdiction before filing appellate brief; whether appeals should be permitted to proceed in such circumstances is subject to broad discretion of Appellate Division, which may consider whether defendant's flight caused significant interference with operation of appellate process; whether defendant's absence so delayed appeal that the People would be prejudiced in locating witnesses and presenting evidence at retrial; length of defendant's absence; whether defendant voluntarily surrendered; importance and novelty of issues raised; and merits of appeal).

C. Presumption In Appeals From Bench Trials

Making it extremely difficult to win a "fair trial" argument upon appeal from a delinquency adjudication is the presumption which appellate courts invoke in favor of the judge at a bench trial. That is, whenever the accused is arguing not that the judge *admitted* evidence illegally - *e.g.*, in a suppression ruling - but rather that the judge's ability to provide a fair trial was fatally compromised because the judge *heard* unduly prejudicial evidence - *e.g.*, because of a *Sandoval* ruling, or a ruling denying a mistrial motion provoked by a prosecutor's or a witness' improper reference to inadmissible evidence - the appellate courts ordinarily presume that the judge did not give the evidence any, or any undue, weight. *See People v. Moreno*, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987).

VIII. Right To Speedy Appeal

In *Matter of Jermaine J.*, 6 A.D.3d 87, 775 N.Y.S.2d 287 (1st Dept. 2004), *lv denied* 3 N.Y.3d 606, the First Department rejected an argument that the respondent's due process rights were violated by delays in the appellate process. The court noted that "[t]he factors considered on a speedy appeal claim are similar to those of a constitutional speedy trial claim, and include the extent of the delay, the reason for

the delay, the nature of the underlying charge, and whether or not there is any indication that the defense has been impaired by reason of the delay (citations omitted)." However, "[w]hile the delay. . . was unusually long," respondent did not establish prejudice based upon a deprivation of his liberty given the negative reports about him and the fact that he threatened another person with a knife.