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MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Juvenile Confessions Issues

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JUVENILE CONFESSIONS ISSUES

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After taking an alleged juvenile delinquent into custody, the arresting officer must follow certain procedures, the violation of which may require suppression of the child's statements.

I. Notification of Parent

After taking a child into custody, or obtaining custody of a child from a private person, the officer "shall immediately notify [the child's] parent or other person legally responsible for the child's care, or if such legally responsible person is unavailable the person with whom the child resides, that the child has been taken into custody." FCA §305.2(3). See In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (no violation of §305.2 where police notified respondent's mother and stepfather and they were present, but detective permitted only mother to enter interview room;

statute is satisfied when officer notifies one “parent or other person legally responsible”); People v. Robinson, 70 A.D.3d 728, 892 N.Y.S.2d 882 (2d Dept. 2010), lv denied 14 N.Y.3d 844 (no statutory violation where police immediately notified defendant’s foster mother, and she declined to appear and designated someone in her place); Matter of Richard UU., 56 A.D.3d 973, 870 N.Y.S.2d 472 (3rd Dept. 2008) (statutory requirements satisfied when DSS caseworker, the person “legally responsible for respondent's care,” was notified and present for administration of Miranda warnings); Matter of Donta J., 35 A.D.3d 740, 826 N.Y.S.2d 693 (2d Dept. 2006) (no error where respondent was questioned in absence of mother, and in presence of brother with whom he lived); Matter of Lawrence W., 77 A.D.2d 570, 429 N.Y.S.2d 731 (2d Dept. 1980) (statement made by respondent in presence of uncle, but before mother arrived, was admissible where respondent had close relationship with uncle and did not reside with mother); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (award of legal custody to mother in divorce judgment did not render father’s presence at interrogation legally ineffective; there is no preference for child's custodial parent where parents do not reside together; however, “were evidence to establish that one parent unequivocally advised the police that the right to counsel was being invoked on the child's behalf and that the police then sought out the child’s other parent in order to obtain a waiver of the child's rights, a Court might very well be disinclined to find that the resulting statement was voluntary”); People v. King, 116 Misc.2d 614, 455 N.Y.S.2d 923 (Sup. Ct., N.Y. Co., 1982) (where defendant refused to see grandmother, aunt could be designated to act as surrogate); see also Miller v. State, 994 S.W.2d 476 (Ark. 1999) (police had no obligation to inform child of statutory right to speak to parent or guardian or have one present).

An officer may not cede to other law enforcement officials his responsibility for making notification. See United States v. Juvenile, 229 F.3d 737 (9th Cir. 2000).

The officer must "mak[e] every reasonable effort to give notice ...." FCA §305.2(4). Since the statute does not prescribe further action, such as questioning, until after it requires reasonable efforts to notify the parent, it has been held that any statement taken in the absence of reasonable efforts must be suppressed. Matter of

Candy M., 142 Misc.2d 718, 538 N.Y.S.2d 143 (Fam. Ct. Ulster Co., 1989); Matter of Albert R., 121 Misc.2d 636, 468 N.Y.S.2d 825 (Fam. Ct. Queens Co., 1983). See also State v. Presha, 748 A.2d 1108 (N.J. 2000) (statements made by juveniles under the age of 14 are inadmissible unless parent was unwilling to be present or was truly unavailable); Matter of Raphael A., 53 A.D.2d 592, 385 N.Y.S.2d 288, 289 (1st Dept. 1976) (former FCA §724 "allows questioning of juveniles after every reasonable effort to notify their parents has been made" [emphasis supplied]); Matter of Williams, 49 Misc.2d 154, 267 N.Y.S.2d 91 (Fam. Ct. Ulster Co., 1966). Cf. Matter of Brian P. T., 58 A.D.2d 868, 396 N.Y.S.2d 873 (2d Dept. 1977) (statement suppressed where uncle was present, but parents were not notified). But see Matter of Stanley C., 116 A.D.2d 209, 500 N.Y.S.2d 445 (4th Dept. 1986), appeal dism'd 70 N.Y.2d 667, 518 N.Y.S.2d 959 (absence of notification is one of several relevant factors).

It appears that the statute has been satisfied when the parent has designated another family member to appear in his or her place. See In re Anthony L., 262 A.D.2d 51, 693 N.Y.S.2d 517 (1st Dept. 1999) (mother directed respondent's 18 and a half year-old sister to appear).

It is not clear what "immediate" notification entails. In People v. Castro, 118 Misc.2d 868, 462 N.Y.S.2d 369 (Sup. Ct., Queens Co., 1983), the court found insufficient the "delayed" attempts to contact the parent, which commenced a half hour after the officer arrived at the precinct with the juvenile). Even if the police need not arrange for notification immediately upon taking a child into custody on the street, see Matter of Emilio M., 37 N.Y.2d 173, 371 N.Y.S.2d 697 (1975) (respondent taken to precinct and mother notified without undue delay); Matter of Jerold Jabbar L., 147 A.D.2d 928, 537 N.Y.S.2d 398 (4th Dept. 1989), aff'd 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990) (child returned to scene for possible identification before arrest and notification), it should be argued that the police should make diligent efforts to insure that a child is alone in custody, particularly at a police station, for as little time as possible. See also United States v. C.M., 485 F.3d 492 (9th Cir. 2007) (federal immediate notification requirement violated where law enforcement waited until juvenile had been in custody for 6 hours); cf. United States v. Juvenile, supra, 229 F.3d 737 (notification statute

violated where agents waited 4 hours after arrest before advising juvenile of Miranda rights).

Nor is there much guidance in the case law concerning the nature of the "reasonable effort" that is required. In People v. Coker, 103 Misc.2d 703, 427 N.Y.S.2d 141 (Sup. Ct., Bronx Co., 1980), the court held that the efforts to contact the defendant's mother were insufficient where the police called the number given by the defendant and received no answer, and later received busy signals. See also Matter of Raphael A., supra, 53 A.D.2d 592 (questioning in absence of parent upheld where police left messages for respondent's mother and waited two and a half hours for her to arrive). Given the importance of a child's right to the presence and advice of a parent during custodial interrogation, the "reasonable effort" requirement should be strictly interpreted, and should include diligent efforts to locate and/or contact a parent who is not immediately available. See United States v. Juvenile, supra, 229 F.3d 737 (agents failed to notify Mexican consulate so that contact with parents could be facilitated).

Assuming that the police are able to contact the child's parent or guardian, what information must be provided? Read literally, the statute requires that the police merely give notification "that the child has been taken into custody." It seems appropriate that, if the parent is going to be unable to come to the police station, the parent should be informed that the child will be questioned, and perhaps should also be given Miranda warnings, see United States v. Doe, 170 F.3d 1162 (9th Cir. 1999), cert denied 528 U.S. 978, 120 S.Ct. 429 (agent violated federal statute requiring that parents be notified of rights when he failed to advise mother of son's Miranda rights over the phone), and be advised that she will be given the opportunity to advise and counsel the child before interrogation). United States v. Female Juvenile (Wendy G.), 255 F.3d 761 (9th Cir. 2001). But see People v. Bonaparte, 130 A.D.2d 673, 515 N.Y.S.2d 599 (2d Dept. 1987) (Miranda warnings not required during telephonic notification).

On the other hand, if the police have withheld information, or otherwise been deceitful in their contacts with the child's family, it could be argued that the police have violated the respondent's statutory rights. In Matter of Aaron D., 30 A.D.2d 183, 290 N.Y.S.2d 935 (1st Dept. 1968), the respondent was arrested at his home, and his

mother was told that the police were investigating him in connection with a robbery and homicide, and "that she could come down to the station house, if she wished ...." 30 A.D.2d at 185. Although the mother requested that she be called as soon as the respondent arrived at the police station, she was not called, and the respondent was then interrogated. The court held that the "procedures of the officers, as mere token observance of [due process] requirements, were not reasonably calculated to secure the voluntariness and the validity of the statements." 30 A.D.2d at 186. Cf. Matter of William L., 29 A.D.2d 182, 287 N.Y.S.2d 218 (2d Dept. 1968), appeal dism'd 21 N.Y.2d 1005, 290 N.Y.S.2d 925 (statement suppressed where police arrested respondent at home and told his mother that there was information that her son was involved in a murder, and, when the mother asked if she could go to the police station, told her it was not a serious matter and that her son would be home in an hour or two).

Without relying on FCA §305.2, it can be argued that a statement is involuntary when the police deliberately isolate a child from his or her family. See People v. Pughe, 163 A.D.2d 334, 557 N.Y.S.2d 167 (2d Dept. 1990) (defendant's mother was erroneously told that defendant was not at precinct, and was then told that he was there but that she did not have to come); People v. Ventiquattro, 138 A.D.2d 925, 527 N.Y.S.2d 137 (4th Dept. 1988) (15-year-old defendant's aunt, who accompanied him to the police station, and defendant's parents, who arrived later, were not allowed in interview room); People v. Hall, 125 A.D.2d 698, 509 N.Y.S.2d 881 (2d Dept. 1987) (father not told that defendant was being questioned, nor was defendant informed of father's phone call); People v. Bentley, 155 Misc.2d 169, 587 N.Y.S.2d 540 (Sup. Ct. Kings Co., 1992) (although mother was present, father, who knew nature of investigation, was falsely told that his wife and son were not at the precinct); People v. Coker, 103 Misc.2d 703, 427 N.Y.S.2d 141 (Sup. Ct. Bronx Co., 1980) (mother was not given true status of case or told that taped statement would be taken). But see People v. Salaam, supra, 83 N.Y.2d 51 (police not required to admit mother to interrogation where 15-year-old defendant claimed he was 16); People v. Insonia, 277 A.D.2d 819, 716 N.Y.S.2d 791 (3rd Dept. 2000), lv denied 96 N.Y.2d 735, 722 N.Y.S.2d 802 (2001) (no evidence that delay in contacting defendant was due to police deceit or trickery). If

it appears that it is legal advice from which the police seek to isolate the child, there may be a violation of the child's right to counsel. See People v. Bevilacqua, 45 N.Y.2d 508, 410 N.Y.S.2d 549 (1978).

When notification has been made, and there is reason to believe the parent is coming, the police must postpone any interrogation for a reasonable time. See Matter of Marvin W., 105 Misc.2d 424, 432 N.Y.S.2d 342 (Fam. Ct. N.Y. Co., 1980). Cf. Matter of Raphael A., supra, 53 A.D.2d 592. But, if the parent is unwilling to appear, questioning may be permissible. See People v. Bonaparte, supra, 130 A.D.2d 673; People v. Ward, 95 A.D.2d 351, 466 N.Y.S.2d 686 (2d Dept. 1983); People v. Susan H., 124 Misc.2d 341, 477 N.Y.S.2d 550 (Sup. Ct. Bronx Co., 1984).

In People v. Fuschino, 59 N.Y.2d 91, 463 N.Y.S.2d 394 (1983), the Court of Appeals held that the 19-year-old defendant did not effectively invoke his right to counsel when he made a request to call his mother. See also United States v. Franzen, 653 F.2d 1153 (7th Cir. 1981) (17-year-old prisoner's request to speak to father was not functional equivalent of request for attorney); but see In re H.V., 252 S.W.3d 319 (Tex. 2008) (sixteen-year-old juvenile invoked right to counsel when he stated to police that he "wanted his mother to ask for an attorney"); E.C. v. State, 623 So.2d 364 (Ala. Ct. Crim. App. 1992) (while juvenile's statement, "[M]y mama got a lawyer," was not, by itself, an invocation of the right to counsel, that statement, considered together with juvenile's immediately preceding answer, necessitated attempt to clarify whether juvenile wished to halt interrogation until his mother, and thereby a lawyer she could provide, was present).

However, a parent's unequivocal request for counsel does constitute an invocation of the juvenile's right to counsel. People v. Mitchell, 2 N.Y.3d 272, 778 N.Y.S.2d 427 (2004); Matter of Abraham R., 22 Misc.3d 1138(A) (any indication by mother that she wanted to speak to lawyer or desired counsel prior to further police contacts with respondent, or that she had a lawyer, was equivocal).

There is no requirement in the statute that the police cease questioning when the juvenile requests the presence of a parent. However, it can still be argued that where a statute provides a right to have a parent present during interrogation, a child's

unequivocal request to speak to a parent must result in the cessation of questioning. Weaver v. State, 710 So.2d 480 (Ala. Ct. Crim. App., 1997) (after juvenile invoked right to communicate with parents, interrogation should have ceased until he had opportunity to speak with parents). Moreover, a juvenile may be able to argue that a request to speak with a parent constituted an invocation of the Fifth Amendment right to remain silent. See Draper v. State, 790 A.2d 475 (Del. 2001) (suspect may have invoked right to remain silent when he indicated that he did not wish to speak to police further until he spoke with mother); People v. Castro, supra, 118 Misc.2d 868.

II. Questioning the Child

A. Need for Questioning

An officer may question a child if the officer "determines that it is necessary ...." FCA §305.2(4)(b). This language suggests that children should not be questioned unless there exists a legitimate law enforcement purpose above and beyond the mere desire to buttress the case against the respondent. For instance, interrogation might be justified when another suspect is at large in the community, when a weapon or other contraband is unrecovered, or when the victim cannot be located. However, even assuming that the exigent circumstances need not be as compelling as those required by the public safety exception to the Miranda rule [see New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984); Matter of John C., 130 A.D.2d 246, 519 N.Y.S.2d 223 (2d Dept. 1987)], the "necessity" requirement is mere surplusage unless it is read to proscribe the routine and gratuitous interrogation of juveniles. Compare Matter of Louis D., 34 Misc.3d 427 (Fam. Ct., Kings Co., 2011) (“[b]y using the word ‘necessary’ the legislature clearly intended that there be a investigative need to question the juvenile, not that the officer merely finds it useful to do so”) with In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (interrogation not limited to exigent circumstances); In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (given seriousness and complexity of charges, it was “necessary” to take respondent to designated facility for questioning) and Matter of Chaka B., 33 A.D.3d 440, 822 N.Y.S.2d 514 (1st Dept. 2006) (police decision to interrogate was appropriate where

there was need to determine whether respondent was engaged in joint criminal activity with armed companion).

B. Suitable Place for Questioning

When it is determined that questioning is "necessary," the officer "may take the child to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the child, to the child's residence and there question him for a reasonable period of time ...." FCA §305.2(4)(b).

Each police precinct contains a facility designated as suitable for questioning pursuant to FCA §305.2(4)(b); it is commonly called the "juvenile room." It also appears that the police may question a child in an "annex" to the juvenile room. See Matter of Bree J., 183 A.D.2d 675, 584 N.Y.S.2d 59 (1st Dept. 1992). Pursuant to the Uniform Rules for the Family Court, §205.20(f), a current list of all designated facilities is maintained by the appropriate administrative judge and is available for inspection. Section 205.20(d) provides that the facility should, inter alia, present an office rather than a jail-like setting; be clean and well-maintained; be well-lit and heated; have separate toilet facilities for children or otherwise insure the privacy and safety of the child; and have a separate entrance for children or otherwise minimize public exposure and mingling with adult detainees. When a female child is being questioned, a policewoman or other qualified female must be present.

The presentment agency has the burden of proving that a designated facility was, in fact, used. See Matter of Matthew M.R., 37 A.D.3d 1133, 830 N.Y.S.2d 420 (4th Dept. 2007) (evidence sufficient where court determined that room was on Office of Court Administration's list). The questioning of a child in a non-designated room may be grounds for suppression, particularly where it appears that the police have willfully or negligently violated the statute. Even where the police have made a good faith attempt to comply with the law, suppression may be appropriate if it appears that the facility actually used does not substantially conform to the prescription in Uniform Rules, §205.20(d). See Matter of Emilio M., supra, 37 N.Y.2d 173; In re Daniel H., 67 A.D.3d 527, 888 N.Y.S.2d 496 (1st Dept. 2009) (fact that respondent was briefly held in adult

holding cell, without adult prisoners, and was questioned in room other than designated juvenile interview room, did not warrant suppression where office used for questioning was substantially similar to juvenile room and did not have coercive atmosphere, and respondent was permitted to speak privately with mother); People v. Ellis, 5 A.D.3d 694, 774 N.Y.S.2d 741 (2d Dept. 2004), lv denied 3 N.Y.3d 639, 782 N.Y.S.2d 410 (other room, which was a bright, office-like setting, chosen because juvenile interview room had been sealed off for fumigation to correct lice infestation); Matter of Jennifer M., 125 A.D.2d 830, 509 N.Y.S.2d 935 (3rd Dept. 1986) (no per se rule requiring suppression; statement made in store manager's office not suppressed); Matter of Luis N., 112 A.D.2d 86, 489 N.Y.S.2d 206 (1st Dept. 1985) (officers sought to comply with the law by asking desk sergeant for designated facility; case remitted for inquiry to "ascertain whether the room contained detention facilities or was otherwise so overpowering in appearance as to make respondent's statement less than voluntary"); Matter of Anthony E., 72 A.D.2d 699, 421 N.Y.S.2d 566 (1st Dept. 1979) (statement made in sex crimes room suppressed); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (although statement made in place other than designated juvenile room, detective's testimony established that room utilized was non-threatening, office-like setting where there were no detention cells and no adult prisoners came into contact with respondent during interview process); Matter of Kenneth C., 125 Misc.2d 227, 479 N.Y.S.2d 396 (Fam. Ct. Kings Co., 1984) (suppression denied; room used was virtually identical to designated room).

Given the statutory scheme safeguarding a child's right to the presence of a parent during questioning, it can be argued that the police should offer transportation to the child's home for questioning whenever the parent or guardian is present at home, but cannot, for practical reasons, appear at the police station.

C. Miranda Warnings

A child "shall not be questioned pursuant to [§305.2] unless he and a person required to be notified pursuant to [§305.2(3)] if present, have been advised:

> (a) of the child's right to remain silent;
> (b) that the statements made by the child may be used in a court of law;

> (c) of the child's right to have an attorney present at such questioning; and
> (d) of the child's right to have an attorney provided for him without charge if he is indigent.

FCA §305.2(7). See Matter of Raphael M., 57 A.D.2d 816, 395 N.Y.S.2d 170 (1st Dept. 1977) (warnings not given to mother in Spanish); State v. Farrell, 766 A.2d 1057 (N.H. 2001) (child must be advised of possibility of prosecution as adult); People v. Garcia, 66 Misc.3d 1215 (Sup. Ct., Kings Co., 2020) (where Spanish translator was available, father's understanding of English, at whatever level, and failure to request translation of all but one of the warnings, did not prevent him from being available to defendant for support and advice; court also notes that warning regarding use of statement in court does not include words "against you"). Of course, prior to any questioning the police must elicit from the child an acknowledgment that he or she understands the Miranda rights and is nevertheless willing to talk.

However, under appropriate circumstances an implied waiver can be found. See Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250 (2010) (where defendant remained mostly silent during three-hour interrogation until, at the end, he said "yes" in response to detective's question about whether he prayed to God for forgiveness for shooting victim, there was implicit waiver of right to remain silent); People v. Sirno, 76 N.Y.2d 967 (1990); People v. Smith, 217 A.D.2d 221, 635 N.Y.S.2d 824 (4th Dept. 1995), lv denied 87 N.Y.2d 977, 642 N.Y.S.2d 207 (1996); In re Taariq B., 38 A.D.3d 395, 833 N.Y.S.2d 22 (1st Dept. 2007) (waiver found where respondent gave statement after he and mother initialed warnings card and mother stated that "they" wanted to speak to police).

Since a parent must be Mirandized only "if present," it has been held that warnings need not be given during a telephonic notification. See People v. Bonaparte, supra, 130 A.D.2d 673. The warnings may be given separately to the child and the parent. In re Taariq B., 38 A.D.3d 395 (no violation of statute where respondent received warnings before mother arrived). It does not appear that warnings must be read separately to the child and the parent when they are together. See People v. Richardson, 202 A.D.2d 227, 608 N.Y.S.2d 627 (1st Dept. 1994).

It is unclear whether a separate waiver must be secured from the parent. Compare People v. Richardson, supra (parent must waive) with People v. McCray, 198 A.D.2d 200, 604 N.Y.S.2d 93 (1st Dept. 1993), lv denied 82 N.Y.2d 927, 610 N.Y.S.2d 179 (1994) (no waiver required) and People v. Vargas, 169 A.D.2d 746, 564 N.Y.S.2d 486 (2d Dept. 1991), lv denied 77 N.Y.2d 1001, 571 N.Y.S.2d 927.

Statements made by the child during private discussions with the parent prior to or during the interrogation are privileged. See Matter of Michelet P., 70 A.D.2d 68, 419 N.Y.S.2d 704 (2d Dept. 1979) (decided under former FCA §724); see also People v. Benjamin Kemp, 213 A.D.3d 1321 (4th Dept. 2023) (suppression ordered based on existence of parent-child privilege where 15-year-old defendant was left alone with his father in interview room but detectives said nothing about the recording devices, and, when father admonished defendant not to speak because of cameras, defendant moved closer to father, covered face with hands, and continued speak); People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dept. 1982), aff'd 59 N.Y.2d 620, 463 N.Y.S.2d 185 (1983) (parent-child privilege exists when minor in custody seeks guidance and advice of parent). The police must afford the child and parent the opportunity to communicate in private, or warn them that the statements may be repeated by any person who hears them, see People v. Harrell, supra, 87 A.D.2d 21, and the police may not attempt to use the parent to elicit an un-Mirandized statement. See People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (mother acted as police agent when she questioned child).

In appropriate circumstances, the police may obtain a parent's voluntary consent to be absent from the actual questioning of the child. In Matter of Jimmy D., 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010), a 4-judge majority upheld the denial of suppression, but stated that special care must be taken to protect the rights of minors in the criminal justice system, and thus New York courts carefully scrutinize confessions by youthful suspects who are separated from their parents while being interviewed; that children may not fully understand the scope of their rights and how to protect their own interests, or appreciate the ramifications of their decisions or realize the importance of counsel, and if the child chooses to waive the Miranda rights, a parent can monitor the

interrogation lest the police engage in coercive tactics; that a parent who is present at the location of a custodial interrogation by a police officer has a right to attend the interrogation, and may not be denied an opportunity to do so and should not be discouraged, directly or indirectly, from doing so, and the better practice is to inform the parent that he or she may attend the interview if he or she wishes; that a parent may choose not to be present, but the police should always ensure that the parent is aware of the right of access to the child during questioning; and that if a parent is asked to leave, the parent should be made aware that he or she is not required to leave. However, the majority noted, a confession obtained in the absence of a parent may be voluntary. In this case, the child and his mother had an opportunity to talk there when they were in the closed-door waiting room. The mother was present for the Miranda waiver that followed the reading of a version of the warnings that explains the rights in simple language, both agreed to questioning outside the mother's presence, and there is no evidence that the child asked for his mother during the questioning. See also Matter of Luis P., 32 N.Y.3d 1165 (2018), aff'g 161 A.D.3d 59 (1st Dept. 2018) (Appellate Division splits 3-2 on admissibility of apology letter obtained in absence of mother; majority concludes that mother did not have to be made aware detective would ask respondent to write letter, and rejects dissent's contention that respondent did not understand letter would be given to court); In re A.W., 51 A.3d 793 (N.J. 2012) (detective's comments did not constitute impermissible suggestion that juvenile should ask father to leave, and father willingly and voluntarily left); State v. Q.N., 843 A.2d 1140 (N.J. 2004) (no suppression required where mother voluntarily left room after questioning began); State v. Presha, 748 A.2d 1108 (N.J. 2000) (it is "difficult to envision prosecutors successfully carrying their burdens" when there has been a deliberate exclusion of the parent); In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (no violation of §305.2 where detective permitted mother, but not stepfather, to enter interview room); People v. Vargas, supra, 169 A.D.2d 746 (police complied with statute where they translated warnings into Spanish for mother, but did not translate the questioning); Matter of Valerie J., 147 A.D.2d 699, 538 N.Y.S.2d 307 (2d Dept. 1989) (non-custodial statement admitted despite absence of parents at time of

questioning); Matter of Edwin S., 42 Misc.3d 595 (Fam. Ct., Queens Co., 2013) (failure of detective to facilitate consultation between respondent and mother prior to mother leaving room did not, by itself, require suppression); Matter of Ronald Y.Z., 10 Misc.3d 1067(A), 814 N.Y.S.2d 564 (Fam. Ct., Chemung Co., 2005) (mother voluntarily chose to be absent); but see Matter of P. G., 36 Misc.3d 463, 945 N.Y.S.2d 532 (Fam. Ct., Queens Co., 2012) (suppression ordered, and Matter of Jimmy D. distinguished, where mother agreed to let officer speak with respondent alone, but Jimmy D. was 13 while respondent was 10; Jimmy D. and mother had opportunity to talk while there was no evidence of conversation between respondent and mother; and Jimmy D. agreed to be questioned alone while respondent was never asked whether he would agree and right to waive presence of parent who is at precinct is personal to juvenile).

The law requires that a suspect be specifically told that he or she has a right to counsel during (and even prior to) questioning. See People v. Smith, supra, 217 A.D.2d 221; People v. DiLucca, 133 A.D.2d 779, 520 N.Y.S.2d 171 (2d Dept. 1987) (defendant not advised of right to attorney during and prior to questioning); Matter of Edwin S., 42 Misc.3d 595 (given respondent's age, and questioning in mother's absence after detective failed to afford them opportunity to consult after Miranda warnings, NYPD simplified juvenile warning was likely to be interpreted by respondent as referring to right to attorney in future where warning stated: "If you cannot afford an attorney, one will be provided for you without cost. Simplified: That means if you want a lawyer but do not have the money to pay for one, the court will give you a lawyer for free"). See also Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195 (2010) (Miranda requirement that individual be "clearly informed" that he has "the right to consult with a lawyer and to have the lawyer with him during interrogation" was satisfied where defendant was advised that he had "the right to talk to a lawyer before answering any of [the officers'] questions" and that he could invoke that right "at any time ... during th[e] interview"); Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875 (1989) (where police told defendant he had right to presence of attorney before and during questioning, warnings were not defective despite additional statement that attorney will be appointed "if and when you go to court").

Moreover, bare warnings may be inadequate in cases involving very young and/or mentally impaired children. In Matter of Chad L., 131 A.D.2d 760, 517 N.Y.S.2d 58 (2d Dept. 1987), the court suppressed a statement made by a ten-year-old child who, according to expert testimony, did not have the capacity to knowingly and intelligently waive his rights. The court noted that the Miranda rights "were read perfunctorily ... from a standard police card," and that, in an appropriate case, the court might "require an extra effort to assure that the rights are explained in language comprehensible" to a child. 131 A.D.2d at 762. See In re D.L.H., 32 N.E.3d 1075 (Ill. 2015) (statement by 9-year-old respondent who was not in custody was involuntary where respondent was later found unfit to stand trial and could not possibly have understood Miranda warnings; and detective marginalized respondent's father by moving him away from table, seized on respondent's fear that someone else in family would go to jail, rejected respondent's repeated denials and made it plain that anything less than an admission was unacceptable, and downplayed significance of an admission by stating that whatever happened was an accident or mistake and that everybody makes mistakes, including the detective); State v. DeAngelo M., 360 P.3d 1151 (N.M. 2015) (under state law, children fifteen and older treated as having intellectual and developmental capacity to waive rights; statements by children younger than thirteen precluded in all circumstances because Legislature decided that such children lack maturity to understand rights and force of will to assert those rights; and statement by child thirteen or fourteen years old presumed to be inadmissible unless State rebuts presumption by clear and convincing evidence which must include evidence that interrogator invited child to explain actual comprehension and appreciation of each Miranda warning); People v. Williams, 62 N.Y.2d 285, 476 N.Y.S.2d 788 (1984) (waiver by 20-year-old functionally illiterate, borderline retarded defendant was valid where detective described rights in more detail and simpler language; but court notes that distinctions in level of comprehension based on intelligence normally are not relevant and that test is whether defendant understands the "immediate meaning" of the warnings); Matter of Tyler L., 197 A.D.3d 645 (2d Dept. 2021), appeal dism'd 37 N.Y.3d 1107 (in 3-2 decision, court upholds denial of

suppression of 15-year-old's videotaped statements, with majority noting, inter alia, that warnings for juveniles were read and written copies of warnings given to respondent and grandfather, and, while written form was not signed, respondent and his grandfather waived rights; that respondent's expert noted in report that respondent tested with 74 IQ and was in "borderline range" of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, but also stated that respondent had basic comprehension and understanding of Miranda rights consistent with other 15-year-old adolescents of comparable abilities; that expert's conclusion that respondent could not have made intelligent, knowing, and voluntary waiver was undermined by evidence of respondent's completion of test that required answers to 189 written questions in 20 minutes; and that expert acknowledged that 2015 individualized education plan rated respondent as "strong reader" and indicated that he could "retell a story and is able to answer questions based on his reading"); Rodriguez v. McDonald, 872 F.3d 908 (9th Cir. 2017) (while finding that officers failed to scrupulously honor juvenile suspect's invocation of right to counsel, court notes that juvenile was 14 years old at time of interrogation and had Attention Deficit Hyperactivity Disorder and "borderline" I.Q. of 77; that I.Q. between 70 and 75 or lower is typically considered cutoff I.Q. score for intellectual function prong of mental retardation definition; and that although juvenile's request for counsel demonstrates that he understood content and importance of Miranda rights, detectives' subsequent failure to honor invocation and contact attorney effectively amended content of Miranda warnings and juvenile would have believed that speaking without counsel was his last, best chance to help himself); In re Steven F., 127 A.D.3d 536 (1st Dept. 2015) (suppression denied despite evidence of respondent's difficulties with comprehension in school; detective had respondent state and write that he understood each warning before proceeding to next one, failure to read from juvenile version of Miranda warnings containing supplemental explanations did not render waiver involuntary); Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011), cert denied 132 S.Ct. 414 (Miranda warnings were defective because detective downplayed warnings' significance by emphasizing that juvenile should not "take [the warnings] out of context"; implied that warnings were just

formalities; assured juvenile repeatedly that detectives did not necessarily suspect him of wrongdoing; misinformed juvenile about right to counsel by deviating from juvenile Miranda form and ad libbing that juvenile had right to counsel if he was involved in a crime; and stated that warnings were for benefit of juvenile and officers, which carried different connotation than if detective had given juvenile straightforward explanation that warnings were given for juvenile's protection, to preserve valuable constitutional rights); People v. Layboult, 227 A.D.2d 773, 641 N.Y.S.2d 918 (3rd Dept. 1996) (16-year-old defendant, who had IQ of between 55 and 70, did not knowingly waive rights where they were not explained "at a level, due to his limited intelligence, which he could comprehend"); People v. Orlando LL., 188 A.D.2d 685, 591 N.Y.S.2d 211 (3rd Dept. 1992), lv denied 81 N.Y.2d 845, 595 N.Y.S.2d 744 (1993) (waiver valid where handicapped 18-year-old was given rights "in [their] simplest form"); Matter of Julian B., 125 A.D.2d 666, 510 N.Y.S.2d 613, 617 (2d Dept. 1987) (court refuses to hold that a child of tender age is incapable per se of understanding rights); United States v. Male Juvenile, 121 F.3d 34 (2d Cir. 1997) (no proof that 16-year-old defendant, who had host of attentional and learning disabilities, was incapable of knowing waiver); State v. Farrell, supra, 766 A.2d 1057 (rights must be explained to juvenile in simplified fashion); Matter of B.M.B., 955 P.2d 1302 (Kansas 1998) (court establishes per se rule requiring presence of parent, guardian or attorney before juvenile under age of 14 may effectively waive rights); In re W.C., 657 N.E.2d 908 (Ill. 1995) (13-year-old, who was functioning at level of 6 or 7-year-old, had capacity to understand simplified warnings); In re S.H., 293 A.2d 181 (N.J. 1972) (recitation of warnings to 10-year-old "even when they are explained is undoubtedly meaningless"); Matter of Akeem Z, NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (court rejects twelve-year-old respondent's argument that detective's reading of juvenile Miranda warnings was perfunctory and insufficient); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (although respondent was only ten, totality of circumstances established valid waiver); Matter of Ronald Y.Z., supra, 10 Misc.3d 1067(A) (8-year-old knowingly and voluntarily waived Miranda rights after officer paraphrased warnings in simplified terms).

The court in Matter of Julian B., supra, 125 A.D.2d 666 cited a model for simplified warnings found in Nissman, Hagen, Brooks, Law of Confessions, §6:13, at p. 174:

> "Table 6-4" Juvenile Miranda Rights
> "1. You have the right to remain silent. That means you don't have to say anything.
> "2. Anything you say can and will be used against you in a Court of Law. That means what you say or write can be used to prove what you may have done. Do you understand that? Any questions?
> "3. You have the right to talk to a lawyer and have the lawyer present with you while you are being questioned. That means that a lawyer can be with you at all times and the lawyer may tell you what the lawyer wants you to do or say. Do you understand that? Any questions?
> "4. If you want an attorney, and you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. That means the cost of having an attorney will be paid by someone else if you cannot pay for it. Do you understand this? Any questions?
> "5. Without your parents agreement, you cannot give up your right to have a lawyer with you and advise you during questioning. Your parents must agree in writing. Do you understand this? Any questions?
> "6. You can refuse to answer any or all questions at any time, or choose at anytime to have a lawyer with you during further questioning. Do you understand that I have to stop talking to you anytime you say you want to stop and wait for a lawyer. Any questions?
> "Waiver of Rights
> “I have read my rights as listed above. I understand each of them. I have been asked if I have any questions and I do not have any. I am, right now, willing to give a statement and answer questions and give up my right to have a lawyer present. No promises or threats have been made to me to make me give up my rights. I understand I may change my mind at any time and say I want my rights if I choose.

125 A.D.2d at 671-672, n. 3.

In his article, The assessment of competency to waive Miranda rights, 9 Journal of Psychiatry and Law 209 (1981), Dr. James Wulach notes that, "[i]n the New York version of the Miranda statements, such words as `right,' `remain,' `silent,' `refuse,' `consult,' `attorney,' `afford,' `provided,' and `opportunity' may cause the most difficulty."

Id. at 214. And, after discussing research on the subject, Dr. Wulach declared that "[o]ne could reasonably infer from these documented norms that a [juvenile] must, at a minimum, be able to perform at the level of an 11-year-old fifth grader in the area of verbal comprehension in order to understand the Miranda warnings." Id. at 217. See also Thomas Grisso, Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Cal. L.Rev. 1134 (1980).

The New York Police Department's special form, *Miranda Warnings For Juvenile Interrogations*, PD 244-1413 (7-08), states:

> 1. You have the right to remain silent and refuse to answer any questions.
> That means that you don't have to say anything to me. Do you understand?
> 2. Anything you say may be used against you in a court of law.
> That means that we can tell the court what you say or write to prove what you may have done. Do you understand?
> 3. You have the right to consult an attorney before speaking to the police (or the prosecutor) and to have an attorney present during any questioning now or in the future.
> That means that you can talk to a lawyer before I ask you any questions and your lawyer can be with you when I ask you any questions. Do you understand?
> 4. If you cannot afford an attorney, one will be provided for you without cost.
> That means that if you want a lawyer but do not have the money to pay for one, the court will give you a lawyer for free. Do you understand?
> 5. If you do not have an attorney available, you have the right to remain silent until you have had the opportunity to consult with one.
> That means that if you want a lawyer but a lawyer is not here right now, we will wait to speak with you until a lawyer can get here. Do you understand?
> 6. Now that I have advised you of your rights, are you willing to answer questions?

The form includes a space for the juvenile to place his/her initial signifying a response of yes or no to each question, and for the signature of the juvenile and his/her parent.

The problems associated with juveniles' comprehension of Miranda warnings also are clearly recognized in 18 USC §5033, which provides that, whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer must immediately give the rights "in language comprehensive to a juvenile ...."

Finally, it should be noted that in Matter of Chad L., supra, 131 Misc.2d 965, aff'd 131 A.D.2d 760, Dr. Wulach also supported the respondent's claim that his unwarned statement was the product of custodial interrogation. Dr. Wulach "testified that the average 10-year-old child, under the circumstances of the described back-bedroom questioning by police, would be incapable of perceiving that he had a right to leave the presence of the police or that he could refuse to answer the questions. Dr. Wulach explained: `Rather, he would have perceived such a situation as subjectively coercive, one in which adult authority figures with considerable power were demanding answers that he, if he was to be an obedient child, would have to respond to.'" 131 Misc.2d at 967. Thus, the age and maturity of the child are relevant not only when the child's ability to make a knowing and intelligent waiver is at issue, but also when the prosecution claims that Miranda warnings were not required because the respondent was not in custody. Compare Matter of Delroy S., 25 N.Y.3d 1064 (2015) (11-year-old respondent in custody where his sister told police that respondent had been bullied by the complainant and stabbed him; sister took officers to respondent's apartment; and, inside, officer asked respondent "what happened?"); A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004) (juvenile in custody where he was questioned for almost 2 hours in closed room with no parent present and had no way to get home, and detective "was close enough to touch" him and told him he was lying); In re Ricardo S., 297 A.D.2d 255, 746 N.Y.S.2d 707 (1st Dept. 2002) (respondent in custody when questioned by 3 officers, even though it was in respondent's home); People v. Layboult, supra, 227 A.D.2d 773 (defendant in custody while questioned after mother honored police request to bring him in); Matter of Robert H., 194 A.D.2d 790, 599 N.Y.S.2d 621 (2d Dept. 1993), lv denied 82 N.Y.2d 658, 604 N.Y.S.2d 557 (respondent in custody after he told officer a friend had been shot by accident while respondent and friends were passing gun around, and then took officer to body), Matter of Robert P., 177 A.D.2d 857, 576 N.Y.S.2d 626 (3rd Dept. 1991) (respondent in custody after being awakened and "asked" to go to precinct), People v. Alaire, 148 A.D.2d 731, 539 N.Y.S.2d 468 (2d Dept. 1989) (sixteen-year-old chronic schizophrenic with borderline-retarded intelligence was in custody); People v. Hall, supra, 125 A.D.2d 698 (fifteen-year-old defendant was in custody during

one-hour interrogation in small room at neighbor's home by three officers who made him repeat story and pointed out flaws) and Matter of Vincent R., 14 Misc.3d 760, 831 N.Y.S.2d 853 (Fam. Ct., Richmond Co., 2006) (respondent in custody when questioned in presence of mother by Fire Marshal where he had been detained in police vehicle and separated from mother for at least one hour and 15 minutes)

with In re D.L.H., 32 N.E.3d 1075 (Ill. 2015) (9-year-old respondent who was functioning in borderline mentally retarded range with full scale IQ of 78 and was, prior to suppression hearing, found unfit to stand trial, was not in custody when questioned about death of 14-month-old brother at respondent's home at kitchen table where plainclothes detective was only officer present; respondent's father was present; each interview lasted between 30 and 40 minutes; detective adopted conversational tone and, prior to first interview, asked respondent and father permission to ask questions; and detective knew respondent's age but was unaware of mental deficits); In re Angel S., 302 A.D.2d 303, 758 N.Y.S.2d 606 (1st Dept. 2003) (respondent not in custody when questioned by school principal in presence of fire marshals; office setting did not impose restraint beyond ordinary condition of student who is required to attend school); In re Rennette B., 281 A.D.2d 78, 723 N.Y.S.2d 31 (1st Dept. 2001), appeal after remand 309 A.D.2d 568, 765 N.Y.S.2d 507 (1st Dept. 2003), lv denied 1 N.Y.3d 507, 776 N.Y.S.2d 23 (2004) (respondent, whose baby was either born dead or died shortly thereafter, was not in custody where her cousin had called police and her grandaunt invited them in and sat with respondent throughout the inquiry; there was no apparent homicide, and the detective merely asked respondent to explain and clarify the situation as part of initial investigation; respondent chose to be in bedroom and on bed, so presence of baby's body could not have been subtle means of overcoming respondent's will; and, although there was large police presence, the other officers were out of the room, out of sight and possibly even out of hearing); Matter of Philip J., 256 A.D.2d 654, 683 N.Y.S.2d 293 (3rd Dept. 1998) (respondent not in custody when questioned in his home after receiving Miranda warnings); Matter of Joshua L., 220 A.D.2d 256, 632 N.Y.S.2d 77 (1st Dept. 1995) (respondent not in custody after 4 plainclothes officers came to his home, his mother woke him up, his father told him to get dressed to go to the precinct, he rode

in the police car with his father, and they were taken to the juvenile room); Matter of Valerie J., supra, 147 A.D.2d 699 (respondent not in custody where she was told that she was free to leave and was allowed to leave after questioning) and Matter of Ojore F., 176 Misc.2d 796, 673 N.Y.S.2d 993 (Fam. Ct., Kings Co., 1998) (respondent not in custody where he and his mother agreed to go to Brooklyn Children's Advocacy Center, which was a child-friendly location, but respondent was in custody after he made inculpatory statement and was then questioned in an accusatory manner); see also J. D. B. v. North Carolina, 131 S.Ct. 2394 (2011) (age of child subjected to police questioning is relevant to determination of whether child is in custody; so long as child's age was known to officer at time of questioning, or would have been objectively apparent to reasonable officer, its inclusion in custody analysis is consistent with objective nature of test); United States v. Ricardo D., 912 F.2d 337 (9th Cir. 1990) (juvenile was under arrest when questioned in patrol car).

D. Voluntariness of Statement or Waiver; Closer Scrutiny of Statement by Juvenile

A statement to a law enforcement officer is "involuntary" if it is obtained "by means of any promise or statement of fact, which ... creates a substantial risk that the respondent might falsely incriminate himself ...." FCA §344.2(2)(b)(i). But see People v. Thomas, 22 N.Y.3d 629 (2014) (constitution prohibits receipt of coerced confessions that are probably true). A statement to any person is involuntary if it results from the use or threatened use of force or any other improper conduct or undue pressure which overcomes the child's will. FCA §344.2(2)(a). See generally, Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860 (1961); but see Matter of Cy R., 43 A.D.3d 267, 841 N.Y.S.2d 25 (1st Dept. 2007) (no suppression where complainant, who was respondent's cousin and a retired detective, approached respondent along with police sergeant and threw respondent up against fence and demanded to know location of his guns, yelled, cursed and threatened respondent, and continued to berate respondent and demand whereabouts of guns after respondent was arrested, until respondent stated "Relax, I'll tell you where the guns are"; court notes that, particularly when statements are made to relative, distinction must be drawn between true threat of

violence and mere hyperbole).

Coercive or deceptive police behavior [see People v. Thomas, 22 N.Y.3d 629 (noting that constitution prohibits receipt of coerced confessions that are probably true, Court of Appeals suppresses statement where police threatened that if defendant continued to deny responsibility, his wife would be arrested and removed from victimized child's bedside; police stated falsely some 21 times that defendant's disclosures were essential to assist doctors attempting to save child's life; and police told defendant 67 times that what had been done to his son was an accident, told him 14 times that he would not be arrested, and told him 8 times that he would be going home if he told all)], trickery, promises of favorable treatment, and other factors must be scrutinized closely in the case of a child.

For instance, although a promise or suggestive hint that an adult suspect's cooperation will be rewarded is usually not grounds for suppression, see, e.g., People v. Weisbrot, 124 A.D.2d 762, 508 N.Y.S.2d 481 (2d Dept. 1986), the same is not true when children are involved. In People v. Ward, supra, 95 A.D.2d 351, an officer stated to the 15-year-old defendant that "[t]here is a complainant who is stating the fact that you committed a certain crime, and if you are willing to talk to me about it or tell me your participation ... I will see that it will be handled fairly." Id. at 352. While concluding that this implied promise constituted improper encouragement and inducement, albeit subtly employed, the court noted that a 15-year-old "should not be judged by the more exacting standards of maturity [citations omitted]." Id. at 353. But see Matter of Jimmy D., 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010) (child was doubtless tired but there was no evidence that he asked for food or water and was denied it, and detective's promise of "help" did not give rise to substantial risk that child might falsely incriminate himself; there is no attraction in making false confession and receiving psychiatric assistance relating to crime one did not commit); Dassey v. Dittman, 877 F.3d 297 (7th Cir. 2017), cert denied 138 S.Ct. 2677 (suppression of confession to rape and murder denied where juvenile was alone with police and was limited intellectually, may have misperceived promise of leniency, asked officers after confessing if he would be back at school that afternoon in time to turn in project, and was asked leading and suggestive

questions and follow-up inquiries when investigators were not satisfied, and confusion and contradictions suggested that confession was product of suggestions and/or desire to tell police what they wanted to hear, but juvenile was not in custody, went with officers voluntarily and with mother's knowledge and consent, understood Miranda warnings sufficiently, and was not subject to physical coercion or threats; investigators stayed calm and never raised voices; investigators stated many times that they already knew what had happened but did not, but such deception is common interview technique; and most incriminating details in confession were not suggested by questioners and were volunteered in response to open-ended questions); Ortiz v. Uribe, 671 F.3d 863 (9th Cir. 2011), cert denied 132 S.Ct. 1811 (polygrapher's empathic and maternal manner with eighteen-year-old habeas petitioner - she told him she loved him, offered hug, compared him to her sons, and stated, "I can get you through this ... I know what I'm doing" - and statements that may have suggested she was not a law enforcement officer, statements suggesting that if petitioner was telling truth and was in fact innocent, she could help him get cleared, and statements reminding petitioner of his obligation to family to tell the truth and that his children were counting on him to do the right thing, did not render petitioner's confession involuntary); In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (delay in commencing questioning was reasonable in light of time consumed in obtaining presence of Children's Village employees, and length of interrogation was reasonable in light of large number of burglaries and need to conduct canvass in which respondent identified locations he burglarized); United States v. Male Juvenile, supra, 121 F.3d 34 (court rejects defendant's claim that statement was not voluntary because agents tricked him by stating that he was not in trouble and could return home that night); People v. Alberto, 76 Misc.3d 1208 (Sup. Ct., Kings Co., 2022) (post-Miranda video statement by 17-year-old suppressed where detectives, inter alia, told defendant "to help himself out" and that mother would find out what he did and would know he had missed opportunity to tell story); Matter of Akeem Z, NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (detective's offer of mental health or other supportive services did not give rise to substantial risk that respondent might falsely incriminate himself).

Psychological pressures which would not overcome the will of an adult may well render involuntary the statement of a child. In People v. Ward, supra, 95 A.D.2d 351, the defendant's mother had advised the officer that she did not want to have anything to do with her son or his problems and hung up the phone. The officer then informed the defendant that it "looks pretty rough for you in the sense that you know your mother doesn't [want to] have anything to do with you." Id. at 352. The Second Department concluded that the officer's statements were improper, and, combined with the improper implied promise, constituted grounds for suppression. See also Tobias v. Arteaga, 996 F.3d 571 (9th Cir. 2021) (no qualified immunity as to Fifth Amendment claims where youth asked for mother and was assured she would be right in, but was then confronted with another round of increasingly aggressive interrogation; for over an hour, youth was cursed at, called a liar, “emotionally worn down,” “hammered” with questions, and “pressured” to confess; detectives falsely insisted they had strong evidence of guilt and promised leniency if youth confessed; one detective repeatedly invoked youth’s family to emotionally manipulate him, saying he was disgusted that youth was going to drag mother into proceedings by refusing to confess; interrogation left youth infused with sense of helplessness and fear; and when he spoke to mother after interview, she described him as “panicking,” “crying,” and “scared to shit”); People v. Jaushi’ir Weaver, (3d Dept. 2018) (tactics used by detectives in encouraging defendant to “be a man” and to “do the right thing” cannot be deemed improper where, as here, there is no evidence that defendant was of subnormal intelligence or susceptible to suggestion; and assurances of confidentiality pertained only to defendant’s disclosure of identity of other shooter and his expressed fear that he would be labeled a “rat” and a “snitch,” and any other apparent promise not to divulge defendant’s statements would have induced defendant to be truthful); People v. DeGelleke, 144 A.D.2d 978, 534 N.Y.S.2d 51 (4th Dept. 1988) (while suppressing videotaped statement as fruit of prior unwarned statement by 14-year-old defendant, court notes that, prior to first statement, defendant was "promised protection and help" by the police); In re Steven F., 127 A.D.3d 536 (1st Dept. 2015) (detective’s interrogation tactics, such as confronting respondent with incriminating evidence and expressing disbelief in respondent’s initial account, were not

improper); People v. Alberto, 76 Misc.3d 1208 (Sup. Ct., Kings Co., 2022) (post-Miranda video statement suppressed where 17-year-old was placed in small room with two detectives seated menacingly close, and one moved even closer as interrogation progressed; for over an hour, defendant, who repeatedly asked for mother, was told that co-defendant was talking and that there were consequences for not talking; and defendant was crying throughout and not provided with food until after he confessed, even though he said he had not eaten for two days); Matter of Noel M., 45 Misc.3d 1214(A) (Fam. Ct., N.Y. Co., 2014) (statement found involuntary where respondent, who had been in pool when informants alleged that he had gun, was wearing only bathing suit and was not allowed to dry off before being placed in air-conditioned office where he was questioned, and spent about three and one-half hours in police custody without being offered shirt, shoes or towel, and any reasonable fifteen-year-old would have felt intimidated and humiliated; police are charged with exercising greater care to insure that rights of youthful suspects are vigilantly observed).

The statute permits questioning for a "reasonable" period of time. FCA §305.2(4)(b). Since it would have been obvious, even without a statutory requirement, that a child, like any adult, may not be questioned for an excessive period of time, this express admonition is a clear reminder that stricter scrutiny is required when a child's confession is at issue. See Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011), cert denied 132 S.Ct. 414 (confession involuntary where there was relentless, nearly 13-hour interrogation of sleep-deprived juvenile by tag-team of detectives; during interrogation, there were extended periods when juvenile was unresponsive, his posture "deteriorated," and he looked down at ground; and, by end of interrogation, juvenile was sobbing almost hysterically); People v. Weaver, 167 A.D.3d 1238 (3d Dept. 2018), lv denied 33 N.Y.3d 955 (16-year-old defendant's statements found voluntary where defendant was detained for approximately 16½ hours but questioning was intermittent, with several lengthy breaks that afforded defendant opportunity to sleep in solitude, and defendant was provided with food and water and permitted to use restroom); Matter of William L., supra, 29 A.D.2d at 184 ("We think it almost self-evident that a boy of 14, aroused from his sleep at 3:00 A.M., taken to a police station and questioned by four or

five police officers concerning a homicide, would scarcely be in a frame of mind capable of appreciating the nature and effect of the constitutional warnings ..."); Matter of Noel M., 45 Misc.3d 1214(A) (respondent spent about three and one-half hours in police custody).

In In re Daniel H., 67 A.D.3d 527, 888 N.Y.S.2d 496 (1st Dept. 2009), the First Department held that the issue of whether a statement should be suppressed as the tainted fruit of a prior unlawful statement was not appreciably different for juveniles, and that, in that case, there was no relevance to the detective's failure to abide by Family Court regulations regarding the handling of juveniles in custody.

E. Expert Testimony Regarding Capacity To Waive Miranda Rights

In virtually any case in which a "Mirandized" confession is being offered, the child's lawyer should consider presenting expert testimony at a suppression hearing concerning the respondent's capacity to comprehend the warnings. When the respondent suffers from an educational handicap, consideration must also be given to subpoenaing school records, or calling school personnel as witnesses. In Matter of Chad L., supra, 131 A.D.2d 760, aff'g 131 Misc.2d 965, 502 N.Y.S.2d 910 (Fam. Ct. Kings Co., 1986), the respondent called Dr. Wulach, who "was unequivocal in concluding that Chad did not comprehend [the Miranda] rights at the time they were read to him. Indeed, Dr. Wulach indicated that no average 10 year old could be expected to appreciate Miranda warnings given literally in the manner given to respondent." 131 Misc.2d at 970. See also Matter of Tyler L., 197 A.D.3d 645 (2d Dept. 2021), appeal dism'd 37 N.Y.3d 1107 (in 3-2 decision, court upholds denial of suppression of 15-year-old's videotaped statements, with majority noting, inter alia, that warnings for juveniles were read and written copies of warnings given to respondent and grandfather, and, while written form was not signed, respondent and his grandfather waived rights; that respondent's expert noted in report that respondent tested with 74 IQ and was in "borderline range" of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, but also stated that respondent had basic comprehension and understanding of Miranda rights consistent with other 15-year-old adolescents of comparable abilities; that

expert's conclusion that respondent could not have made intelligent, knowing, and voluntary waiver was undermined by evidence of respondent's completion of test that required answers to 189 written questions in 20 minutes; and that expert acknowledged that 2015 individualized education plan rated respondent as "strong reader" and indicated that he could "retell a story and is able to answer questions based on his reading"); People v. Cleverin, 140 A.D.3d 1080 (2d Dept. 2016) (waiver found involuntary where evaluation of defendant between ages of 12 and 14 revealed that he had emigrated from Haiti, spoke only Creole until age 13, and was diagnosed as being moderately mentally retarded; records from residential school for children with cognitive and intellectual deficits revealed IQ score consistently between 40 or 50 and diagnosis of moderate mental retardation or borderline intellectual functioning; expert testified that defendant's IQ score was 53 and score on reading test was at kindergarten level; and defendant did not understand phrase, "you have the right to remain silent and to refuse to answer any questions," or phrase "you have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future"); People v. Knapp, 124 A.D.3d 36 (4th Dept. 2014), appeal w'drawn 24 N.Y.3d 1220 (neither knowing, voluntary, and intelligent waiver, nor voluntariness, established where mentally retarded defendant had full-scale IQ of 68 and verbal comprehension IQ score of 63 and was suggestible and overly compliant; most of detective's questions were leading and he repeated question when he was not satisfied with defendant's response and urged defendant to "be honest" with him and to tell the truth; and detective told defendant he had spoken to victim and her mother, that victim was "not lying," and that medical examination would show that "something happened" between defendant and victim, and defense expert testified that, if presented with memory counter to what he believed to be true, defendant would change answer); Matter of Ariel R., 98 A.D.3d 414 (1st Dept. 2012) (reversible error where court refused to allow respondent's treating psychiatrist to render opinion at Huntley hearing as to whether respondent could have understood juvenile Miranda warnings; although psychiatrist did not perform tests specifically addressing this issue, the evidence he had, including his evaluations of respondent's receptive communication skills and IQ, was

sufficient to enable him to form opinion as to whether respondent had adequate language and cognitive skills to understand the Miranda warnings, and any deficiencies in the testing went to the weight of the testimony rather than to admissibility); People v. Layboult, supra, 227 A.D.2d 773 (psychologist testified as to IQ and mental age of respondent); People v. Wise, 204 A.D.2d 133, 612 N.Y.S.2d 117 (1st Dept. 1994), lv denied 83 N.Y.2d 973, 616 N.Y.S.2d 26 (defendant failed to prove that his learning disability precluded a valid waiver). Cf. United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) (defendant should have been permitted to present expert testimony regarding his difficulties with language to help jury understand problems that defendant, a long-time special education student who spoke both English and Spanish, had in communicating in English in high-pressure situations); Matter of Akeem Z, NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (court finds waiver voluntary where respondent's composite IQ score of 78 placed him above range where individual would be considered mildly mentally retarded and expert testified that respondent's verbal comprehension abilities placed him in low average range; expert indicated only that respondent "would have a problem with some of [the Miranda warnings]" and "did not understand completely"; respondent's responses to certain questions indicated that he was capable of basic reasoning and more abstract thought; and respondent was not incapable of asserting himself in face of authority). But see State v. Griffin, 869 A.2d 640 (Conn., 2005) (defendant failed to establish that expert testimony regarding "Grisso" protocol was sufficiently reliable); People v. Hernandez, 46 A.D.3d 574, 846 N.Y.S.2d 371 (2d Dept. 2007), lv denied 11 N.Y.3d 737 (no error where expert was permitted to testify concerning defendant's mental retardation and studies showing effect retardation has on person's ability to make intelligent waiver of Miranda rights, but court precluded testimony regarding defendant's performance on battery of tests known as "Grisso instrument; tests have not been generally accepted by New York courts and, even if general acceptance among forensic psychologists has been established, defendant failed to demonstrate reliability of procedures followed where validity of test result was undermined by significant differences between vocabulary used in test and that used in actual warnings and expert did not administer other tests normally considered

necessary in order to render reliable opinion); People v. Casiano, 40 A.D.3d 528, 837 N.Y.S.2d 76 (1st Dept. 2007) (psychiatric testimony involved no special knowledge or skill outside range of ordinary intelligence or training and was equivalent to opinion that defendant's waiver was not knowing and voluntary); People v. Cole, 24 A.D.3d 1021, 807 N.Y.S.2d 166 (3rd Dept. 2005), lv denied 6 N.Y.3d 832 (trial court did not err in ruling, following Frye hearing, that defendant could not present expert testimony from forensic psychologist regarding administration and results of "Grisso test" used to measure accused's ability to comprehend Miranda warnings; record supports court's determination that tests had not gained sufficient acceptance for reliability and relevance in the scientific community, and that vocabulary used to gauge defendant's understanding of Miranda warnings differed substantially from warnings defendant received).

It might also be helpful to a parent's testimony concerning the impact the respondent's intellectual limitations has on his or her functioning. Compare People v. Cratsley, 206 A.D.2d 691, 615 N.Y.S.2d 463 (3rd Dept. 1994), aff'd 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995) (no error where person who was not psychiatrist or psychologist testified concerning victim's retardation) with People v. Koury, 268 A.D.2d 896, 701 N.Y.S.2d 749 (3rd Dept. 2000), lv denied 94 N.Y.2d 949, 710 N.Y.S.2d 6 (lay opinion testimony by mother as to defendant's likely reaction in "pressure-created situation" was not admissible to establish that admissions to police were involuntary).

F. Expert Testimony Regarding Credibility Of Confession

In People v. Bedessie, 19 N.Y.3d 147 (2012), the Court of Appeals held that since false confessions that precipitate a wrongful conviction manifestly harm a defendant, the crime victim, society and the criminal justice system, and experts in psychiatry and psychology or the social sciences may educate a jury about factors of personality and situation that the scientific community considers to be associated with false confessions, expert testimony should be admitted in appropriate case, but may not include testimony as to whether a particular defendant's confession was or was not reliable, and the expert's proffer must be relevant to the defendant and the interrogation before the court. In Bedessie, the judge properly determined that the testimony would

not assist the jury in evaluating the voluntariness and truthfulness of defendant's confession or in reaching a verdict. See Miller v. State, 770 N.E.2d 763 (Indiana 2002) (although expert may not opine regarding credibility of particular witness, trial court erred in excluding in its entirety testimony by an expert in the field of "social psychology of police interrogation and false confessions"); People v. Caparaz, 80 Cal.App.5th 669 (Cal. Ct. App., 1st Dist., 2022) (court erred in ruling that defendant's expert could not testify regarding his assessment of defendant's own suggestibility and susceptibility; it did not matter that there was no coercion since defense theory was that defendant's psychological makeup made him susceptible); People v. Churaman, 184 A.D.3d 852 (2d Dept. 2020) (court erred in excluding testimony where expert's report referred to, inter alia, characteristics that heightened defendant's vulnerability to manipulation, detectives' interrogation techniques, and improper participation of defendant's mother during interview); People v. Boone, 146 A.D.3d 458 (1st Dept. 2017), lv denied 29 N.Y.3d 1029 (court erroneously believed testimony must address both personality or psychological makeup that could make defendant particularly susceptible to confessing falsely, and situational factors when the interrogation is conducted in way that might induce defendant to make false confession); People v. Evans, 141 A.D.3d 120 (1st Dept. 2016), appeal dism'd 26 N.Y.3d 1101 (3-2 decision concluding that unlike defendant in Bedessie, defendant established that testimony was relevant to defendant and the interrogation where expert would have testified about mental conditions and personality traits of defendant linked by research studies to false confessions; defense alleged that detectives employed techniques research has shown to be highly correlated with false confessions; defendant was interrogated for more than 12 hours and detectives allegedly used rapport-building techniques to gain trust and posed suggestive or leading questions; lack of videotaping raised significant concerns; and there was no overwhelming corroborating evidence that undermined usefulness of expert testimony); People v. Days, 131 A.D.3d 972 (2d Dept. 2015), lv denied 26 N.Y.3d 1108 (reversible error where court denied defendant's motion for leave to introduce expert testimony on issue of false confessions; court erred in concluding that psychological studies bearing on reliability of confession are within ken of the typical

juror, proffered testimony was relevant to defendant and circumstances of case, and defendant's "extensive proffer" included submissions from two experts and defendant's videotaped confession); People v. Krivak, 78 Misc.3d 988 (County Ct., Putnam Co., 2023) (court allows expert to testify regarding "Promises of Leniency," "Minimization" and "Contamination"; error correction technique but only if there is evidence presented that any investigator directed defendant or the other witnesses to strike portions of their statements even though no errors existed; and information provided to defendant which investigators knew was false or had been recanted); People v. Ronald Thomas, (Sup. Ct., Kings Co., 2020) (defense expert allowed to testify about background information and studies regarding false confessions, police interrogations and Reid method of interrogation; explanation of how basic principles of decision-making can lead to false confessions when police use Reid method; description of other factors that can contribute to false confessions including lack of sleep and intoxication by drugs or alcohol; and his opinion regarding whether police used Reid method); People v. Oliver, 45 Misc.3d 765 (Sup. Ct., Kings Co., 2014) (proposed expert on police tactics and false confessions not permitted to testify where proposed testimony was not relevant to particular facts of case and expert's qualifications and claims were suspect; testimony of other expert excluded because testimony offered to demonstrate that defendant's personality traits make him susceptible to confessing falsely is irrelevant, potentially confusing, and lacking in sufficient certainty); see also People v. Reyes, 130 A.D.3d 847 (2d Dept. 2015) (no error in preclusion of expert testimony offered in support of defendant's contention that he could not have written alleged handwritten confession because he was illiterate, which was not beyond ken of typical juror).

G. Conflict of Interest Involving Parent or Guardian

In Matter of Michelet P., supra, 70 A.D.2d 68, the respondent was interrogated about the death of a woman with whom he had resided after arriving from Haiti. Acting as guardian for the respondent, who had no known relatives in this country, was the deceased's son. The Second Department, while suppressing a statement under former FCA §724, noted that "[t]he incapacity of the victim's son to act as guardian for the accused is apparent." Id. at 71.

Thus, whenever a statement is taken in the presence of a guardian, the child's attorney should examine the circumstances to determine whether the goals and interests of the guardian were in conflict with those of the child. It is clear that the child is entitled to the advice of a guardian who is not guided by his or her own agenda, and who has the child's interests in mind. Compare People v. Legler, 969 P.2d 691 (Colo 1998) (grandmother was not appropriate guardian where she had made it clear that granddaughter was not welcome to return to her home); In re E.T.C., 449 A.2d 937 (Vt. 1982) (juvenile did not have assistance of independent, impartial, responsible, interested adult where group home director coerced juvenile by implying that it was best to "come clean"); Matter of Noel M., 45 Misc.3d 1214(A) (Fam. Ct., N.Y. Co., 2014) (aunt had conflict where she was respondent's guardian and mother of respondent's cousin, who was also accused of having gun) and Matter of Lance BB., 14 Misc.3d 359, 829 N.Y.S.2d 846 (Fam. Ct., Chemung Co., 2006) (statement suppressed where grandfather-guardian was complainant; police should have made attempt to contact respondent's sister, or, failing that, taken respondent to court) with In re Kevin R., 80 A.D.3d 439, 914 N.Y.S.2d 143 (1st Dept. 2011) (appearance at interrogation by parent who is also parent of complainant not disqualifying, but only factor to be considered in evaluating voluntariness); People v. Gardner, 257 A.D.2d 675, 683 N.Y.S.2d 351 (3rd Dept. 1999) (no violation of notification requirement where person legally responsible was the deceased victim - defendant's paternal grandmother - and defendant's father was notified; court rejects defendant's argument that father was not "supportive" adult in her life); People v. Charles, 243 A.D.2d 285, 663 N.Y.S.2d 965 (1st Dept. 1997), lv denied 91 N.Y.2d 971, 672 N.Y.S.2d 850 (1998) (no conflict where Department of Social Services employees acted as defendant's guardians); Matter of James OO., 234 A.D.2d 822, 652 N.Y.S.2d 783 (3rd Dept. 1996) (respondent's mother, who "just want[ed] him to have the help that he needs," played largely passive role during questioning as to sex crime involving respondent's sister); People v. Barnes, 124 A.D.2d 973, 508 N.Y.S.2d 818 (4th Dept. 1986) (information that defendant's guardian may have possessed goods stolen by defendant did not disqualify guardian); Matter of Omar L., 192 Misc.2d 519, 748 N.Y.S.2d 209 (Fam. Ct., Kings Co., 2002) (no

suppression where mother was present during interrogation regarding respondent's sexual abuse of his 8-year-old sister, and mother said, *inter alia*, "how could you do something like this to your sister") and People v. Susan H., supra, 124 Misc.2d 341, 348 (the police "had no reason to believe the H.'s were neglectful or unconcerned about their daughter"). See also People v. Benedict V., 85 A.D.2d 747, 445 N.Y.S.2d 798 (2d Dept. 1981) (statement involuntary where school principal, whose duty to school and its property conflicted with ability to act in loco parentis because of nature of crimes charged, not only permitted questioning of defendant, but expressly assumed role of parental protector and, in furtherance of role, encouraged defendant to make confession); Matter of Steven William T., 499 S.E.2d 876 (W.Va. 1997) ("The presence and consent of a parent or guardian, as required by statute, may be rendered meaningless where the parent or guardian has a conflict of interest with the child or has no real parental relationship with the child, as was the case here where the biological mother had not seen the child in four years"). When a parent or guardian has indicated to the police, to probation or to the child's attorney that the respondent has serious behavioral problems, or when a PINS petition is pending or has been filed in the past, the attorney should consider arguing that the guardian's primary concern at the interrogation may not have been the protection of the child, but the guardian's own desire to be rid of the child, or, at the very least, secure the assistance of the authorities in controlling the child.

Particular attention should be paid to cases in which a child was arrested while in placement, and a counselor or other representative from the facility acted as guardian at a police interrogation. It has been held that placement agency were properly notified by police because they were the "persons legally responsible for respondent's care." In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (Children's Village was entity legally responsible for respondent's care); Matter of Richard UU., 56 A.D.3d 973, 870 N.Y.S.2d 472 (3rd Dept. 2008) (statutory requirements satisfied when DSS caseworker was notified and present for administration of Miranda warnings); Matter of Arthur O., 55 A.D.3d 1019, 871 N.Y.S.2d 396 (3rd Dept. 2008) (police did not violate statute where they failed to notify respondent's mother, but she had surrendered

custody of respondent to DSS); Matter of Stanley C., supra, 116 A.D.2d at 214. However, the Second Department has indicated that, when there is evidence that the facility no longer desires custody of the child, a counselor or other representative is an inappropriate guardian during court proceedings. Matter of John L., 125 A.D.2d 472, 509 N.Y.S.2d 398 (2d Dept. 1986) (group home representative, who stood in for parent when respondent made admission, "informed the court that [respondent] was no longer welcome at that residence"); Matter of Lloyd P., 99 A.D.2d 812, 472 N.Y.S.2d 142, 143 (2d Dept. 1984) ("[t]he obviously antagonistic position taken by the school in whose custody [respondent] was then placed renders the presence of its officials an inadequate substitute"); see also Matter of Delfin A., 123 A.D.2d 318, 506 N.Y.S.2d 215, 217 (2d Dept. 1986) (while ruling that respondent's counsel had conflict of interest due to his representation of placement facility where crime occurred, court notes that "it is significant that the facility had expressed its disinclination to retain [respondent] as a resident in view of his alleged participation in the incident"); Matter of Candy M., supra, 142 Misc.2d 718. Even in the absence of a desire to expel the child, the representative of a placement facility, whose duties and loyalties are unlikely to spawn any concern for the potential consequences of a child's confession to law enforcement authorities, is not an appropriate guardian. Cf. Matter of Tracy B., 80 A.D.2d 792, 437 N.Y.S.2d 90 (1st Dept. 1979) (court erred in appointing court officer as guardian ad litem). In such cases, it should be required that an attempt be made to notify the child's parent or guardian. If there are no known family resources, the child should not be questioned. See Matter of Michelet P., supra, 70 A.D.2d at 72 (where notice could not be made because no one was legally responsible for child, police should have brought child to Family Court "so that a guardian less interested in the case than [the victim's son] could have been appointed"); Matter of Candy M., supra, 142 Misc.2d 718; but see Matter of Richard UU., 56 A.D.3d 973 (fact that caseworker advised respondent to speak with investigator does not establish that she was not acting in respondent's best interests); Matter of Arthur O., 55 A.D.3d 1019 (although respondent claimed that DSS was ineffective or improper custodian because caseworker had not developed sufficiently protective relationship with respondent and acted in conflict with his interests by advising him to

tell police what happened, there was no evidence that DSS acted against respondent's interests and no requirement that police make subjective determination as to whether relationship between DSS and juvenile is sufficiently supportive).

H. Recording Of Custodial Interrogation

Where a child is subject to interrogation at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to FCA § 305.2(4), the entire interrogation, including the giving of any required notice to the child as to his or her rights and the child's waiver of any rights, shall be video recorded in a manner consistent with standards established by rule of the Division of Criminal Justice Services pursuant to Criminal Procedure Law §60.45(3)(e). The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to FCA §331.2. FCA §305.2(5-a); see also FCA §344.2(3).

I. Balancing of Factors in FCA §305.2 vs. Per Se Suppression

"In determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his or her parents or other persons legally responsible for his or her care, notification pursuant to subdivision three and, where the child has been interrogated at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles, whether the interrogation was in compliance with the video-recording and disclosure requirements of subdivision five-a of this section shall be included among relevant considerations." FCA § 305.2(8).

In Matter of Stanley C., supra, 116 A.D.2d 209, the Fourth Department held in dicta that a police failure to notify a parent or guardian does not automatically require suppression of a statement. The court cited FCA §305.2(8), which states that "[i]n determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his parents or other persons legally responsible for his care and notification pursuant to subdivision

three shall be included among relevant considerations" (emphasis supplied).

Although Matter of Stanley C., supra, 116 A.D.2d 209 apparently involved a failure to even attempt notification, it can be argued that, while a failed effort at "notification" may be used in a balancing test, a failure to make any attempt at all must result in suppression. Significantly, FCA §305.2(8) refers to the notification requirement in §305.2(3), not to the "reasonable effort" requirement in §305.2(4). Moreover, a per se rule would avoid any conflict between §305.2(8) and prior cases holding that no questioning may take place until after reasonable efforts have been made. See Matter of Brian P.T., supra, 58 A.D.2d 868; Matter of Raphael A., supra, 53 A.D.2d 592; Matter of Albert R., supra, 121 Misc.2d 636; cf. People v. Salaam, supra, 83 N.Y.2d 51, 56-57 (a "failure to strictly comply with [FCA §305.2(3)] ... does not necessarily require suppression where a good faith effort at compliance has been made" [emphasis supplied]). In any event, it seems clear that the absence of a parent should be a highly significant factor and be given added weight in any balancing test. Compare State v. Presha, 748 A.2d 1108 (N.J. 2000) with United States v. Guzman, 879 F.Supp.2d 312 (EDNY 2012) (violation of federal Juvenile Delinquency Act's post-arrest parental notification requirement does not per se require suppression of juvenile's statements; lack of notification is simply one factor among many).

In addition, neither the requirement that the parent, if present, receive Miranda warnings, nor the requirement that the child be questioned in a properly designated facility, is included in the "balancing" test in FCA §305.2(8). Consequently, there is nothing in the statute to suggest that a failure to give the Miranda warnings to the parent and secure a voluntary, knowing and intelligent waiver, or the knowing or negligent use of an inappropriate interrogation setting by the police, should not automatically lead to suppression.

III. Questioning Of Children Over 16 Years Of Age

When FCA §305.2(2) authorized an officer to take into custody "a child under the age of sixteen," courts held that the special protections in §305.2 applied only to the interrogation of persons who are under the age of 16 at the time of questioning. See,

e.g., In re Eduardo E., 91 A.D.3d 505 (1st Dept. 2012).

However, as part of the 2017 “Raise the Age” legislation, FCA §305.2(2) was amended to refer instead to “a child who may be subject to the provisions of this article,” and thus it is now clear that the statute protects a child of any age who is arrested on juvenile delinquency charges. At the same time CPL §140.20(6) was amended so that children arrested on juvenile offender or adolescent offender charges would have the same protections provided by §305.2, and thus the attorney for the child can cite §140.20(6) when moving to suppress after a case has been transferred to the family court.

Arguably, compliance with this requirement may be excused when the police reasonably believed a false claim by the juvenile suspect that he or she was 18 years of age or older. See People v. Salaam, 83 N.Y.2d 51, 607 N.Y.S.2d 899 (1993) (CPL, not FCA, applied where 15-year-old defendant told police he was 16 and showed a transit pass to prove it); People v. Styles, 208 A.D.2d 779, 617 N.Y.S.2d 785 (2d Dept. 1994), lv denied 84 N.Y.2d 1016, 622 N.Y.S.2d 927 (defendant deceived police into believing he was 16). See also People v. King, supra, 116 Misc.2d 614 (police reasonably believed defendant, who was about 6' 4" tall, was about 20 years old until they learned he was 15 when they took his pedigree).

IV. Notice Of Intent To Offer Statement

Pursuant to FCA §330.2(2), the presentment agency must serve upon the respondent notice of its intention to offer evidence "described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law .... Such notice must be served within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. If the respondent is detained, the court shall direct that such notice be served on an expedited basis." When a petition is dismissed after 15 days have passed and no notice has been served, and a superseding petition is then filed, the 15-day period does not begin running again. Matter of Jason R., 174 Misc.2d

920, 666 N.Y.S.2d 903 (Fam. Ct., Kings Co., 1997). In the absence of good cause for untimely notice, preclusion of the statement is required.

The way in which FCA §330.2(2) was drafted has given rise to a controversy that should be noted. Criminal Procedure Law §710.20, which is referred to in FCA §330.2(2), includes types of evidence which can be the subject of a suppression motion, but are not included in the notice requirement in CPL §710.30. For instance, CPL §710.20 includes tangible evidence, and, through the incorporation by reference of CPL §60.45, involuntary statements made to private individuals.

In Matter of Eddie M., 110 A.D.2d 635, 487 N.Y.S.2d 122 (2d Dept. 1985), the Second Department held that tangible evidence is covered by the notice requirement in FCA §330.2(2), but concluded that since the respondent had knowledge of the presentment agency's intention to introduce a gun that was the subject of a possession charge, there was good cause to dispense with the notice requirement.

However, although the Second Department gave FCA §330.2(2) a literal reading in Eddie M., the Court of Appeals held in Matter of Luis M., 83 N.Y.2d 226, 608 N.Y.S.2d 962 (1994) that §330.2(2) does not require the presentment agency to serve notice of its intent to offer a statement made by the respondent to a person not involved in law enforcement. Relying upon a detailed analysis of the legislative history, the Court of Appeals concluded that the Legislature had no intention of expanding the notice requirement in delinquency cases to include such statements.

V. Interrogation By School Officials

Generally speaking, it does not appear that non-law enforcement school officials are required to provide Miranda warnings prior to conducting a "custodial" interrogation of a student. See In re Angel S., supra, 302 A.D.2d 303; Matter of L.A., 21 P.3d 952 (Kansas, 2001); Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass., 1992); State v Biancamano, 666 A.2d 199 (N.J. Super. Ct., App. Div., 1995), cert denied 673 A.2d 275 (NJ, 1996).

However, an argument can be made that the FCA §330.2 notice requirement applies. Compare People v. Batista, 277 A.D.2d 141, 717 N.Y.S.2d 113 (1st Dept.

2000), lv denied 96 N.Y.2d 825, 729 N.Y.S.2d (2001) (child protective caseworker not a "public servant") with People v. James Whitmore, 12 A.D.3d 845, 785 N.Y.S.2d 140 (3rd Dept. 2004) (DSS caseworker is "public servant").

In any event, it is clear that if school officials conduct custodial questioning while cooperating with, or at the suggestion of, a police officer, or under any circumstances which establish an agency relationship, Miranda warnings must be provided, and the presentment agency must provide notice pursuant to FCA §330.2. The physical presence of a police officer during questioning would obviously provide a good basis for the use of an agency analysis.

Compare People v. Ray, 65 N.Y.2d 282, 491 N.Y.S.2d 283 (1985) (Bloomingdale's course of conduct in employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide Miranda warnings before turning suspect over to authorities; "[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency" and "[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective"); People v. Rodriguez, 135 A.D.3d 1181 (3d Dept. 2016) (child protective services worker not police agent where he was on task force that included law enforcement, but did not consult with law enforcement regarding plans to interview defendant and law enforcement was not present at interview); People v. Cooper, 99 A.D.3d 453 (1st Dept. 2012), lv denied 21 N.Y.3d 1003 (no police-dominated atmosphere where police apprehended defendant and turned him over to store personnel to permit them to perform store's routine administrative procedures, which included giving defendant notice that he was prohibited from entering store again; police had no vested interest in outcome of store's private procedures, which were not designed to elicit potentially inculpatory evidence, and were not involved with, and did not orchestrate or supervise, actions of store employees); In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long

as school official independently decides to search and then invites law enforcement personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present); In re Tateana R., 64 A.D.3d 459, 883 N.Y.S.2d 476 (1st Dept. 2009), lv denied 13 N.Y.3d 709 (no custodial interrogation where dean's goal was to recover stolen iPod and presence, and officer provided minimal input and participation was directed at locating iPod, not obtaining confession; even if there was state action, respondent was not in custody since dean's office ordinarily is not considered additional restraint for student who is not free to leave school without permission, and being summoned to dean's office is unpleasant but not unusual occurrence for student); In re Angel S., supra, 302 A.D.2d 303 (although fire marshals were present when principal conducted questioning, they did not prompt or have any input into the questioning) and People v. Hussain, 167 Misc.2d 146, 638 N.Y.S.2d 285 (Sup. Ct., Queens Co. 1996) (Child Welfare Administration caseworker was not police agent)

with State v. Antonio T., 352 P.3d 1172 (N.M. 2015) (presence of law enforcement officer during assistant principal's questioning converted school disciplinary interrogation into criminal investigatory detention and triggered application of the statute requiring knowing, intelligent and voluntary waiver of Miranda rights before statement may be used against child in juvenile delinquency proceeding); N.C. v. Commonwealth, 396 S.W.3d 852 (Ky. 2013), cert denied 134 S.Ct. 303 (court suppresses un-Mirandized custodial statements made by juvenile in response to questions from school assistant principal, in presence of armed deputy sheriff assigned to high school as School Resource Officer, who had been with assistant principal when juvenile was taken out of class); People v. Rodas, 145 A.D.3d 1452 (4th Dept. 2016) (right to counsel violated where there was such a degree of cooperation between caseworker and police that caseworker acted as agent of police); People v. Slocum, 133 A.D.3d 972 (3d Dept. 2015) (child protective services caseworker acted as agent of police when she questioned defendant in jail; caseworker acknowledged that she worked closely with police in certain investigations and that officer was present in room as she was

speaking with defendant); Jackson v. Conway, 763 F.3d 115 (2d Cir. 2014), cert denied 135 S.Ct. 1560 (caseworker was aware of possibility that investigation could support criminal prosecution, and should have known that questions were reasonably likely to evoke incriminating response); People v. Wilhelm, 34 A.D.3d 40 (3d Dept. 2006) (statements suppressed where caseworkers were members of county-wide, multidisciplinary team comprised of members of District Attorney's office and police and social service agencies; team met regularly to enhance prosecutorial process, and caseworkers cooperated with DA's office by providing information when requested; before interviewing defendant, caseworkers worked with members of team, including Assistant District Attorney and police investigators, and supervising caseworker was told by ADA that she would be called to testify at grand jury proceedings; and, after interviewing defendant, caseworkers met with ADA to discuss "results of the interview" and progress of investigation); People v. Greene, 306 A.D.2d 639, 760 N.Y.S.2d 769 (3rd Dept. 2003), lv denied 100 N.Y.2d 594, 766 N.Y.S.2d 170 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); People v. Warren, 97 A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dism'd 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives) and People v. Crosby, 180 Misc.2d 43, 688 N.Y.S.2d 398 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant).

It is immaterial that the intent to question originated with school officials if the police subsequently played a role. See United States v. Knoll, 16 F.3d 1313, 1320 (2d Cir. 1994).

In New York City, it can be argued that the Police Department's assumption of responsibility for school security (via "School Safety Agents") must result in full Miranda

protections for students who are interrogated while in custody by security officers who are now employees of the Police Department. See In re R.H., 791 A2d 331 (Pa. 2002) (Pennsylvania Supreme Court plurality holds that juvenile was entitled to receive Miranda warnings where school police officers were employees of school district, but were also judicially appointed and explicitly authorized to exercise same powers as municipal police on school property, and were wearing uniforms and badges during interrogation); Matter of G.S.P., 610 N.W.2d 651 (Minn. Ct. App., 2000) (Miranda warnings required where school liaison police officer interrogated juvenile); People v. Butler, 188 Misc.2d 48, 725 N.Y.S.2d 534 (Sup. Ct., Kings Co., 2001) (School Safety Officer employed by police improperly questioned defendant in absence of Miranda warnings); see also Educ. Law §3214(3)(d)(1) (requires, inter alia, that school officials notify the Family Court presentment agency whenever a student under 16 years of age is found with a firearm); State v. Helewa, 537 A.2d 1328 (N.J. Super. Ct., App. Div., 1988) (given child protection caseworkers' statutory obligation to report abuse and neglect to county prosecutor, un-Mirandized statement to caseworker during custodial interview is not admissible in criminal proceeding).