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

In the Matter of	:	Hon.
	:	Return Date 2/6/01
	:	Docket No.: D
A Person Alleged to be a Juvenile Delinquent,	:	NOTICE OF MOTION FOR ORDER PURSUANT TO FCA 255
Respondent.	:	

PLEASE TAKE NOTICE that upon the annexed affirmation of , ESQ., Attorney for the Respondent, dated the day of , 200 , and upon all papers and proceedings heretofore filed and had herein, a motion will be made to this Court, in Part thereof, the Honorable presiding, at , New York, on the day of , 200 , at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order:

A. Pursuant to Family Court Act Section 255, directing the New York State Office of Children and Family Services to arrange for or provide respondent with the following treatment and/or services:

B. Granting any other relief the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 2214(b) of the New York Civil Practice Law and Rules, answering affidavits, if any, are required to be served upon the undersigned at least two days prior to the return date of this Motion.

Dated: , New York
, 200

Yours, etc.

Monica Drinane, Esq.

THE LEGAL AID SOCIETY
Juvenile Rights Division

New York
, of Counsel
Attorney for Respondent
( )

TO:

, ESQ.
New York State Office of Children and Family Services

, ESQ.
Assistant Corporation Counsel
of the City of New York

, New York

CLERK OF THE FAMILY COURT

, New York

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

In the Matter of	:	Hon.
	:	Return Date
	:	Docket No.: D
A Person Alleged to be a Juvenile Delinquent,	:	AFFIRMATION
Respondent.	:	

, ESQ., an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following, upon information and belief, is true:

1. I am of counsel to MONICA DRINANE, ESQ., attorney of record for the Respondent herein, and as Respondent's Law Guardian I am fully familiar with the facts and circumstances of this case.

2. This affirmation is submitted in support of Respondent's attached Motion for an Order Pursuant to Family Court Act Section 255.

3. This affirmation is made upon personal knowledge and upon information and belief, the sources of which include .

FACTUAL BACKGROUND

4. On , 200 , upon [Respondent's admission or a fact-finding hearing], this Court found that Respondent committed acts that, if committed by an adult, would constitute the crime[s] of [specify crime[s]]. That day, the Court ordered the Department of Probation to prepare an investigation and report for disposition, and, on [specify date], the Court ordered that a mental health study be done by the Family Court Mental Health Service.

5. Respondent received a copy of the Probation I&R on , 2000 , and a copy of the mental health study on , 2002. Those reports recommend that Respondent be placed away from home, and that he is in need of treatment and services.

[outline services and treatment, while quoting from and citing relevant portions of reports]

PURSUANT TO FCA 255, THE COURT SHOULD ORDER OCFS TO ARRANGE FOR OR PROVIDE THE TREATMENT AND SERVICES THAT RESPONDENT NEEDS

6. Respondent, if he is placed by this Court, has a constitutional due process right to receive necessary and appropriate treatment and services in order to prevent serious physical or emotional harm. In *DeShaney v. Winnebago County Department of Social Services*, 489 US 189 (1989), the Supreme Court noted:

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

489 US at 199-200. Needless to say, an adjudicated juvenile delinquent, placed into the custody of the State, has a constitutional right to receive medical care, including mental health treatment, without which he would be at danger of serious physical or emotional harm. In *Matter of Lavette M.*, 35 NY2d 136 (1974), the Court of Appeals stated:

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

omitted]."

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

7. Even if there were no Constitutional right to treatment, applicable Family Court Act provisions both make it clear that this Court must become involved in dispositional planning in juvenile delinquency proceedings, and, when doing so, has broad discretion to issue appropriate orders. Although FCA 353.3 and 353.5, which govern placement, do not expressly authorize the order requested by Respondent, authority does appear in FCA 255, which provides, in pertinent part, as follows:

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

Undoubtedly, this grant of authority includes the power to order OCFS, the agency under whose "care, treatment, supervision or custody" Respondent will be, to render "assistance" and "cooperation" by doing what OCFS is required to do under 18 NYCRR 441.22(a), and what any caretaker would have to do or else face charges of child neglect:[1] that is, ensuring that Respondent

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[1] *See Matter of Krewsean S.*, 273 AD2d 393 (2d Dept. 2000) (mother did not participate in treatment plan for child with attention deficit hyperactivity disorder, respond to repeated phone calls from hospital staff, or attempt to visit child in hospital for three weeks); *Matter of Joyce SS.*, 234 AD2d 797 (3rd Dept. 1996); *Matter of Junaro C.*, l45 AD2d 558 (2d Dept. l988); *Matter of*

receive necessary medical and health services. *See Usen v. Sipprell*, 41 AD2d 251, 259 (4th Dept. 1973) (pursuant to FCA 255, family court "may solicit and order such care, education, and treatment" of PINS respondent "as it may appear can appropriately be afforded" by mental health officials); *Matter of Nicholas M.*, Misc.2d (Fam. Ct., Onondaga Co., 2001) (while finding that lack of special education services outlined in respondent's Individualized Education Program may result in failure to provide him with services he requires, court directs OCFS to have respondent evaluated by qualified personnel with respect to his need for speech language therapist and teacher of the deaf); *Matter of Joseph I.*, N.Y.L.J., 8/21/01, at 22, col. 3 (Fam. Ct., Suffolk Co.) (while denying OCFS' motion for modification of order directing OCFS to place "respondent . . . in an OASAS certified program of substance abuse treatment wherein he shall also be given psychotherapy . . . [and that] OCFS shall provide progress reports to the court every 90 days," court notes that, while it may not designate the particular facility or place where a juvenile will be housed and from selecting the type of program that the juvenile will be enrolled in, the court does have power to order generally that the juvenile receive psychotherapy and substance abuse treatment and counseling in a certified "program"); *Matter of Dennis M.*, 82 Misc2d 802 (Fam. Ct., Bronx Co., 1975) (Commissioner of Mental Hygiene ordered to place neglected child in appropriate treatment facility); *In re Leopoldo Z.*, 78 Misc.2d 866 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to find or create suitable facility for delinquent child who was moderately retarded and had antisocial personality); *In re Graham S.*, 78 Misc.2d 351, 355 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to provide juvenile a "setting and treatment specifically recommended for his condition"). Respondent's interest in obtaining treatment and services cannot "be subordinated to agency claims of insufficient time, staff, or funds . . . ." *Matter of Lofft*, 86 Misc2d 431, 435 (Fam.

Sharnetta N., l20 AD2d 276 (lst Dept. l986)

Ct., Cayuga Co., 1976). *See also Matter of Edward M.*, 76 Misc2d 781, 787 (Fam. Ct., St. Lawrence Co., 1974), *affd,* 45 AD2d 906 (3rd Dept. 1974) (official "may not hide behind a shield of insufficient time, inadequate staff, insufficient funds, or mere rhetoric"); *see also Matter of Lavette M.*, 35 NY2d 136, 143 ("Nor can the failure to provide suitable and adequate treatment be justified by lack of staff or facilities").

8. Moreover, such an order would be consistent with, and is clearly contemplated by, statutory provisions governing disposition. Pursuant to FCA 352.2(2)(b), the court is required to determine, inter alia, as follows:

> ". . . that, where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the child was removed from his or her home prior to the dispositional hearing. Where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the child to safely return home." whether reasonable efforts were made

Moreover, at a permanency/extension of placement hearing conducted pursuant to FCA 355.5, the court must again make reasonable efforts determinations, and must also consider and determine, inter alia, whether and when the respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with a relative, or placed in another permanent living arrangement, and specify "the steps that must be taken by the agency with which the respondent is placed to implement the plan for release or conditional release . . . the adequacy of such plan and any modifications that should be made to such plan." FCA 355.5(7).

9. Thus, it is clear that the family court may not sit idly by and delegate to OCFS the unfettered discretion to make determinations regarding a respondent's treatment needs; indeed, it is

clear that the Legislature contemplates that judges will be active in formulating an then ordering appropriate permanency and treatment/service plans.

WHEREFORE, affirmant respectfully requests that this Court grant the Respondent the relief requested herein and such other relief as this Court deems just and proper.

DATED: New York, New York

, 200

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, ESQ.