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THE  
LEGAL AID  
SOCIETY  
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RIGHTS



June 4, 2021

The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

The Honorable Andrea Stewart-Cousins  
Majority Leader of the Senate  
188 State Street  
Legislative Office Building, Room 907  
Albany, NY 12247

The Honorable Carl E. Heastie  
Speaker of the Assembly  
188 State Street  
Legislative Office Building, Room 932  
Albany, NY 12248

Dear Governor Cuomo, Senate Majority Leader Stewart-Cousins, and Assembly Speaker Heastie:

We are writing to request that you immediately end all suspensions of Articles Three and Ten of the Family Court Act (“FCA”) that were imposed pursuant to Executive Orders issued in response to the pandemic crisis (the "EOs"). In light of recent improvements in public health and reopening of New York City’s family courts, extraordinary suspensions of New York families’ constitutional rights are no longer justified, and we ask that you fully reinstate all legal requirements in the FCA as it relates to these proceedings.

For more than a year, the Executive Orders have been interpreted by the New York City Family Court Administration and many individual Family Court judges as eliminating constitutional and statutory rights of families threatened with separation or juvenile detention in New York State. These orders, in conjunction with Administrative Orders issued by the Chief Administrative Judge, have resulted in great harm to thousands of individuals who have been denied the due process guaranteed by New York law to challenge the separation of families and the detention of children by the government.

Article Ten controls the court process by which the state separates children from their families. This includes FCA sections 1027 and 1028, which require immediate evidentiary hearings to

determine whether family separation is necessary and warranted under the facts of the case. The First Department of the Appellate Division recently emphasized the precept that hearings following the removal of a child from their parent generally “should be measured in hours and days, not weeks and months.”<sup>1</sup> In creating the law that requires these immediate hearings, New York’s legislature recognized the inherent damage caused by family separation and codified the constitutional right to family integrity for parents, caretakers, and children. Throughout the pandemic, New York City Family Courts have interpreted the EOs to suspend the requirement for these immediate hearings, despite their constitutional underpinning.

While courts are regularly issuing orders separating families on the request of the local child welfare agency, the NYC Administration for Children’s Services (ACS), and have been doing so throughout the pandemic, parents and children have not consistently or reliably been afforded timely hearings to contest these family separations. Hundreds of families have experienced this precise injustice, leaving them apart for weeks and even months based on unsubstantiated allegations. In some cases, when a 1027 or 1028 hearing was finally held weeks or months later, it was determined that there was no basis for the initial family separation. Children were thus taken from their parents based on facts that were insufficient from the beginning, and families were denied the ability to challenge the separation. Despite the fact that courts are scheduled to reopen soon and are fully capable of timely holding these constitutionally required hearings, the Family Courts continue to interpret the EOs to relieve them of their obligation to follow the FCA.

The first Executive Order that impacted Article Ten cases was signed on March 20, 2020, more than fourteen months ago. Since that time, there have been multiple extension orders with different language and potentially conflicting requirements, creating a great deal of confusion about the scope and applicability of the suspension to various provisions of the law. While some Family Court judges follow the statutory timelines for the immediate commencement of emergency hearings to determine whether a child should remain separated from their parents, other judges believe that under the EOs they do not have to follow these strict timelines. Even these varying interpretations of the Executive Orders change from month to month, with each new extension order and with changes in the judges’ individual dockets. Thus, in addition to the obvious harm to those families denied timely hearings—and timely reunification—the orders have made it impossible for litigants and attorneys to predict whether or when a particular family separation will receive judicial review.

When families separated by ACS are denied timely judicial review, the damage can be long-lasting.<sup>2</sup> Even a short separation between parent and child can have lifelong effects, and each additional day that they are forced to spend apart creates further injury to both.<sup>3</sup> The impact of family separation has increased exponentially during the months of the pandemic, with in-person

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<sup>1</sup> *In Re F.W.*, 183 A.D.3d 276 (2020)

<sup>2</sup> *See, e.g.*, Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. Pa. J. L. & Soc. Change 207 (2016) available at <https://repository.law.umich.edu/articles/1851/>; Eli Hager, *The Hidden Trauma of “Short Stays” in Foster Care*, The Marshall Project, Feb. 11, 2020, <https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care>.

<sup>3</sup> *Id.*

visits severely limited and even suspended completely in many cases.<sup>4</sup> During the fourteen months since the initial Executive Order, we have seen children isolated in the city’s congregational care “Children’s Center,” unable to visit with their families in person while waiting for judicial review of their separation from their parents—only to win their hearings and be returned home.

The impact of the Executive Orders also extends to youth charged with acts of Juvenile Delinquency in Article Three proceedings. Since the March 20, 2020, EO, there have been multiple extension orders, also creating confusion about the interpretation and applicability of the orders. The Office of Court Administration (OCA) has indicated that the orders suspend the entire Article whether a youth is detained or released for the pendency of the proceedings. This has allowed judges to relax the strict statutory timeframes for youth who are detained.

Our clients in Article Three and Ten proceedings in New York City’s family courts are overwhelmingly low-income families of color and are among those most impacted by the pandemic itself. The Executive Orders have been applied inconsistently among Family Court judges across the city, adding to the confusion and uncertainty during a time of extraordinary personal and collective trauma for these members of already-marginalized communities.

While we do not believe that the Executive Orders ever legally suspended constitutionally mandated statutory timeframes under Article Ten and Article Three, or that there was any need for continued suspension of the timeframes after the early days of the pandemic, it is clear there is no longer any need or basis to suspend these timeframes. Family Court staff, including judges, uniformed court officers, and other staff returned to work at the courthouses on May 24, 2021. Significantly, Supreme Court is now fully open to all types of civil claims, including matters, like contract disputed, that are significantly less constitutionally protected and call for significantly less expediency than the separation of parents and children. This is the time to affirmatively require that courts operate under the full set of laws and protections in place for the families under their jurisdiction—families whose most fundamental rights are at stake: their right to be together and free from unwarranted state intervention in their lives.

The legal scheme for pandemic-related executive orders requires that suspensions of law be imposed only when compliance with a statute will “prevent, hinder or delay action necessary to cope with [a] disaster or . . . to assist or aid in coping with such disaster.” Exec. Law § 29-A. With vaccinations now universally available, the percentage of fully vaccinated adults in New York greater than fifty percent, and the redeployment of all staff to the courthouses, there is no longer any justification to issue Emergency Orders that restrict New York families’ constitutional rights in Family court.

We urge that you take immediate action to fully reinstate all statutory timeframes applicable to litigants in Article Three and Ten proceedings so that families throughout New York, especially the families our offices serve that have been disproportionately impacted by the pandemic, can receive the due process to which they are entitled and that they deserve.

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<sup>4</sup> Eli Hager, *These Parents Had to Bond With Their Babies Over Zoom — or Lose Them Forever*, The Marshall Project, Apr. 14, 2021, <https://www.themarshallproject.org/2021/04/14/these-parents-had-to-bond-with-their-babies-over-zoom-or-lose-them-forever>

If you have questions, please do not hesitate to contact Yung-Mi Lee at Brooklyn Defender Services at [ylee@bds.org](mailto:ylee@bds.org).

Thank you,

Brooklyn Defender Services

Bronx Defenders

Center for Family Representation

New York County Defender Services

Juvenile Rights Practice, The Legal Aid Society

Neighborhood Defender Service of Harlem

Queens Defenders