



# Office of Children and Family Services

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## Administrative Directive

<b>Transmittal:</b>	16-OCFS-ADM-08
<b>To:</b>	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
<b>Issuing Division/Office:</b>	Strategic Planning and Policy Development
<b>Date:</b>	April 28, 2016
<b>Subject:</b>	<b>Permanency Hearing Notification and Participation Requirements</b>
<b>Suggested Distribution:</b>	Directors of Social Services Child Welfare Supervisors Foster Care and Adoption Supervisors Staff Development Coordinators
<b>Contact Person(s):</b>	Any questions concerning this release should be directed to the appropriate regional office, Division of Child Welfare and Community Services: Buffalo Regional Office-Tina Cook (716) 847-3145 <a href="mailto:Tina.Cook@ocfs.ny.gov">Tina.Cook@ocfs.ny.gov</a> Rochester Regional Office-Karen Buck (585) 238-8201 <a href="mailto:Karen.Buck@ocfs.ny.gov">Karen.Buck@ocfs.ny.gov</a> Syracuse Regional Office-Sara Simon (315) 423-1200 <a href="mailto:Sara.Simon@ocfs.ny.gov">Sara.Simon@ocfs.ny.gov</a> Albany Regional Office-Kerri Barber (518) 486-7078 <a href="mailto:Kerri.Barber@ocfs.ny.gov">Kerri.Barber@ocfs.ny.gov</a> Spring Valley Regional Office-Yolanda Désarmé (845) 708-2498 <a href="mailto:Yolanda.Desarme@ocfs.ny.gov">Yolanda.Desarme@ocfs.ny.gov</a> New York City Regional Office-Raymond Toomer (212) 383-1788 <a href="mailto:Raymond.Toomer@ocfs.ny.gov">Raymond.Toomer@ocfs.ny.gov</a> Native American Services-Heather LaForme (716) 847-3123 <a href="mailto:Heather.LaForme@ocfs.ny.gov">Heather.LaForme@ocfs.ny.gov</a>
<b>Attachments:</b>	<a href="#">PH-4: Notice of Permanency Hearing</a>

**Filing References**

<b>Previous ADMs/INFs</b>	<b>Releases Cancelled</b>	<b>NYS Regs.</b>	<b>Soc. Serv. Law &amp; Other Legal Ref.</b>	<b>Manual Ref.</b>	<b>Misc. Ref.</b>
15-OCFS-ADM-22			Chapter 573 of the Laws of 2015  Family Ct. Act §§1089,1090-a  Child and Family Services Improvement Act of 2006 (P.L. 109-288)  Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183)		

**I. Purpose**

The purpose of this Administrative Directive (ADM) is to advise local departments of social services (LDSSs) and voluntary authorized agencies (VAs) regarding the provisions of Chapter 573 of the Laws of 2015 as amended by Chapter 14 of the Laws of 2016. These chapters amend Article 10-A of the Family Court Act (FCA) in relation to the notification and participation of children in foster care 10 years of age or older in their permanency hearings.

**II. Background**

In 2006, Congress recognized the importance of input from children in court proceedings by enacting the Child and Family Services Improvement Act of 2006 (P.L. 109-288). This Act required, among other things, that courts conduct permanency hearings to review the foster care status of a child and to consult with each child in an age-appropriate manner regarding his or her permanency plan. In 2014, the Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183) strengthened this requirement to require the court to ask the child about the permanency outcome designated for him or her.

Recent New York State statutory changes strengthen the right of children in foster care (10 years of age or older) to receive notice of and participate in their permanency hearing. Chapter 573 of the Laws of 2015 amended section 1089 of the FCA to require that notice of their permanency hearing be provided to all children in foster care who are 10 years of age or older, no later than 14 days prior to the date certain of the permanency hearing. Chapter 573 also addressed the right of foster children to be present at their permanency hearing; and to waive their right to appear, if they so choose following consultation with their attorney. The attorney for the child may also apply for an adjournment if necessary in order for the child to meaningfully participate in the

permanency hearing. Chapter 573 was signed into law by Governor Andrew Cuomo on December 22, 2015, and was effective on that date.

However, when Governor Cuomo signed the legislation, he issued an approval memorandum expressing a concern that the legislation mandated that a child be present for the permanency hearing “regardless of the facts and without exception.”<sup>1</sup> Governor Cuomo wrote that he was signing the bill into law on the basis that the New York Assembly and Senate had agreed to pass legislation in the 2016 session to address and correct this concern and to provide that a child can decide whether he or she wants to participate in some or all permanency hearings, and if necessary, by electronic means.

The resulting law, Chapter 14 of the Laws of 2016, was signed into law by Governor Cuomo on March 21, 2016. Section 1 of Chapter 14 removed the provisions of Chapter 573 from section 1089 of the FCA and amended that section in order to clarify that an LDSS must serve a child in foster care, 10 years of age or older with the *Notice of Permanency Hearing* (PH-4) no later than 14 days before the date certain for a permanency hearing.<sup>2</sup> Section 2 established a new section 1090-a of the FCA that outlines the process for children to participate in their permanency hearings, while outlining the specific requirements regarding such participation for the attorney for the child, the court and the LDSS prior to and during a permanency hearing. Children under the age of 10 may choose to participate in their permanency hearings, but may be limited in their participation upon a finding that it is in the child’s best interests to do so. Children ages 10-13 may choose to participate in their permanency hearing and may choose the manner in which he or she will participate, but may be limited in their participation in his or her permanency hearing upon a finding that it is in the child’s best interests to do so. Children ages 14-21 must be permitted to participate in person in all or any portion of their permanency hearing in which the child chooses to participate. The effective date for Section 1 was December 22, 2015. Section 2 will take effect June 18, 2016.

Part M of Chapter 54 of the Laws of 2016, signed into law by Governor Cuomo on April 4, 2016, also includes provisions that impact participation in permanency planning for a child in foster care, 14 years of age or older. Chapter 54 amended sections 355.5, 756-a and 1089 of the FCA to require that the court must determine at the permanency hearing for a child in foster care who is 14 years of age or older and include in its order that the permanency plan developed for the child and any revisions thereto must be developed in consultation with the child and, at the option of the child, up to two individuals selected by the child. The individual(s) selected by the child may not be his or her foster parent, case worker, case planner or case manager. The child may designate one of the individuals as his or her advisor, who may advocate, as necessary, with respect to the application of the reasonable and prudent parent standard. The commissioner of the agency that has legal custody of the child (LDSS or OCFS) may reject an individual(s) chosen by the child, if the commissioner has good cause to believe that the individual(s) would not act in the best interests of the child. It is important to highlight that Part M of Chapter 54 addresses the child’s physical participation at the permanency hearing, while regulatory changes made to 18 NYCRR 428.9(b)(1) as a result of P.L. 113-183 relate to a youth 14 years of age or older and his or her participation in the case consultation held to prepare for a permanency hearing.<sup>3</sup>

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<sup>1</sup> Governor’s Approval Memorandum No. 27 of 2015.

<sup>2</sup> <http://www.nycourts.gov/forms/familycourt/permanencyhearing.shtml>

<sup>3</sup> [15-OCFS-ADM-22, Case Planning For Youth in Foster Care 14 Years of Age or Older](#)

### III. Program Implications

When children enter foster care, they may lose some predictability and control over their day-to-day life. Some decisions are often made without their input. The child welfare agency and sometimes the court decide where the children will live temporarily and permanently, where they will go to school, when they will see their parents, siblings, and extended family, along with many other decisions about their well-being. Including children in their permanency hearings can empower them by allowing them to have a voice in the decisions being made about and for them. Their involvement may provide the court with vital information to help the court understand the children's view about a variety of issues that directly affect their lives. Ultimately, this may help achieve better and timely outcomes for children and families.

In order for their experience to be positive, children need to be adequately prepared for their participation in permanency hearings. They must be provided with information on their rights and responsibilities, and know what to expect during the hearings. It is extremely important that they are debriefed after their hearings by either the attorney for the child and/or their caseworker. The Permanent Judicial Commission on Justice for Children produced a publication, *Tools for Engaging Children in Their Court Proceedings*,<sup>4</sup> that highlights the developmental stages of school-age children (ages 5 to 20 years) and provides a series of age-appropriate questions and tips that are relevant to appearing in court and participating in permanency hearings.

Chapter 14 of the Laws of 2016 outlines specific requirements for LDSSs regarding the notification and participation of a child in foster care in his or her permanency hearings. Chapter 14 also lists specific steps that the attorney for the child and the court must take prior to and during the permanency hearing. It is important that LDSSs and VAs are aware of these steps in order to work in partnership with the attorney for the child and the court in order to prepare a child in foster care for his or her permanency hearing.

The following lists the steps **required of the attorney for the child and the court** by age range of the child.

#### **A. Child in foster care who is younger than 10 years of age:**

- a. A child who is younger than 10 years of age may participate in his or her permanency hearing.
- b. If a child chooses to participate in his or her permanency hearing, the attorney for the child is not required to make a motion to allow such participation.
- c. The court has the discretion to determine the manner and extent to which a particular child may participate in his or her permanency hearing based on his or her best interests.

#### **B. Child in foster care 10-21 years of age:**

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<sup>4</sup> <https://www.nycourts.gov/ip/justiceforchildren/PDF/PJCJC%20Handbook%20-%20Encouraging%20Child%20in%20Court.pdf>

- a. The attorney for the child must consult with the child to determine whether the child would like to assert his or her right to participate in the permanency hearing, and if so, the extent and manner in which the child would like to participate.
- b. The child must not be compelled to participate in his or her permanency hearing if he or she has indicated that he/she does not wish to participate.
- c. If the child decides to participate in his or her permanency hearing, there may be limitations on the participation of the child depending on the child's age and cognitive ability.

**i. A child 10-13 years of age**

1. A child, who has chosen to participate in his or her permanency hearing, may choose the manner in which he or she will participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court.
2. The court may, on its own motion or upon motion of the LDSS, limit the participation of a child 10-13 years of age in his or her permanency hearing upon a finding that doing so would be in the best interests of the child.
  - a. When making this determination, the court must consider the child's assertion of his or her right to participate and may consider factors including, but not limited to:
    - i. The impact that contact with the other persons who may attend the permanency hearing would have on the child;
    - ii. The nature of the content anticipated to be discussed at the permanency hearing;
    - iii. Whether attending the permanency hearing would cause emotional detriment to the child; and
    - iv. The child's age and maturity/developmental level.
3. If the court determines that limiting the child's in-person participation is in his or her best interests, the court must make alternative methods of participation available which may include:
  - a. Splitting the permanency hearing into two parts;

- b. Allowing the child to participate in the permanency hearing by telephone or other available electronic means; or
- c. The issuance of a written statement from the child to the court.

ii. **A child 14 years of age and older**

- 1. The child must be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate.
- d. The attorney for the child must notify the attorneys for all parties and the court at least 10 days in advance of the scheduled permanency hearing whether or not the child is asserting his or her right to participate, and if so, the manner in which the child has chosen to participate. However, the failure of the attorney for the child to notify the court of the request of a foster child 10 years of age or older to participate in his or her permanency hearing shall not be grounds to prevent the child from participating unless the court makes a finding to limit the child's participation based on the grounds noted above for children between the ages of 10 and 13 years.
- e. Permanency hearings must include an age-appropriate consultation with the child
- f. The court must grant an adjournment whenever necessary to protect the right of a child to participate in his or her permanency hearing.
- i. If an adjournment is granted, the court on its own motion, the attorney for the child or any party may move to make a finding that reasonable efforts have been made to effectuate the child's approved permanency plan, and such finding must be made in a written order.
  - ii. The permanency hearing must be completed within 30 days of the scheduled date certain.<sup>5</sup>
- g. The court may proceed to conduct the permanency hearing without the child, upon the consent of the attorney for the child, if the attorney for the child has not conducted a meaningful consultation with the child regarding his or her participation in the permanency hearing upon the court's finding that:
- i. The child lacks mental capacity to consult meaningfully with his or her attorney and understand the nature and consequences of the permanency hearing, as a result of a significant cognitive limitation that is determined by a health or mental health professional or an educational professional as part of a Committee on Special

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<sup>5</sup> FCA §1089(a)(1)(ii)

Education evaluation. This limitation must be documented in the court record or the permanency hearing report;

- ii. The attorney for the child has made diligent and repeated efforts to consult with the child, and the child was either unresponsive, unreachable, or declined to consult with his or her attorney. However, the failure of the agency or foster parent in making the child reachable or available is not grounds to proceed without consulting the child;
- iii. The child was absent without leave from foster care at the time the consultation was attempted; or
- iv. Demonstrative evidence that other good cause exists and cannot be alleviated in a timely manner.

#### IV. Required Action

The following steps are required of the LDSS or VA regarding the notification and participation of children in permanency hearings:

- LDSSs must serve all children in foster care, 10-21 years of age, with a notice of the permanency hearing (PH-4) by regular mail, at least, 14 days before the date certain of the permanency hearing.
- All children in foster care, 14 years of age or older, and at the option of the child, up to two individuals selected by the child, must be consulted in the development of the permanency plan, and any revision or addition to the plan.
  - The individual(s) selected by the child may not be his or her foster parent, case worker, case planner, or case manager.
  - The child may designate one of the individuals as his or her advisor, who may advocate, as necessary, with respect to the application of the reasonable and prudent parent standard.
  - The commissioner of the agency that has legal custody of the child (LDSS or OCFS) may reject an individual(s) chosen by the child, if the commissioner has good cause to believe that the individual(s) would not act in the best interests of the child.
    - In making the determination to reject an individual chosen by the child, the commissioner of the agency that has legal custody of the child (LDSS or OCFS) must look at the relationship the youth has with the individual(s) and any potential safety or other issues adverse to the best interests of the foster child that could arise if the individual(s) participates in the development of the permanency plan, and any revision or addition to the plan. [15-OCFS-ADM-22, Case Planning for Youth in Foster Care 14 Years of Age or Older](#), provides more information on how to determine whether an individual(s) may not act in the best interests of the youth in regards to case planning and would also apply for permanency planning.

**V. Systems Implications**

Caseworkers must document in progress notes when the permanency hearing notification is sent to the child and any conversation held with the child regarding his or her participation in the permanency hearing.

If an individual(s) chosen by the child to consult in the development of the permanency plan is rejected by the commissioner of the agency that has custody of the child, the determination that the individual(s) would not act in the best interests of the child must be documented in the CONNECTIONS progress notes.

**VI. Effective Date**

The provisions in Chapter 573 of the Laws of 2015 relating to notification of children in foster care 10 years or age or older of their permanency hearing became effective December 22, 2015.

Regarding the amendments to Chapter 573 of the Laws of 2015, as enacted by Chapter 14 of the Laws of 2016, the provision regarding notice of permanency hearing took effect December 22, 2015. The provision regarding children's participation in their permanency hearings will be effective June 18, 2016.

Part M of Chapter 54 of the Laws of 2016 regarding consulting a child in foster care, 14 years of age or older, and at the option of the child, up to two individuals selected by the child in the development of the permanency plan, and any revision or addition to the plan became effective April 4, 2016.

*/s/ Thomas R. Brooks*

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**Issued By:**

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