

RULE PROPOSALS

INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Department of Children and Families Hearings Right to Counsel in Child Abuse Registry Cases Proposed New Rules: N.J.A.C. 1:10A-3

Authorized By: Lisa James-Beavers, Acting Director, Office of Administrative Law.

Authority: N.J.S.A. 52:14F-5(e), (f), and (g); and *New Jersey Department of Children and Families, Division of Child Protection and Permanency v. L.O.* 460 N.J.Super 1 (App Div 2019).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2019-156.

Submit comments by January 17, 2020, to:

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The agency proposal follows:

Summary

The Office of Administrative Law (OAL) is proposing new N.J.A.C. 1:10A-3 to implement the New Jersey Appellate Division's (Court's) finding in *New Jersey Department of Children and Families, Division of Child Protection and Permanency v. L.O.* 460 N.J.Super 1 (App Div 2019) (*L.O.*).

When the Department of Children and Families (DCF) investigates allegations of child abuse or neglect, it makes a finding for each allegation as to whether it has been "substantiated," "established," "not established," or "unfounded" (see N.J.A.C. 3A:10-7.3(b)). The determination that an allegation has been "substantiated" or "established" can be made by DCF based on N.J.A.C. 3A:10-7.4 or 7.5, respectively, or can be made by the Superior Court Chancery Division. When there is a finding of "substantiated" or "established," the person who is the subject of the finding has a right to challenge that determination pursuant to N.J.A.C. 3A:5. When the challenge is to a finding by DCF, N.J.A.C. 3A:5-4.3 mandates that DCF transmit the contested case (as determined pursuant to N.J.A.C. 1:1-1.1) to the OAL, specifically paragraph (a)2 states, "a request by a perpetrator of child abuse or neglect to appeal a substantiated

finding of child abuse or neglect, when there are material disputed fact." Following an OAL hearing, an ALJ will render an initial decision either affirming or not affirming the finding of substantiation. The DCF may then adopt in full, reject in full, or modify the ALJ's initial decision in a final decision. If the final decision is substantiation of child abuse or neglect, that conclusion compels the parent or guardian's inclusion in the Child Abuse Registry pursuant to N.J.S.A. 9:6-8.11. As the Court stated in *New Jersey Div. of Youth & Family Services v. N.S.*, 412 N.J.Super. 593, 619-620 (App. Div. 2010), an adverse finding in a matter or case involving child abuse or neglect "could affect parents' 'constitutionally protected right to maintain a relationship with their children' ... [and] in addition to these custodial ramifications, numerous collateral consequences flow from such a finding." Placement on the Child Abuse Registry may be released in certain statutorily enumerated situations. The Court in *L.O.* pointed out that inclusion in the Child Abuse Registry is permanent; there is no expiration date on this "governmentally imposed scarlet letter" and there is no mechanism for a parent or guardian to seek removal from the list or relief from such consequences. *Id.* at 15.

In *L.O.*, the Court was tasked with determining "whether an indigent parent or guardian—substantiated for child abuse or neglect—is entitled to appointment of counsel when exercising the right to an administrative hearing" *Id.* at 1-2. The Court determined that "a parent or guardian has the right to a hearing when the [Division of child Protection and Permanency (Division)] investigation into an abuse or neglect referral has either been 'substantiated' ... or 'established ...' And, while it may not immediately follow that the right to a hearing alone establishes the right to counsel, [the Court is] satisfied the evolution of the latter in matters where the government has taken action that impacts parental rights and family integrity has inexorably led us to this place" *Id.* at 13-14 (internal citations omitted). The Court later found "[t]here is no valid or logical reason for maintaining the distinction between the existence of a right to counsel in a Superior Court child abuse action and the denial of the same right at the administrative level ... All things considered, the substantiation of abuse carries 'consequences of magnitude' that compel [the Court's] determination that indigent litigants at the administrative level are entitled to the inestimable right to counsel." *Id.* at 17-18. The Court found that the right to counsel attached at the administrative level, as well as at the level of the appeal to the Appellate Division.

As OAL hearings do not otherwise involve a right to counsel for indigent parties and, therefore, it does not have existing rules for providing counsel, the proposed new rules lay out the process through which the OAL will comply with the Appellate Division's determination. The proposed new rules set forth the following:

N.J.A.C. 1:10A-3.1 states that a party shall have the right to be represented by counsel in any matter at OAL that has a potential outcome of placement on the Child Abuse Registry.

N.J.A.C. 1:10A-3.2 contains the application and determination process for assignment of court-appointed counsel to indigent parties. The requesting party shall make an application before an Administrative Law Judge at the OAL. A determination of indigency shall be based on the New Jersey Administrative Office of the Courts 2019 Income Eligibility Guidelines for Indigent Defense Services, which is incorporated into the rule by reference, as amended and supplemented. If the applicant's income amount for the applicant's family size is at or below the applicable income amount, a determination of indigency shall be made. If a determination of indigency is made, then the applicant shall be appointed an attorney; however, if an applicant is deemed ineligible, the applicant shall be advised that the matter shall be scheduled for an evidentiary hearing. Finally, consistent with the holding in *L.O.*, representation of the party by the assigned counsel shall continue through the filing of exceptions to the OAL decision and any appeal of the DCF Commissioner's final decision.

As the OAL has provided a 60-day comment period on this notice of proposal, this notice is exempted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules should have a positive social impact as they are creating a process to allow indigent parties in a specific OAL hearing to have counsel appointed, if they qualify.

Economic Impact

The proposed new rules will have no economic impact on applicants for counsel as there is no fee for the application. The only economic impact will be on the State and will be nominal in providing counsel to parties deemed indigent and on the OAL for holding a hearing on the indigency application. The Court in *L.O.* noted that in 2016, 2017, and 2018, there were 63, 62, and 46, contested cases, respectively, where applications for counsel may have been made; however, it is not known in how many of those cases a party had private counsel or would have been deemed ineligible for appointment of a court-appointed attorney.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are promulgated in implementation of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and are not subject to any Federal standards or requirements.

Jobs Impact

The proposed new rules will not generate or cause the loss of any jobs.

Agriculture Industry Impact

The proposed new rules will not impact the agriculture industry.

Regulatory Flexibility Statement

The proposed new rules impose no reporting, recordkeeping, or compliance requirements on small businesses, as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Housing Affordability Impact Analysis

The proposed new rules will have no impact on housing affordability or the average costs associated with housing as they pertain to hearings at the OAL with a potential outcome of placement on the Child Abuse Registry.

Smart Growth Development Impact Analysis

The proposed new rules will have no impact on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan as they pertain to hearings at the OAL with a potential outcome of placement on the Child Abuse Registry.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The OAL has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

SUBCHAPTER 3. RIGHT TO COUNSEL IN CHILD ABUSE REGISTRY CASES

1:10A-3.1 Representation in Child Abuse Registry hearings

A party shall have the right to be represented by counsel in any matter at the Office of Administrative Law that has a potential outcome of placement on the Child Abuse Registry.

1:10A-3.2 Application and determination for assignment of court appointed counsel to indigent parties

(a) Any party who wants to apply for representation by a public defender shall complete an Office of Administrative Law (OAL) Application for Assignment of Counsel, incorporated herein by reference as N.J.A.C. 1:10A-3 Appendix, and shall appear before an OAL Administrative Law Judge (ALJ), who will render an indigency determination.

(b) A determination of indigency under (a) above will be found if the applicant's gross household income is at or below the income amount for the applicant's household size, pursuant to the New Jersey Administrative Office of the Courts 2019 Income Eligibility Guidelines for Indigent Defense Services, which are incorporated herein by reference, as amended and supplemented, and available at <https://www.njcourts.gov/courts/assets/municipal/indigencyguidelines.pdf>.

(c) The ALJ shall advise the applicant of his or her eligibility for a court-appointed attorney at the end of the hearing held pursuant to (a) above.

(d) If an applicant is deemed eligible for a court-appointed attorney, after the hearing held pursuant to (a) above, then the OAL shall notify the Office of the Public Defender for such appointment. The appointed public defender shall file an appearance with the OAL no more than 10 days after being appointed to the case.

(e) If an applicant is deemed ineligible for a court-appointed attorney, then the ALJ shall advise the applicant that his or her matter will be assigned by the OAL to an ALJ for an evidentiary hearing.

(f) Representation of the party by a public defender appointed pursuant to this section shall continue through the filing of exceptions to the OAL decision and any appeal of the Department of Children and Families Commissioner's final decision.

APPENDIX

Approved
 Rejected

Application for Assignment of Counsel

In the matter of _____

Applicant Name		DOB (applicant)		Docket Number	
Home Address - Street			Apt No.	Social Security Number	
City	State	Zip	Home Phone Number		
Applicant's Employer			Supervisor Name		
Street Address			Work Phone Number ext.		
City	State	Zip	Length of Employment		

Dependents currently living in the household (#): _____

Living Arrangement (check one)
 Married Married, Separated Living Together Divorced Other (Specify) _____

Income (monthly)	Total (\$)	Liabilities/Debt (monthly)	Total (\$)
Welfare	\$	Mortgage	\$
Salary	\$	Rent	\$
Cash on hand	\$	Utilities	\$
Unemployment	\$	Insurance	\$
Disability	\$	Medical	\$
Social Security	\$	Loans	\$
Pension	\$	Car	\$
Support/Alimony	\$	Home Equity	\$
Other Income & Source	\$	Credit Card Debt	\$
		Tuition	\$
		Other Loans	\$
Total Income (monthly)	\$ 0.00	Court Obligations	\$
Other Ass'ts	Value	Fines, Fees, Costs	\$
Own Home (check one) <input type="checkbox"/> Yes <input type="checkbox"/> No	\$	Support/Alimony	\$
Real Estate (specify)	\$	Other debt	\$
Other Personal Property (specify)	\$	Total Expenses/Debt	\$ 0.00
		Open Judgments (Amount)	\$
Total Value of Assets	\$ 0.00	Specify	

I certify that the foregoing statements made by me are true. I am aware if any of the foregoing statements made by me are willfully false, I am subject to punishment. (Certification Rule 1:4-4 (b))

Signature of Witness (Court Designee) _____ Date _____

Signature (of person giving information) _____ Date _____

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