



# Office of Children and Family Services

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## Administrative Directive

<b>Transmittal:</b>	21- OCFS-ADM- 26
<b>To:</b>	Commissioners of Social Services
<b>Issuing Division/Office:</b>	Division of Child Welfare and Community Services
<b>Date:</b>	<b>November 4, 2021</b>
<b>Subject:</b>	<b>Change in Standard of Evidence for Child Protective Services Investigations</b>
<b>Suggested Distribution:</b>	Directors of Social Services Child Protective Services Supervisors Child Protective Services Staff Legal Staff
<b>Contact Person(s):</b>	Cassandra Kelleher-Donnaruma, Senior Director, Office of Implementation, Community Affairs and Protective Practices
<b>Attachment:</b>	Attachment A – <i>Case Examples and Discussion of a Fair Preponderance of the Evidence Standard for Child Protective Services Investigation Determinations</i>

### Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law and Other Legal Ref.	Manual Ref.	Misc. Ref.
		18 NYCRR Part 432  18 NYCRR section 434.10	Part R of Chapter 56 of the Laws of 2020  Title 6 of Article 6 of the Social Services Law	<i>Child Protective Services Manual</i>	Veto Message #232 of 2019

### I. Purpose

The purpose of this Administrative Directive (ADM) is to instruct local departments of social services (LDSSs) of changes in legal requirements, policies and procedures relating to child protective services (CPS) practice in conducting investigations of reports of alleged child abuse

or maltreatment accepted by the New York Statewide Central Register of Child Abuse and Maltreatment (SCR). These changes were enacted through Part R of Chapter 56 of the Laws of 2020 (commonly referred to as “SCR reform legislation”). Among other amendments, this new law changes the standard of evidence that CPS must utilize in determining whether to indicate a report of alleged child abuse or maltreatment that is accepted by the SCR on or after January 1, 2022, from “some credible evidence” to “a fair preponderance of the evidence.”

## II. Background

Included in the many provisions of the SCR reform legislation is the change to the standard of evidence that is applied by CPS in determining if an allegation of child abuse or maltreatment must be substantiated. This important and complex issue is the focus of this ADM.

### *Legislative Intent*

A core component of the legislative intent behind the SCR reform legislation was addressing the disproportionality and disparity in race and income for families engaged with CPS. Overrepresentation of low-income individuals and those of color in the child welfare system is well documented. The enacted statutory changes will work to rectify potential employment consequences for allegations of child maltreatment that are not supported by a fair preponderance of the evidence.

An indicated report of child abuse or maltreatment has potential consequences, such as:

- may be disclosed in a database check conducted by the SCR regarding potential or continued employment or licensure for certain jobs working with children or vulnerable persons;
- may be disclosed in future legal action in family court pertaining to child custody and/or visitation;
- must be considered by CPS in a future investigation of alleged child abuse or maltreatment; and
- may be the basis of a filing a petition in family court pursuant to Family Court Act (FCA) Article 10 alleging child abuse or neglect and may be the basis for removal of a child from the home in such a proceeding.

A prior bill to enact similar legislation was vetoed in 2019 (see Veto Message #232 of 2019). The accompanying veto message stated, in pertinent part:

“There are widely acknowledged reforms needed to New York’s operation and administration of the SCR and child protective systems. Therefore, I am directing the Office of Children and Family Services to identify reforms to the SCR and child protective systems that can be implemented within existing resources, without jeopardizing safety.”

The enacted SCR reform legislation imposes a heightened evidentiary standard for CPS investigations for reports of alleged child abuse or maltreatment accepted by the SCR on or after

January 1, 2022, to limit negative consequences to subjects of the report where the allegations are not supported by the higher standard of evidence. The enacted legislation also implements these reforms in a way that is mindful of the safety and well-being of the child(ren) and family.

### III. Program Implications

#### *Changing the Legal Standard of Evidence for CPS to Substantiate an Allegation of Child Abuse or Maltreatment Contained in a Report Accepted by the SCR on or After January 1, 2022*

The enacted SCR reform legislation changes the legal standard of evidence, or “proof,” required for CPS to indicate a report of alleged child abuse or maltreatment accepted by the SCR on or after January 1, 2022.

Specifically, this new law raises the legal standard of proof that is required: from “some credible evidence” to “a fair preponderance of the evidence.”

Existing New York State Office of Children and Family Services (OCFS) regulations at 18 New York Code Rules and Regulations (18 NYCRR) section 434.10 define these terms as follows:

- “Some credible evidence” is evidence that is worthy and capable of being believed.
- “A fair preponderance of the evidence” is evidence that outweighs other evidence that is offered to oppose it.

In other words, under the “some credible evidence” standard, CPS only needs to find that “some” evidence that is “credible” exists to substantiate a specific allegation in a report of alleged child abuse or maltreatment that is under investigation.

In contrast, to establish “a fair preponderance of the evidence,” CPS must weigh the information collected in its totality and determine whether the evidence collected that supports the allegation is stronger than the evidence gathered that does not. In using this standard, CPS should remain mindful that some pieces of evidence are more compelling than others.

In determining whether to indicate a report of alleged child abuse or maltreatment, among other things, CPS must consider whether the evidence supports a determination that a child is either an “abused child” or a “maltreated child” as these terms are defined in law.

Please note that the enacted SCR reform legislation did not change the underlying legal definitions of “abused child,” “maltreated child” or “subject of the report.” The new law also did not change the criteria to be utilized by the SCR in determining whether to register a report of suspected child abuse or maltreatment.

#### *Definition of Terms*

Social Services Law (SSL) section 412, FCA section 1012, and OCFS regulations at 18 NYCRR section 432.1 provide the definitions of the key terms to be used by CPS staff statewide when conducting investigations of alleged child abuse or maltreatment. The definitions of these terms are discussed below. Having functional expertise regarding these terms and concepts is necessary for CPS staff to determine whether to substantiate individual allegations of child abuse or maltreatment.

### “Subject of the Report”

Pursuant to SSL section 412, a subject of the report may be any parent of, guardian of, or other individual, 18 years of age or older, that is a “person legally responsible” (PLR) for the child as defined in FCA section 1012(g), who is allegedly responsible for causing injury, abuse, or maltreatment to the child or allowing abuse or maltreatment to be inflicted upon a child.

Persons that may be a “subject of the report” include individuals who are over the age of 18 and who are:

- the child's parent or guardian;
- a director, operator, employee, or volunteer of a family day care home, a day care center, a group family day care home, or a school-age child care program; or
- a person that meets the definition of PLR under FCA section 1012(g) – this includes the child's custodian, guardian, and any person responsible for the child's care at the relevant time.
  - Note the term “custodian” may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or maltreatment of the child.

### “Abused Child”

“Abused child” means a child less than 18 years of age whose parent or other person legally responsible for their care:

- inflicts or allows to be inflicted upon such child physical injury by other than accidental means, which causes or creates a substantial risk of death or serious or protracted disfigurement, or protracted impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ; or
- creates or allows to be created a substantial risk of physical injury to such child by other than accidental means, which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ; or
- commits, or allows to be committed an offense against such child defined in article 130 of the Penal Law (*sex offenses*); or
- allows, permits, or encourages such child to engage in any act described in sections 230.25, 230.30, 230.32 and 230.34-a of the Penal Law (*promoting prostitution in the third, second, or first degree, or sex trafficking*); or
- commits any of the acts described in sections 255.25, 255.26 and 255.27 of the Penal Law (*incest in the third, second, or first degrees*); or

- allows such child to engage in acts or conduct described in article 263 of the Penal Law (*sexual performance by a child*); or
- permits or encourages such child to engage in any act, or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 as enacted by Public Law 106-386 or any successor federal statute.

“Maltreated Child”

“Maltreated child” means a child less than 18 years of age:

- whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of their parent or other person legally responsible for their care to exercise a minimum degree of care in:
  - supplying the child with adequate food, clothing, shelter, or education in accordance with the provisions of part one of article 65 of the Education Law, or medical, dental, optometrical, or surgical care, though financially able to do so, or offered financial or other reasonable means to do so, or in the case of an alleged failure of the parent or PLR to provide education to the child, notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition; or
  - providing the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that they lose self-control of their actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the parent or PLR is voluntarily and regularly participating in a rehabilitative program, evidence that the parent or PLR has repeatedly misused a drug or drugs or alcoholic beverages to the extent that they lose self-control of their actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired;
- who has been abandoned, by their parents or other person legally responsible for their care; or
- who has had a serious physical injury inflicted upon them by other than accidental means.

*Applying the “Fair Preponderance of Evidence” Standard*

The standard of evidence required for CPS to indicate a report of alleged child abuse or maltreatment that is accepted by the SCR on or after January 1, 2022, will increase from “some credible evidence” to “a fair preponderance of the evidence.”

Please note that because the statutory change regarding the standard of evidence that must be utilized in CPS investigations applies to reports that are accepted by the SCR on or after January 1, 2022, there will be some reports under investigation by CPS on January 1, 2022, that will still

be subject to the “some credible evidence” standard and not “a fair preponderance of the evidence” standard. For example, a report that is registered by the SCR prior to January 1, 2022, is still subject to the “some credible evidence” standard. Accordingly, as the new law takes effect, CPS caseworkers and supervisors are encouraged to double-check the date of the acceptance of the SCR report that is listed when choosing the standard of evidence that they must employ in determining the outcome of the investigation. In CONNECTIONS, the date the report was accepted by the SCR is referred to as the “oral report date” or “ORD.” There will be indicators in CONNECTIONS that will also help to make the standard of evidence that is required to be applied by CPS more readily apparent during the first 90 days following implementation.

Use of “a fair preponderance of the evidence” standard means that CPS must weigh the evidence of abuse or maltreatment in its totality to discern whether more evidence was gathered during the investigation to support the allegations than not. In making this determination, CPS must consider the weight and credibility of the particular evidence that has been obtained from multiple sources.

To indicate a report of alleged child abuse or maltreatment accepted by the SCR on or after January 1, 2022, CPS must determine and appropriately document that “a fair preponderance of the evidence” exists that demonstrates that the child is an abused or maltreated child under the criteria in the definitions discussed above, and that the act of child abuse or maltreatment was committed by the subject of the report.

Importantly, when indicating a case for maltreatment, the case record must demonstrate how the subject of the report’s failure to exercise a minimum degree of care caused impairment or imminent danger of impairment to the child’s physical, mental or emotional condition. Demonstrating that the subject of the report’s failure to exercise a minimum degree of care without showing impairment or imminent danger of impairment to the child’s physical, mental or emotional condition occurred as a result, is not sufficient to indicate a report of maltreatment. Conversely, demonstrating that the child’s physical, mental or emotional condition was impaired or in imminent danger of becoming impaired, without showing how such impairment or imminent danger of impairment was caused by the subject of the report’s failure to exercise a minimum degree of care, is also not sufficient to indicate a report of maltreatment.

For definitions of abuse that reference the Penal Law, the change in the standard of evidence does not mean that there must be enough evidence for a criminal charge to be brought or for a conviction to be made for the listed criminal offense.

“A fair preponderance of the evidence” standard should be familiar to CPS and other LDSS staff as this is the the same legal standard used in child abuse or neglect proceedings brought under FCA Article 10 and for administrative reviews and fair hearings held pursuant to SSL sections 422 and 424-a that challenge a determination by CPS to indicate a report of alleged child abuse or maltreatment. However, this does not mean that the only reports of alleged child abuse or maltreatment where CPS is seeking to commence an FCA Article 10 proceeding should be indicated. It does mean that CPS must be mindful of whether the totality of the evidence documented in the case record demonstrates that abuse or maltreatment occurred in determining whether to substantiate the allegations contained in each report.

CPS must document in the case record all efforts to obtain information as to the nature and effects of the alleged child abuse or maltreatment on the child(ren) named in the report. CPS must be able to describe, and have documented in the case record, how the alleged abuse or maltreatment created impairment or imminent danger of impairment to the child(ren), what interventions are

necessary to protect the child(ren), and what services or supports CPS has arranged for to assist the family in creating and maintaining safety for the child(ren).

CPS caseworkers should strategically employ interpersonal skills with parents, PLRs, child(ren), and collateral sources to obtain as much relevant information as possible when investigating reports of alleged child abuse or maltreatment. CPS caseworkers also should utilize focused questioning and critical thinking skills to ascertain whether the evidence gathered during an investigation is sufficient to make a determination to indicate the report under “a fair preponderance of the evidence” standard.

Please note that OCFS will be revising regulatory language contained in 18 NYCRR Parts 432 and 434 as well as the *Child Protective Services Manual*, consistent with this ADM, to conform with the statutory changes enacted by the SCR reform legislation.

A list of case examples to illustrate the application of a fair preponderance of the evidence standard for child protective services investigation determinations is included herein as Attachment A.

*Consolidation of Subsequent Reports Under Investigation Across Implementation Date Threshold is Not Permitted*

“Subsequent reports” may be registered by the SCR when families have a child abuse or maltreatment report still undergoing an investigation or differential response at the time the SCR accepts an additional report regarding such family. Generally, “subsequent reports” resulting in an investigation may be consolidated into an existing CPS investigation if certain criteria are met, as detailed in the *Child Protective Services Manual*. However, consolidation of reports of alleged child abuse or maltreatment that were accepted by the SCR on or after January 1, 2022, to an on-going CPS investigation for the same family resulting from a report of alleged child abuse or maltreatment that was registered by the SCR before January 1, 2022, is not allowed. In these instances, CPS must make the required determinations attendant to each report separately. If this occurs, the standard of evidence to be utilized by CPS for an investigation of any report registered by the SCR prior to January 1, 2022, is “some credible evidence” and the evidentiary standard that must be used for the investigation of any subsequent report accepted by the SCR on or after January 1, 2022, is “a fair preponderance of the evidence.”

#### **IV. Required Action**

*Utilizing the Correct Standard of Evidence in CPS Investigations*

For all reports of alleged child abuse or maltreatment that are forwarded to CPS for investigation that were accepted by the SCR on or after January 1, 2022, CPS must use “a fair preponderance of the evidence” standard in determining whether to indicate the report.

*Mandated Training*

All LDSS staff that are involved in decisions regarding whether to indicate a report of alleged child abuse or maltreatment are required to take an OCFS-developed online training regarding the change in the evidentiary standard prior to January 1, 2022. This web-based training is approximately 50 minutes in length and is accessible on the Human Services Learning Center (HSLC) platform. The training entitled “Change in the Standard of Evidence for Child Protective

Services Investigation Determinations,” explains the change in the standard of evidence and how it should be applied.

#### *Use of Revised Notification Letters*

As part of implementation of the SCR reform legislation, OCFS has revised several letter communications provided to persons who are “the subject of the report” in a CPS investigation, including, but not limited to, the “notice of existence,” “notice of indication,” and “notice of unfounding” letters, that are generated in CONNECTIONS. These letters have been revised to reflect the changes in the law and so that the information provided to the subject is conveyed in plain language. Translated versions of these updated letters will also be available on the OCFS intranet and/or website. LDSS staff are required to use the revised letters for investigations where the report of alleged child abuse or maltreatment is accepted by the SCR on or after January 1, 2022.

## **V. Systems Implications**

#### *Language in the Investigation Conclusion Narrative Template*

Currently, the investigation conclusion narrative template in CONNECTIONS reads “Using the standard of some credible evidence.” For reports with an intake report January 1, 2022, or later, the template will automatically show “Using the standard of a fair preponderance of the evidence.”

#### *Warning Message for Standard of Evidence to be Used*

Starting on January 1, 2022, when a CPS caseworker clicks on the investigation conclusion link in CONNECTIONS, a pop-up message will appear that will remind them of which standard of evidence to use based on the date the report was accepted by the SCR. This message will also display when a CPS supervisor goes to view their staff’s investigation after it is submitted for approval. Use of this pop-up message will be time limited for the first 90 days following implementation.

#### *Consolidation Across Implementation Date Threshold is Not Permitted*

Currently, CONNECTIONS allows multiple CPS reports to be consolidated into one investigation stage (INV stage), following certain parameters. After January 1, 2022, CONNECTIONS will not allow an investigation with an intake date of January 1, 2022, or later to be consolidated into an existing INV stage with an intake date prior to January 1, 2022. As noted above, in instances where there is an initial report registered by the SCR before January 1, 2022, and forwarded to CPS for investigation, and a subsequent report regarding the same family is accepted by the SCR and forwarded to CPS for investigation on or after such date, the outcome of each report will need to be determined separately, using the appropriate standard of evidence.

#### *Revised Notification Letters*

As noted above, there have been changes to several written communications that CPS is required to provide to persons who are the subject of a report of alleged child abuse or maltreatment that are accessible in CONNECTIONS, such as the “notice of existence,” “notice of indication,” and “notice of unfounding” letters. These letters have been revised to reflect the changes in the law and so that the information provided to the subject of the report is conveyed in plain language.

LDSS staff are required to use the revised letters for investigations where the report of alleged child abuse or maltreatment is accepted by the SCR on or after January 1, 2022. Translated versions of these updated letters will also be available on the OCFS intranet and/or website.

## VI. Contacts

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## VII. Effective Date

This ADM is effective upon release. The change in the standard of evidence is effective for reports of alleged child abuse or maltreatment that are accepted by the SCR on or after January 1, 2022, and that are forwarded to CPS for investigation.

*/s/ Lisa Ghartey Ogundimu*

**Issued by:**

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