

**The Bronx  
Defenders**

**Redefining  
public  
defense.**

## **PROTRACTED 1028 HEARINGS**

**FIVE CASE STUDIES RAISING STATUTORY AND  
CONSTITUTIONAL CONCERNS ABOUT NON-  
EXPEDITED HEARINGS UNDER SECTION 1028 OF  
THE FAMILY COURT ACT**

**IMPACT LITIGATION PRACTICE**

## EXECUTIVE SUMMARY

The New York Family Court Act enumerates procedures in abuse and neglect cases that are intended to safeguard fundamental familial rights. These procedures balance the state's interest in protecting children from harm with the family's interest in unity free from government interference. The Bronx Defenders represents thousands of parents facing abuse and neglect allegations each year. In this report, we shine a light on operational and structural problems within the Bronx Family Court that routinely result in the prolonged and unwarranted separation of families and which cause the kinds of harm that the Family Court Act was designed to prevent.

When the Administration for Children's Services (ACS) temporarily removes children from their parents pending trial in abuse and neglect cases, parents may request the return of their children under Section 1028 of the Family Court Act. Pursuant to this provision, the court must reunite the parent and the subject child unless it finds that doing so would put the child's life or health at "imminent risk." N.Y. Fam. Ct. Act § 1028(a). Once a parent requests a 1028 hearing, "such hearing shall be held within three court days" and may not be adjourned "except upon good cause shown." *Id.* As a result of operational and structural problems in the Bronx Family Court, however, our clients frequently have Section 1028 hearings that last far beyond the proscribed three-day period. The Bronx Defenders' Impact Litigation Practice, in collaboration with the Family Defense Practice, conducted a review of a sampling of 1028 hearings in our clients' cases. We found common problems among the hearings that we reviewed, including, *inter alia*, the following:

- Hearings took between one and six months, with many taking three or more months.
- Hearings took between ten and twenty-four court appearances to conclude.
- Hearing appearances were only rarely scheduled on consecutive days.
- Hearing appearances were often more than a week apart.
- Hearing appearances were usually scheduled in thirty-minute increments.
- It was common for less than half of the allotted time to be used for testimony.
- It was common to spend five or more minutes on scheduling the next appearance.
- Counsel for the parents did not waive time and often objected to delay.

In each of these hearings, the presiding judge found that our client did not present an imminent risk to the child and ordered the reunification of the family. Between the time of removal and the time of reunification, parents and children in these cases suffered the precise harms that expedited proceedings under Section 1028 were designed to avoid, including, by way of example: A six-year-old child placed in stranger foster care who cried often for her mother and who began expressing suicidal thoughts; a parent being separated from her four-month-old baby until that baby was almost eight months old; and a child being beaten by residents in the facility where he had been temporarily placed. The high social cost to these families, their community, and these children compels attention. Even if this were not a moral imperative, it is a legal one. *See Nicholson v. Scoppetta*, 3 N.Y.3d 357, 378 (N.Y. 2004) ("The court *must do more* [in a 1028 hearing] than identify the existence of a risk of serious harm. . . . It must balance that risk against the harm removal might bring." (emphasis in original)).

In this report, we present five case studies that are representative of a much larger body of our cases in which a 1028 hearing lasted far beyond the three-day statutory period. We selected these five cases for inclusion in this report because each exemplifies the problems that prevent 1028 hearings from being truly expedited.<sup>1</sup>

Our review of 1028 hearings reveals that many judges attempt to complete hearings within the statutory timeframe, but their attempts are frustrated by structural problems within the operation of the family court. For instance, court appearances other than trials are ordinarily scheduled in thirty-minute increments. Sometimes judges presiding over 1028 hearings proactively schedule several days of thirty-minute time slots for continued 1028 proceedings over several weeks into the future, expressing a desire to reserve enough time slots to ensure the proceeding – in all – is allotted the court time needed to finish. But each thirty-minute time slot reserved for the hearing inevitably becomes shorter, because the court requires time at each appearance to address other matters that arise, such as visitation and childcare issues. The court therefore sometimes must add additional appearances to those already scheduled, all while accommodating several days each week that attorneys for ACS or the child cannot be available due to intake schedules. The practice of scheduling 1028 hearing appearances for weeks and months into the future, though a laudable attempt to ensure a 1028 hearing can be completed, is a recognition that three days of thirty-minute time slots will not do.

If even diligent attempts to expedite 1028 hearings fail, then there is a problem with the system. These five case studies suggest that regular court operations prevent the Bronx Family Court from meeting statutory and constitutional requirements applicable to 1028 hearings. In sharing these case studies, we aim to show the damage done to families as a result of this systematic failure, to identify the urgent change that is needed, and to ask the court to work with us to ensure that parents receive the process they are due. We believe that the law, the families of the Bronx, and the interests of the family court demand a meaningful and prompt solution.

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<sup>1</sup> This report is not intended to include exhaustive information about either the specific cases discussed or the broader universe of 1028 hearings that The Bronx Defenders handles. The five case studies included herein were compiled based on an initial review of the records on file with The Bronx Defenders in those cases.

## **FIVE CASE STUDIES**

### **Case No. 1: FA**

At about 1pm on March 24, 2016, FA dropped off his 3-year-old child with the child's Mother, pursuant to a planned visitation schedule. FA gave Mother money to buy Child lunch. The exchange was uneventful.

Mother and Child then went to McDonald's along with Mother's boyfriend. Child ate chicken nuggets, French fries and apple juice. Boyfriend and Child then dropped Mother off at work. For the remainder of the afternoon and early evening, Boyfriend was watching Child alone.

In the late afternoon, upon information and belief, Boyfriend called Mother complaining that Child had made a mess of the toys in his bedroom and was not cooperating. Then, on a second call, Boyfriend complained again that Child was not cooperating. On a third call, Boyfriend told Mother that Child had fallen asleep on toy and had a red mark on his face. On yet another call, he complained to Mother that that Child fell on toys on his bottom.

**28 week hearing**

**23 court appearances**

**Finding of no imminent risk**

When Mother came home later that evening, Child was lethargic and would not eat. After she tried to feed him, he began vomiting. Eventually, after Child's symptoms worsened, Mother called 911.

At the hospital, Child was diagnosed with serious injuries to his liver and pancreas. He had bruises on his cheek, thighs, abdomen and back. A petition of abuse and neglect was filed on April 1, 2016 against FA and Mother. When Child was being released from the hospital, ACS asked for Child to be remanded. FA petitioned under Section 1028 for the return of Child that same day. On October 14, 2016, the judge found no imminent risk with respect to FA and ordered the release of Child to FA.

The hearing lasted six months and required twenty-three court appearances. On the fifth court appearance, The Bronx Defenders objected to the amount of time it was taking to conduct the hearing. Yet it took sixteen more appearances and another five months for the hearing to finish. The majority of the court appearances were not scheduled on consecutive days. Court appearances were repeatedly a week or a month apart. Most of the 1028 hearing appearances lasted thirty minutes. At each appearance, a portion of time was spent on updates and administrative matters, such that sometimes only a few minutes were used for hearing testimony. It was frequently difficult to identify adjournment dates for the hearing because of routine scheduling conflicts.<sup>2</sup> FA never waived time or consented to a hearing beyond three days.

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<sup>2</sup> At a minimum, three attorneys' schedules must be accommodated for court appearances on a 1028 hearing: *i.e.*, the lawyers for (1) ACS, (2) the parent, and (3) the child. Some cases involve up to seven or more attorneys, depending on how many people are charged and how many children are named in the petition. In addition, attorneys for ACS and attorneys for the children block out certain days of the week,

## Case No. 2: KDP

On the evening of March 11, 2016, KDP decided to run to a bodega one block from her home in order to get something to eat. She left her older son, fifteen-year-old DY, in charge of her youngest children, 6-year-old R and 3-month-old DJ. When KDP entered the bodega, which had several patrons inside, she was attacked by a former friend (“FF”). A shocking video of this attack shows KDP lying on the ground in fetal position with her arms covering her face as FF repeatedly kicks, punches and stomps KDP’s body and face. A crowd of people in the store can be heard cheering on the beating. The police arrived and arrested KDP; FF was not arrested. When KDP was arrested, KDP’s neighbors arranged immediately for the next-door neighbor – the godmother of KDP’s youngest child and the godmother’s partner – to watch KDP’s children. Those neighbors, who regularly watched the children, retrieved R and DJ from KDP’s apartment. Fifteen-year-old DY stayed in his family’s apartment and agreed to check in with the neighbors in the morning.

11 week hearing

12 court appearances

Finding of no imminent risk

Several weeks later, KDP was running an errand. When she got into the car, FF appeared and began punching KDP through the window. This time, the police arrested FF. KDP thereafter obtained an order of protection against FF, which provided the basis for a safety transfer to another family shelter unit.

Before the first attack in the corner store, an anonymous complaint was lodged against KDP with ACS. Upon information and belief, it was FF who lodged this complaint. Because of those allegations, ACS had been investigating and observing KDP and her family for three months leading up to the attack. During this three-month period, ACS cited no safety concerns and declined to seek court intervention. Upon KDP’s arrest, ACS was quickly notified. They went to KDP’s home to check on the children and found R and DJ with the neighbors.

All three children were placed in non-kinship foster care, despite the neighbors’ attempt to become their kinship foster care providers. As soon as KDP was released from jail, on April 1, 2016, she petitioned under Section 1028 for the return of her children. DY, the 15-year-old, was released to her at the first 1028 appearance. R and DJ, however, remained in non-kinship foster care.

Following the 1028 hearing, the court found no imminent risk and released both R and DJ to KDP. The 1028 hearing lasted almost four months and involved twelve court appearances, and only two of these appearances were on consecutive days. One 1028 appearance lasted an hour. The remaining 1028 appearances were thirty minutes. Most of the court appearances were from

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every week, as intake days. During intake days, these attorneys are unavailable to schedule any appearance, including on 1028 hearings. Together, this means that there are regularly as many as three days a week during which a particular 1028 hearing will not be scheduled, leaving only two days a week as an option for adjournments. Stated differently, it is often the case that only about half of all dates are even available for scheduling a 1028 hearing due to the practice of accommodating attorney intake days.

several days to more than a week apart. At each appearance, a portion of time was spent on updates and administrative matters, such that sometimes only a few minutes were used for hearing testimony, and a significant portion of each thirty-minute time slot was spent on scheduling the next thirty-minute time slot. It was frequently difficult to identify adjournment dates for the hearing because of routine scheduling conflicts among attorneys. KDP never waived time or consented to a hearing beyond three days. Upon information and belief, had the hearing been held uninterrupted, it likely would have taken about four hours to complete.

DJ was four months old when he was separated from his mother, and this lengthy 1028 period meant they were not reunited until he was almost eight months old. While the 1028 was pending, 6-year-old R deteriorated. She cried often for her and mother began expressing suicidal ideation.

### **Case No. 3: BH**

BH suffers from a mental health condition and his son, seven-year-old K, does as well. BH lived with K in a building operated by a nonprofit that provides extensive services to tenants who suffer from mental illness. A building employee allegedly reported to ACS that BH appeared on several days to be under the influence of marijuana. On July 20, 2015, ACS filed a petition of neglect against BH, alleging that BH failed to prove he was receiving necessary treatment for Post-Traumatic Stress Disorder, that K had excessive absences from school, and that K reportedly said BH allowed him to engage in inappropriate sexual activities. BH denies these charges.

ACS did not initially seek to remove K from BH's care, but almost one year later, on June 14, 2016, ACS sought to remand K to foster care. The removal was based on BH's alleged failure to comply with agreed upon mental health treatment for himself and his son, and K's acting out in school. The court ordered the removal of K. BH agreed to engage in a course of treatment and did not immediately seek the return of his son.

**12 week hearing**  
**10 court appearances**  
**Finding of no imminent risk**

K was placed in the New York City Children's Center, which provides behavioral healthcare services to youth suffering from mental disturbances. On or about July 14, 2016, K ran away from the facility and was later found by facility staff in the middle of a street. K was later transferred, over BH's objection, to a residential treatment center outside of New York City. K did very poorly at the facility and said he desperately wanted to go home to his father. At the residential treatment center, K alleged that he was beaten by other kids at night. K reportedly missed his father terribly and expressed fear that his father would forget him in the facility.

On July 20, 2016, BH petitioned under Section 1028 for the return of K. On the first hearing date, the Court asked ACS whether imminent risk of harm existed, suggesting that imminent risk at that point could not be based on the original allegations and that ACS needed a contemporaneous reason to support removal. ACS largely supported its removal based on BH's alleged failures to schedule treatment appointments, despite that he presented evidence that he

had scheduled those appointments. On October 12, 2016, the court found no imminent risk and released K to BH.

The 1028 hearing lasted almost three months and took approximately ten court appearances. Only one of the court appearances was scheduled on consecutive days. The appearances were all several days to more than a week apart. Upon information and belief, each 1028 appearance was scheduled for thirty minutes. At each appearance, a portion of time was spent on updates and administrative matters, such that sometimes only a few minutes were used for hearing testimony. Upon information and belief, during the first appearance, only five minutes was spent on hearing testimony. It was frequently difficult to identify adjournment dates for the hearing because of routine scheduling conflicts. During the pendency of the hearing, K continued to deteriorate.

#### **Case No. 4: BXH**

On June 29, 2016, BXH experienced a miscarriage. The next morning, feeling she could make the trip, she headed to a local meat market for groceries. On the way, while on the phone with her mother, she witnessed a group of teenage girls beating another teenage girl, who appeared to be alone. BXH ended the call with her mother so that she could try to intervene. She ended up being punched and kicked by the girls. BXH's mother was nearby and she came running when BXH ended the call. When BXH's mother arrived on the scene, she threatened to call the police, which caused the group to disperse.

BXH returned to her shelter apartment, with her mother's help. BXH began to feel very tired. In addition to being hurt from the teenagers earlier, she was bleeding from the miscarriage. BXH called her friend to babysit her children – 2-year-old F and 5-month-old C. When Friend confirmed she would help, BXH called 911.

Meanwhile, shelter staff reported anonymously to ACS that it heard fighting in BXH's unit. When ACS arrived, they found BXH being taken into an ambulance. ACS filed a neglect petition against BXH and her partner and removed the children that day.

**15 week hearing**

**16 court appearances**

**Finding of no imminent risk**

On June 30, BXH moved under Section 1028 for the return of her children. F and C were in stranger foster care during pendency of the hearing. On October 17, 2016, the court released F and C to BH, when ACS consented to the release mid-hearing. The court went on to formally find no imminent risk of harm.

The 1028 hearing took over three months and sixteen court appearances to complete. Only two appearances were on consecutive days. Several appearances were more than a week apart. Upon information and belief, each court appearance lasted for only thirty minutes. At each appearance, a portion of time was spent on updates and administrative matters, such that sometimes only a few minutes were used for hearing testimony. At one hearing, only approximately five minutes were spent on testimony. It was frequently difficult to identify



adjournment dates for the hearing because of routine scheduling conflicts. Upon information and belief, the testimony in this hearing should have taken no more than 3 hours to complete if conducted without interruption. BH never waived time and never consented to delaying the hearing. B was separated from her baby from when he was 5-months-old until he was almost 9-months-old.

**Case No. 5: UH**

In April 2017, UH lived with her fourteen-month-old baby, K, and her husband, who is K's father. Also living in their home were UH's adult step-son and his family, including Step-Son's newborn baby, A, and A's mother. On April 24, 2017, A was admitted to the hospital with serious injuries to his head and torso.

On April 26, 2017, based on mandated reports from hospital staff, ACS filed an emergency petition removing A from the home. Because the cause of A's injuries was not immediately known, the petition named four of the adults living in the home as respondents, which included UH. The allegation against UH was based on *res ipsa loquitur*; the sole affirmative allegation against UH is that she bathed A at some point prior to his admission to the hospital and she reported seeing no injuries. There were no specific allegations that she knew of A's injuries or the circumstances surrounding them. Based on the injuries to A, and only the injuries to A, ACS contemporaneously filed a petition removing UH's son, K. There were no allegations that K suffered any injuries or showed any signs of abuse or neglect. By all accounts from ACS caseworkers and others who have observed UH with K, she is a loving, careful, and patient parent and K is a happy and healthy child.

**11 week hearing**  
**14 court appearances**  
**Finding of no imminent risk**

When the petition was filed and K was removed on April 26, UH was assigned counsel and she immediately moved for the return of K under Section 1028. The 1028 took seventy-seven days – or eleven weeks – and fourteen court appearances. UH never waived time. Most hearing appearances were not scheduled on consecutive days, and some appearances were a week or more apart. Testimony was usually only heard for thirty minutes or less. On July 12, 2017, the court found that UH presented no imminent risk to K and ACS consented to release the child to UH's care.

Meanwhile, less than two weeks after the filing of the petition, on or about May 8, 2017, a hospital psychiatrist reported to ACS that Step-Son told the psychiatrist he had caused A's injuries, and that he had squeezed A's head and torso when he was frustrated at A's crying. These statements were shared with UH's counsel on or about May 10. Despite these statements, and despite that there were no allegations that UH knew of A's injuries prior to hospitalization or that she knew of Step-Son's conduct, ACS continued to press forward with its removal of K. The hearing went on for another two months, and it was another two months before K was returned to his mother.



The protracted nature of this 1028 is particularly stark given UH's attempts to expedite the hearing. UH repeatedly objected that the hearing was taking too long. She repeatedly objected to the lengthy adjournments between appearances. Mid-hearing, UH filed a request to conduct the hearing day-to-day until completion, and, though the court granted this request, day-to-day hearings were only scheduled for the next six court dates. Additionally, counsel sought to expand the limited visitation that UH had with her baby, but the application was denied largely because the hearing was still on-going. On May 18, 2017, upon learning that the judge overseeing the case would be out on vacation for two weeks, UH asked for the hearing to continue in the interim before another judge. The court indicated that another judge was available to hear the 1028, but UH would have had to start the entire hearing over again, and she was not guaranteed significant court time.

## **CONCLUSION AND REMEDIES**

Parents “have a constitutionally protected liberty interest in the care, custody and management of their children.” *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999) (collecting cases). *See also Troxel v. Granville*, 530 U.S. 57, 666 (2000) (citing the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). The right to “establish a home and bring up children” is a fundamental privilege “long recognized at common law as essential to the orderly pursuit of happiness” among free people. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). While the “State has a profound interest in the welfare of the child, particularly his or her being sheltered from abuse,” *Tenenbaum*, 193 F.3d at 593-4, this compelling state interest does not “derogate a parent’s constitutional rights completely.” *Wilkinson ex rel Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999). And “the State registers no gain” toward protecting the welfare of the child “when it separates children from the custody of fit parents.” *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

Article 10 of the Family Court Act is expressly intended to safeguard these parental rights. N.Y. Fam. Ct. Act § 1011 (preamble to the act, stating that the law “is designed to provide due process of law for determining when the state, through its family court, may intervene against the wishes of the parent on behalf of a child so that his needs are properly met.”). Section 1028 is an integral component of the provision of due process to parents within this statutory scheme, and under Section 1028 parents have a right to demand a hearing. *See* N.Y. Fam. Ct. Act § 1028 (McKinney), Practice Commentaries (“Section 1028 does not include a prescribed time limit to demand a hearing, and it has long been established that one may be requested up to the time the issue of abuse or neglect has been adjudicated, i.e. until the fact-finding hearing has been completed or until the entry of a finding following an admission.” (citing *In re Toni W.W.*, 52 A.D.2d 108, 383 N.Y.S.2d 98 (3d Dep’t 1976))).

A parent’s right to an expedited hearing under Section 1028 is significant. “The court [has] no discretion to deny the [1028] application without a hearing as long as the conditions established by the plain language of the statute [are] satisfied.” *In re Cory M.*, 307 A.D.2d 1035, 1036, 763 N.Y.S.2d 771 (2d Dep’t 2003); *In re Prince Mc.*, 88 A.D.3d 885, 886, 931 N.Y.S.2d 261 (2d Dep’t 2011) (“A hearing pursuant to Family Court Act § 1028 is intended to give a parent an opportunity for the prompt return of his or her children pending trial, and a Family Court has no discretion to deny a parent’s application pursuant to section 1028 without a hearing

if the statute's conditions are satisfied.”). Court orders that “in effect” deny a 1028 request without a hearing are also impermissible: Once a request is made, the hearing must be held within three days. *See In re Danazah B.D.*, 125 A.D.3d 964, 965, 1 N.Y.S.3d 865 (2d Dep’t 2015) (“the Family Court erred by, in effect, denying the mother's motion for return of the subject child pursuant to Family Court Act § 1028 without a hearing” (citations omitted)). Even when a trial is set to imminently commence, the court must hold a 1028 hearing at the parent’s request and continue the hearing until it is completed. *In re Melissa H.*, 62 A.D.2d 1045, 404 N.Y.S.2d 49 (2d Dep’t 1978) (directing the family court to immediately commence 1028 hearing because, after a several week delay, “the mother should not be compelled to wait any longer for a right granted to her by statute.”). And if the presiding judge is unavailable to hold the 1028 hearing, or her courtroom is unavailable, the court must make arrangements to continue the hearing before a different judge to ensure completion within three days. *Cf. Villanueva v. City of New York*, No. 08 Civ. 8793(LBS), 2010 WL 1654162 at \*8 (S.D.N.Y. Apr. 14, 2010) (weighing fact that judge offered to find another available courtroom in order to complete 1028 hearing within three days in favor of dismissing procedural due process claim).

In each of our five case studies, the court found that the parent presented no imminent risk of harm. Yet in each case, the families were separated for extended periods and suffered serious consequences. While the state has an important interest in hearing evidence to determine whether a child faces harm if placed at home pending trial, the current status quo of non-expedited 1028 hearings in the Bronx Family Court serves no valid interest. Families are entitled to expedited 1028 hearings, and the Bronx Family Court must implement measures to ensure the requirements of state and federal law are met.