

NOTICE OF ADOPTION – effective March 27, 2019

Part 352 of Title 9 NYCRR is amended to read as follows:

Part 352 GRADUATED RESPONSES

(Statutory authority: Executive Law Article 12, specifically Section 243)

352.1 - Definitions.

352.2 – Objective.

352.3 – Applicability.

352.4 - Graduated responses.

352.5 – Procedures for the use of incentives and rewards in criminal and family court cases.

352.6 - Procedures for non-compliant behaviors and probation violations in criminal and family court cases.

352.7- Procedures for new offense violations for criminal supervision cases.

352.8- Issuance and management of probation warrants and notices to appear.

352.9- Supervision during a violation proceeding.

352.10- Notification of court upon probationer’s failure to complete alcohol or substance abuse treatment program.

Section 352.1 Definitions.

- (a) The term “Absconder” means a probationer who has failed to make his/her whereabouts known for a period of 30 calendar days subsequent to his/her last failure to report, or who has left the jurisdiction of the court without permission of the court or probation officer with intent to evade supervision.
- (b) The term “Court Notification Report” means a written communication which is submitted by the Probation Department to notify the proper court(s) of events relating to non-compliance with probation conditions and/or rearrest(s).

- (c) The term “Declaration of Delinquency” means a court-approved tolling of the period of the disposition or sentence of probation when the court has reasonable cause to believe that a probationer has violated a condition or conditions of probation.
- (d) The term “Graduated Responses” means a system of incentives, sanctions, and/or referral to evidence-based services. The use of incentives/rewards should include, but not be limited to encouragement by the probation officer, verbal praise, letter of recognition, easing of restrictions, granting travel requests, and decreased reporting requirements. The use of sanctions should include, but not be limited to the imposition of progressively more severe or restrictive actions for continued non-compliance such as increased interventions and appearance at a departmental administrative hearing or court for judicial admonishment.
- (e) The term “Reasonable cause” refers to the existence of evidence or information, which appears reliable, disclosing facts or circumstances that a person has violated a condition of probation and such evidence or information is substantial enough to convince a person of ordinary intelligence, judgment and experience that it is likely that such condition was violated and that such person violated it.
- (f) The term “Revocation” means rescinding of the disposition or sentence of probation by the court following the finding of a violation at a hearing.
- (g) The term “Violation of probation” means a failure to comply with the terms and conditions of probation supervision imposed by the court (technical violation), or the commission of an offense other than a traffic infraction.
- (h) The term “Violation of Probation Petition and Report” means a written document which is submitted by the Probation Department to notify the court that a probationer has violated one or more conditions of probation and to request immediate response from the court. It shall include a description of the alleged violation or violation(s) of probation, the facts and/or evidence to support the allegation(s) against the probationer, summary of the probationer’s adjustment to probation supervision, and a recommendation

in accordance with law.

- (i) The term “Warrant” means a violation of probation or probation warrant.

#### Section 352.2 Objective.

This rule supports the role of probation in assisting probationers make positive behavioral change through the use of graduated responses, including incentives and sanctions. It incentivizes pro-social behavior and promotes public safety and offender accountability through prompt and decisive action.

#### Section 352.3 Applicability.

This Part is applicable to both family and criminal court cases.

#### Section 352.4 Graduated Responses.

- (a) The local probation director shall establish and disseminate to departmental staff a written policy and procedure with respect to the use of incentives to reinforce pro-social behavior and interventions, services and/or sanctions to address non-compliant behaviors. The policy shall be consistent with public safety and effective supervision strategies for determining the appropriate course of action, and the timeframes within which to take those actions. These policies shall provide for:
  - (1) early notification to the individual, and parent/guardian where appropriate, of the probation department’s application of incentives, interventions and sanctions to encourage pro-social behavior; and
  - (2) consideration as to which incentives and interventions may be suitable and support the probationer’s behavioral change and compliance with conditions; and
  - (3) consideration as to which sanctions such as additional interventions, intensifying the level of supervision, reprimands by department administrative officials, changes in service

providers, and/or greater restrictions on movement can be imposed administratively by the department, while reducing the need for formal court intervention; and

(4) consideration of the probationer's history of non-compliance with the terms and conditions of the current disposition, gravity of the non-compliant behaviors, dangerousness to self and/or others, and other case specific circumstances; and

(5) consideration, if a Violation of Probation Petition and Report is being prepared, as to the feasibility and advisability of:

- (i) continuing the probation sentence or disposition with or without modification;
- (ii) extending the probation term as provided by law;
- (iii) when revocation of the probation sentence is recommended, whether to propose a sentence of imprisonment coupled with probation as authorized by law, where the original sentence of probation contained no condition of imprisonment; or
- (iv) when revocation of the probation sentence or disposition is recommended, whether to propose an alternate dispositional option.

#### Section 352.5 Procedures for the use of incentives and rewards in criminal and family court cases

(a) Procedures for the use of incentives and rewards shall be implemented to support positive behavioral change in the probationer and compliance with conditions of probation. To be most effective, responses to behavior shall be swift, certain, fair, and tailored to the individual:

- (1) Procedures should incentivize pro-social behavior and successful completion of short and long term case plan goals;
- (2) Procedures should encourage referrals to service providers which utilize incentives and rewards in working with probationers;
- (3) Procedures should define incentives and may include, but not be limited to, verbal praise, written

acknowledgement of positive behavior, accomplishment of goals, and improved education or employment performance, or other recognitions valued by the individual or family. Incentives may also include modifications of court-ordered conditions including early discharge with court approval; and

- (4) Procedures should incorporate responsivity principles.

Section 352.6 Procedures for non-compliant behaviors and Probation violations in criminal and family court cases.

- (a) Procedures for responding to non-compliant behaviors, other than absconding or new offenses, to be utilized in the absence of court direction.

- (1) Investigation of alleged non-compliance.

- (i) When a probation officer has reasonable cause to believe that a probationer has not complied with condition(s) of probation, the probation officer shall commence an investigation.

- (ii) Such investigation shall, to the extent necessary, consist of determining the facts and seriousness of the alleged non-compliance.

- (iii) The probation officer shall review incentives and sanctions that have been utilized during the supervision period.

- (2) Consistent with department policy, the probation officer shall consider addressing non-compliant behavior through the use of sanction(s).

- (i) the probation officer shall use the department's graduated response protocol or grid in response to non-compliant behavior.

- (ii) the department's graduated response protocol or grid shall consider the individual's risk of re-offending, the severity (minor, moderate or serious) and frequency of the

non-compliant behavior, the impact to any victim, and seriousness of the underlying offense.

- (3) Supervisor notification and consultation. Where a significant technical violation has occurred, the facts of this investigation shall be presented to the immediate supervisor or other probation official.
- (4) Required actions. With supervisory approval, one of the following actions shall be taken, pursuant to local written probation policy, based upon the nature of the alleged non-compliant behaviors and potential threat of the probationer to the victim(s), community, and/or self, and previous attempts to use graduated responses:
  - (i) Administrative Review. When it is determined that the non-compliance does not require court involvement, the probation officer and supervisor/director shall discuss the non-compliant behavior(s) with the probationer. Where the probationer is under 16 years of age, the parent/guardian shall also be present. When the youth is a 16 or 17-year-old, the Probation Officer should include the parent or other person(s) legally responsible for the youth's care, where feasible. During this meeting, the probationer's progress in achieving the goals of the case plan and adhering to the conditions of probation will be addressed. A summary of the meeting shall be entered into the case record.
  - (ii) Judicial Reprimand and/or Modification of Conditions. As a result of an administrative review, the probation department may request that the court require the probationer to appear for the purpose of modifying the conditions of probation or for judicial reprimand. A Court Notification Report shall be utilized for this purpose.
  - (iii) Violation of Probation. When it is concluded that a violation of probation hearing is appropriate, a Violation of Probation Petition and Report shall be prepared by the probation officer with supervisory approval and forwarded to the court. A request for any

Declaration of Delinquency for criminal cases shall also be forwarded to the court at this time. A request for a Notice to Appear or a warrant for the arrest of the probationer shall accompany such report.

- (b) Procedures for technical violations in cases of absconders.
  - (1) Upon the determination that a probationer has absconded, the probation officer shall file a Violation of Probation Petition and Report together with requests for any Declaration of Delinquency and a warrant for the arrest of the probationer.
  - (2) Probation departments shall make reasonable efforts, consistent with local resources, to work with law enforcement agencies to address probation violations and warrants.
  - (3) The director of probation or designee shall be responsible for maintaining a log of all active absconder cases.
  - (4) The provision of this section shall not relieve, or in any way alter, the responsibility of the Probation Department to comply with the provisions of Section 355.3(d) of Part 355 of this Chapter, governing Probation Officers as Peace Officers.

Section 352.7 Procedures for new offense violations for criminal supervision cases.

- (a) Procedures upon a probationer's arrest for a new offense.
  - (1) Investigating the alleged offense.
    - (i) Upon a probation department's knowledge that a probationer under its supervision has been arrested for a new offense (other than a traffic infraction), the probation officer shall commence an investigation.
    - (ii) Such investigation shall, to the extent necessary, consist of determining the facts and seriousness of the alleged offense.
  - (2) Supervisor notification and consultation. The results of this investigation shall be presented

by the probation officer to the immediate supervisor or other probation official upon conclusion of the investigation.

(3) Required actions. One of the following actions shall be taken with supervisor approval based upon the nature of the alleged offense, and the potential threat of the probationer to the victim(s), the community, and/or self:

(i) Arrest for a violation-level offense. Where any alleged violation-level offense(s) occurred, no action shall be required, unless provided for in local policy, until such time as there is a conviction, in which event, the provisions of subdivision (b) of this section shall apply.

(ii) Arrest for a crime. Where any alleged crime(s) occurred, the probation officer shall notify the proper court(s) and provide a brief description of the alleged crime(s) and the status of the case, no later than seven business days upon learning of and confirming that an arrest has been made. Said information shall be recorded in either a Court Notification Report or a Violation of Probation Petition and Report. Either report may request issuance of a Notice to Appear to secure the probationer's appearance before the court. Where a Violation of Probation Petition and Report is filed, it shall be accompanied by:

(a) a request for any Declaration of Delinquency; and

(b) either a request that the probationer be required to appear before the court (Notice to Appear), or a request for a warrant. The department shall continue to notify the court of relevant changes in the status of the case.

(b) Procedures upon conviction of a new offense.

(1) Investigating the conviction. When a probation department receives notification that a probationer has been convicted of an offense which occurred during the period of probation supervision, the probation officer shall commence an investigation. Such investigation shall



consist of determining all relevant facts concerning the new conviction unless this information has been obtained in a prior investigation.

- (2) Supervisory notification and consultation. The facts of this investigation shall be presented by the probation officer to the immediate supervisor or other probation official upon conclusion of the investigation.
- (3) Court Notification. Upon conclusion of the investigation and supervisory notification and consultation, the probation officer shall file either a Court Notification Report or a Violation of Probation Petition and Report (either of which shall be an update of any prior report) within seven business days of the probation department's knowledge of the conviction. Where the new conviction is for a violation-level offense, a Court Notification Report may be filed. Where a Violation of Probation Petition and Report is filed, it shall satisfy the requirement for court notification and shall be accompanied by:
  - (a) a request for any Declaration of Delinquency, if not already granted; and
  - (b) either a request for a Notice to Appear, or a request for a warrant for the arrest of the probationer if deemed necessary.
- (4) In lieu of a recommendation for formal court action, the probation officer, with supervisory approval, may initiate departmental administrative procedures. If the issues presented by the conviction can be resolved administratively, the court shall be apprised of any action taken by the department, with a recommendation to the court that the Probation Department be allowed to adjust the case administratively.

#### Section 352.8 Issuance and Management of warrants for arrest of probationers and notices to appear.

- (a) The local probation director shall establish written policies and procedures governing:
  - (1) the circumstances to be considered relative to obtaining a notice to appear or warrant;

- (2) the timely preparation and delivery to the appropriate court for consideration of the recommendation and, where necessary, follow-up communication and documentation of the court's response to the request;
- (3) where the probation department is the holder of criminal court warrants for the arrest of probationers,
  - (i) a process that ensures chronological tracking of all warrants from the request for such, through issuance, receipt at the department, entry into the NYS Division of Criminal Justice Services (NYS DCJS) Wanted/Missing Persons file system, intradepartmental chain of responsibility, execution, and, as appropriate, cancellation. Such procedures shall comply with the electronic posting of warrants as required by NYS DCJS and issued by the National Crime Information Center (NCIC);
  - (ii) a process that ensures the timely entry of warrants and removal of warrants from the NYS DCJS Wanted/Missing Persons file system in a manner that complies with the electronic posting of warrants as required by NYS DCJS and NCIC, and the updating of information in the NYS DCJS Integrated Probation Registrant System (IPRS).
- (4) Where other law enforcement agencies enter and hold warrants for the arrest of probationers, the local director shall establish written policies that clearly delineate the department's responsibility as to the issuance, tracking, execution, and cancellation of warrants for the arrest of probationers. This policy shall not inhibit the entering/holding agency's ability to comply with the electronic posting of warrants as required by NYS DCJS and NCIC.

#### Section 352.9 Supervision during a violation proceeding.

The probation department shall continue supervision of the probationer in a manner commensurate with the risk and needs of the probationer and public safety during the pendency of a violation of probation

proceeding.

Section 352.10 Notification of court upon probationer's failure to complete alcohol or substance abuse treatment program.

Where a criminal court probationer ceases to participate in or is unsuccessfully terminated from an alcohol or substance abuse treatment program ordered as a condition of probation, the probation officer shall investigate reason(s) for non-compliance and immediately notify the local probation director or his designee. Each director shall, within ninety (90) business days, report the cessation or termination to the court, unless the probationer has resumed participation in an alcohol or substance abuse program with the approval of the director.