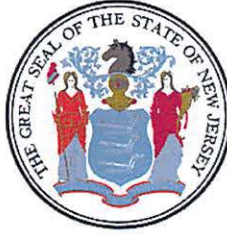


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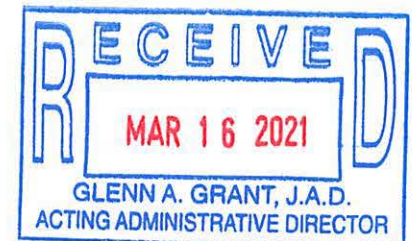
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March 9, 2021

*Via Email to: [Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov)*

The Honorable Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Comments on Assessing the Competency of Child Witness  
Hughes Justice Complex - P.O. Box 037  
Trenton, New Jersey 08625-0037



RE: Comments by the NJOPD Office of Parental Representation  
on Assessing the Competency of Child Witness

Dear Judge Grant:

The New Jersey Office of the Public Defender, Office of Parental Representation is pleased to respond to the Supreme Court's invitation for written comments on the report and recommendations of the Joint Committee on Assessing the Competency of Child Witnesses. As you may be aware, the NJOPD Office of Parental Representation (NJOPD/OPR) provides legal representation to parents or legal guardians in Family Court cases where the New Jersey Division of Child Protection and Permanency (DCPP) files a complaint against him/her alleging neglect or abuse under Title 9 or files a complaint for care and supervision or a complaint for guardianship under Title 30.

The NJOPD/OPR consists of seven (7) regional offices and an appellate section that provide constitutionally mandated legal representation to indigent persons in Children in Court (CIC) matters statewide. The NJOPD/OPR represents approximately ninety-five (95%) of the families engaged in litigation with DCPP. Data indicates that black and brown children overwhelmingly

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ACTING ADMINISTRATIVE DIRECTOR

are disproportionately impacted by the child welfare system in New Jersey. Our office is uniquely suited to provide commentary on the report and recommendations in relation to its impact on the CIC docket and child welfare practice specifically.

The NJOPD/OPR first had opportunity to review and comment on the report and recommendations of the Joint Committee through our NJOPD/OPR designee member of the Supreme Court Family Practice Committee. Notwithstanding the full Family Practice Committee's endorsement and approval of the Joint Committee's report and recommendations, the NJOPD/OPR does not endorse the report and recommendations as proposed.

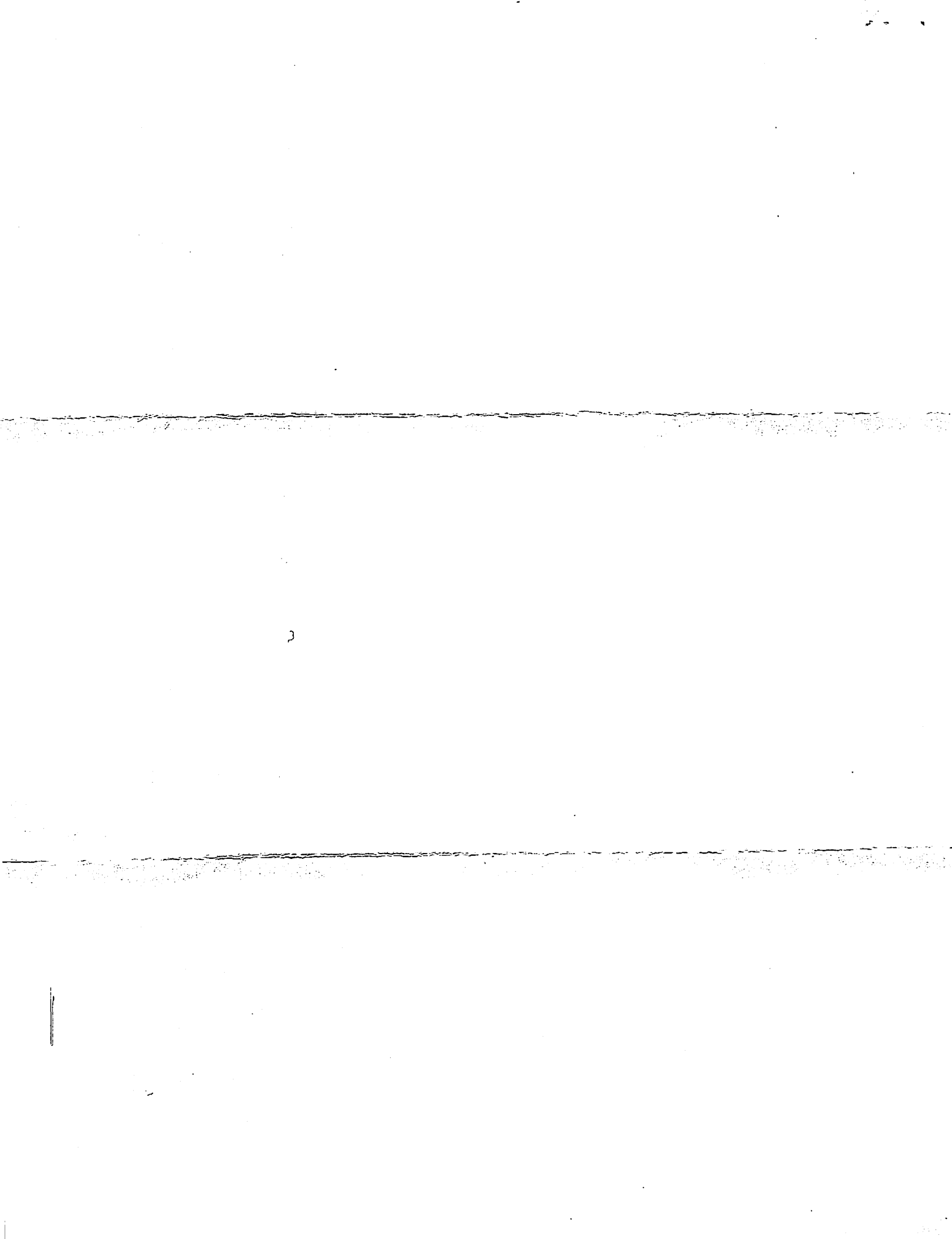
In general, the NJOPD/OPR supports model questions for assessment of truth telling competency and agrees that the proposed two-part age specific protocol of both oral and picture-based models, consistent with New Jersey law, may be an effective method to assist the court in assessing child competency. Components of the methodology proposed by Dr. Lyon to assess child truth telling however, raise significant concerns for the NJOPD/OPR, particularly as it relates to the CIC case practice including the following:

- The protocol as designed has the potential to result in the Court's adoption and utilization of an assessment model that inadvertently conflates issues of competency and accuracy.
- Several assessment questions reflect inherently biased assumptions and are narrowly tailored to exclude consideration of broader cultural narratives for any age group.
- Some assessment questions as framed may be triggering for a child witness, further contributing to the child's trauma, and detrimentally impacting the assessment's accuracy.
- Some assessment questions reflect a lack of impartiality necessary for any model utilized by the courts.

For these reasons, we urge the Supreme Court to consider the weaknesses in assessment pertaining to the CIC practice, as identified by the NJOPD/OPR, and as explained in more detail below.

**THE ASSESSMENT AS DESIGNED HAS THE POTENTIAL TO RESULT IN THE COURT'S ADOPTION AND UTILIZATION OF AN ASSESSMENT MODEL THAT INADVERTENTLY CONFLATES ISSUES OF COMPETENCY AND ACCURACY.** The NJOPD/ OPR is cautioned by and echo the concerns raised by Dr. Jodi Quas, as highlighted below.

More generally, though, it is also important for the Bueso Committee, and the New Jersey Courts, to have some general knowledge about children's eyewitness capabilities, specifically in relation to their ability to answer competency questions regarding their understanding of the difference between the truth and a lie and of the consequences of telling a lie. **In large part, findings suggest that simple assessments of young children's understanding of truths and lies (e.g., What is a lie? Do you know the difference between the truth and a lie?), are unrelated to the accuracy of their memory of prior events (e.g., Goodman, Hirschman, Hepps, & Rudy, 1991; Huffman, Warren, & Larson,1999). Likewise, a moral discussion about truths and lies is also unrelated to older children's**



**disclosures of a minor laboratory transgression (Evans & Lee, 2010). In contrast, when children are explicitly asked to promise to tell the truth, such promises are effective at increasing children's disclosures of such transgressions (e.g., Evans & Lee, 2010; Quas, Stolzenberg, & Lyon), although these findings primarily emerge in school-age as opposed to preschool-age children.**

**In light of these lines of inquiry, I would suggest the Bueso Committee think very critically about whether requiring formal competency assessments for children is necessary to achieve the Court's ultimate goal of pursuing justice. Whether children can or cannot answer competency questions has very little, if any, bearing on their ability to disclose and recount their experiences accurately and completely. It seems to me that the latter is much more important and relevant to a legal case than basic competency capabilities. (Emphasis added. See Report Appendix 2 at p FPC77).**

Per Dr. Lyon, the goal of his report however, was "to identify the most age-appropriate means of assessing children's testimonial competency, and not to suggest changes to New Jersey case or statutory law". Purported not to assess accuracy, and instead only a child's testimonial competency, the model does so by ostensibly requiring fact finders to evaluate the *accuracy* of a child's answers to questions. This has the potential to result in the Court's adoption and utilization of an assessment tool that inadvertently conflates issues of competency and accuracy, leading to determinations on child competency that may be more prejudicial than probative.

**ASSESSMENT QUESTIONS INCLUDE BUILT-IN ASSUMPTIONS THAT ARE INHERENTLY BIASED AND ARE NARROWLY TAILORED TO EXCLUDE CONSIDERATION OF BROADER CULTURAL NARRATIVES FOR ANY AGE GROUP.** Assessing whether the child appreciates distinction between truth and lies. *In one assessment Children 9 and older: are asked, "If someone says something that didn't really happen, is that the truth or a lie?" Then ask the child, "And if someone says something that really did happen, is that the truth or a lie?" If the child answers "lie" and "truth," then the child has demonstrated an understanding of the distinction. If the child doesn't answer the question correctly, administer the "Meaning Task," because the task will provide a more sensitive test of understanding.*

Equating a "lie" with saying "something that didn't really happen" assumes that a child is lying; and here the "lie" presumes a nefarious intent. As designed, the assessment is too absolute. It fails to consider broader cultural narratives that provide a context for a child identifying as truthful, "something that really didn't happen." In many cultures, including American culture, "hyperbole", "exaggeration", "storytelling", "folklore" and "mythology" are an integral and positive component of the culture. Per the model, a child answering "yes" to the inquiry "Do unicorns exist?" would be "lying" because s/he is indicating as true something that did not really happen. The questions give little consideration for the imaginations of children and cultural environment; and force fact finders to draw conclusions that may be inaccurate. The determination of the "correctness" of an answer, suggests that if the child doesn't correctly answer, in the fact-finder's opinion, the answer is "wrong" and additional Meaning Test will be needed. However, from a more culturally competent perspective, the purported incorrect answer, could in fact be true for that child.

**ASSESSMENT QUESTIONS AS FRAMED MAY BE TRIGGERING FOR A CHILD WITNESS, FURTHER CONTRIBUTING TO THE CHILD'S TRAUMA, AND DETRIMENTALLY IMPACTING THE ASSESSMENT'S ACCURACY.** Assessing whether the child anticipates "negative consequences in the event of a lie." *In one assessment, the child can be asked to choose which of two child story characters "is going to get in trouble" a child described as lying or the one telling the truth. The interviewer points to the picture of the judge and says, "Here's a Judge. She wants to know what happened to these children. Well, one of these children is going to get in TROUBLE for what they say, and you will tell me which child is going to get in TROUBLE." Pointing to the child on the left, the interviewer says, "This child tells the TRUTH," and pointing to the child on the right, the interviewer says, "This child tells a LIE." Then The interviewer asks, "Which child is going to get in trouble?" Additional pictures depict a doctor, a social worker (described as someone who visits the children at home), and a counselor (described as someone who talks to the child in an office). "Children 9 and older: Ask the child "What happens to people who tell lies?" If the child describes something negative, then the child has demonstrated an understanding of the negative consequences of lying. If the child doesn't answer the question correctly, administer the "Consequences Task," because the task will provide a more sensitive test of understanding."*

In the above example, "lying" is associated with "getting in trouble". In the CIC practice however, this terminology can be triggering to a child witness. Children as alleged or actual victims of neglect or abuse need not be traumatized by fear of "getting in trouble" by a Judge. Ironically, the question uses a fictional assertion to assess truth. Child-witnesses will not "be in trouble" and are not "punished" in the CIC courts for either lying or telling the truth. This assessment model is factually misleading.

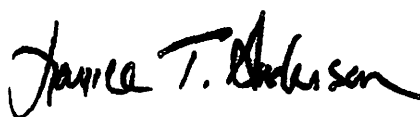
The general assumption that "lying" results in "getting in trouble" is also indicative of the model's bias and lack of cultural competency. The protocol as proposed is narrowly designed to illicit one correct response. When assumptions are suspended and assessment responses are viewed through a more culturally sensitive and unbiased perspective however, a variety of responses will be deemed "accurate". For example, if you are questioning a child witness who has been living in a safe house and told to "lie" about their address for safety reasons, the "lie" does not "get you into trouble", but the truth may. In some instances, the "lie" is a lifesaver.

**SOME ASSESSMENT INQUIRIES REFLECT A LACK OF IMPARTIALITY NECESSARY FOR ANY MODEL UTILIZED BY THE COURTS.** This model utilizes pictures of authority figures that include a "judge", "doctor", "social worker" or "counselor", all of whom are illustrated as White. The assessment does not include a picture of a "parent of guardian" as an authority figure to whom the child should tell the truth. The glaring exclusion of parents or guardians as authority figures is indicative of bias and creates an appearance of impartiality. In the CIC context, individuals in their capacity as "doctors, social workers, counselors and/or someone who visits the child at home" are generally called as witnesses for the State in the DCPD cases. Showing a child these images to the exclusion of parents as authorities, inures to the benefit of the State. If the goal of the protocol is simply to determine child competency, models that favor one party over another do not advance this goal, but instead raise questions of impartiality and fundamental unfairness. Use of this model as designed would be prejudicial to the defense in Title 9 and Title 30 actions. The court should be cautioned against adopting an assessment that could raise questions regarding the court's neutrality.

There is much to be considered regarding utilization of this model in the CIC context. Without careful examination of the assessment and protocols, implementation of same by our courts could prove counter-productive and ultimately lead to inaccurate determinations regarding child competency. Given the NJOPD/OPR's continued participation as members of the AOC's CIC Race Equity Leadership Team and its significant engagement in CIC Race Equity Leadership training (including *Racial Equity Learning Exchange Sessions (RELE)*, a project funded by the federal Court Improvement Program (CIP) training grant as part of the CICIC's statewide strategic plan to address systemic racism and achieve race equity in our child welfare system); it is critically important to the NJOPD/OPR that the model adopted by our courts to assess child witness competency be fair, free from bias and reflect cultural sensitivity. Because we believe the recommended protocols fall short in this regard, the NJOPD/OPR does not support the report and recommendations as proposed. The NJOPD/OPR urges the Supreme Court, consistent with the goal of its July 16, 2020 *Action Plan for Ensuring Equal Justice* to remove barriers to justice and eliminate the vestiges of institutional bias, to ensure that the protocol described by Dr. Lyon is free from implicit bias and cultural insensitivity before the same is adopted for use in our courts statewide.

In sum, the NJOPD/OPR finds that Dr. Lyon's report raises several concerns such that we do not support the protocol as proposed for utilization in the Court, and in CIC Court in particular. As indicated above we believe that a model protocol would be of value and therefore propose that before adoption the Supreme Court submit the report and recommendations to the AOC's CICAC Race Equity Leadership Committee and the Supreme Court Committee on Diversity, Inclusion and Community Engagement, given its expertise, for additional input and perhaps alteration to ensure that the protocol described by Dr. Lyon is fair, impartial, free from implicit bias and cultural insensitivity before the same is adopted for use in our CIC courts.

Respectfully submitted,



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Assistant Public Defender

Cc: Joseph E. Krakora, Public Defender  
Valerie Jackson, Deputy Public Defender  
Robyn Veasey, Deputy Public Defender