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Assembly Task Force on Women's Issues
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Hearing on Family Involvement in the Child Welfare and Family Court Systems

Written Testimony of The Bronx Defenders By

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Thank you for convening this hearing on family separation by the child welfare system, one of the most important and pressing issues in New York State. Similar to over policing and mass incarceration, New York's child welfare system is unequally applied, largely targeting poor families, the majority of which are Black and Latinx.¹ Every year in New York State, approximately 8,760 children are separated from their families and placed in foster care.² Many more families are placed under court-ordered supervision. Contrary to popular narratives, the vast majority of the parents of children in the system have not hurt, abandoned, or abused their children.³ Rather, they face the loss of their children for reasons of poverty or because they are experiencing a condition created and/or exacerbated by multigenerational poverty and structural inequality, such as a lack of stable and adequate housing or income, lack of access to medical or child care, a substance use disorder, or a mental health condition. Rather than addressing the social deficits, economic inequality, and structural racism that plagues families in the child welfare system, the system responds with child removal, family separation and therapeutic services. The harm of family separation cannot be underestimated; the trauma produced by family separation is long lasting and reverberates across generations and communities. The child welfare system, the harms it imposes, and its inadequacy at addressing the issues experienced by

¹ Forty-four percent of the children in foster care in New York are Black and 26% of the children in foster care in New York are Latinx. *See* Child Trends, State-level data for understanding child welfare in the United States, Foster Care: Federal Fiscal Year 2017 (Feb. 26, 2019).

² Child Trends, State-level data for understanding child welfare in the United States, Foster Care: Federal Fiscal Year 2017 (Feb. 26, 2019) (children removed from their parents in NY State remain in foster care for an average of 29.5 months).

³ In New York City, for Fiscal Year 2018, there were nearly 17,000 indicated reports for neglect only. By contrast, there were just under 500 indicated reports where the sole allegation was abuse. Available at <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2019/Jun16/annualReport.pdf>

families that are struggling should not be ignored any longer. We encourage New York State in taking the lead to change how families are supported by the state and appreciate the opportunity to testify today.

The Bronx Defenders is a public defender non-profit that is transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

Our Family Defense Practice was created in 2005 and represents parents in child protection and all of the related family court proceedings that arise out of an abuse or neglect case, including custody, visitation, family offenses, and termination of parental rights. Since New York City first funded institutional parent representation in 2007, we have represented more than 13,000 parents in the Bronx and helped thousands of children either safely remain at home or safely reunite with their families. Our multidisciplinary staff of more than 75 attorneys, social workers, and parent advocates represents 1,500 new parents each year through assignment by the Family Court and over 300 additional parents during child welfare investigations. Our experience makes clear how critical it is for parents to be made aware of their rights, have access to counsel at every step of the proceeding, and for us to ensure that all parents, no matter their race or income, are treated fairly by a system that is intended to serve, not harm, vulnerable families.

I. Family Separation Caused by the Child Welfare System Causes Irreparable Harm to Children, Parents, and Entire Communities.

Since the Spring of 2018, our nation has witnessed the forced separations of thousands of children from their parents at the US-Mexico border. In addition to seeing and hearing the

brutality, we also heard from experts who explained the traumatic life-long impact on children and parents who are separated. The harm was described as irreparable, causing children toxic stress, permanent emotional damage and long-lasting difficulty with learning, mood regulation, and the ability to make emotional and relational attachments. Dr. Charles Nelson, professor of pediatrics at Harvard Medical School warned that when children are forcibly separated from their parents,

Their heart rate goes up. Their body releases a flood of stress hormones such as cortisol and adrenaline. Those stress hormones can start killing of dendrites—the little branches in brain cells that transmit messages. In time, the stress can start killing of neurons and -- especially in young children—wreaking dramatic and long-term damage, both psychologically and to the physical structure of the brain. “The effect is catastrophic . . . There’s so much research on this that if people paid attention at all to the science, they would never do this.”⁴

The American Pediatric Association issued a formal statement opposing family separation on the border announcing:

Separating children from their parents contradicts everything we stand for as pediatricians—protecting and promoting children’s health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short—and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.⁵

Because of the trauma and harm inflicted on families by this practice, a District Court in California ordered the Government to provide mental health screenings and treatment to these families. In the words of Professor Erwin Chemerensky, “The court is recognizing that when a government creates a danger that inflicts trauma, the government is responsible for providing a solution.” The same responsibility applies to the government of the State of New York in ensuring that children are not unnecessarily traumatically separated by its child welfare system.

As family court practitioners in New York City who represent parents in child abuse and neglect proceedings, we witness the same traumatic harm inflicted on families when they are

⁴ Wan, W. (2018, June 18). What Separation from Parents Does to Children: The Effect is Catastrophic.

⁵ American Academy of Pediatrics. (2018). AAP Statement Opposing Separation of Children and Parents at the Border, *available at*

<https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx>

separated through the child welfare system. Many of these removals occur unnecessarily. Indeed, the Commissioner of the Administration for Children's Services in New York City has acknowledged that approximately 20-25% of emergency removals are reversed by the court when ACS files the case and the separation is reviewed. Although New York government officials do not deliberately inflict harm on children and their families for political gain, the devastating consequences of family separation on a child and their parents are the same, no matter the reason. Moreover, in our experience, separations by New York's child welfare system often occur hastily and unnecessarily for reasons of poverty that the system is ultimately ill-equipped to address.

While many assume that children in foster care do better than they would living with their own families, the vast amount of research undermines this assumption. Studies show that even for children on the margin of foster care placement who live in homes with identifiable risks, those children who remain home with their families, with supports in place, are more likely to have positive life outcomes than if they were removed.⁶ Placement in foster care and subsequent placement changes affect children's ability to build healthy attachments and has negative effects on their quality of life long term.⁷ Research shows that many children exit foster care facing a host of negative life circumstances and outcomes.⁸ Indeed, one recent study found that by age twenty-four, 16% of young men who had aged out of care were incarcerated and nearly three-fifths had been convicted of a crime since age 18.⁹ Surveys have found that nearly one third of homeless youth and well over half of victims of child trafficking also had experience in foster care.¹⁰

⁶ Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *Am. Econ. Rev.* 1583, 1584 (2007) (comparing young adults who had been in foster care to a group of adults who had been similarly neglected but remained with their families and finding that, compared to the group who stayed with their birth families, those placed in foster care were more likely to be arrested).

⁷ For a summary of this research see Sankaran, Vivek and Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, Penn Law, 2017.

⁸ See generally Catherine R. Lawrence *et al.*, *The Impact of Foster Care on Development*, 18 *Dev. & Psychopathology* 57 (2006); K. Chase Tovall & Mary Dozier, *Infants in Foster Care: An Attachment Theory Perspective* 2 *Adoption Q.* 55 (1998); U.S. Gov't Accountability Office, *GAI-12-270T, Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions* 7 (2011); Patrick J. Fowler *et al.*, *Pathways to and From Homelessness and Associated Psychosocial Outcomes Among Adolescents Leave the Foster Care System*, 99 *Am. J. Pub. Health* 1453 (2009).

⁹ Jennifer L. Hook & Mark E. Courtney, *Employment of Former Foster Youth as Young Adults: Evidence from the Midwest Study* 9 (Chapin Hall at the University of Chicago, 2010), available at www.chapinhall.org/sites/default/files/publications/Midwest_IB3_Employment.pdf.

¹⁰ See "Missed Opportunities: Youth Homelessness in America," Chapin Hall and Voices of Youth Count, November 2017; Debra S. Wolfe *et al.*, *Human Trafficking Prevalence and Child Welfare Risk Factors Among Homeless Youth* (January 2018), available at <https://fieldcenteratpenn.org/wp-content/uploads/2013/05/6230-R10-Field-Center-Full-Report-Web.pdf>

Family separations that occur in the child welfare system are conducted in a manner that fails to reduce the known trauma of separation. Often, children are removed by caseworkers exercising their emergency removal powers unnecessarily and before a court has considered whether the children are at imminent risk of harm in their home.¹¹ During an investigation, parents are not informed of their rights, including the right to consult with an attorney or to refuse a caseworker entry into their home without a court order. Removals are often done with haste and require a caseworker or police officer to physically separate a child from their parents. Parents are rarely given the opportunity to prepare and reassure their children, organize and pack their belongings, or even say goodbye. Instead, they describe the look of terror on their children's faces as they are taken out of their beds by a stranger. Abrupt separation of children from their parents without explanation is inherently traumatic, and unthinkable to families who are not subjected to child welfare surveillance. In light of the well documented harm that family separation causes children, it is New York State's legal and moral imperative to ensure that proper safeguards are in place so that children are not separated from their families unnecessarily, and that families are supported so that they can stay together.

II. The Child Welfare System Disproportionately Criminalizes Poverty and Targets Black and Latinx Families.

It is a widespread misconception that children are separated from their families in the child welfare system because their parents have abused or abandoned them. Poverty, and the conditions, stresses, and diseases associated with multigenerational poverty and a history of structural racism are the leading predictors of child welfare involvement. Studies show that families who are “below the poverty line are twenty-two times more likely to be involved in the

¹¹ Part 2 of article 10 of the Family Court Act sets forth three ways in which a child may be separated from their family in response to an allegation of child maltreatment and pending the outcome of a child protection case: (1) a preliminary order of the court after a petition for neglect or abuse is filed under FCA 1027; (2) a preliminary order of the court before a petition is filed; and (3) emergency removal of a child from their parent without a court order and before a petition for neglect or abuse is filed in family court. The statute creates a continuum of consent and urgency and mandates a hierarchy of required review before a child is separated from his or her family. Regardless of the mechanism of removal, New York law makes clear that family separation should occur only when remaining in a parent's home presents an imminent danger to the child's life or health and would be contrary to the child's best interest. “A court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.” See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004). Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means such as court orders or services.

child welfare system than families with incomes slightly above it.”¹² Allegations of neglect which include a parent’s failure to provide adequate food, shelter or medical care compose the majority of child welfare cases in New York City despite misleading media stories that single out isolated incidences of child abuse. High poverty rates mean these families are less likely to have access to necessary resources such as stable housing, counseling, and childcare services without which they may be determined neglectful by the child welfare system.¹³ Research shows that housing instability is one of the largest drivers into the child welfare system. One study found that 30% of America’s foster children could be safely in their own homes if their parents had safe, affordable housing.¹⁴ Yet another study underscoring the impact of housing instability, found housing to be more important than substance abuse in determining whether children remain with their families.¹⁵ Nearly half of families (47%) whose children are removed from their homes have trouble paying for basic necessities.¹⁶ Although the vast majority of poor families never come to the attention of child protection authorities, poverty is still the best predictor of family separation by the child welfare system.¹⁷

The correlation of poverty and child welfare involvement plays out in the Bronx with devastating consequences for the borough’s children. The Bronx has the highest rates of eviction, unemployment, and public benefits enrollment in New York City. According to the 2014 American Community Survey, 43.3 percent of children under 18 live below the poverty line.

¹² Martin Guggenheim, General Overview of Child Protection Laws in the United States, in *Representing Parents In Child Welfare Cases: Advice and Guidance for Family Defenders* 1, 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015)

¹³ Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy (2018); Fluke, et al. *A Research Synthesis on Child Welfare Disproportionality* (Jan. 2011).

¹⁴ Deborah S. Harburger & Ruth Anne White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanency Supportive Housing*, 83 *Child Welfare* 493 (2004).

¹⁵ Deborah S. Harburger & Ruth Anne White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanent Supportive Housing*, 83 *Child Welfare* 493 (2004).

¹⁶ National Survey of Child and Adolescent Well-being (2005, April). CPS Sample Component Wave 1 Data Analysis Report

http://www.acf.hhs.gov/programs/opre/abuse_neglect/sscaw/reports/cps_sample_report_revised_090105.pdf.

¹⁷ Studies have shown that families earning incomes below the poverty line are 22 times more likely to be involved in the child welfare system than those with incomes slightly above it. Experts estimate that 40 to 70 percent of children currently in foster care have not been abused and need not be separated from their families if society sufficiently assisted poor families in raising their children at home. Study of “Lack of supervision” cases-in 52% of the cases studied the service most needed was childcare but the service most offered was foster care. *See* Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8, *The Future of Children* 88, 95 (1998)Duncan Lindsey, *The Welfare of Children* 141, 155 (1994); *see also*, Martin Guggenheim, *Representing Parents in Child Welfare Cases* (2015)Mary Ann Jones, *Parental Lack of Supervision: Nature and Consequences of a Major Child Neglect Problem* (1987)

Community District 1, encompassing much of the South Bronx where our office is located, has a median income of just \$16,800 per year, with 60 percent of residents receiving some kind of public assistance. According to data provided by the Office of Court Administration, in 2017 1,191 Bronx children were separated from their families; Bronx children represent over 30% of the children separated from their families in New York City.¹⁸ Because of their relative poverty, Bronx children are particularly vulnerable to family separation, its short term distress, and long lasting negative consequences.

Black children are particularly more vulnerable to the traumatic life altering consequences of family separation. The disproportionate impact is profound. In New York State, Black children make up 15% of the general population,¹⁹ but 44% of the foster care population, where as white children make up 48% of the general population, but 23% of the foster care population.²⁰ In New York City, Black children account for 22.7% of children under the age of eighteen, but a staggering 52.8% of children separated from their families in foster care. In contrast, 25.5% of the children in New York City are white, but white children comprise only 5.5% of the foster care population.²¹ Not only are Black children more likely to be removed from their families and placed in foster care, but the harm of separation is more likely to be exacerbated for Black children. Black children spend longer time separated from their families, change placement more frequently, are less likely to receive necessary services, less likely to ever reunify with their families, and they are more likely to age out of foster care without being adopted.²²

¹⁸ Data provided by the Office of Court Administration. (2017) Table 10: Family Court Disposition of Original Abuse (NA) & Neglect (NN) Petitions: Temporary Removal of Children From Home 2017. Retrieved from:

<http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/Family-Court-statistics2017.pdf>

¹⁹ Kids Count Data Center, Child Population by Race in New York, *available at* <https://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=34&loct=2#detailed/2/34/false/37,871,870,573,869,36,868,867,133,38/68,69,67,12,70,66,71,72/423,424> (2018).

²⁰ Child Trends, State-Level Data for Understanding Child Welfare in the United States, Foster Care New York, *available at* <https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states> (2017).

²¹ New York State Office of Children and Family Services, 2018 Monitoring and Analysis Profiles With Selected Trend Data: 2014-2018, at 7 (2018); Citizens' Committee for Children, Keeping Track Online, The Status of New York City Children, Child Population Race/Ethnicity, 2017, <https://data.cccnewyork.org/data/map/98/child-population#11/12/1/18/25/a>.

²² See Elisa Minoff, Entangled Roots: The Role of Race in Policies that Separate Families, Center for the Study of Social Policy (2018); Fluke, et al. A Research Synthesis on Child Welfare Disproportionality (Jan. 2011).

To end family separation and the short and long term trauma to children and their families, we must address the structural barriers to family well-being like racism, poverty, segregation, and lack of access to education and other opportunities. An extensive body of research shows that family separation can be avoided or shortened if parents have access to suitable housing, food, income, childcare, healthcare, and other public benefits. As discussed above, housing and income instability and their related stress on a family are often the root cause of child welfare involvement and traumatic family separation. While families of privilege can rely, and often do, on private resources to assist with mental health issues or substance use disorders, low income families are often reported to the system by social workers or social service providers and therefore subjected to family separation. The child welfare system is not designed or equipped to address the roots of the problems of these families. The services and supports that it offers seek to address individual failings through therapeutic interventions, rather than the concrete needs like housing, food, and income that all families need to be healthy and thrive. While preventive therapeutic services have increased in areas like New York City, the housing subsidy available to child welfare involved families remains a mere \$300 dollars a month which hardly makes a dent in family rent in New York City. The prioritization of therapeutic intervention over concrete assistance undermines the families' ability to meet the demands of the child protection system, let alone thrive. It further fails to address the problem that family separation often leaves families worse off than they were before because loss of custody can result in loss of housing and public benefits and participating in mandatory services and attending court dates often means the loss of employment.

A. Hospitals' "Test and Report" Practice Targets Low-Income Black and Latinx New Mothers and Their Newborns and is an Extension of the Child Welfare System's Criminalization of Poverty.

Particular attention is worth paying to one of the significant ways new mothers enter the child welfare system. The child welfare system's criminalization of poverty and targeting of Black and Latinx families is intimately linked to the very social service systems that are tasked with helping them. As Harvard researcher Kelley Fong explains, "Child welfare surveillance of families encompasses not only surveillance *by* child welfare authorities but[,] also a more extensive monitoring by other entities *for* child welfare authorities."²³ A major way that new mothers come to the attention of the child welfare authorities is through hospitals and medical providers when women, particularly Black and Latinx women, give birth and are drug tested without notice or their consent. There is often no medical explanation or reason given or

²³ Kelley Fong, Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement, 97(4) *Social Forces* 1785, 1786 (2019).

recorded in the medical record for why the test is necessary and often no medical treatment is offered to or performed on the woman or newborn if the test is positive.

Although there exists no mandate in New York that hospitals drug test pregnant women and/or their newborns, nor does there exist a mandate hospitals must per se report a positive drug test, the practice persists, and disproportionately targets low-income pregnant Black and Latinx women and their newborns.²⁴ Similar to stop and frisk practices, the “test and report” practice of hospitals and child welfare authorities reveals extreme racial disparities. Despite similar or greater rates of drug use among white women, Black women are ten times more likely to be reported to child welfare for a positive drug test.²⁵ The New York Daily News conducted a survey and found that “[p]rivate hospitals in rich neighborhoods rarely test new mothers for drugs, whereas hospitals serving primarily low-income moms make those tests routine and sometimes mandatory.”²⁶ A 2010 study of a hospital in Rochester demonstrated that despite race-blind testing guidelines, the hospital tested and reported greater numbers of women of color regardless of whether they met guidelines.²⁷ Other hospitals had similar results.²⁸ This evidence

²⁴ There is no law in New York that requires a hospital to drug test a pregnant woman or their newborn. Indeed, a bill providing for the toxicology testing of newborns and the reporting of positive tests was proposed in the State Assembly in each of the past two legislative sessions, and did not make it out of committee. Moreover, New York law does not require hospitals to report to the SCR a positive drug test of a pregnant woman or a newborn. Rather, New York Social Services Law provides that mandated reporters must make a report “when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child.” SSL § 413(1)(a). The law has been clear for more than two decades that without more, neither a positive toxicology for an illegal drug, nor a parent’s admission of past drug use, is sufficient, in and of itself, to establish child neglect. *See* Terplan et al. Prenatal Substance Use: Exploring Assumptions of Maternal Unfitness. *Substance Abuse: Research and Treatment* 2015;9(S2) 1–4 doi: 10.4137/SART.S23328.

²⁵ The Guttmacher Report on Public Policy, State Responses to Substance Abuse Among Pregnant Women, (December 2000, Vol. 3, No. 6)

²⁶ Terplan, Cannabis and pregnancy: Maternal child health implications during a period of drug policy liberations, 104 *Preventative Medicine* 46, Abstract (2017), *available at* <https://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292#ixzz31hXS2sUE>

²⁷ Ellsworth MA, Stevens TP, D’Angio CT. Infant race affects application of clinical guidelines when screening for drugs of abuse in newborns. *Pediatrics*. 2010;125(6):e1379–e1385.

²⁸ Brenda Warner Rotzoll, Black Newborns Likelier to be Drug-Tested: Study, *Chicago Sun-Times*, Mar. 16, 2001 (noting that “[b]lack babies are more likely than white babies to be tested for cocaine and to be taken away from their mothers if the drug is present, according to the March issue of the *Chicago Reporter*”); Troy Anderson, Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers, *L.A. Daily News*, June 30, 2008. Another study concluded that “Black women and their newborns were 1.5 times more likely to be tested for illicit drugs as non-Black women in multivariable analysis.” Kunins et al, The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting. *Journal of Women’s Health* (2007);16(2):245–255 *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2859171/pdf/nihms-182195.pdf>

suggests and what we have seen over the past decade in the Bronx is that great racial disparities exist in who is tested and who is reported for child maltreatment based on drug use.

It may not be the intent of the child welfare system to dismantle low-income Black and Latinx families, but it is those families who are most surveilled and disproportionately subjected to the family separation. It is therefore critical to examine what drives families into the system from racially disparate reporting practices to social determinants for family well-being, while simultaneously ensuring that the system itself does not do further harm.

III. The Child Welfare System Fails to Address the Structural Inequality and Social Deficits that Make Poor Families Vulnerable to Child Welfare Involvement and Prioritizes Expedient Permanency Over Children’s Well-Being.

As discussed, poverty is the greatest driver of families into the child welfare system. The material disadvantages of the families also make it nearly impossible for families to meet the demands of the child welfare system in the short time frames mandated by law. In 1997, the Adoption and Safe Families Act (ASFA) was signed into law. Under ASFA, states are financially incentivized to place children in adoptive homes, and are mandated to move to terminate a parents rights if a child has remained in the foster system for 15 out of 22 months. Given the short time frames mandated by ASFA, parents put in the impossible position of having to ameliorate the issues, many of which are due to poverty and structural inequalities, that brought the family within the child protective system, within 15 of 22 short months. The central idea behind ASFA is that the best thing for children is a permanent living arrangement, even if that permanency does not include the families they have who love them and want to care for them. We know from experience that oftentimes caring parents are facing a termination only because they could not meet the demands of the child welfare system and did not receive the material support they needed while the foster, pre-adoptive parents are paid to provide for the children in their care. As Christine Gottlieb, Adjunct Professor of Clinical Law and Co-Director of the New York University Family Defense Clinic, has said, the United States is “the only country in the world that routinely pays people to adopt children whose birth parents want desperately want to raise them” and “puts America first in the world in the legal destruction of families.”²⁹

An extensive body of research shows that family separation and family dissolution can be avoided if parents have access to suitable housing, food, income and other public benefits. As discussed above, housing and income instability and their related stress on a family are often the

²⁹ Christine Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, New York Amsterdam News (2018), <http://amsterdamnews.com/news/2018/feb/01/lessons-mass-incarceration-child-welfare/?page=1>.

root cause of child welfare involvement and traumatic family separation. The child welfare system, however, is not designed or equipped to address the roots of the problems of families in the system. The services and supports that it offers seek to address individual failings through therapeutic interventions, rather than the concrete needs like housing, food, and income that all families need to be healthy and thrive. Indeed, while money is continually put into preventative therapeutic services, the housing subsidy available to child welfare involved families is a mere \$300 dollars a month which hardly makes a dent in family rent in New York City. In our experience, children can languish in foster care for years as foster care agencies fail to address the material needs of the parents, while instead supplying foster parents with the financial subsidies and other resources necessary to raise children.

In addition to failing to address the actual needs of families in the system, the system prioritizes “permanency” in whatever form that may be—even if a child has maintained a connection with their parent—over addressing the very real needs of parents who love and want to raise their own children. This prioritization of permanency over the preservation of a family is misguided and not in the best interest of children. Even when a parent has failed to meet the demands of the child welfare system, it is contrary to the best interest of the child to reflexively presume that the parent-child bond established is no longer worthy of nurturing and preserving. Lost in the child welfare system’s myopic focus on permanency is the fact that the strength of a child’s bond to his or her parent often endures well beyond the ASFA timeline and legal determinations of parental rights. Moreover, despite the law’s emphasis on permanency, data shows that a termination of parental rights and subsequent adoption is often neither a permanent solution for children, nor in children’s best interest. Between 1993 and 2014, 4.7% of the subsidized adoptions facilitated by ACS in New York City failed. In nearly half of these cases, the child’s mental health was cited as the primary reason for the failure of the adoption.³⁰

Even if a parent is unable for whatever reason to be the daily caretaker to their child, the presumption that it is best to cut off a parent’s connection to their child in the name of permanency is misguided. Often children have remained connected to their biological parents during their stay in foster care. While the approach of open adoption has been embraced for private adoptions that more often involve families of privilege, complete family dissolution is still the default of the child welfare system. It is impossible to quantify the loss of family connection and family identity to a child. A large body of research has shown that openness in adoption is beneficial to children. According to the Donaldson Adoption Institute:

Openness in adoption is healthy for all members of the extended family of adoption. It helps facilitate identity development for the child and their family and allows family

³⁰ The Children’s Law Center, *Beyond Permanency One Year Later: Looking Back, Looking Forward*, available at <https://www.clny.org/files/120560604.pdf>.

members to fully embrace the truth. Families need to be encouraged to build authentic relationships in order for their families to be strong³¹.

Adopted children cite advantages such as having more family, access to useful information, being freed from the frustration of not knowing, being empowered by knowledge, feeling compassionate, fortunate and more secure³². Contact with their biological families can help young people maintain a healthy sense of identity, and promotes the exchange of critical family and medical health information. Despite this preference for parent-child connection in private adoptions, the child welfare system, by its very structure, makes it almost impossible for families, who are predominantly low-income and Black and Latinx, to recover their lives and keep their children.

The very structure, time frames, and incentives of the child welfare system results in low-income, mostly Black and Latinx families being separated when they could stay together. Rather than address what truly disadvantages families such as socio-economic and racial inequality, it incentivizes and flows toward what is easier: separation and the ultimate civil death of termination. In this way the child welfare system reflects its classist and racist origins in this country and remains a dystopia for only our most vulnerable families. This requires us to reimagine our approach to families in crisis and how to achieve living arrangements for children that support their safety and well-being, as well as that of their families.

IV. The Family Court System Unjustly Prolongs Family Separation and Child Welfare Involvement in Families' Lives.

Recognizing that foster care should be a last resort, the New York Court of Appeals has held that “a child may be forcibly removed from his family only when that child is at imminent risk of serious harm.”³³ When ACS or a family court temporarily separates children from their families pending trial in abuse and neglect cases, the law provides the parent due process. The statutory scheme in New York ensures that parents can challenge the decision in a timely manner. Once a parent requests a 1028 hearing, the law requires that “such hearing shall be held within three court days” and may not be adjourned “except upon good cause shown.” N.Y. Fam Ct Act 1028. Likewise, a hearing under Family Court Section 1027 must commence the next day after the filing of the petition and continue on successive court dates. See N.Y. Fam. Ct. Act

³¹ The Donaldson Adoption Institute, www.letsadoptreform.org/research.

³² Susan Ayers-Lopez et al, Presentation: Openness in Adoptions from Foster Care: Implications for Children and Families, Rudd Annual Adoption Conference, April 2013.

³³ *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 379 (Courts “must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests”).

1027. Even were it not a moral obligation to ensure that the decision to separate a family be made thoughtfully and expeditiously, it is a legal one.

As a result of policies and practices in the Family Court and a lack of resources and time, however, parents of children who have been separated from them frequently have family separation hearings that do not comport with the requirements of due process and last far beyond the prescribed time periods. In our experience, 1027 hearings are often not started within 24 hours of the child's removal because there are not enough court hours in the day to accommodate all of the necessary hearings. Hearings often last for days, even weeks, and are heard in just ten minute increments. All the while, children languish in the homes of strangers or group residential settings separated from their families, often to be returned at the hearing's conclusion. Even when the court does not grant ACS's application to separate a child from their family and issues a "no status ruling" during the pendency of the hearing, ACS often removes the child anyway, citing its emergency powers. Such removals are an abuse of the agency's emergency powers.

In the summer of 2017, The Bronx Defenders conducted a review of a sampling of 1028 hearings in our clients' cases. We found common problems among the hearings that we reviewed, including 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 the hearings examined in the study, 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 precise harms in addition to the trauma inherent in family separation 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 following his removal from his mother.

Our review of family separation hearings reveals that many judges diligently attempt to complete hearings within the statutory timeframe, but their attempts are frustrated by structural problems within the operation of the family court. These problems include too few judges, court parts, and a lack of evening and weekend hours for emergencies. As a result families are separated needlessly and kept separated for longer than necessary.

V. Recommendations

- The Bronx Defenders calls upon New York State to commit financial resources to provide material support to families vulnerable to family separation through the child welfare system and to ensure that contact with the child welfare system results in concrete material support.
- The Legislature should urge Governor Cuomo to sign The Preserving Family Bonds Act S.203A/A.2199A which would allow judges to order contact between parents and their children if it is in the child's best interest. This bill provides the opportunity for the courts to give children adopted out of foster care the best chance of assimilating into their adopted homes, and mitigates the trauma of separation from their biological families, who they may maintain close bonds with. In signing this bill into law, the State would remove yet another significant obstacle to family unity, and provide a safeguard to children whose ties with their family are in their best interest.
- The Legislature should take measures to ensure that all parents in New York state have meaningful access to legal representation and social work advocacy during child welfare investigations. In our experience, the agency's decision to remove children from their homes is often due to a parent's uninformed refusal of a service that is offered, a breakdown in communication between the parent and the caseworker, a misunderstanding, a mistake of fact, or a condition in the parent's life that could be addressed with legal and social service assistance. Countless unnecessary and traumatic family separations could be avoided if the parent had access to legal representation and social work advocacy during the investigation while the critical decisions about family separation are made.³⁴

³⁴ All of the institutional providers of parent representation in New York City provide as much preventive advocacy during a child protection investigation as they can. At The Bronx Defenders, we provide early representation to families in the Bronx with funding from the New York City Council and a small amount of private seed money, and with funding from the New York City Council. Our data evidence demonstrates the astounding impact on families. During FY 2018, we advised 378 parents during ACS investigations. Of those parents, 239 (63%) were never charged with abuse or neglect in court.

- While family separation is a traumatic experience for children of any age, newborns are especially vulnerable to the effects of separation from their families, whose caregivers serve as an extension of their own regulatory systems.³⁵ Despite the fact that there exists no mandate in New York that hospitals must drug test pregnant women and their newborns, nor does there exist a mandate that New York hospitals must report a positive drug test, the “test and report” practice persists. Like the child welfare system, the practice of “test and report” disproportionately targets low-income Black and Latinx pregnant women and their newborns, and the result is far from benign. Rather, the “test and report” practice, undermines patient autonomy, often irrevocably damages trust and confidentiality necessary for effective maternal-fetal health care. Moreover, the response of drug testing and reporting women and their newborns makes them vulnerable to family separation, which is well known to be harmful to children. Ultimately it is imperative to end the non-consensual testing of pregnant women and their newborns, however, to truly understand the scope of the issue, there is also a need for greater transparency and data collection on the “test and report” practice in New York. We look forward to engaging with the Assembly to create a comprehensive solution to address these issues.
- New York should consider legislation that would require child protection agencies to inform parents of their rights and provide information about consulting an attorney during a child welfare investigation. Parents are not informed about their rights during an investigation, and the support and advice of a parent advocate, social worker, and attorney can focus the efforts on addressing the family’s actual needs, avoiding the misconceptions and mistakes of fact that so often lead to unnecessary family separation, and ensuring that the government does not violate the rights of parents and children case.

VI. Conclusion

The child welfare system in New York State can and should be designed to keep children safe and protect them from the considerable harm that comes from needlessly separating them from their families. These must be treated as equal, rather than competing priorities. To do this, it is imperative that we examine how structural inequality appears in and is reproduced by the child welfare system. Further, we must move beyond reductive narratives of “moral failings” and “personal responsibility” entrenched in our child welfare and social services systems, and instead re-orient the discussion to one that seeks to keep families together and avoid the trauma and harm of family separation whenever possible. As such, we must renew New York State’s commitment to anti-poverty measures. For those families that have been permanently separated due to a termination of parental rights, we must recognize that legal proceedings do not

³⁵ Beatrice Beebe et al., A Systems View of Mother-Infant Face-to Face Communication, 52 Dev. Psychol. 556 (2016).

necessarily terminate the loving bond between a parent and a child. Given this, New York State should support measures to allow for continued contact between biological parents and their children. Finally, we need to recognize robust family defense has greatly contributed to the reduction in the foster care census over the last decade and we need to expand and build on that model by providing parents with access to multi-disciplinary teams during child protection investigations and access to civil advocates to assist with housing, income, and benefits.