



NEW YORK STATE
BAR ASSOCIATION

Report and recommendations of the Committee on Families and the Law **Racial Justice and Child Welfare**

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**New York State Bar Association
Committee on Families and the Law**

Report and Recommendations on Racial Justice and Child Welfare

I. Introduction

The New York State Bar Association Committee on Families and the Law submits this statement in support of a Resolution to adopt policies and legislative advocacy aimed at eliminating structural racism and anti-Black discrimination in the child welfare system of New York State and the United States.¹

The murder of George Floyd, a 46-year-old Black man, on May 25, 2020, by Derek Chauvin, a white police officer with the Minneapolis Police Department resulted in renewed scrutiny into the impact of racism upon our law enforcement systems and an outpouring of national and international outcry for long-overdue radical changes. On the other hand, the recent killing of a Black youth, 16-year-old Cornelius Frederick, by an employee of the foster care group home at which he was placed by the Michigan Department of Health and Human Services,² has not received the same kind of attention. Similarly, while the killing by police officer Nicholas Reardon of 16-year-old Ma'Khia Bryant at a foster care home in Columbus, Ohio has garnered some media attention, protests and demonstrations in support of her and her family “have paled in comparison with those of George Floyd last summer.”³ Because Black children taken from their parents into state “protective custody” are at heightened risk of

¹ We acknowledge that structural racism significantly impacts families of many backgrounds, and action is also required on behalf of all such groups as well following additional research and writing.

² Cornelius Frederick was a 16-year-old Black youth in state custody through the foster care system in Michigan. On April 29, Cornelius threw a sandwich. He was disciplined by a group home employee, and died after he was restrained by the employee who sat on him for 12 minutes. Tyler Kingkade and Hannah Rapple, *The Brief Life of Cornelius Frederick: Warning signs missed before teen's fatal restraint*, NBC News, (July 23, 2020, updated Aug. 14, 2020), <https://www.nbcnews.com/news/us-news/brief-life-cornelius-frederick-warning-signs-missed-teen-s-fatal-n1234660>.

³ Audra Henrichs, *Months after Ma'Khia Bryant's killing, Columbus police more emboldened than ever*, The Guardian, (Aug. 26, 2021), <https://www.theguardian.com/us-news/2021/aug/26/ma-khia-bryant-columbus-ohio-police>.

harm at the hands of state actors.⁴ Moreover, across a wide range of outcome measures such as postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement, children who “age out” of the system have been found to fare poorly relative to children not impacted by the system.⁵ Given their disproportionate representation in the foster care population, it is fair to say that Black children are subjected to these outcomes at a higher rate than their counterparts of other races.⁶ The New York State Bar Association’s Committee on Families and the Law (“the Committee”) stresses the need for similarly intense examination of the devastating impact of racism in our child welfare system.

The Committee’s critique of the child welfare system’s racialized impact is not intended to deny that there exists a proactive role for the state in promoting children’s safety and well-being. In the United States, child rearing has largely been considered the right and province of parents. At least in theory, government agencies have authority to regulate parental conduct and monitor the parent-child relationship only when there is an actual or imminent threat of serious harm to a child’s life or health from a parent’s behavior.⁷ While about a quarter of the situations currently brought to the attention of CPS agencies nationwide involve intentional, harmful acts by parents such as sexual conduct with a child, severe physical injury, or substantial emotional abuse, the majority of cases (75% in the most recent national statistics) involve the inability of parents, for reasons of poverty, to meet the basic

⁴ See, e.g., Mandi Eatough, *Foster Care Privatization: How an Increasingly Popular Public Policy Leads to Increased Levels of Abuse and Neglect*, 34 *Sigma J. Pol. & Int’l Studies* 51 (2017); Staff of S. Comm. on Fin., 115th Cong., *An Examination of Foster Care in the United States and the Use of Privatization 2* (Comm. Print 2017); Richard Wexler, *Foster Care vs. Family Preservation: The Track Record on Safety and Well-Being*, Nat’l Coal. for Child Prot. Reform Issue Paper 1 (2015). For more reporting and data on mistreatment, see Wexler at 2, nn.1–17.

⁵ Mark E. Courtney et al., *Midwest Evaluation of Adult Functioning of Former Foster Youth: Outcomes at Age 26*, at 6 (2011). See also Laura Gypen et al., *Outcomes of Children Who Grew Up in Foster Care: Systematic-Review*, 76 *Child. & Youth Servs. Rev.* 74 (2017).

⁶ Dettlaff, A., & Weber, K. (2020, June 22). *Now Is the Time for Abolition* [Editorial]. *The Imprint*. Retrieved August 16, 2020, from <https://imprintnews.org/child-welfare-2/now-isthe-time-for-abolition/44706> (“While the potential for these adverse outcomes exists for all children who enter foster care, the risk of experiencing these outcomes is heightened for Black children.”).

⁷ See, e.g., New York Family Court Act Article 10 – Child Protective Services; FCA 1012 (definitions of neglect and abuse).

physical or health needs of their children or to provide minimally consistent and stable parenting.⁸ Thus, while the Committee acknowledges the need for government intervention in those rare occasions where parental behaviors that have resulted in, or threatened, substantial harm to a child, we nevertheless recognize that this does not diminish the ongoing damage to Black families from inappropriate government intervention.⁹

The current impact of America's history of racism and the underlying premise of white supremacy are not limited to the criminal legal system and to policing and mass incarceration. The dual cancers of white supremacy and racism exist in virtually all institutions of our society, including those which most directly impact the integrity and autonomy of the family and the health, well-being, and promise of children. Racism's destructive impact on the lives of Black children, families, and communities is a longstanding and well-documented feature of the United States child welfare system that persists.¹⁰

The deleterious impact of racism on Black children taken from their families into state custody is clear and appalling: by the time they reach the age of 18 years old, an astounding 53% of Black children in the United States will have been subjected to at least one child protective services (CPS) investigation compared with 28% of white children and 37% of all children.¹¹ While African American children represent only 14% of the U.S. population, nationwide they make up 24% of the foster care population despite the fact that Black families are no more likely than white families to meet the

⁸ Children's Bureau Press Release, <https://www.acf.hhs.gov/media/press/2021/child-abuse-neglect-data-released>.

⁹ See, e.g., Bryan Samuels, *Addressing Systemic Racism in our Child Welfare System*, The Imprint (Sept. 15, 2020), <https://imprintnews.org/opinion/addressing-systemic-racism-in-our-child-welfare-system/47430>.

¹⁰ Dorothy E. Roberts, *Shattered Bonds: The Color of Child Welfare* (2002); see also The Center for the Study of Social Policy, *Places to Watch: Promising Practices to Address Racial Disproportionality in Child Welfare*, Dec. 2006.

¹¹ Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 Am. J. Pub. Health 274, 278 (2017).

definition for child maltreatment.¹² Moreover, Black children remain in state custody longer than white children and are more likely to be placed in institutional settings.¹³

II. Historical Perspective: The Assault on the Integrity of Poor Families and Families of Color

“The reach of the foster system into the lives of people living in poverty and Black, American Indian and Latinx communities rivals the much more widely discussed criminal legal system.”¹⁴ With regard to Black families in particular, the roots of the child welfare system’s threat to family integrity in the American institution of chattel slavery from colonial times onward is well documented.¹⁵ Enslavers did not respect or even acknowledge the family unit of the people they enslaved. They regularly and cruelly separated Black children from their families with no recognition of the family unit.

As outlined by Children’s Rights, Inc. in its May 2021 report, *Fighting Institutional Racism at the Front End of the Child Welfare Systems: A Call to Action to End the Unjust, Unnecessary, and Disproportionate Removal of Black Children from Their Families*,¹⁶ organized state intervention into the family relationships of Black children has evolved over time. In the late 18th century and early 19th century, in states where slavery was not recognized, Black children who were orphaned were generally

¹² *Black Children Continue to Be Disproportionately Represented in Foster Care*, The Annie E. Casey Foundation Kids Count Data Center (Apr. 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-populationby-race-and-ethnicity>.

¹³ U.S. Government Accountability Office. (2007a). African American children in foster care: Additional HHS assistance needed to help states reduce the proportion in care (GAO-07-816). <https://www.gao.gov/products/GAO-07-816>.

¹⁴ Movement for Family Power, “*Whatever they do, I’m her comfort, I’m her protector.*” *How the foster system has become ground zero for the U.S. drug war*, p. 11 (June 2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf>.

¹⁵ See, e.g., Andrea Elliot, *Invisible Child: Poverty, Survival & Hope in an American City* (2021); Laura Briggs, *Taking Children: A History of American Terror* (2020); Movement for Family Power, “*Whatever they do, I’m her comfort, I’m her protector.*” *How the foster system has become ground zero for the U.S. drug war*, 11 (June 2020); Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition*, 22–44 (Apr. 27, 2020) (B.A. thesis, Oberlin College).

¹⁶ Shereen White, et al, *Fighting Institutional Racism at the Front End of the Child Welfare Systems: A Call to Action to End the Unjust, Unnecessary, and Disproportionate Removal of Black Children from Their Families*, 6-11 (Children’s Rights, May 2021), <https://www.childrensrights.org/fighting-institutional-racism-at-the-front-end-of-child-welfare-systems/> (hereinafter *Fighting Institutional Racism*).

placed in a workhouse or indentured.¹⁷ By the middle of the 19th century in non-slavery states, some orphanages were established for Black children, but they were desperately overcrowded and under resourced.¹⁸ With the establishment of the federal Children’s Bureau in 1912, the explicit exclusion of Black children and families from organized state intervention was replaced with less formal discrimination. In the 1920s, more than half of state child welfare agencies were reserved for white families, and while by the mid-twentieth century the child welfare agencies did include Black families in their mandate, in most instances no services were provided.¹⁹ Although federal legislation adopted over the past 50 years has ostensibly been adopted with the intent that the various enactments would be supportive of children and families, inherent systemic and structural biases have meant that the legislation was often destructive of impacted families and children.²⁰

For example, in 1963, the federal Children’s Bureau proposed model legislation to guide states in setting legal standards for reporting child abuse, and by 1967, all states had enacted mandatory child abuse reporting laws.²¹ “Today, mandatory reporters are deeply involved in the disproportionate representation of Black families in the child welfare system.”²² Further deepening Black families’ involvement in the child welfare system, in 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which required that states receiving certain federal funding institute mandated reporting laws requiring certain professionals having contact with children to report suspected child

¹⁷ *Id.* at 7.

¹⁸ *Id.* See also Rhonda Evans, *The Howard Colored Orphan Asylum: New York’s First Black-Run Orphanage*, New York Public Library (June 11, 2020), <https://www.nypl.org/blog/2020/06/11/howard-colored-orphan-asylum-new-york>

¹⁹ Children’s Rights, *Fighting Institutional Racism*, *supra* note 16, at 7.

²⁰ *Fighting Institutional Racism*, *supra* note 16, at 7-11 (describing major federal legislation that has defined the experiences of Black families and “that have continued to perpetuate the system’s entrenched racism while strengthening its surveillance and regulatory capacities”).

²¹ *Id.* at 8.

²² *Id.*

abuse and neglect.²³ The inclusion of “neglect” in the reporting requirement, as well as the expansion of the network of professionals mandated to report child maltreatment to for investigation by CPS, “has strengthened the child welfare surveillance state.”²⁴ Since the enactment of CAPTA the number of reports to state child welfare agencies of suspected abuse and neglect have increased exponentially: in 1974, there were 60,000 reports; in 2018, 3,534,000 million children were the subject of a child protective services (CPS) investigation or alternative response.²⁵ Black families are represented disproportionately in the data reported.²⁶

Part of the reason for the disproportionate reporting of Black families results from the expansion in 1974 of reporting under CAPTA to include not only abuse but also neglect that is most often related to conditions of poverty. Notably, almost 75% of child protective proceedings are brought due to unmet basic needs for healthcare, food and other essentials.²⁷ Thus, as actionable “neglect” upon which the state can remove a child from his or her family is defined by parental inability to provide their children with the necessities of life, it should not come as a surprise that communities with high child welfare involvement are communities with high rates of poverty. Poverty should not and cannot be the premise for punitive child removal. More appropriate levels of economic support through better paying wages and more appropriate benefits should provide the route out of poverty.

The expansion of mandatory reporting to include poverty framed as “neglect” has had a major impact on the surveillance of Black families and the removal of Black children into the foster system.

²³ For a discussion of the background of the enactment of CAPTA, see Angela Olivia Burton and Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 Columbia J. Race and Law 639 (2021).

²⁴ *Fighting Institutional Racism*, *supra* note 16, at 8.

²⁵ *Child abuse, neglect data released*, Administration for Children & Families (Jan. 15, 2020), <https://www.acf.hhs.gov/media/press/2020/2020/child-abuse-neglect-data-released>

²⁶ *Id.*

²⁷ See Daan Braveman and Sarah H. Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 Temp. L. Rev. 447, 452-61 (1997).

Because Black Americans experience higher rates of poverty than all other racial groups,²⁸ the inclusion of “neglect” as a ground for investigation and prosecution of families by the child welfare system means that indicia of poverty such as food insecurity, actual or potential homelessness, and lack of accessible and culturally appropriate medical, mental health, and substance use treatment, ensures that Black families will be disproportionately subject to mandated reporting. Since receipt by the states of federal funding is conditioned on compliance with mandated reporting laws, the *consequences are devastating* to poor and disproportionately Black families. Reporters include not only doctors and teachers, but also police officers, social service providers and other professionals.

Further compounding the problems faced by poor families and most particularly by poor Black families was the passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which requires that state agencies must make “reasonable efforts” to prevent or eliminate the need for removal of a child and placement in foster care. Congress left undefined what activities constitute “reasonable efforts,” providing only that states must make reasonable efforts to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home.²⁹ Not surprisingly, state efforts to keep families together or to return children to their families if they are removed are typically *pro forma* when it comes to children of color and most particularly Black children.³⁰

²⁸ John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, (United State Census Bureau, Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

²⁹ *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, Children’s Bureau (Sept. 2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>

³⁰ *Fighting Institutional Racism*, *supra* note 16, at 9 (observing that “widespread misuse of the “reasonable efforts” provision as a “mere *pro forma* exercise in paper shuffling to obtain Federal funding” became evident within a decade of passage of the AACWA “and has persisted to date.”)

The 1997 enactment of the federal Adoption and Safe Families Act of 1997 (ASFA)³¹ has had perhaps the most devastating impact on families of color, and particularly, Black families and children.³² The Act includes provisions to terminate parental rights if a child remains in foster care for 15 of the last 22 months. It prioritizes termination over family relationships.³³ Most recently, in 2018, Congress enacted the Family First Prevention Services Act (FFPSA or Family First) with the goal of shifting “fiscal incentives and the focus of the child welfare system back to early prevention of maltreatment and removal.”³⁴ Although the FFPSA gives states the opportunity to use open-ended federal funds disbursed through Title IV-E of the Social Security Act for “preventive services” such as substance abuse and mental health treatment, “it will not lead to a radical shift in the existing structure that unnecessarily subjects Black families to surveillance and control through state-sponsored monitoring and inherently coercive services.”³⁵ As Miriam Mack, a prominent family defense attorney in New York City, argues:

The Act keeps intact, and indeed reifies, the fundamental pillars of the family regulation system: pathology, control, and punishment, all of which uphold and further white supremacy. It leaves unchallenged the underlying structure of the family regulation system which works to pathologize Black parents, mostly mothers, and which allows Black communities and homes to be controlled and occupied by family regulation system workers. Despite tinkering at the system’s edges, the Family First Act reinforces the notion that Black children remaining in their homes with their parents necessitates the watchful eye of family regulation system agents.³⁶

While the legal child welfare framework today acknowledges the integrity of all families, racial,

³¹ PUBLIC LAW 105–89—NOV. 19, 1997.

³² See, e.g., Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997 - The Worst Law Affecting Families Ever Enacted by Congress*, 11 Columbia J. of Race & Law 711 (2021).

³³ See, e.g., Cheri Williams & Kimberly Offutt, *Black Children Are Overrepresented in the Foster Care System: What Should We Do About It?*, Children’s Bureau Express (Aug./Sept. 2020) (“When ASFA weakened the ‘reasonable effort’ requirement and prioritized moving children from the taxpayer-funded foster care system into permanent adoptive homes, it failed to invest in family-strengthening, preservation, and reunification efforts. This has disproportionately hurt Black children and families.”), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5625>.

³⁴ *Fighting Institutional Racism*, *supra* note 16, at 10.

³⁵ *Fighting Institutional Racism*, *supra* note 16, at 10; see also Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 Columbia J. Race and Law 767 (2021), <https://journals.library.columbia.edu/index.php/cjrl/article/view/8751>.

³⁶ Mack, *White Supremacy Hydra*, *supra* note 35, at 770.

cultural, and class biases are deeply embedded in the policies, structure, and practices of the child welfare system and predictably result in less respect and support for Black families. These deliberate, systemic biases are evidenced in the operations of institutions such as the child welfare system, the judicial system, the juvenile legal system, and the educational system. As discussed below, the consequences of these biases include the overrepresentation and disparate treatment of families of color subjected to child welfare intervention and oversight through the Family Court of the State of New York.

III. The New York State Legal Framework: Experiences of Black Families in the Child Welfare and Family Court Systems

A. Introduction

The Office of Children and Family Services (OCFS) is the New York state agency designated to receive federal subsidies for various child welfare activities, including social services to keep families together (such as food, housing, mental health and substance abuse treatment) and CPS investigation, case management, and initiation and prosecution of court proceedings.

OCFS has acknowledged the racial disproportionality that exists in child welfare and juvenile justice systems and since 2011 has engaged in some preliminary efforts to address these problems.³⁷ One such effort is seen in OCFS' "blind removal" effort to address the acknowledged disproportionality of Black children in foster care and the disparity in services received. To counteract this effect, a pilot project was pursued in Nassau County. In blind removals, a committee of child welfare workers decide whether to remove children without knowing the family members' names, race, or any other identifying information, such as zip codes, education, and income level. Upon implementation of the pilot, the

³⁷ *The OCFS Initiative to Address Racial Disproportionality in Child Welfare and Juvenile Child Welfare and Juvenile Justice*, N.Y. State Off. of Children & Family Servs. (Jan. 19, 2011), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/ocfs-disproportionality.pdf>

percentage of Black children removed from their homes was reduced from 57 percent to 21 percent.

Despite this initial success, new data show that the decline in removals in Nassau County did not persist steadily, with fluctuations in numbers of Black children entering care every year ranging from as low as 35.5 percent to as high as 61.9 percent. Furthermore, some child welfare workers expressed concerns that the process was potentially harmful and did not address some of the initial reasons Black families were being scrutinized by child welfare agencies, including conditions linked to poverty and barriers to resources to support families.³⁸ If OCFS is to be part of the solution and not part of the problem, it must also take steps to prevent poverty-based conditions from serving as a basis for family disruption in cases of alleged neglect.

To fully grapple with the issues involved and how these issues relate to the current examination of racism in the child welfare system one must look at the data. Over-representation of Black children in the New York State foster care system has been documented in 35 counties.³⁹ While the proportion of Black children in the foster system nationwide dropped from 26% to 21% between 2006 to 2016, wider gaps have persisted in cities like New York City. In New York City, the foster care population has shrunk dramatically since the late 1990s. However, according to the NYC Administration for Children's Services, in 2018 Black children constituted 23% of the child population but made up more than 53% of the children in foster care in 2018.⁴⁰ By contrast, the city's white, Latinx, and Asian children were all relatively underrepresented in foster care compared to their share of the total population. This disparity

³⁸ "The Idea of Removing Race from Child Removal Decisions," Children's Bureau Express (July/August 2021), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=228&articleID=5847&keywords=blind%20removals>. See Loudonback, "Color-Blind Ambition," The Imprint (April 1, 2021), <https://imprintnews.org/los-angeles/color-blind-ambition-removals/52958>

³⁹ Jessica A. Pryce et al., *Race Equity: Nassau and Onondaga County Report*, Social Work Education Consortium, Univ. of Albany (Dec. 2016), at 3, <https://www.nassaucountyny.gov/DocumentCenter/View/18095/FINAL-OCFS-Report-Race-Equity-2016>.

⁴⁰ Foster Care Research & Analysis Findings, NYC Administration for Children's Services Presentation to Child Welfare 20/21 Advisory Board (July 11, 2018), at 5, <https://www1.nyc.gov/assets/acs/pdf/about/2018/ProviderAdvisoryCommitteePowerPointKickOffmeeting2.pdf>.

also exists in upstate New York. For example, according to 2011 OCFS data, in Onondaga County a Black child was six times more likely to be removed from their parents and taken into state custody. As the result of targeted efforts, by 2012, the county had cut that percentage in half. However, Black children were still three times more likely to be placed in foster care.⁴¹ Likewise, African American children in Monroe County were disproportionately taken into the foster system: in 2020, of the 547 children placed in foster care, 412 (75%) were children of color. Of the children involved in a protective case, 86% are children of color. A significant majority of these children and their families are poor.⁴²

In addition to their disproportionate presence in the child welfare system, Black families face *significantly harsher outcomes* at the front-end of the system, leading to the initiation of child protective proceedings in the NYS Family Courts in situations that may have been avoided with the provision of concrete resources or appropriate services. These “front-end” disparities impact every stage of the process, from investigations of alleged child maltreatment to decisions about whether to offer “preventive services,” to the filing of a child abuse or neglect petition through removals of children from their families, fact findings of child neglect or abuse, dispositions of long-term placements of children in foster care and terminations of parental rights.⁴³

B. “Pre-Petition” Family Intervention by NYS Department of Child & Family Services

1. Reporting to OCFS

Entry into the child welfare system leading to investigation and oversight usually occurs upon a report of suspected maltreatment. It is relatively easy to initiate a CPS investigation: Currently, an investigation may be initiated even upon an anonymous reporter’s statement indicating they “suspect or

⁴¹ *Id.* at 4.

⁴² Report of the Commission on Racial and Structural Equity (RASE), Center for Governmental Research (2020), at 146–48.

⁴³ Dorothy Roberts & Lisa Sanogi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, The Appeal (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

have reason to believe that a child has been abused or neglected.” An investigation can be extremely intrusive and traumatic for the child and family and can quickly lead to possibly unnecessary state intervention and family disruption.⁴⁴ As family defense attorney Michelle Burrell observes:

Caseworkers enter homes, not necessarily showing official documentation or identification indicating who they are and why they are there. Once in the home, they ask a series of questions, some related to the investigation at hand and others not. Parents do not understand that the caseworkers are collecting information that may result in an eventual Family Court petition alleging abuse and neglect, and give them an abundance of information (not always connected to their actual parenting) in hopes that if they are honest, they will be left alone. As happened with stop-and-frisk, we need to get to the point where people are looking at the child welfare system – essentially the act of the government entering the home of private citizens to judge their parenting – as overly invasive.⁴⁵

Following receipt of a report, vast amounts of resources are immediately poured into investigatory and prosecutorial activities that can result in a significant disruption of, but not necessarily of direct benefit to families living in poverty.

In both NYC and the rest of the State, as measured by rate per 1,000 children in population, Black children are more likely than Hispanic children, and Hispanic children are more likely than white children, to be reported to SCR, indicated for abuse/neglect, enter foster care, and in care.⁴⁶ According to a study reported by the New England Review of Medicine, “Black families are more likely to be reported and investigated for child abuse and neglect, to have their cases substantiated, and to have their children removed from their custody or care. Moreover, many clinicians are disconnected from the consequences for families after referral to CPS.”⁴⁷

⁴⁴ Children’s Bureau, Federal Legislation, *infra* note 100, at 3.

⁴⁵ Michelle Burrell, “Child Welfare Needs to Have Its ‘Stop-and-Frisk’ Moment,” Urban Matters, New School Center for New York City Affairs (June 27, 2018), <http://www.centernyc.org/child-welfare-needs-to-have-its>. For a comprehensive analysis of the parallels between CPS investigations and the discredited “stop and frisk” policy of the New York City Police Department, see Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. Rev. 124 (2019), <https://academicworks.cuny.edu/clr/vol22/iss1/14>.

⁴⁶ *The OCFS Initiative to Address Racial Disproportionality in Child Welfare and Juvenile Child Welfare and Juvenile Justice*, N.Y. State Off. of Children & Family Servs. (Jan. 19, 2011), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/ocfs-disproportionality.pdf>

⁴⁷ Jamila Perritt, “#WhiteCoatsForBlackLives-Addressing Physicians’ Complicity in Criminalizing Communities,” 383 *New England J. of Med.* 1804, 1805 (2020).

2. Investigation by Local Child Protective Service

Once a report of suspected child maltreatment is made, Black and Hispanic/Latinx children are more likely to be subjected to a child protective investigation. For example, Black and Hispanic/Latinx children comprise only 61.3% of the total New York City population, but they constitute 87.8% of the children in investigations.⁴⁸ During the child protective investigation, ACS is obligated to assist adults in the home with obtaining necessary prevention services⁴⁹ such as mental health, substance use and other treatment programs.⁵⁰ However, Black children are disproportionately less likely to be in prevention case openings following a substantiated investigation. Despite comprising 44.3% of the children in substantiated investigations in 2017, only 37.8% of the children in prevention case openings that year were Black children.

One example of undue investigation of Black families relates to drug testing. Racially discriminatory drug screening of pregnant people and newborns in hospitals without informed parental consent contributes substantially to disproportionate child welfare surveillance and of Black families and the separation of newborns from their parents during the most critical time for bonding.⁵¹

3. Preventive Services Provided By Local Child Protective Service

As a general matter, Black parents are less likely to have access to and receive the kinds of services that would help to address issues leading to investigations and family disruption.⁵²

⁴⁸ Local Law 174 Public Report, Administration for Children’s Services Equity Action Plan. July 1, 2019, at 9, https://www1.nyc.gov/assets/operations/downloads/pdf/11174_public_report_w_appendices_2019.pdf.

⁴⁹ *Supra* note 5.

⁵⁰ *Id.*

⁵¹ See Movement for Family Power, “Whatever they do, I’m her comfort, I’m her protector.” How the foster system has become ground zero for the U.S. drug war, 11 (June 2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf>. According to Sapna V. Raj, Deputy Commissioner of the Law Enforcement Bureau of the NYC Commission on Human Rights, the manifestation of anti-Black racism in medical settings is a well-known and entrenched problem and rooting out this form of discrimination is a top priority of the NYCCHR. See *New York City Commission on Human Rights Launches Investigations Into Three Major Private Hospital Systems’ Practices of Drug Testing Newborns and Parents*, NYS Commission on Human Rights, Nov. 16, 2020.

⁵² *Supra*, Wulczyn; *Supra*, Roberts and Sangoi.

C. Family Court Child Protective Proceedings

Every day in family court buildings across the country, thousands of people, but disproportionately Black mothers, stand before child welfare officials and family court judges who subject their parenthood to extraordinary scrutiny and vilification. These judges and officials use consequences of poverty, such as several siblings sharing a single room or lack of adequate heat, as evidence of child neglect. Family members who have prior criminal or family court involvement are deemed risks to their children, without any consideration for the well-documented overcriminalization of poor Black communities.⁵³

The Family Court of the State of New York is the primary interface for issues implicating legal aspects of family relationships. The New York family courts provide the forum for issues involving child protection (neglect and abuse and foster care), custody, visitation, support, guardianship, paternity, adoption, and family violence.

When the local CPS agency believes that a parent has abused or neglected a child and that preventive services will not protect the child from harm, an “Article 10” petition is filed in the Family Court of the State of New York. The Court must then determine whether abuse or neglect has occurred. If this determination is made, the Court then must decide whether the child may remain in the care of their parent under court ordered services to ameliorate the conditions that resulted in the abuse or neglect, or whether the child must be placed in foster care to prevent further harm while the parent receives these services. Upon the filing of an Article 10 petition, the Family Court swiftly determines whether a child may remain at home or must be placed during the pendency of the petition.

1. Judicial “Removals”

Black children are more likely than others to be placed outside the home at the preliminary stages of the proceedings. Moreover, “Black children are more likely to be placed into congregate care rather than into a relative’s home for the sole reason that the system deems that home too small,

⁵³ Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, *The Appeal*, Mar. 26, 2018, <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

as families of color and various cultures live in a wide variety of arrangements, as compared with the more typical white, suburban, American household.”⁵⁴ Family advocates may be able to utilize new requirements for congregate care placements to address some of these concerns.⁵⁵

2. Judicial Findings of Abuse or Neglect

Black mothers are deemed unfit at higher rates than their white counterparts, despite evidence that they are no more likely to use substances or engage in other instances of child maltreatment.⁵⁶

3. Judicial Placements

The number of foster youths in America has declined for a second straight year, but the percentage of placements of those who are not identified as white appears to be growing.⁵⁷

Nationwide, 33 percent of children in foster care are Black, but they make up just 15 percent of U.S. children.⁵⁸ For example, the proportion of Black children placed in foster care is more than twice the

proportion of the total New York City child population. While Black children make up 24.3% of the

City’s youth population, they comprise 53.8% of the children placed in foster care.⁵⁹ Hispanic/Latinx

children are equally represented in foster care, 37.5%, compared to their total youth population size of 37.0%.⁶⁰ Black children are 35% more likely than white youths to be placed in group homes or

residential treatment facilities. Lakeside was the third facility Cornelius Frederick had been placed in since his mother died in her sleep of heart failure several years earlier—Cornelius was the one who

⁵⁴ Cathy Krebs, *It’s Not Enough to Mean Well*, The Imprint (Aug. 12, 2020), <https://imprintnews.org/race/child-welfare-racism-not-enough-to-mean-well/46360>.

⁵⁵ Megan Conn, *New York Lawmakers Clash with State Courts over New Congregate Care Rule*, The Imprint (Sept. 29, 2021), <https://imprintnews.org/top-stories/new-york-lawmakers-clash-with-state-courts-over-new-congregate-care-rule/59255>

⁵⁶ Sarah Gonzalez & Jenny Ye, *Black Mothers Judged Unfit at Higher Rates Than White Mothers in New Jersey*, WNYC (May 2015), <https://www.wnyc.org/story/black-parents-nj-lose-custody-their-kids-more-anyone-else/>.

⁵⁷ John Kelly, *Who Cares: A National Count of Foster Homes and Families—Executive Summary*, The Imprint (Nov. 2, 2020), <https://www.fostercarecapacity.com/stories/who-cares-2020-executive-summary>.

⁵⁸ Tyler Kingkade and Hannah Rappleye, *The Brief Life of Cornelius Frederick: Warning Signs Missed Before Teen’s Fatal Restraint*, NBC News (July 23, 2020, updated Aug. 14, 2020): <https://www.nbcnews.com/news/us-news/brief-life-cornelius-frederick-warning-signs-missed-teen-s-fatal-n1234660>

⁵⁹ *Id.* at 12.

⁶⁰ *Id.*

found her. His father lost custody after he was incarcerated.⁶¹

Tragically, Black children often receive services that are inferior to those of their white counterparts once they are placed into foster care⁶² lessening their chances for family reunification. On average, they experience longer stays in foster care, leaving foster care at a slower rate than they are entering.⁶³

4. Host Homes and Other “Shadow Placements”

Rather than uniformly providing the necessary services that Black families need and are entitled to for the prevention of family separation, OCFS has sanctioned both informal and formal processes whereby some children are physically placed outside the home without parents or children receiving the advice of counsel; reunification services; or due process in Family Court.⁶⁴

5. Post-Dispositional Proceedings

Terminations of Parental Rights

Consequently, Black parents are also more likely to have their parental rights terminated than white parents.⁶⁵ “With certain exceptions that states too often ignore, ASFA requires that child welfare agencies seek to terminate the parental rights of children whenever they have been in foster care for 15 of the most recent 22 months. Courts are instructed to terminate parental rights unless the parent can show that the conditions that led to the removal initially no longer exist. The law has been responsible for the massive destruction of Black and brown families. More than two million children’s parents’ rights have been terminated by American courts since ASFA was enacted.”⁶⁶ Moreover, ASFA currently provides criminal history restrictions on placements of children with no best interests

⁶¹ *Id.*

⁶² *Supra*, Wulczyn; *Supra*, Roberts and Sangoi

⁶³ Administration for Children’s Services, “Child Safety,” <https://www1.nyc.gov/site/acs/child-welfare/ChildAbuseNeglectKid.page>

⁶⁴ *See* 18 NYCRR § 441, et. seq.

⁶⁵ Minkyong Song, *Termination of parental rights and adoption in foster care*, Univ. of Penn. Doctoral Dissertation (2006), <https://repository.upenn.edu/dissertations/AAI322547>.

⁶⁶ Guggenheim, *supra* note 32.

or safety exceptions, creating additional obstacles to children living with a family member when a return to their parent is not possible.⁶⁷

IV. Recent Statewide Efforts to Promote Racial Justice in Child Welfare Cases

A. Office of Indigent Legal Services (ILS)

On November 6, 2015, the ILS Board approved the “Standards for Parental Representation in State Intervention Matters” (the Standards).⁶⁸ The Standards seek to improve the quality of representation provided under Family Court Act § 262(i)–(iv) and (ix) (i.e., child protective, foster care, destitute child and termination of parental rights proceedings, given the fundamental liberty interests and due process rights involved pursuant to the Family Court Act § 261 and *In re Ella B.*, 30 N.Y.2d 352 (1972), when the State seeks family separation without providing adequate representation.⁶⁹

B. NYSBA Committee on Mandated Representation

The New York State Bar Association House of Delegates approved the 2021 Revised Standards for Providing Mandated Representation (Revised Standards) on January 30, 2021.⁷⁰ The Revised Standards note that “[h]istorically, the largest impediment to the provision of quality mandated representation is under-funding of the provider. It is vital that funding sources provide funding adequate to enable providers to meet or exceed the requirements of these standards.”⁷¹

C. Chief Judge DiFiore Initiatives

1. The New York State Commission on Parental Legal Representation

In her February 6, 2018, State of Our Judiciary address, Chief Judge Janet DiFiore announced the creation of the Unified Court System’s Commission on Parental Legal Representation.⁷² In

⁶⁷ See SSL § 378-a.

⁶⁸ <https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf>

⁶⁹ *Id.* at 4.

⁷⁰ https://nysba.org/app/uploads/2020/02/Standards-for-Quality-Mandated-Rep_2021.pdf

⁷¹ *Id.* at 1.

⁷² Chief Judge Janet DiFiore, The State of Our Judiciary 2018, p. 14, New York State Unified Court System (Feb. 6, 2018), available at <https://www.ils.ny.gov/files/State%20of%20Our%20Judiciary%20Address%20020618.pdf>.

creating this Commission, Chief Judge DiFiore emphasized that the court system is “focused on supporting the well-being of children by supporting the legal needs of their parents.”⁷³ The Executive Summary of the Commission’s Interim Report provides that their mandate was to examine the current state of representation for indigent parents in constitutionally and statutorily mandated family-related matters, and to develop a plan to ensure the future delivery of quality, cost-effective parental representation across the state.⁷⁴ It states that after a searching inquiry, comprehensive review of the evidence, and thoughtful deliberation, the Commission concluded that a complete transformation is urgently needed in New York’s publicly funded system of parental representation in child welfare matters.⁷⁵ They found that systemic problems in New York State’s underfunded, county-based system are well-documented, as are the harmful effects of inadequate representation on families and family courts. For decades, reports have chronicled the crisis in parental representation, particularly regarding child welfare proceedings. Instances of inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent. The crisis in parental legal representation goes to the core of the judicial function—to make “reasoned determinations of fact” and “proper orders of disposition.”⁷⁶ Without meaningful parental representation, Family Courts may lack the comprehensive information and evidence needed to make reasoned determinations and render proper dispositional orders. Without State funding and oversight, attorneys lack all the resources necessary to deliver the effective assistance to which parents are constitutionally entitled. Those messages clearly emerged in testimony to the Commission. In addressing lapses in the quality of parental representation, the Commission points to the lack of the resources and support attorneys require to deliver consistently effective representation. The Commission emphasized the need for

⁷³ *Id.*

⁷⁴ http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

⁷⁵ In the Interim Report, the terms, “child welfare,” “child protective,” and “State intervention” are used interchangeably and refer generally to abuse and/or neglect proceedings pursuant to Article 10 of the Family Court Act, as well as foster care placement, termination of parental rights, surrender, destitute minor, and permanency planning proceedings. Child protective services agencies are referred to as “CPS” or “DSS” agencies.

⁷⁶ Family Court Act § 261.

significant and swift State action to address systemic problems, thus enabling attorneys to provide effective representation and Family Courts to make sound decisions that will best meet the needs of families. Testimony provided to the Commission made it clear that inadequate representation of parents has a particularly pernicious impact in state intervention proceedings: it can cause the unnecessary separation of children from their families. Such avoidable separations cause avoidable disruption, stress, and trauma to families and avoidable financial cost to government. For these reasons, the Commission determined that decisive remedial action is needed most urgently in the child welfare realm.

2. The Secretary Johnson Report

On June 9, 2020, Chief Judge Janet DiFiore appointed former U.S. Secretary of Homeland Security Jeh Johnson to conduct “an independent review of the New York State court system’s response to issues of institutional racism and to make recommendations that center on operational issues that lie within the power of the court system to implement administratively and unilaterally” necessary changes to such structure and operations.⁷⁷ While Black families had long pointed out what they experience as discriminatory treatment in New York City’s family courts,⁷⁸ the report issued by Secretary Johnson confirmed many of their complaints.

Secretary Johnson reported the following findings:

- Most litigants appearing in the NYC Family Courts are parents and families of color.⁷⁹
- Underrepresentation within the judiciary has persisted across all non-white groups, though the representation of Black judges has steadily improved over the past 30 years. In the Latinx and Asian communities, the gaps between population and judges widened in the late 1990s before

⁷⁷ Jeh Charles Johnson, Report from the Special Adviser on Equal Justice in the New York State Courts, N.Y. State Unified Court System (Oct. 1, 2020), <https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

⁷⁸ Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, Time (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families/>; Amber Wilkes-Smith, ‘I Was Denied the Right to Keep My Family Intact’ – Black families like mine have been separated for generations, Rise Magazine (July 29, 2020), <https://www.risemagazine.org/2020/07/denied-the-right-to-keep-my-family-intact/>

⁷⁹ Jeh Johnson Report, *supra* note 78, at 36.

more recently narrowing, but they remain larger for both communities than they were in 1991.⁸⁰

- “[T]he #1 complaint ... heard from multiple interviewees from all perspectives was about an under-resourced, over-burdened court system, the dehumanizing effect it has on litigants and the disparate impact all this has on people of color,” with the Family Courts being among those in particular that continue with high volumes of cases but fewer resources to hear those cases. “Addressing the backlog of cases due to court closures during COVID-19 will no doubt make matters worse.”⁸¹
- “The picture painted for us was that of a second-class system of justice for people of color in New York State.”⁸²
- One judge remarked that “the systemic reluctance to devote resources to these high-volume courts in New York City, which primarily serve indigent people of color, is ‘the very definition of institutional bias.’”
- Delays in processing a Family Court Article 10 case can result in permanent damage to children, particularly when those delays impact reunification. One Family Court judge noted, “in this context, ‘justice delayed is justice denied.’” The delays can “impart a sense of profound unfairness and have a demoralizing effect on clients.... Ultimately, the message sent is that the loss of the litigants’ time – particularly those who are indigent or people of color—is a casualty within the system’s broader disorganization.... [L]itigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all.”⁸³
- Court officers, attorneys and judges sometimes exhibit a lack of understanding, empathy and compassion towards litigants of color, “a culture in the courts that discourages compassionate treatment.”⁸⁴ A Family Court judge in New York City reportedly yelled at a litigant reporting that

⁸⁰ *Id.* at 33.

⁸¹ *Id.* at 54.

⁸² *Id.*

⁸³ *Id.* at 57.

⁸⁴ *Id.* at 58.

she did not know who the father of her child was, and the judge then asked, “How is it that you people never know?”⁸⁵ An attorney reported that he witnessed a court-appointed attorney “buying boots on her iPad while her client lost custody of her child in Family Court.”⁸⁶

These findings by Secretary Johnson illuminate the extreme lack of respect experienced by Black children, parents, and families and the urgent need for the New York State Family Court system to undertake a more searching and critical examination of its policies, practices, and procedures through a racial justice lens. As reported in Rise Magazine:

For parents simply walking into Family Court, it is obvious that this is a system that almost entirely impacts Black and brown families and communities. As Rise Parent Leader Imani Worthy has written: “Going to family court is like the feeling of marching to the guillotine. You’re ashamed and your mistakes are put out to the public. “While in the courthouse, I couldn’t help but notice a barrier when you enter. Lawyers, judges, clerks, ACS caseworkers, and staff walk in on one side. On the side where the employees were walking in, I noticed a lot of Caucasian people entering. “The other side is for the general public. The general public had so many black and brown faces.”⁸⁷

The devastating impacts of Family Court on Black families cannot be overstated or overlooked any longer.⁸⁸

Following the release of Jeh Johnson's devastating report, which contained numerous proposals for reform focused on the court system's authority to carry out administrative changes, Chief Judge DiFiore appointed Judge Edwina Richardson-Mendelson, Deputy Chief Administrative Judge for Justice Initiatives, to lead the effort to implement the Equal Justice recommendations contained in the Jeh Johnson report. Judge Mendelson headed an implementation committee of judicial leaders and managers that met with a variety of stakeholders to develop a strategic plan. The work of that group

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Parents to City Council: Fund Communities, Not ACS*, Rise Magazine (Nov. 3, 2020), <https://www.risemagazine.org/2020/11/fund-communities-not-ac/>.

⁸⁸ It should be noted that a significant number of people coming to Family Court in NYS appear at least initially without a lawyer. A very high percentage of the unrepresented are people of color with a history with the child welfare system attempting to address related issues such as child support, custody and visitation, parentage, guardianship and domestic violence. They are at a great disadvantage when not represented by counsel.

resulted in the issuance of a recently released report, Equal Justice in the New York State Courts: 2020-2021 Year in Review.⁸⁹

As outlined in the Year in Review Report, among the steps taken are the amendment of Section 17.3 of the Rules of the Chief Judge to require that all state paid judges receive regular anti-bias training, mandatory bias education and training for all UCS non-judicial personnel, appointment of an ombudsman for bias matters with widely publicized complaint procedure for bias matters, creation of Equal Justice Committees in the 13 Judicial Districts, and implementation of new policies and procedures for court officers with the requirement of a designated Community Affairs Officer in every county.

It should be noted that the Report states that in New York City many of the Equal Justice subcommittees are city-wide, including one for the New York City Family Court. Consideration should be given to creating a statewide Family Court Equal Justice Committee to ensure that common issues are addressed appropriately.

D. Lawsuits

The courts play an integral and key role in overseeing decisions that affect Black families.

1. NYC Legal Aid Society

For example, a recently filed lawsuit by the New York City Legal Aid Society alleges that city and state officials “unjustly prohibit relatives from becoming foster parents due to prior criminal offenses and allegations of child abuse and neglect—even when they are decades old or never resulted in a conviction, and that the impact of these practices “falls most heavily on Black and Latino children, who are vastly overrepresented in New York City’s foster care system.”⁹⁰ As stated by Dawne Mitchell, attorney-in-charge of the juvenile rights practice at the Legal Aid Society, “[t]hese policies and

⁸⁹ <https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf>

⁹⁰ Megan Conn, Madison Hunt, Michael Fitzgerald, *New York Class-Action Lawsuit Alleges Kin Caregivers are Denied Rights by Foster Care System*, The Imprint (Nov. 11, 2021), <https://imprintnews.org/top-stories/new-york-class-action-lawsuit-alleges-kin-caregivers-are-denied-rights-by-foster-care-system/60366>.

practices perpetuate the racially discriminatory impact of the criminal legal system and the child welfare system, which disproportionately police and prosecute communities of color and disproportionately regulate families of color.”⁹¹ As to the court’s role, Gerard Wallace noted that “[t]here’s a ‘preference’ for kin in the law, but it’s really discretionary to the courts, and they do a dance to whatever the county officials tell them . . . [f]amilies’ rights should trump states’ rights, but they don’t in too many of these cases.”⁹²

The class-action suit, filed by The Legal Aid Society and Dechert LLP in the U.S. District Court for the Eastern District of New York, states that current practices deprive vulnerable children of the opportunity to live with family, widely considered the best placement for foster children's well-being and long-term outcomes.”⁹³ “The suit further argues that the resulting widespread disqualification of responsible foster or adoptive parents ends up having a “disproportionate impact on families of color” and thus it “reinforces other discriminatory government practices.”⁹⁴

2. **New York County Lawyers Association, et al. v. State of New York, et al.**⁹⁵

“Claiming they’ve worked for almost 20 years without adequate compensation,¹⁰ New York bar associations representing court-appointed attorneys in the criminal and family courts have resorted to filing a lawsuit⁹⁶ against the city and state to increase their pay and what they can provide clients. Seeking an increase in assigned counsel rates, plaintiffs in this action have alleged that the State’s

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Jason Grant, *Legal Aid Society, Dechert Sue State, NYC Over Rules That Often Prevent Kin From Fostering Children*, N.Y.L.J. (Nov. 11, 2021), <https://www.law.com/newyorklawjournal/2021/11/11/legal-aid-society-dechert-sue-state-nyc-over-rules-that-often-prevent-kin-from-fostering-children/>, <https://imprintnews.org/top-stories/new-york-class-action-lawsuit-alleges-kin-caregivers-are-denied-rights-by-foster-care-system/60366>, <https://imprintnews.org/top-stories/new-york-class-action-lawsuit-alleges-kin-caregivers-are-denied-rights-by-foster-care-system/60366>

⁹⁵ Andrew Denney, *Bar Groups Sue Over Stagnant Pay for Assigned Counsel*, N.Y.L.J. (Jul. 26, 2021), <https://www.law.com/newyorklawjournal/2021/07/26/bar-groups-sue-over-stagnant-pay-for-assigned-counsel/>. See Amended Complaint, https://drive.google.com/file/d/1B_Vo8S9CvsqxRLgFkrM2TKkJY2au6ryx/view; see also Madison Hunt, *New York’s Family Court Attorneys File Lawsuit for Better Pay*, *The Imprint* (Nov. 1, 2021), <https://imprintnews.org/top-stories/new-yorks-family-court-attorneys-file-lawsuit-for-better-pay/59975>

⁹⁶ https://drive.google.com/file/d/1B_Vo8S9CvsqxRLgFkrM2TKkJY2au6ryx/view

“failure to provide reasonable and sufficient compensation to assigned private trial and appellate counsel has caused and threatens to further cause substantial irreparable harm to indigent criminal defendants.”⁹⁷ Assigned counsel who represent parents in New York State family courts have also not received a raise in almost 20 years, and the family court system faces the same shortage of attorneys. It is hoped that an increase for criminal assigned counsel will also be applied to family court assigned counsel, including attorneys for the child.

IV. Proposals for NYSBA Action

A. NYSBA Policy Proposals

The Committee on Families and the Law seeks New York State Bar Association adoption of the following resolution and policies:

1. Proposed NYSBA Resolution

RESOLUTION ADDRESSING SYSTEMIC RACISM

IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK

The New York State Bar Association recognizes:

- a. Systemic racism exists within the NYS child welfare system, impacting Black families disparately which originates from the history of slavery in the United States.
- b. Collective responsibility of legislators, policymakers, judges and attorneys for creating, promulgating, maintaining, implementing and/or enforcing laws, policies, rulings and practices that have not adequately valued Black families and have often resulted in their unnecessary investigation and separation of families.
- c. Systemic racism and disparate treatment of Black families in the NYS child welfare system have often resulted in:
 - (1) Undue investigation into and control over Black families in New York; and

⁹⁷ *Id.* at 49.

(2) Unequal and inadequate distribution of necessary resources for the preservation of Black families.

WHEREFORE, it is

RESOLVED, that the New York State Bar Association shall promote action by legislators, policymakers, judges and attorneys to:

- a. Create, promulgate, maintain, implement and/or enforce laws, policies, rulings and practices that value and preserve Black families; and
- b. Bring about the repeal of child welfare laws and policies enacted upon racist goals; that disproportionately impact Black Families; or result in unequal consequences.

2. Proposed NYSBA Policies committing to:

- a. Conducting a race equity impact analysis for all policies and decision-making when deciding whether to promote or oppose child welfare related legislation. (The Annie E. Casey Foundation provides one possible tool to guide such engagement.⁹⁸)
- b. Challenging [racism] [disparate treatment of Black Families] in the child welfare system by:
 - (1) Evaluating and assessing practices that [violate the] [do not protect the dignity] and equal treatment of families represented by our members;
 - (2) Addressing practices that infringe upon the equal treatment of all individuals represented by our members;
 - (3) Acknowledging and accounting for past and current inequities, and promoting laws and practices that provide all people, particularly those most impacted by racial inequities, the infrastructure needed to thrive.⁹⁹

B. Proposed Federal and State Budget Advocacy

⁹⁸ The Annie E. Casey Foundation, *Race Equity Crosswalk Tool*, July 20, 2017, <https://www.aecf.org/m/blogdoc/aecf-raceequitycrosswalk-2018.pdf>

⁹⁹ See, e.g., The Center for Advanced Studies, Univ. of Minn. School of Social Work, *Confronting Racism*, Summer 2021.

The Committees propose that NYSBA continue to advocate for federal and NYS budgets that increase funding for programs to promote racial justice in child welfare systems.

1. Support funding to support effective parental representation to ensure appropriate caseloads and practice standards as recommended by the Commission on Parental Representation.¹⁰⁰
2. Increase mandated essential preventive community-based services to preserve families, increase economic opportunity and ameliorate poverty without the threat of unnecessary family separation through the child welfare system.¹⁰¹

C. Proposed State and Federal Legislative Action & Advocacy

The Committees propose that the NYSBA advocate for legislation as described below.

1. Federal Legislation

- a. The Child Abuse Prevention and Treatment Act:
 - (1) Study the history and impact of CAPTA as it pertains to Black families;¹⁰²
 - (2) Consider the growing consensus among influential and thoughtful observers that this legislation should be repealed or significantly modified;
 - (3) Engage in discussion regarding to CAPTA's continuation and possible delinking of child protective services from family well-being;¹⁰³

¹⁰⁰ http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf. See Martin Guggenheim, *How Family Defender Offices in New York City Are Able to Safely Reduce the Time Children Spend in Foster Care*, Family Law Quarterly, Volume 54, Numbers 1 & 2, 2020. (ABA 2021). See also *Effects of Funding Changes on Legal Representation Quality in California Dependency Cases*, ABA 2020, page 12.

¹⁰¹ Alan J. Dettlaff et al, *It is not a broken system, it is a system that needs to be broken: the upEND movement to abolish the child welfare system*, 14 J. of Public Child Welfare 500, 500-17 (Sept. 6, 2020).

¹⁰² 42 U.S.C. §§ 5101–5116i. Originally enacted in P.L. 93-247, CAPTA has been amended numerous times, most recently on January 7, 2019, by the Victims of Child Abuse Act Reauthorization Act of 2018 (P.L.115-424). Children's Bureau, Admin. For Children & Families, U.S. Dep't Health & Human Servs., About CAPTA: A Legislative History (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf> [<https://perma.cc/UNB8-L6V2>].

¹⁰³ See Dorothy E. Roberts, *Shattered Bonds: The Color of Child Welfare* (2002); *Abolition Is the Only Answer: A Conversation with Dorothy Roberts*, Rise Magazine (Oct. 20, 2020) [hereinafter *Abolition Is the Only Answer*], <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/J57Z-ZEX6>] (interview with Dorothy Roberts). Others have challenged the conventional terminology of the child welfare system as well. See, e.g., Emma Williams, 'Family Regulation' Not 'Child Welfare': *Abolition Starts with Changing Our Language*, The Imprint (July 28, 2020), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586>; Molly Schwartz, *Do We Need To Abolish Child Protective Services? Inside One Parent's Five-Year Battle with the 'Family Destruction System'*, Mother Jones (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/> [<https://perma.cc/H7N2-7BJ4>]; *Burton and Montauban, Toward Community*

(4) Make recommendations as a result of this study and discussion; and take action to further these recommendations such as:

- Include the right to counsel for children and parents in CAPTA or other federal legislation. (As of November 2021, 200 organizations, states and individuals have written in support of this guarantee.¹⁰⁴)
- Revise definitions of abuse and neglect¹⁰⁵ to avoid conflating the consequences of poverty with child maltreatment.¹⁰⁶
- Revise mandated reporting requirements to ensure only child safety or child welfare issues are addressed¹⁰⁷ and to eliminate anonymous reporting while maintaining the reporter’s confidentiality.¹⁰⁸
- Revise the “reasonable efforts” legal standard more clearly providing specific steps that child welfare agencies must make to prevent separation of Black families.

b. The Adoption and Family Safety Act (AFSA)

Eliminate standards that use arbitrary timelines to terminate parental rights and provide for best

Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being, 11 Colum. J. of Race & Law 639 (June 2021); see, e.g., Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, Time (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families/> [<https://perma.cc/5K6E-YS8A>

¹⁰⁴ *Campaign Pushes for Children and Parents’ Right to Quality Legal Counsel*, The Imprint (Nov. 16, 2021), <https://imprintnews.org/news-briefs/campaign-pushes-for-children-and-parents-right-to-quality-legal-counsel/60354>.

¹⁰⁵ CAPTA requires states to include “neglect” with “abuse” in their child protection reporting laws, defined broadly as “any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation ... or [a]n act or failure to act which presents an imminent risk of serious harm.” Similar to “suitability provisions” that emerged during the Civil Rights era, such expansive definitions open the door to highly subjective assessments about parental fitness. State definitions of neglect include failures to provide adequate housing, clothing, or food but do not meaningfully address a parent’s ability to acquire necessities. Subjective determinations of “adequacy” have allowed poverty rather than actual neglect to serve as a basis for determinations of parental fitness and family separations. See Jerry Milner and David Kelly, *It’s Time to Stop confusing Poverty with Neglect*, The Imprint (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222>

¹⁰⁶ Children’s Rights, “Ending the Unjust, Unnecessary Removal of Black Children From Their Families,” June 20, 2021.

¹⁰⁷ Michael Fitzgerald, *New York City Child Welfare Chief Calls For Changes to Mandated Reporting System*, The Imprint (March 15, 2021), <https://imprintnews.org/child-welfare-2/child-welfare-chief-calls-for-changes-to-mandated-reporting-system/52710>.

¹⁰⁸ Children’s Rights, “Ending the Unjust, Unnecessary Removal of Black Children From Their Families,” June 20, 2021.

interests and other reasonable exceptions to the prohibition against placing children with family members who have criminal records that do not pose a safety risk.¹⁰⁹

2. State Regulations & Legislation

Advocate for:

- a. Legislation to enact recommendations of the Commission on Parental Legal Representation,¹¹⁰ including:
 - (1) Early representation to provide free parental legal services when a child protective investigation begins and ahead of hearings to determine imminent risk leading to family separation;
 - (2) Presumed financial eligibility of parental respondents in Article 10 cases;
 - (3) Increase in 18(b) rates for parental representation and rates for Attorneys for the Child;
 - (4) State oversight of mandated parental representation;¹¹¹
- b. Requirement that CPS caseworkers immediately inform parents of their rights to remain silent, to speak to a lawyer, and to not permit entry into their home;¹¹²
- c. Prohibition against anonymous reports of child neglect to the NYS central registry by requiring callers to leave their names and contact information when making a report, while maintaining confidentiality;
- d. Requirement of written informed consent before pregnant or perinatal persons could be subjected to medically unnecessary drug testing in New York hospitals;¹¹³

¹⁰⁹ See, e.g., Michael Fitzgerald, , “Amid Pandemic, Congress Considers Giving Parents More Time to Reunify with Kids in Foster Care,” The Imprint (Aug. 11, 2020), <https://imprintnews.org/child-welfare-2/pandemic-congress-parents-reunify-kids-foster/46487>.

¹¹⁰ Commission on Parental Legal Representation, Interim Report to Chief Judge DiFiore (Feb. 2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

¹¹¹ *Id.* at 24

¹¹² Similar to *Miranda* warnings given to people in criminal custody, this bill would allow parents to make informed, sound decisions at a particularly vulnerable moment in CPS investigations.

¹¹³ This legislation would help curb the practice of discriminatory drug testing of parents that can lead to the parents being separated from their newborn children.

- e. An enactment that would give Family Court judges the discretion to order continued contact between children and their families of origin after a parent’s rights are terminated when in the child’s best interest;
- f. Requirement of state oversight of quality for New York State parental representation.

D. Proposed Continuation and Strengthening of Support for NYS Family Court Practice Standards

Support and further promote:

1. Quality standards of practice in NYS Family Court child welfare cases as issued by the NYS Office of Indigent Legal Services¹¹⁴ and the NYSBA Committee on Mandated Representation¹¹⁵ and as supported by the NYS Commission on Parental Representation,¹¹⁶
2. Pre-petition assignment of counsel pursuant to FCA § 262 at all stages of the proceedings when separation is at issue;
3. Parental representation that utilizes these family defense strategies in particular:
 - a. Expert services to provide testimony demonstrating how the trauma, loss and long-term developmental impacts the child’s attachment to their family as the result of separation.¹¹⁷
 - b. Cross examination requiring child welfare agencies to clearly demonstrate in minute detail that separation is necessary for the safety of the child and that they have made reasonable efforts to preserve and sustain families to avoid removal, including but not limited to the provision of food, safe and affordable housing, medical, substance abuse

¹¹⁴ NYS Office of Legal Services, NYS ILS Indigent Legal Service Standards - Parental Representation in State Intervention Matters (2015)

¹¹⁵ NYSBA Committee on Mandated Representation, 2021 Revised Standards for Providing Mandated Representation.https://nysba.org/app/uploads/2020/02/Standards-for-Quality-Mandated-Rep_2021.pdf

¹¹⁶ Commission of Parental Legal Representation, Interim Report to Chief Judge DiFiore, February 2019. http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

¹¹⁷ Children’s Rights, “Ending the Unjust, Unnecessary Removal of Black Children From Their Families,” June 20, 2021; Alan J. Dettlaff et al., *It is not a broken system, it is a system that needs to be broken: the upEND movement to abolish the child welfare system*, 14 J. of Public Child Welfare 5, 500-17 (Sept. 6, 2020).

and mental health treatment.¹¹⁸

c. Opposition to family separation utilizing testimony and other proof demonstrating that the Article 10 allegations conflate the consequences of poverty with child maltreatment.¹¹⁹

d. Expert and other testimony to prove that termination of parental rights is not in the best interests of the child upon an evidentiary dispositional hearing.

E. Proposed Support for Civil Rights Litigation

1. State Action to Increase Assigned Counsel Rates for Parental Representation

Continue monitoring progress and provide support for *New York County Lawyers, et al. v. State of New York*, which seeks to increase the rate of pay for Section 18(b) attorneys who currently receive \$75 an hour for criminal and family court mandated legal services. Parental attorneys have not had a raise since 2005.¹²⁰

2. U.S.C. § 1983 Action for Violations of Due Process Equal Protection Under Color of Law¹²¹

Support Section 1983 civil rights litigation under Title VI of the Civil Rights Act of 1964 (either as a state or federal court claim) which prohibits discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance, such as state

¹¹⁸ Effective October 27, 2019. *See* Soc. Serv. Law § 384-b(7)(f), defining “diligent efforts” as reasonable attempts by an agency to assist, develop, and encourage a meaningful relationship between the parent and child, including: 1) cooperating with the parents to develop a plan for appropriate services to the child and his or her family; 2) Making suitable arrangements for the parent to visit with the child; 3) Providing services and other assistance so that problems preventing the child's discharge from care can be resolved or ameliorated; 4) Informing the parents of the child's progress, development, and health; 5) Making suitable arrangements with a correctional facility for an incarcerated parent to visit with the child, if such visiting is in the best interests of the child; and 6) When the child is in the custody of authorized agency, providing information outlining the legal rights and obligations of a parent who is incarcerated or in a residential substance abuse treatment program and on social or rehabilitative services available in the community.

¹¹⁹ Children’s Rights, “Ending the Unjust, Unnecessary Removal of Black Children From Their Families,” June 20, 2021.

¹²⁰ *See New York County Lawyers Association, et al. v. State of New York, et al.*, Index No. 156916/2021, Amended Complaint, https://drive.google.com/file/d/1B_Vo8S9CvsqxRLgFkrM2TKkJY2au6ryx/view, <https://imprintnews.org/top-stories/new-yorks-family-court-attorneys-file-lawsuit-for-better-pay/59975>

¹²¹ *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 Md. L. Rev. 2, 358-411, <https://core.ac.uk/download/pdf/56358191.pdf>

child welfare systems.¹²²

¹²² Children’s Rights, “Ending the Unjust, Unnecessary Removal of Black Children From Their Families,” June 20, 2021.

