

Testimony

Richard C. Lewis, President of the New York State

Bar Association Before the

Senate Standing Committee on Judiciary

And

Senate Standing Committee on Children & Families

November 1, 2023

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I am Richard C. Lewis, President of the New York Bar State Bar Association, and I am joined by Susan Lindenauer, Chair of the Association's Committee on Families and the Law. We thank you for the opportunity to present testimony on behalf of the Association at today's joint public hearing on the resources, operations, culture, and outcomes of New York's Family Court system, with the goal of creating a more equitable and accessible justice system – particularly for individuals of color.

Family Courts are a top priority because they are where most Americans experience the justice system. Hundreds of thousands of individuals enter the courts every year seeking a divorce, legal separation, and matters related to children – both happy (like adoption or becoming a foster parent, and difficult (such as child support, custody, joint parenting agreements). Given the weight of these matters on countless lives, it is paramount that our Family Court system has sufficient resources, training, and reforms necessary to ensure fair treatment for all.

Our Association has a long and deep commitment to addressing legal issues that impact families and children. Among the many Association sections and committees that have been involved in this important work is the Committee on Families and the Law, which last April released a report that looked at family courts across the state and the child welfare system from a historical perspective, recognizing the myriad challenges – including inherent structural racism - that exist within these institutions and requires a concerted reform effort to combat. The full report is submitted to this Committee with my written testimony.

This Association report followed on the heels of an independent review commissioned by the Chief Judge in 2020, which issued a stark indictment of a court system that delivers second-class justice for New Yorkers of color. Unfortunately, this was particularly the case in our Family Courts, where a chronic lack of respect for individuals of color and unacceptable delays in abuse and neglect proceedings far too often result in permanent damage to families and children.

The Committee on Families and the Law's report found, for example, that at the preliminary stages of child protective proceedings, judges are more likely to order Black children into the foster system. Once in the system, these children often receive inferior services and experience longer stays than white children experience on average, lessening their chances of family reunification.

The NYSBA Committee on Family and the Law's report makes a series of recommendations aimed at improving the culture and efficiency of the Family Court system, including:

- Increasing the availability of essential preventative community-based services to preserve families, increase economic opportunity, and ameliorate poverty without the threat of unnecessary family separation through the child welfare system.
- Appointing more judges. Family Courts continue to experience a high volumes of cases but receive fewer resources to hear those cases. Delays in case processing can result in permanent damage to children, particularly when those delays impact family reunification.
- Raising the pay for court appointed attorneys in family law cases. Quality legal representation is essential to combatting the disproportionate and disparate impact of the child welfare system on families of color. Effective assistance of counsel for parents and children help keep families together; reduce the duration of foster care stays; and ensure access to individualized, culturally appropriate, and supportive services and resources. Competitive compensation and reasonable caseloads that enable attorneys to meet their ethical obligations to clients are critical to ensuring effective representation.
 - o The Association continues to advocate for an increase in state assigned counsel rates to bring them in line with federal rates. This

will increase participation in the program, addressing a shortage in representation – particularly for indigent defendants and minors 0 which is undermining access to justice in this state.

- This year's state budget increased assigned counsel rates. As of April, the rates for Attorneys for Children and 18b attorneys went up to \$158 per hour. This is an important step forward. While future state funding is not guaranteed, the Association will continue to advocate for continued raises to keep in line with the current and future fiscal climates.

Conclusion

The New York State Bar Association acknowledges the pervasive systemic racism in our state's child welfare and Family Court systems. We are ready to work with legislators, policy makers, judges, and attorneys to enact reforms that will improve access to justice for individuals of color.

Thank you again for the invitation to present testimony on behalf of the New York State Bar Association, and for your consideration of our remarks.

Attachment 1



NEW YORK STATE
BAR ASSOCIATION

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

April 2022

**New York State Bar Association
House of Delegates
April 2, 2022**

Report and Recommendations of Committee on Families and the Law

**RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM
OF THE STATE OF NEW YORK**

The New York State Bar Association recognizes:

Systemic racism resulting from the history of slavery in the United States exists within the NYS child welfare system, impacting Black families disparately. 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.

Systemic racism and disparate treatment of Black families in the NYS child welfare system have often resulted in:

Undue investigation into and control over Black families in New York.

Unequal and inadequate distribution of necessary resources for the preservation of Black families;

Unnecessary harm to children of color and poor children due to trauma of separation from their caregivers; and

The economic and social toll on communities and society as a whole.

WHEREFORE, it is

RESOLVED, that the New York State Bar Association shall

Promote action by legislators, policymakers, judges and attorneys to:

Create, promulgate, maintain, implement and/or enforce laws, policies, rulings and practices that value and preserve Black families; and

Bring about the repeal of child welfare laws and policies enacted upon racist goals and assumptions that disproportionately impact Black Families; or result in unequal consequences.

New York State Bar Association
Committee on Families and the Law

Report and Recommendations on Racial Justice
and Child Welfare

March 2022

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Acknowledgments

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Executive Summary

There is a pressing need for an intense examination of the devastating impact of racism in our child welfare system. This Report by the Committee on Families and the Law of the New York State Bar Association is presented in support of a Resolution to adopt policies and engage in legislative advocacy aimed at ending structural racism in the child welfare systems in New York State and the United States. Since the murder of George Floyd, there has been a national reckoning regarding structural racism in law enforcement and throughout the criminal justice system. However, far less attention has been paid to the cases of two Black youths placed in the foster care system who were killed by state actors. Such tragedies are an emblem of a system purportedly designed to protect children that is permeated by bias and often destroys family integrity and autonomy and permanently harms children. Structural racism in child welfare is longstanding and well-documented. What is different today is a heightened awareness and concern about this problem and a great responsibility for leaders to seize the moment to bring about racial justice and widespread reform.

To be sure, the government may properly intervene to protect children from actual serious harm to their life or an imminent threat thereof due to a parent's behavior. Yet only a quarter of child protective cases involve intentional, harmful acts by parents. Most cases involve parents who cannot meet their children's basic needs due to poverty, and these families are disproportionately Black families. The roots of racism in child welfare can be found in our country's colonial past when slave owners often separated children from their parents. As detailed in this Report, state intervention in Black families evolved over time. Over the last half century, Congress passed many laws that have been destructive to Black families. Mandatory reporting laws, enacted by states as a prerequisite to receive certain federal funding, are pernicious. There has been an explosion in reports of suspected neglect that is often related to conditions of poverty endured by Black families who need economic support, not punitive child removal. Congress enacted another law requiring state agencies to make "reasonable efforts" to keep families intact but did not define the term, thus enabling states to make negligible efforts to prevent the placement of Black children. Another federal law has emphasized the termination of parental rights over reunification efforts and has resulted in the massive destruction of Black and brown families. Most recently, Congress passed an act that focuses on states providing preventive services but does not address the systemic biases that pathologize, surveil, and punish Black families.

New York has not escaped structural racism in child welfare. Black parents in our State have less access than other families to services needed to meet their children's basic needs. They are more often the subject of "hotline" reports and are more often investigated. Such probing examinations of families are often traumatic, intrusive, and disruptive. When an investigation results in the filing of an abuse or neglect petition by a local social services agency, Family Court must determine whether the child should be removed during the pendency of the proceeding or whether services can prevent removal. Black families are less likely than other families to receive services, and thus they are more likely to have children removed. Those Black children are more often placed in congregate care than other children and are more apt to have prolonged stays in foster care. Finally, Black parents are more likely than other parents to have their parental rights terminated. Children who "age out" of the system fare poorly compared to children not impacted by the system across a wide range of measures, including post-

secondary education, employment, housing stability, and involvement in the criminal justice system. Since Black children are disproportionately represented in the foster care system, they are subjected to these tragic, enduring outcomes more than other children. The policies and practices of our State's Office of Children and Families Services need to be overhauled so that the agency is part of the solution, not part of the problem.

Efforts have been made to improve parental representation and thereby better promote racial justice. These include attorney performance standards issued by the State Office of Indigent Legal Services and the State Bar Association and the creation of a Commission on Parental Legal Representation. The Commission's Interim Report declared in 2019 that crises in parental representation are particularly acute in child welfare proceedings and urged that robust State funding and oversight and effective legal representation are needed to transform the system. In 2020, an independent review commissioned by the Chief Judge resulted in a scathing indictment of a court system that delivers second-class justice for people of color, particularly in Family Courts, where there is an extreme lack of respect for Black families, and delays in abuse and neglect proceedings result in permanent damage to children. Reform efforts, including judicial bias trainings, are underway. Another avenue being pursued to achieve change is litigation, including a class action alleging that New York City officials unjustly prohibit certain relatives—disproportionately Black people—from becoming foster parents. An increase in the compensation paid to assigned counsel is the aim of another lawsuit.

As this Report details, the problems in the child welfare system are profound and require aggressive and comprehensive action at the state and federal level. The Committee therefore urges the New York State Bar Association to adopt a resolution acknowledging the system racism in our State's child welfare system; to advocate that legislators, policy makers, judges, and attorneys take action to value and preserve Black families; to consider the potential racial impact when reviewing proposed child welfare legislation; to support federal and state funding needed for effective parental representation and preventive services; and to seek the reform of federal and state laws that harm Black families, as set forth in detail in the proposed resolution; to continue to endorse an increase in assigned counsel rates; and to promote strengthened parental and child representation, beginning at the pre-petition stage in child welfare cases, and the effectuation of other recommendations of the Commission on Parental Legal Representation and other statewide advocates of family preservation.

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 and placed in state “protective custody” (“foster care”) as a result of allegations of abuse or neglect are at particularly heightened risk of harm at the hands of state actors, greater attention must be paid to the impact of anti-Black discrimination and structural racism on child welfare decision making.⁴ Moreover, foster care “raises the risk of long-term adverse effects on children compared to socioeconomically similar children who are not removed, including poor school performance, homelessness, arrest, chemical dependency, and mental and physical illness.”⁵ 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 suffer worse life outcomes relative to children not impacted by the system.⁶ Given their disproportionate representation in the foster care population, it is fair to say that Black children are

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, 2022, 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>.

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 Allon Yaroni et al., *Innovations in NYC Health and Human Services Policy: Child Welfare Policy*, Vera Institute of Justice (January 2014), <https://www1.nyc.gov/assets/opportunity/pdf/policybriefs/child-welfare-brief.pdf>.

6 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).

subjected to these outcomes at higher rate than children of other races.⁷ The New York State Bar Association’s Committee on Families and the Law (“the Committee”) stresses the need for 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 there exists a proactive role for government 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.⁸ While about a quarter of the situations currently brought to the attention of Child Protective Services (“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 physical or health needs of their children or to provide minimally consistent and stable parenting.⁹ Thus, while the Committee acknowledges the need for government intervention where a parent’s acts or omissions result in or threaten substantial harm to their child, we nevertheless assert the urgent imperative to end the unnecessary disruption and destruction of Black families caused by the child welfare system.¹⁰

The current impact of America’s history of racism and the ideology 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.¹¹

The magnitude of 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.¹² While Black children represent only 14% of the U.S. population, nationwide they make up 24% of the foster care population, despite Black families being no more likely than white families to meet the (highly

7 Dettlaff, A., & Weber, K. (June 22, 2020). 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.”).

8 See, e.g., New York Family Court Act Article 10 – Child Protective Services; FCA 1012 (definitions of neglect and abuse); see also Definitions of Child Abuse and Neglect, Child Welfare Information Gateway (March 2019) (all United States jurisdictions), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/define/>.

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

10 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>.

11 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.

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

subjective) criteria for child maltreatment.¹³ Moreover, Black children remain in state custody longer than white children and are more likely to be placed in institutional settings.¹⁴

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

As outlined above, the impact of the child welfare system on the “lives of people living in poverty and Black, American Indian and Latinx communities rivals the much more widely discussed criminal legal system.”¹⁵ 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.¹⁶ 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 the prominent child advocacy organization, Children’s Rights, 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*,¹⁷ organized state intervention into Black children’s family relationships has evolved over time. In the late 18th century and early 19th century, in states where slavery was not recognized, Black children who were alleged to be orphans were generally placed in a workhouse or bonded out as indentured servants.¹⁸ 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.¹⁹ With the establishment of the federal Children’s Bureau in 1912, the explicit exclusion of Black children and families from government child welfare efforts 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

13 *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-population-by-race-and-ethnicity>.

14 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/assets/gao-07-816.pdf>; see also The Annie E. Casey Foundation, *Keeping Kids in Families: Trends in U.S. Foster Care Placement* (2019) (“Systems were least likely to place African-American children in a family.”), <https://assets.aecf.org/m/resourcedoc/aecf-keepingkidsinfamilies-2019.pdf>.

15 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>.

16 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).

17 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*).

18 *Id.* at 7.

19 *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>.

century the child welfare agencies did include Black families in their mandate, in most instances no services were provided.²⁰ As “services shifted from the private to public sector” and state support began to be available to Black families, the child welfare system enhanced its surveillance and “increasingly subjected Black families to the unwarranted policing that had historically been used to separate marginalized families.”²¹ Although federal legislation adopted over the past 50 years has ostensibly been supportive of the safety and wellbeing of children and families, inherent systemic and structural biases have meant that the legislation has often facilitated government disruption and destruction of Black families and children.²²

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.²³ “Today, mandatory reporters are deeply involved in the disproportionate representation of Black families in the child welfare system.”²⁴ Further ensnaring Black families into 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 reporting laws mandating certain professionals having contact with children to report suspected child abuse and neglect.²⁵ The inclusion of “neglect” in the reporting requirement, as well as the ever-expanding network of professionals mandated to initiate investigation of families by CPS “has strengthened the child welfare surveillance state.”²⁶ Reporters include not only doctors and teachers, but also police officers, social service providers, therapists, drug treatment counselors, domestic violence services providers and other professionals, as well as any other person who suspects child maltreatment.²⁷ Poverty amplifies a family’s exposure to social service systems, such as public health, public benefits or housing assistance, and education systems – which further increases their exposure to mandated reporters.²⁸ 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 CPS investigation or alternative response.²⁹ Black families are represented disproportionately in the data reported.³⁰

20 Children’s Rights, *Fighting Institutional Racism*, *supra* note 17, at 7.

21 *Id.* at 7.

22 *Fighting Institutional Racism*, *supra* note 17, 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”).

23 *Id.* at 8.

24 *Id.*

25 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).

26 *Fighting Institutional Racism*, *supra* note 17, at 8.

27 Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect*, (April 2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

28 As just one example, as of October 2020, approximately 57% of heads of household in New York City’s homeless shelters were Black, and 32% were Latinx, 7% were white. See “New York City Homelessness: The Basic Facts” (October 2020), Coalition for the Homeless, https://www.coalitionforthehomeless.org/wp-content/uploads/2020/10/NYCHomelessnessFactSheet8-2020_citations.pdf. These shelters are staffed primarily with mandated reporters, who are obligated to call in cases against families they are ostensibly required to service.

29 *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>.

30 *Id.*

CAPTA also increased disproportionate reporting of Black families by including “neglect” in the mandatory reporting requirement, which was defined to capture conditions most often related to poverty. Notably, almost 75% of child protective proceedings today are brought due to unmet basic needs for healthcare, food and other essentials.³¹ Thus, since 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.

The expansion of mandatory reporting to include poverty framed as “neglect” has significantly facilitated intrusive surveillance of Black families and the separation of Black children from their families. Rather than providing economic support, supportive services, employment and housing assistance, and streamlined access to government benefits, government policies and laws have instead made poverty a premise for punitive child removal. Because Black Americans are subjected to poverty at higher rates than all other racial groups,³² the inclusion of conditions such as food insecurity, actual or potential homelessness, and lack of accessible and culturally appropriate medical, mental health, and substance use treatment as grounds for reporting, investigation, and prosecution of families 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.

Passage of the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”) did not alleviate the problems faced by poor Black families. AACWA requires state agencies to make “reasonable efforts” to prevent or eliminate the need to place or keep a child in foster care. However, 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.”³³ Given the system’s well-documented racism and anti-Black discrimination, it is not surprising that state efforts to keep families together or to return children to their families when they remove them are typically *pro forma* when it comes to children of color and most particularly Black children.³⁴

The 1997 enactment of the federal Adoption and Safe Families Act of 1997 (“ASFA”)³⁵ has had perhaps the most devastating impact on families of color, and particularly, Black families and children.³⁶ The Act

31 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), <https://ocfs.ny.gov/programs/cwcs/assets/docs/Blue-Ribbon-Commission-Report-2022.pdf>.

32 John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, (United States 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>.

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

34 *Fighting Institutional Racism*, *supra* note 17, 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.”).

35 PUBLIC LAW 105–89—NOV. 19, 1997.

36 See, e.g., Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act*

includes provisions to terminate parental rights if a child remains in foster care for 15 of the last 22 months. It prioritizes legal termination of a child’s family bonds over family relationships.³⁷ Moreover, the introduction of criminal background checks and mandatory disqualification of foster, adoptive, and kinship caretakers has further increased the severing of family relationships even when prior criminal records are years old and unrelated to any safety concern for a child.³⁸

Most recently, in 2018, Congress enacted the Family First Prevention Services Act (“FFPSA” or “Family First”) with the stated goal of shifting “fiscal incentives and the focus of the child welfare system back to early prevention of maltreatment and removal.”³⁹ 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.”⁴⁰ 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.⁴¹

The FFPSA is also an attempt by the federal government to reduce the institutionalization of children within the foster care system. Nationally, more than a third of young people who are 13 and older in child welfare systems lived in group placements in 2017, and “systems were least likely to place African-American children in a family.”⁴² In New York City alone, over six hundred children spend their nights in congregate care settings, far away from their families and communities.⁴³ Children, some

of 1997 - The Worst Law Affecting Families Ever Enacted by Congress, 11 Columbia J. of Race & Law 711 (2021).

37 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>.

38 Child Welfare Information Gateway, *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers*, (September 2018), <https://www.childwelfare.gov/pubPDFs/background.pdf>.

39 *Fighting Institutional Racism*, *supra* note 17, at 10.

40 *Fighting Institutional Racism*, *supra* note 17, 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>.

41 Mack, *White Supremacy Hydra*, *supra* note 40, at 770.

42 The Annie E. Casey Foundation, *Keeping Kids in Families: Trends in U.S. Foster Care Placement*, at 2 (Mar. 2022), available at <https://www.aecf.org/m/resourcedoc/aecf-keepingkidsinfamilies-2019.pdf>.

43 ACS Flash Report Monthly Indicator, p. 17 (February 2022), available at <https://www1.nyc.gov/assets/acs/pdf/data->

as young as 7 years old, are placed in facilities where they are raised by rotating shifts of staff. Tragically, research shows that youth who spend most of their time in group placements are least likely to ever become part of a permanent family.⁴⁴ While the FFPSA provides some avenues to attempt to reduce the population of young children sent away for years into institutionalized care, there is significant room for improvement. The law is also inadequate to address the atmosphere of violence, despair, and isolation that children experience when they are placed in congregate care settings at great distance from their families.

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

To fully grapple with the issues involved and how they relate to the current examination of racism in the child welfare system one must look at the data. Over-representation of Black children in New York's foster system has been documented in 35 counties.⁴⁵ 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.⁴⁶ 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 also exists for the rest of New York State.

For instance, while black children make up approximately 10% of the population in the rest of the state, they comprise over 33% of the total population of youth in foster care.⁴⁷ In Upstate New York, 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

[analysis/flashReports/2022/02.pdf](#).

44 *Id.*

45 Jessica A. Pryce at 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>.

46 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>.

47 OCFS Request for Proposal Part IV: Disproportionate Minority Representation (DMR) in Child Welfare and Juvenile Justice Systems (December 2015), available at <https://ocfs.ny.gov/main/contracts/docs/DMR-Section-Seven-of-Grant-RFP-2015.pdf>.

county had cut that percentage in half. Likewise, Black 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.⁴⁸

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.⁴⁹

A. The New York State Office of Children and Family Services

The Office of Children and Family Services (OCFS) is the New York state agency responsible for overseeing and monitoring the child welfare system. Thus, OCFS is 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.⁵⁰ One such initiative is the adoption by OCFS of a “blind removal” policy, in an effort to address the acknowledged disproportionality of Black children in foster care and the disparity in services received.⁵¹ The OCFS policy is an outgrowth of a strategy piloted in 2011 by the Nassau County Department of Social Services in response to disproportionate representation of children of color in that county’s foster system. With the stated goal of reducing bias at the point of the removal decision-making process, 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 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, 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

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

49 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/>.

50 *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>.

51 New York State Office of Children and Family Services, “The Blind Removal Process,” Administrative Directive 20-OCFS-ADM-19, (October 14, 2020), [20-OCFS-ADM-19.docx \(live.com\)](https://www.ocfs.ny.gov/files/20-OCFS-ADM-19.docx).

poverty and barriers to resources to support families.⁵² Notably, the concept of “blind removals” fails to address poverty, which is the main driver of Black families coming into contact with the child welfare system. While the blind removal concept may be useful in highlighting bias in decision-making, 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.

1. “Pre-Petition Family Intervention by NYS Office of Children and Family Services: Reporting to OCFS

A families’ entanglement in the child welfare system leading to investigation and government oversight usually occurs upon a report of suspected maltreatment to the State “child abuse hotline.” It is relatively easy to initiate a CPS investigation: currently, an investigation may be initiated even upon an anonymous reporter’s statement indicating they “have reasonable cause to suspect” that a child is an abused or neglected child.⁵³ An investigation can be extremely intrusive and traumatic for the child and family and can quickly lead to unnecessary state intervention, family disruption, and child separation.⁵⁴ 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.⁵⁵

Following receipt of a hotline report, vast amounts of government resources are immediately poured into investigatory, monitoring, and prosecutorial activities that can result in a significant disruption of, but not necessarily of direct benefit to impacted children and families. In both NYC and the rest of the State, as measured by rate per 1,000 children in the population, Black children are more likely than Hispanic children, and Hispanic children are more likely than white children, to be reported to the child abuse hotline, indicated for abuse/neglect, taken into state custody. Black children also remain in the system longer than children of other races.⁵⁶ According to a study reported by the New England Review of

52 “*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 Loudenback, “*Color-Blind Ambition*,” The Imprint (April 1, 2021), <https://imprintnews.org/los-angeles/color-blind-ambition-removals/52958>

53 New York State Social Services Law § 413.

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

55 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.centrernyc.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>.

56 *The OCFS Initiative to Address Racial Disproportionality in Child Welfare and Juvenile Child Welfare and Juvenile*

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.”⁵⁷

2. Harms of Investigations by Local CPS Agencies

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.⁵⁸ 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.⁵⁹

Additionally, the trauma to children during these investigations can be significant. During a CPS investigation, it is common for CPS investigators to strip search children, even when there has been no allegation of abuse.⁶⁰ CPS workers “can strip search children if CPS receives information about possible child abuse. CPS has much discretion on whether to conduct a strip search. . . CPS is able to conduct strip searches of a minor without the consent of a parent if CPS suspects an imminent threat to the child’s safety.”⁶¹ “A strip search can be so traumatizing to youth that they feel it is unsafe to return to the setting where the strip search occurred. . . the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable.”⁶² Noting that “[s]trip searches can seriously traumatize children, leading them to experience negative consequences for years. including anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars,” the American Bar

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>.

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

58 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/l1174_public_report_w_appendices_2019.pdf.

59 *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

60 Lenore Skenazy and Diane Redleaf, *How dare she dash in for muffins? After a mom lets the kids wait in the car, a nightmare, including strip searches, followed*, *Washington Post*, May 22, 2019,

<https://www.washingtonpost.com/outlook/2019/05/22/how-dare-she-dash-muffins/>.

61 American Bar Association, Section of Litigation, Children Rights Litigation Committee and New York Civil Liberties Union, *Preventing Strip Searches of Children and Youth: A Guide for Advocates- New York State Supplement* (March 2021), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/strip-search-tool-kit-nys-supplement.pdf.

62 *Id.*

Association has adopted a resolution “urging all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances.”⁶³

3. Preventive Services Provided by Local Child Protective Services Agencies

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.⁶⁴ During the child protective investigation, CPS is obligated to assist adults in the home with obtaining necessary prevention services⁶⁵ such as mental health, substance use and other treatment programs.⁶⁶ However, Black children are disproportionately less likely to be assisted with services to prevent families separation 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.

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.⁶⁷

B. 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.*⁶⁸

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. To initiate a court proceeding alleging that a parent has abused or neglected a child and that preventive services will not protect the child from harm, the local CPS agency files a “child protective” petition in the Family Court under Article 10 of the New York Family Court Act. Once a petition is filed, judges exercise broad authority to oversee and regulate intimate aspects of

63 ABA Resolution Prohibiting Strip Searches of Children and Youth, Except in Exceptional Circumstances, (adopted 2020), <https://dev.americanbar.org/groups/litigation/committees/childrens-rights/preventing-strip-searches-of-children-and-youth/>.

64 Roberts and Sangoi, *supra* note 49.

65 *Supra* note 5.

66 *Id*

67 See 18 NYCRR § 441, *et seq.*

68. Roberts and Sangoi, *supra* note 49.

a family's life, and can order detailed investigations and reports by CPS, issue orders of protection and warrants, and take any other steps they decide is necessary to protect the child's interests. After a period of time, sometimes years, the judge determines whether the CPS agency has proven the allegations of abuse or neglect by a preponderance of the evidence.

A child may be forcibly removed from his or her family at any time throughout these family court proceedings, and even prior to the filing of the petition, as CPS agencies are authorized to remove a child on an "emergency basis," and without court approval, if they think there is imminent danger to the child's life or health.⁶⁹ Subsequent to the filing of the petition, the Court may order a child to be removed from their home at any point in the proceedings. Children often live for years not knowing whether they are going to stay with their families or be packed up and moved into a stranger's home or an institution. If a child is removed from their home before a judge rules on the agency's petition ("makes a finding"), the family is entitled to an expedited hearing to seek the return of their child. Because of court congestion, these hearings sometimes take weeks or even months to resolve, trapping the child in foster care for the duration. If a child is removed from his or her home after the Court finds the parent guilty of neglect, the family has no recourse to an expedited hearing and hearings can take up to half a year to resolve.⁷⁰

1. Judicial Removals, Findings of Abuse or Neglect, and Placement into the Foster System

At the preliminary stages of child protective proceedings, judges in a neighboring state are more likely to order Black children into the foster system than children of other races. Black mothers are deemed unfit at higher rates than their white counterparts, despite evidence that they are no more likely than white mothers to abuse or neglect their children.⁷¹ Tragically, once placed into the foster system, Black children often receive services that are inferior to those of their white counterparts,⁷² 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.⁷³

While the number of children and youth in foster care in America has declined for a second straight year, the percentage of placements of children of color into the system appears to be growing.⁷⁴ Nationwide, 33 percent of children in the foster system are Black, but they make up just 15 percent of U.S. children.⁷⁵ In New York City, for example, while Black children make up 24.3% of the City's youth population, they comprise more than twice that amount - 53.8% - of the children placed in foster

69 Family Court Act § 1024. *See also* FCA § 1046(b), which provides that for cases of severe or repeated child abuse, findings may be made by clear and convincing and those heightened grounds may then form the basis for termination of parental rights proceedings under Social Services Law § 384-b(8).

70 *See In Re F.W.*, 122 N.Y.S.3d 620 (1st Dept. 2020).

71 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/>.

72 Roberts and Sangoi, *supra* note 49.

73 Administration for Children's Services, "Child Safety," <https://www1.nyc.gov/site/acs/child-welfare/ChildAbuseNeglectKid.page>.

74 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>.

75 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>.

care.⁷⁶ Hispanic/Latinx children are equally represented in foster care, 37.5%, compared to their total youth population size of 37.0%.⁷⁷

Moreover, judges are more likely to order Black children “placed into congregate care rather than into a relative’s home for the sole reason that the system deems that home too small, as families of color and various cultures live in a wide variety of arrangements, as compared with the more typical white, suburban, American household.”⁷⁸ Black children are 35% more likely than white youths to be placed in group homes or residential treatment facilities. Black youth spend an average of 29 months in institutions, compared with white youth who spend an average of 18 months.⁷⁹ Black youth over age 10 who are institutionalized are significantly less likely to be reunited with family than their white counterparts.⁸⁰ Lengthy, traumatic, and unstable congregate care placements are costly, ineffective, and rob children of the opportunity to be raised within a family. Often, children are subjected to numerous moves from one institution to another. The Family First Prevention Services Act seeks to address these problems as congregate care should now be much harder to accomplish. Implementation of the FFPSA in New York began on 9/29/2021, so it remains to be seen whether it will have this impact.

2. Termination of Parental Rights

Judges are also more likely to terminate the parental rights of Black parents than white parents.⁸¹ Professor Marty Guggenheim, a nationally recognized expert on the system observes that:

With certain exceptions that states too often ignore, ASFA [the federal Adoption and Safe Families Act] 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... 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.⁸²

In addition to the arbitrary termination time frame, ASFA currently restricts the placement of children with family members based on certain criminal history criteria, with no best interests or safety exceptions, creating additional obstacles to children living with a family member when a return to their parent is not possible.⁸³ The restrictions on placements, especially with relatives or kin who have *de minimis* contacts with the child welfare or criminal justice systems, can be disastrous. Since ASFA was passed, modifications to New York’s Social Services Law have resulted in almost 300 felonies in New

⁷⁶ *Id.* at 12.

⁷⁷ *Id.*

⁷⁸ 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>.

⁷⁹ Think of Us, *Away from Home: Youth Experiences of Institutional Placements in Foster Care*, (July 21, 2021), https://assets.website-files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf.

⁸⁰ *Id.*

⁸¹ Minkyong Song, *Termination of parental rights and adoption in foster care*, Univ. of Penn. Doctoral Dissertation (2006), <https://repository.upenn.edu/dissertations/AAI3225547>.

⁸² Guggenheim, *supra* note 36.

⁸³ See SSL § 378-a.

York penal law that require mandatory foster/adoptive parent disqualification, a behemoth list which includes some “attempted” felonies.⁸⁴ There are 40 other felonies, including some drug possession offenses, that require a five-year mandatory disqualification. This creates significant and unnecessary barriers to families and kin who want to be supports for children in care, and deeply harms children who would be better served living with families, relatives, and friends instead of with strangers or in congregate care facilities.

IV.

Recent National and Statewide Efforts to Promote Racial Justice in Child Welfare Cases

A. Federal Efforts to Improve Legal Representation for Parents and Children in Child Welfare Proceedings

Quality legal representation is essential to combatting the disproportionate and disparate impact of the child welfare system on Black families. Effective assistance of counsel for parents and children can be expected to have salutary effects on the experiences and outcomes of impacted families, including keeping children safely with their families; reducing the time children spend in foster care; and ensuring access to individualized, culturally appropriate, and supportive services and resources.

Recognizing the importance of legal representation, in January 2021, the federal Administration for Children and Families issued a memorandum urging all state and tribal title IV-E agencies, courts, administrative offices of the courts and Court Improvement Programs to work together to ensure that parents, children and youth and child welfare agencies receive high quality legal representation at all stages of child welfare proceedings.⁸⁵ The memorandum emphasized that “[p]roviding high quality legal representation to children and youth in foster care, candidates for foster care and their parents at all stages of dependency proceedings is crucial to improving the experiences children, youth and parents have with the child welfare system and in turn improving outcomes.”⁸⁶ It noted that legal advocacy in times of family vulnerability can help stabilize families and reduce the need for more formal child welfare system involvement, including foster care.⁸⁷ The memorandum pointed to research demonstrating that the early appointment of counsel in child welfare proceedings can improve case planning, expedite permanency and lead to cost savings. This was coupled with a revision of the Child Welfare Policy Manual to allow federal reimbursement under Title IV-E of the Social Security Act for enhancements to parent and child representation. This policy change is being implemented in NYS. According to the New York City Administration for Children’s Services (“ACS”), consistent quality of representation was a key factor leading to improved permanency outcomes for children in New York City.⁸⁸ However, it also acknowledged that two important elements to ensuring high quality representation are competitive compensation and reasonable caseloads that enable attorneys to meet their ethical obligations to clients.⁸⁹

84 SSL 378-a(2)(e)(1).

85 <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>.

86 *Id.* at 14.

87 *Id.* at 11.

88 *Id.* at 9.

89 *Id.*

B. Practice Standards for Parental Representation in New York

On November 6, 2015, the ILS Board approved the “Standards for Parental Representation in State Intervention Matters” (the Standards).⁹⁰ 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.⁹¹ Additionally, the New York State Bar Association House of Delegates approved the 2021 Revised Standards for Providing Mandated Representation (Revised Standards) on January 30, 2021.⁹² The Revised Standards note that “[h]istorically, the largest impediment to the provision of quality mandated representation is underfunding of the provider. It is vital that funding sources provide funding adequate to enable providers to meet or exceed the requirements of these standards.”⁹³

C. Chief Judge DiFiore’s 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 to be chaired by Hon. Karen Peters, former Presiding Justice of the Appellate Division Third Department.⁹⁴ In 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.”⁹⁵ The Commission’s 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.”⁹⁶ After a comprehensive fact-finding process, the Commission concluded that “a complete transformation is urgently needed in New York’s publicly funded system of parental representation in child welfare matters.”⁹⁷ With regard to child welfare matters, the Commission found that “[i]nstances 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.”⁹⁸ Emphasizing “the need for significant and swift State action to address systemic problems, thus enabling attorneys to provide effective representation and Family Courts to

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

91 *Id.* at 4.

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

93 *Id.* at 1.

94 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>.

95 *Id.*

96 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 (Interim Report).

97 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.

98 Family Court Act § 261.

make sound decisions that will best meet the needs of families,” the Commission stressed that “[e]very parent and child in our Empire State must receive timely, quality legal counsel before a family unit is torn asunder.”⁹⁹

2. Racial Injustice in the Courts: The Secretary Jeh 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.¹⁰⁰ Black families had long pointed out what they experience as discriminatory treatment in New York City’s family courts.¹⁰¹ 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.¹⁰²

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 more recently narrowing, but they remain larger for both communities than they were in 1991.¹⁰³

“[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.”¹⁰⁴

“The picture painted for us was that of a second-class system of justice for people of color in New York State.”¹⁰⁵

Delays in processing a Family Court Article 10 case can result in permanent damage to children, particularly when those delays impact reunification. 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.’” 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

99 Interim Report, *supra* note 96, at 4.

100 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>.

101 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/>.

102 Jeh Johnson Report, *supra* note 100, at 36.

103 *Id.* at 33.

104 *Id.* at 54.

105 *Id.*

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."¹⁰⁶

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.”¹⁰⁷ A Family Court judge in New York City reportedly yelled at a litigant reporting that she did not know who the father of her child was, and the judge then asked, “How is it that you people never know?”⁸⁵¹⁰⁸ 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.”¹⁰⁹

The devastating impacts of Family Court on Black families cannot be overstated or overlooked any longer.¹¹⁰ 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.”¹¹¹

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 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 is described in a recently released report, *Equal Justice in the New York State Courts: 2020-2021 Year in Review*.¹¹² Among the steps taken are the amendment of Section 17.3 of the Rules of the Chief Judge to require that all state

¹⁰⁶ *Id.* at 57.

¹⁰⁷ *Id.* at 58.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 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.

¹¹¹ *Parents to City Council: Fund Communities, Not ACS*, Rise Magazine (Nov. 3, 2020), <https://www.risemagazine.org/2020/11/fund-communities-not-acs/>.

¹¹² <https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf>.

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. Federal and State Lawsuits

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

1. *B.B., et al. v. Hochul, et al.*

The Legal Aid Society of New York City recently filed a lawsuit in federal court, alleging that city and state officials in New York “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. “As Black and Latino children are vastly overrepresented in New York City’s foster care system, these 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.”¹¹³ The class-action suit, filed jointly with Dechert LLP in the U.S. District Court for the Eastern District of New York, argues 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.”¹¹⁴ 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.”¹¹⁵

2. *New York County Lawyers Association, et al. v. State of New York, et al.*¹¹⁶

New York bar associations representing court-appointed attorneys in the criminal and family court have filed a lawsuit¹¹⁷ against the city and state to increase their pay and what they can provide clients,

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 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>.

¹¹⁶ 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>.

¹¹⁷ https://drive.google.com/file/d/1B_Vo8S9CvsqxRLgFkrM2TKkJY2au6ryx/view.

asserting that they have worked for over 20 years without adequate compensation. Seeking an increase in assigned counsel rates, plaintiffs in this action have alleged that the State’s “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.”¹¹⁸ Assigned counsel who represent parents and children 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, resulting in unduly heavy caseloads and the inability to provide families and children with the effective assistance of counsel.

V. 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:

Systemic racism resulting from the history of slavery in the United States exists within the NYS child welfare system, impacting Black families disparately. 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.

Systemic racism and disparate treatment of Black families in the NYS child welfare system have often resulted in:

Undue investigation into and control over Black families in New York.

Unequal and inadequate distribution of necessary resources for the preservation of Black families;

Unnecessary harm to children of color and poor children due to trauma of separation from their caregivers; and

The economic and social toll on communities and society as a whole.¹¹⁹

¹¹⁸ *Id.* at 49.

¹¹⁹ Center for Disease Control and Prevention and Adverse Childhood Experiences, <https://www.cdc.gov/violenceprevention/aces/fastfact.html>.

WHEREFORE, it is

RESOLVED, that the New York State Bar Association shall

Promote action by legislators, policymakers, judges and attorneys to:

Create, promulgate, maintain, implement and/or enforce laws, policies, rulings and practices that value and preserve Black families; and

Bring about the repeal of child welfare laws and policies enacted upon racist goals and assumptions that disproportionately impact Black Families; or result in unequal consequences.

2. Propose NYSBA Policies committing to:

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.¹²⁰

Challenging disparate treatment of Black Families in the child welfare system by:

Evaluating, assessing and addressing practices that violate equal treatment of families and children.

Addressing practices that infringe upon the equal treatment of all families and children.

Acknowledging and accounting for past and current inequities, and promoting laws and practices that provide families and children, particularly those most impacted by racial inequities, with the infrastructure needed to thrive.¹²¹

B. Proposed Federal and State Budget Advocacy

The NYSBA continues to:

Advocate for federal and NYS budgets that increase funding for programs to promote racial justice in child welfare systems.

Support increased funding for effective legal representation for parents and children to ensure appropriate caseloads and practice standards as recommended by the Commission on Parental Representation.¹²²

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

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

122 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.

Require that the State increase the availability of 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.¹²³

C. Proposed State and Federal Legislative Action & Advocacy

The Committee proposes that NYSBA advocate for legislation as described below.

1. Federal Legislation

The Child Abuse Prevention and Treatment Act:

Study the history and impact of CAPTA as it pertains to Black families;¹²⁴

Consider the growing consensus among influential and thoughtful observers that this legislation should be repealed or significantly modified;

Engage in discussion regarding to CAPTA's continuation and delinking of child protective services from family well-being;¹²⁵

Make recommendations 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.¹²⁶)
Revise definitions of abuse and neglect¹²⁷ to avoid conflating the consequences of poverty with child

123 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).

124 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>].

125 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-%20need-to-abolish-child-protective-services/> [<https://perma.cc/H7N2-7BJ4>]; Burton and 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 *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>].

126 *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>.

127 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

maltreatment.¹²⁸

Revise mandated reporting requirements to ensure only child safety issues are addressed¹²⁹ and to eliminate anonymous reporting while maintaining the reporter’s confidentiality.¹³⁰

Revise the “reasonable efforts” legal standard to specific steps that child welfare agencies must make to prevent separation of Black families.

The Adoption and Safe Families Act (ASFA)

Revise standards that use arbitrary timelines for proceeding toward termination of parental rights to ensure that no petition is filed unless a determination has been made that termination would be in the best interest of the child;

Provide for individual assessments and best interest exceptions to the prohibition against placing children with family members who have criminal records that do not pose a safety risk.¹³¹

Family First Prevention and Services Act (FFPSA)

Establish an independent panel to review the impact of FFPSA on children in congregate care settings.

2. State Regulations & Legislation

Advocate for:

Legislation to enact recommendations of the Commission on Parental Legal Representation,¹³² including:

Early representation to provide free parental and child legal services when a child protective investigation begins and ahead of hearings to determine imminent risk leading to family separation;

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>.

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

129 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>.

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

131 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>.

132 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.

Presumed financial eligibility of parental respondents in Article 10 cases;

Increase in 18(b) rates for parental representation and rates for Attorneys for the Child (“AFC), including a provision for increased funding to institutional and private providers of parental and AFC legal and social work services; and including a provision to increase rates periodically without the need for new legislation;

Amend § 249 (a) of the Family Court Act to require the appointment of an Attorney for Child in child custody matters under Article 6 of the Act; and

State oversight of mandated parental representation;¹³³

Increase the number of Family Court Judges so that New York is no longer supporting a second-class system of justice in its Family Courts and can offer meaningful access to justice to the families of color that make up the vast majority of Family Court litigants;

Require that CPS caseworkers immediately inform parents and children of their rights to remain silent, to speak to a lawyer, and to not permit entry into their home;¹³⁴

Prohibit 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;

Require written informed consent before pregnant or perinatal persons can be subjected to medically unnecessary drug testing in New York hospitals;¹³⁵

Provide 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 interests;

Repeal the Host Homes regulations, which may be used to separate families without providing them with any services or supports, access to counsel, or other due process rights;

Eliminate the mandatory disqualification requirements in SSL 378 and require and individualized assessments of kin or relatives as foster/adoptive parents.

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

Support and further promote:

133 *Id.* at 24.

134 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.

135 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.

Quality standards of practice in NYS Family Court child welfare cases as issued by the NYS Office of Indigent Legal Services¹³⁶ and the NYSBA Committee on Mandated Representation¹³⁷ and as supported by the NYS Commission on Parental Representation;¹³⁸

Pre-petition assignment of counsel pursuant to FCA § 262 at all stages of the proceedings when separation is at issue and assignment of counsel to a child as soon as a voluntary petition is signed by their parent;

Parental and child representation that utilizes these family defense strategies including:

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.¹³⁹

Cross examination requiring child welfare agencies to clearly demonstrate in relevant 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 and mental health treatment.¹⁴⁰

Opposition to family separation utilizing testimony and other proof demonstrating that the Article 10 allegations conflate the consequences of poverty with child maltreatment.¹⁴¹

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 and Child Representation

Continue monitoring progress and provide support for *New York County Lawyers, et al. v. State of New*

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

137 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.

138 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.

139 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).

140 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.

141 Children's Rights, "Ending the Unjust, Unnecessary Removal of Black Children From Their Families," June 20, 2021.

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. Parent and AFC attorneys have not had a raise since 2005.¹⁴²

2. U.S.C. § 1983 Action for Violations of Due Process Equal Protection Under Color of Law¹⁴³

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 child welfare systems.¹⁴⁴

142 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>.

143 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>.

144 Children's Rights, "Ending the Unjust, Unnecessary Removal of Black Children From Their Families," June 20, 2021.

Attachment 2



COMMITTEE ON FAMILIES AND THE LAW

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**NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON FAMILIES & THE LAW
CHILD WELFARE AND RACIAL JUSTICE REPORT & RECOMMENATIONS
2023 Follow-Up Report**

October 24, 2023

The Committee on Families and the Law (CoFL) of the New York State Bar Association (NYSBA) researches, studies, recommends, and promotes legislative and administrative measures for increasing assistance for parties with special needs and circumstances.

In keeping with their mission to shape the development of the law, educate and inform the public, and respond to the demands of its diverse and ever-changing legal profession, NYSBA has advocated for state and federal legislation to promote equal access to justice for all, including many of those recommended by the CoFL. In April of 2022 NYSBA adopted the findings and recommendations of the CoFL’s report on Racial Justice and Child Welfare (“Report”) which demonstrates that current New York systems unduly impact Black families and calls for numerous state and federal legislative and administrative changes and other measures to alleviate the resulting racial injustice. The American Bar Association subsequently embraced the Report and adapted its finding and recommendations into one of its own.

Subsequent to issuing its Report, the CoFL identified three areas of focus for further work to ensure meaningful follow-up upon its recommendations and to make such additional recommendations as may be appropriate. These areas of focus included:

1. *Narrowing the Front Door*

To identify and address executive, judicial, and legislative matters requiring attention to lessen arbitrary and unnecessary intrusion by New York’s child welfare system into the lives of Black families. The following are some of the issues that have been considered and addressed in part:

- a. Refinement and narrowing of legal definition of neglect.
- b. Reform of mandatory reporting laws.
- c. Notice of rights requirements.
- d. Probable cause for drug testing without consent.

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2. *Unlocking the Back Door*

To identify and address executive, judicial, and legislative matters requiring attention to lessen arbitrary and unnecessary child welfare placements of Black children. The following are some of the issues that have been considered and addressed in part:

- a. Development and emphasis upon a well-defined and enforced “Active Efforts” standard to ensure family preservation or to bring about reunification as a condition of any placement.
- b. Reformation of FCA Section 255 to give the Family Court more power to order timely provision of appropriate services to preserve or reunite families.
- c. Monitoring and assessing the adequacy of judicial and attorney resources for the effective processing of neglect proceedings in the Family Courts.
- d. Advocacy for the Preserving Family Bonds Act which would allow for judicially ordered post termination of parental rights contact if in the best interests of the child.
- e. Funding for quality representation and judicial resources needed for the expeditious reunification of families.

3. *Education*

To inform and encourage the public, especially judges and attorneys, about developments and initiatives that will promote equal justice in matters of child welfare in New York, including the Recommendations of the Chief Judge’s Commission on Parental Representation:

- a. Eligibility guidelines in Article 10 Cases.
- b. Office of Indigent Legal Services Standards of Practice in Child Welfare Cases.

CoFL’s Continuing Work to Ensure Meaningful Follow-Up

The CoFL is continuing its work and making plans to provide additional meaningful follow-up to the recommendations of the Report, including (but not limited to) the following:

1. *The “Narrowing the Front Door” focus includes:*

- a. **Proposals to refine and narrow the legal definition of neglect:**
 - An amendment to the FCA narrowing the definition of neglect.
 - An amendment to the standard for/ use of “indicated” OCFS findings.
 - Advocacy for pre-petition/early representation and best access by parents and children to the courts.
- b. **Support reform of mandatory reporting laws:**
 - An amendment to CAPTA to change mandated reporting requirements.
 - Anti-Harassment bill A 2479/S902 (to help prevent false reports).
- c. **Strengthen Parents’ Rights to Counsel through legislation including:**
 - “Family Miranda” legislation such as A 1980/S901.
 - “Informed Consent Act” A109B/S320(requires probable cause for drug test.
 - Proposed pre-petition representation.

2. *The “Unlocking the Back Door” focus includes advocacy for efforts to maintain families*

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or expeditiously reuniting families including:

- a. Encourage development and emphasis upon a well-defined and enforced “Active Efforts” standard to ensure family preservation or to bring about reunification as a condition of any placement.
- b. Changes to ASFA (or superseding legislation) that replaces financial reimbursement incentives for placement of children with incentives for preserving families.
- c. Advocacy for substantial changes to termination of parental rights law, including the Preserving Family Bonds Act which would allow for judicially ordered post termination of parental right contact if in the best interests of the child.
- d. Reformation of FCA Section 255 to give the Family Court more power to order timely provision of appropriate services to preserve or reunite families.
- e. Monitoring and assessing the adequacy of judicial and attorney resources for the effective processing of neglect proceedings in the Family Courts.
- f. Additional increases in funding and incentives for quality mandated representation and judicial resources needs for expeditious adjudication of cases and reunification of families.

Since passing a resolution to address systemic racism in the child welfare system of New York, the NYSBA and its CoFL has monitored relevant executive, legislative, and judicial action, and advocated successfully for the following:

- Increase in the number of Family Court Judges.
 - Increase in rates of pay for Attorneys for the Child (AFC) and 18(b) Parent Attorneys.
 - Increase in state funding for parental representation through the Office of Indigent Legal Services.
 - Create attorney (and others) financial incentives for success with efforts to reunify families.
- g. Advocate for changes to parent attorney and AFC assignment system to encourage strong advocacy for preservation of families/return of children.

3. *Education*

With its focus on education to further the recommendations of the Report, the CoFL will take steps to identify and supply speakers to appear in statewide CLEs and other forums to present on all of the issues specified above in addition to the following:

- a. Eligibility guidelines in Article 10 cases.
- b. Office of Indigent Legal Services Standards of Practice in Child Welfare.
- c. Pre-petition representation.