

**New York City Council
Committee on General Welfare jointly with the Committee on Hospitals
Oversight - Impact of Marijuana Policies on Child Welfare
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**Written Testimony of The Bronx Defenders By
Emma S. Ketteringham, Managing Director, Family Defense Practice
Anne Venhuizen, Supervising Attorney, Family Defense Practice
Jessica Prince, Attorney, Family Defense Practice**

My name is Emma Ketteringham and I am the Managing Director of the Family Defense Practice at The Bronx Defenders. The Bronx Defenders has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 28,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, the loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

Our Family Defense Practice has been in place since 2005 and represents parents in child protection and all of the related family court proceedings that arise out of an abuse or neglect case. Since New York City first funded institutional parent representation in 2007, we have represented more than 11,000 parents in the Bronx and helped thousands of children either safely remain at home or safely reunite with their families. Our multidisciplinary staff of more than 50 attorneys, social workers, and parent advocates is assigned to intakes 1,500 new parents each year.

As a holistic defense organization, we have seen the ways that disparate enforcement of marijuana laws has hurt our clients—not only in criminal court, but in family court, housing court, civil proceedings, and in immigration proceedings. We are encouraged that lawmakers are not only seeking to rectify the wrongs that criminal enforcement of marijuana prohibitions have caused in Black and Latinx communities,¹ but are also working to ensure that the child welfare

¹ *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio's New York*, Drug Policy Alliance and Marijuana Arrest Research Project, July 2017
(<https://www.drugpolicy.org/sites/default/files>)

system does not cause needless court supervision and family separation based on a parent's use of marijuana. This testimony is intended to assist in that effort by identifying the primary ways that marijuana use is used against parents of color in the child welfare system, and how it often results in parents being added to the State Central Register for Child Abuse and Maltreatment (SCR), unnecessary court filings, prolonged supervision by the Administration of Children's Services (ACS), and traumatic family separation.

I. The City Council's Marijuana Justice Package Should Address How the Child Welfare System Responds to Use of Marijuana by a Parent.

This January, Governor Cuomo announced his intention to move forward with marijuana legalization in New York State. While marijuana legalization is a step in the right direction, efforts to eradicate the harm to communities caused by marijuana prohibition must address the ways that the child welfare system unjustifiably focuses on marijuana use and the civil penalties that result.

The use of marijuana comes up in a variety of contexts in child welfare cases; the harm it causes is broad and deep.² Allegations regarding marijuana use can be the reason ACS indicates a case and places a parent on the SCR limiting their employment options, files a case, opposes unsupervised contact between a parent and a child, requests an extension of supervision of a family, requires a family to engage in services, or rejects a family member available to care for children who must otherwise reside in foster care with strangers. While ACS does not often present marijuana use as the sole allegation in a neglect petition, use of marijuana is often held

/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf (“*To sum up: In New York City neighborhoods with low rates and numbers of arrests for marijuana possession, and with relatively few Black and Latinx residents, Blacks and Latinx were most of the people police arrested in 2016 for possessing marijuana. And in neighborhoods with high rates and numbers of arrests for marijuana possession, and with high percentages of Black and Latinx residents, nearly all of the people arrested for possessing, marijuana were Blacks and Latinx.*”)

² Indeed, the child welfare response to drug use generally might overshadow the harm of criminal enforcement of marijuana laws. Research shows that while one in ten people charged with a drug related offense is incarcerated, one in four children are removed by ACS in cases involving allegations of drug use. It is unknown how many of these cases involved the use of marijuana. Additionally, in 2017, 5,916 parents in the Bronx were investigated for allegations of drug use (almost 20% of all investigations), and over 40% of those parents had a case indicated against them—meaning that ACS found that there is “some credible evidence” of the alleged child abuse or neglect and placed the parent on the State Central Registry with far reaching consequences for their employment prospects. It is unknown how many of these investigations were for allegations of marijuana use as opposed to other drugs. See forthcoming report on the NYC child welfare system's response to allegations of drug use by parents, to be published by the NYU School of Law Family Defense Clinic and Movement for Family Power, Feb 2019.

against a parent, along with other allegations, and is invoked at every stage of a family court case to prolong child welfare involvement and, often, family separation.

The child welfare system's response to parents who use marijuana exacerbates the extreme racial disproportionality of the system. Systemic control and separation of families of color is deeply rooted in this country's history.³ Today, not only are children of color more likely to have contact with the child welfare system, but once involved, they are more likely to be separated from their families, placed with strangers in the foster care system, and remain in care for longer amounts of time.⁴ Research has consistently shown that children of all races and ethnicities are equally likely to be abused or neglected; however, children of color are significantly more likely to be represented in the child welfare system than their white peers.⁵ In New York City, Black children are more likely to be involved in the child welfare system than white children at each and every stage of the process: Black children are 6.3 times more likely to be involved in a report of abuse or neglect than white children, 7.5 times more likely to be involved in a report indicated by the child welfare agency, and 11.4 times more likely to be placed in foster care.⁶ Moreover, in New York City, and New York State as a whole, Black children remain in foster care longer, on average, than white children.⁷ Similar to Black children, Latinx children are more likely than white children to be involved in the child welfare system.⁸

Over the last decade, despite shifts away from draconian criminal enforcement, marijuana use, both past and present, is still a frequent basis or contributing factor for the prosecution of child protective proceedings in the family court.⁹ Simply changing the law to make it legal to possess and smoke marijuana going forward is not enough to remedy these harms. Any reform must address how the child welfare system responds to the use of marijuana by parents.

³ Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474, 1487 (2012); DeNeen L. Brown, 'Barbaric': America's cruel history of separating children from their parents, WaPo (May 31, 2018),

https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/?noredirect=on&utm_term=.3833ed584ec1; Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. Rev. 68, 69 (2017).

⁴ Jessica Pryce, Wonhyung Lee, Elizabeth Crowe, Daejun Park, Mary McCarthy & Greg Owens (2018): A case study in public child welfare: county-level practices that address racial disparity in foster care placement, *Journal of Public Child Welfare*.

⁵ U.S. Gov't Accountability Office, GAO-07-816, *African American Children in Foster Care: Additional HHS Assistance Needed to Help State Reduce the Proportion in Care* 8 (2007).

⁶ Vajeera Dorabawila & Nicole D'Anna, *Disproportionate Minority Representation (DMR) in Child Welfare and Juvenile Justice Systems Report 2014, Part IV, Page 7* (2015).

⁷ See id. at 10.

⁸ See id. at 7.

⁹<https://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html>

A. Marijuana Justice Requires that Hospitals Stop Testing and Reporting Women and Their Newborns to Child Welfare Authorities for Marijuana Use.

Marijuana use is cited to justify charges of child neglect and family separation most often in cases where women have just given birth and are alleged to have used marijuana while pregnant. These women, the vast majority of whom are Black and Latinx, are brought to the attention of child welfare authorities because they are drug tested by medical facilities at birth — often without notice and consent — reported to child welfare authorities, and brought before the family court to answer neglect charges, despite no evidence that they pose a risk to their newborns. Often, they are separated from their newborns during the critical time of maternal-infant bonding, only to be reunited when they are finally assigned an attorney in family court.

Case Study: Marion

The following case illustrates the destructive and unjustified response of the child welfare system to marijuana use. Our client Marion¹⁰ gave birth to a healthy baby girl at a New York City public hospital. Without her knowledge or consent, she was tested for drugs when she gave birth. Hospital staff informed her that she had tested positive for marijuana and that they would be testing her newborn daughter as a result. Marion was not given any medical explanation for why the drug screen was necessary nor the opportunity to refuse. She waited, confused and anxious, for the results. When the urine sample from the infant came back negative for all substances, Marion was discharged home with her newborn.

During the next two weeks, Marion attended to her daughter's every need while her partner worked outside of the home. She attended two well-baby visits and her pediatrician assured her that her baby was healthy and growing appropriately. At the second visit, however, the doctor also informed Marion that the result of a second drug screen had returned positive for marijuana. The doctor informed Marion that because the test was positive for marijuana she was required to call the Statewide Central Register of Child Abuse and Maltreatment (SCR) hotline and report Marion to the authorities, but that Marion should not worry as her daughter was clearly well cared for.

The following evening, on a Friday, two weeks after she had taken her baby home from the hospital, Marion received a knock at the door from an ACS child protective specialist (CPS). As the CPS later reported, the CPS observed Marion's home to be clean and well prepared to care for a baby. She observed the baby to be well taken care of and she had no immediate concerns. She further stated that she did not observe Marion to appear under the influence of any substances during her investigation.

Despite these observations, the CPS informed Marion that she was going to remove Marion's newborn from her care because of the positive marijuana screen. Marion begged the CPS not to remove her baby. When the CPS insisted she had no choice, Marion begged her to

¹⁰All names used throughout are changed to protect privacy.

wait for the baby's father to return home and to consider having him care for the baby if she could not. At no time did the CPS tell Marion she could speak to an attorney or have an advocate advise her of her rights. The CPS agreed to wait, but informed Marion that she would have to leave the home, and told her that if she returned at all during the weekend and the CPS discovered her there that her baby would be removed and placed in foster care. When the father of the child returned home, CPS quizzed him as to how to change a diaper and how many ounces of milk to feed the baby. Satisfied with his answers, CPS left the baby home with her father and told Marion to leave and appear in Bronx Family Court on Monday.

Marion did as she was instructed. She did not turn to family members for a place to stay because she feared bringing ACS to their homes to remove their children. Having nowhere to go, just two weeks after giving birth, Marion slept on the trains. On Monday she went to Bronx Family Court and was assigned an attorney from The Bronx Defenders. Over ACS's objection, the Family Court allowed Marion to return to her home, finding that she posed no imminent risk of harm to her baby. Even though her child was returned, she will never get this critical bonding time back. What's more, the mere filing of a case places her family under the supervision of the Court and ACS for at least another year, and now Marion is ordered to drug test, and permit contract agencies to inspect her child and home in order to keep her baby.

Marion's story is typical of what we see all too often in the Bronx: unnecessary and unjustified charges of neglect brought against women for testing positive for marijuana after giving birth, with traumatic¹¹ family separation as a result. Any reform about marijuana use must prevent cases like this one from occurring.

1. Hospitals Should Not Routinely Test Women Who Give Birth or Their Newborns for the Use of Marijuana.

Cases based on a woman's use of marijuana while pregnant begin with a drug screen of the mother, the newborn, or both, that is conducted by medical personnel at a hospital, as in Marion's case. In our experience, hospitals do not always obtain a woman's consent, let alone informed consent for the test and often do not even notify the woman that the test is being performed on her or her newborn. When tested, no medical explanation or reason is given or recorded in the medical record for why the test is necessary and no medical treatment is offered to or performed on the woman or newborn if the test is positive for marijuana.

Despite the fact that hospitals routinely drug test, there is no law in New York that requires a hospital to drug test a pregnant woman, a woman giving birth, or her newborn. While eight states have enacted laws that require medical professionals to drug test pregnant women when drug use is suspected, New York wisely has not enacted such a statute.¹² Such an approach, as discussed below, undermines maternal fetal and child health. A bill providing for the toxicology testing of newborns and the reporting of positive tests was proposed in the State

¹¹ Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Pa. J.L. & Soc. Change 207, 211 (2016)

¹² <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (as of Feb. 1, 2019)

Assembly in each of the past two legislative sessions, and did not make it out of committee.¹³ Nor does any federal law require drug testing of pregnant women.¹⁴

Drug testing in this manner is inconsistent with the most recently available written policy of the Health and Hospital Corporation (HHC).¹⁵ HHC's policy does not provide for required toxicology testing in the prenatal and postpartum contexts; instead it identifies ten risk indicators that may be considered in determining whether to test.¹⁶ The policy also provides that:

The medical provider must inform the mother if a toxicology test is necessary and obtain her verbal consent. The provider at the same time should explain to the mother how the results of the toxicology test will be used for her medical care and that of her unborn or newborn child. All toxicology test results must be shared with the patient. If the mother refuses to give verbal consent for testing, this refusal will be documented in her medical record. The medical provider will not conduct testing without the mother's consent. **Note: A positive toxicology test result is not an indication to report to the State Central Registry of Child Abuse and Maltreatment unless there is a concern regarding the safety of other children in the home.**¹⁷

Our experience is that these directives and guidelines are consistently ignored. To our knowledge, hospitals have different guidelines for when to test and there is little to no oversight by HHC to ensure that testing is not done in a manner that contravenes their policy, done solely for investigative reasons, and in a manner that protects against racial disparities in who is tested and who is reported. This is why The Bronx Defenders supports Resolution 0746 as it calls on New York State to pass legislation requiring the New York Department of Health to create clear and fair regulations for the drug testing of pregnant women and for pregnant women to be informed of their rights prior to testing. Specifically, we recommend that the City Council support the enactment of Assembly bill 5478, with the amendment to make it clearer that it apply to postpartum women and their newborns and require notice and clear consent from a pregnant or postpartum woman prior to drug testing her or her infant.

¹³ Assembly Bill A5369 (Feb. 8, 2017); Assembly Bill A9297 (Feb. 16, 2016).

¹⁴ The Child Abuse and Prevention Act (CAPTA) is the key federal legislation affecting child abuse and neglect. CAPTA does not require states to drug test newborns for drugs. It requires only that states have policies in place to notify child welfare agencies of babies who are "affected by substance abuse," affected by "withdrawal symptoms," or having Fetal Alcohol Withdrawal Syndrome. The law specifically does not require states to define child maltreatment as including babies exposed to drugs or require that it be a child welfare agency that is notified. See Understanding CAPTA and State Obligations, National Advocates for Pregnant Women, (September 18, 2019).

¹⁵ Operating Procedure memo. HHC Operating Procedure 180-8: Corporate Policy for Urine Toxicology Testing in the Pregnant Woman during the Antepartum Period, Labor and Delivery and Postpartum.

¹⁶ Id. at 2.

¹⁷ Id. at 3.

2. Hospitals Should Not Report a Positive Toxicology of a Newborn or Mother for Marijuana to Child Welfare Authorities Absent Other Indications of Neglect.

If a postpartum toxicology screen is positive for marijuana, the consequence is that medical professionals call the SCR maintained by the Office of Children and Family Services (OCFS) to report child maltreatment. If the report is accepted by the SCR, it is transmitted to ACS and ACS commences an investigation. In 2017 in the Bronx, 462 mothers were investigated for drug use while pregnant as a result of calls to the SCR, and almost 70% of these mothers had investigations indicated against them.¹⁸ It is unknown how many women overall were drug tested by medical facilities in the Bronx, how many tested positive for marijuana, and how many or what proportion of the women who tested positive were reported to child welfare authorities.

New York law does not require reporting to the SCR a positive drug test of a mother or newborn at birth. Although twenty-five other states have enacted such laws, New York wisely has not enacted such a requirement.¹⁹ The New York Social Services Law provides that mandated reporters must make a report “when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child.” SSL § 413(1)(a). The law has been clear for more than two decades that without more, neither a positive toxicology for an illegal drug (whether a newborn’s or expectant mother’s), nor a parent’s admission of past drug use, is sufficient to establish child neglect.²⁰ Without fact-specific evidence that a mother’s use of marijuana places her child at risk, there is little to no basis for a reasonable suspicion of child maltreatment.²¹

After a report is made to the SCR, ACS has 60 days to investigate the allegations and determine whether the allegation is substantiated. If ACS determines, by finding some credible evidence, that the report is substantiated, the report will be “indicated” and the parent is placed on the SCR until the parent’s youngest child turns 28. Placement on this list can mean that a parent is prevented from being hired or loses her employment, as many employment

¹⁸ “Advanced copy of research report on the NYC child welfare system’s response to allegations of drug use by parents, to be published by the NYU School of Law Family Defense Clinic and Movement for Family Power, Feb 2019.

¹⁹ <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (as of Feb. 1, 2019).

²⁰ *See Nassau Cty. Dep’t of Soc. Servs. ex rel. Dante M. v. Denise J.*, 87 N.Y.2d 73, 79 (1995). Courts have explained that absent additional facts concerning the alleged drug use—the frequency, degree, effects, and circumstances of use—the Court cannot assess the impact on the respondent’s standard of care in parenting, or whether a child has been harmed or is at risk of harm *because of* the alleged drug use. *Id.* at 78 (citing Family Court Act 1012(f)(i)(B)); *See, e.g., In re Anastasia G.*, 861 N.Y.S.2d 126, 127–28 (2d Dep’t 2008) (admission of past drug use held insufficient to establish neglect where “no evidence was elicited as to the type of drugs the father used, the duration, frequency, or repetitiveness of his drug use, or whether he was ever under the influence . . . while in the presence of the . . . child” (citing *In re Stefanel Tyasha C.*, 556 N.Y.S.2d 280, 282–83 (1990)).

²¹ Terplan et al. Prenatal Substance Use: Exploring Assumptions of Maternal Untness. *Substance Abuse: Research and Treatment* 2015;9(S2) 1–4 doi: 10.4137/SART.S23328.

opportunities require SCR clearance, including jobs working with children, custodial or administrative jobs in hospitals and schools, and home health aide positions. In addition, once on this list, it is difficult to be an alternate caregiver for related children should that become necessary in the future. In this way, placement on the SCR can have an impact for generations. The SCR disproportionately affects low income women of color — creating economic instability for families and furthering income inequality along racial lines in our city. Indeed, only 6% of parents with indicated cases are white.²²

Nearly 27,000 new reports are added to the SCR each year. It is unknown how many parents are placed on this list for the use of marijuana during pregnancy or otherwise. The City Council should require ACS to report on how many parents are on the SCR due to marijuana use. Those parents who are on the SCR for marijuana use should have their records amended and sealed immediately. This is why we recommend that the City Council pass a resolution recommending that New York State pass legislation that would require greater transparency about the SCR and automatically and retroactively amend and seal the records of anyone on the registry because of marijuana use.

3. ACS Should Stop Filing Cases and Removing Children Based on Allegations of Marijuana Use During Pregnancy.

When ACS investigates a parent, it then decides whether to close a case, offer the family preventive services or to file a case in family court and either seek court supervision or a removal of the child to foster care. In a case that involves allegations of marijuana use, the preventive services might include supervision of the home, parenting classes, drug testing, an evaluation of whether a parent requires drug treatment, or a referral to drug treatment. Although these services are labeled “voluntary” by ACS and parents can refuse in theory, parents are under extreme pressure to comply with ACS’s demands regardless of whether they believe they need treatment or whether their children are at risk because the consequences of refusing to attend are often that ACS will file the case in family court. Families often comply with unnecessary demands and services out of fear of ACS and escalating the situation.

If ACS files a case, ACS might decide to remove a child from his parents. ACS has broad discretion in making these decisions and it is unknown how many families with allegations of marijuana use are brought to court as compared to how many families are offered preventive services in the community, or what factors are considered by ACS in making the decision. We know that filings of cases seeking court ordered supervision have increased by 30% from 2006 to 2014,²³ and ACS seeks court permission to supervise families in 5,500 new cases per year.²⁴

²² Strengthen Families by Alleviating Collateral Consequences of Reports to the State Central Register, PLAN (May 2018).

²³ Abigail Kramer, Center for New York City Affairs, *Is Reform Finally Coming To New York City Family Court?*, at 17 (2016) available at <http://www.centernyc.org/s/CWW-Is-Reform-Finally-Coming-to-Family-Court-p0wx.pdf>

²⁴ New York City Administration for Children’s Services, *Assessment of New York City Administration for Children’s Services Safety Practice and Initiatives*, at 24 (prepared by Casey Family Programs, May 2017) www1.nyc.gov/assets/acs/pdf/testimony/2017/NYCACSAssessmentReportMay2017.pdf

ACS does not report specifically on how many cases it files that involve allegations of marijuana use or how many cases involving marijuana use are maintained as preventive cases.

Family separation, in the context of a newborn, can take several forms. The baby might be removed from the mother *after* being discharged home by the hospital. ACS might require the parent alleged to have used marijuana to leave her home, like in Marion's case, and leave the baby in the care of the other parent. The baby might also be held at the hospital on a so-called "social hold" and ACS will petition the court for placement in foster care. Data is unavailable regarding how many newborns and children are separated from their families based on allegations of marijuana use. It is unknown how many newborns are removed prior to a case being filed in court on a purported emergency basis, as in Marion's case. It is also unknown how many applications ACS makes to the family court to remove newborns and children based on marijuana use and how many of these are granted and how many are denied by the court. It is important that ACS be required to report on these numbers. While ACS has stated publicly that they do not separate children from a parent or file a case against a parent based on a parent's use of marijuana, this is not our experience on the front lines. It is critical that ACS be required to report on marijuana cases and that the data be disaggregated by race, gender, and zip code so that ACS's response to parents who use marijuana is transparent and fully understood.

Regardless of how separation is achieved, the disruption in maternal infant bonding and the consequences are profound. This is why The Bronx Defenders supports Resolution 0740 as it calls upon ACS to implement a policy that a person's mere possession or use of marijuana does not by itself result in family separation. We further recommend that the resolution be expanded to also require ACS to adopt a policy that mere possession of marijuana without any indicia that a child is neglected does not by itself result in the filing of a neglect petition for court ordered supervision or result in the rejection of family resources for children who must otherwise enter foster care.

Moreover, the definition of neglect provided in the Family Court Act does not support the filing of a case against a parent in family court based on a positive toxicology for marijuana. The Family Court Act specifies that neglect can be found based on a parent failing "to exercise a minimum degree of care" by "misusing a drug or drugs," a standard that cannot be met based on a single positive toxicology for marijuana.²⁵ The Family Court Act also provides that neglect can be found based on "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality."²⁶ Again, this standard cannot be met based on a single positive toxicology. Twenty-three states have laws that define a mere positive toxicology at birth as child neglect.²⁷ Here too, New York wisely has chosen not to enact such a statute, and a neglect finding may not be based on drug use alone but on drug misuse, and evidence that a child has been harmed or is

²⁵ Family Court Act 1012(f)(i)(B)

²⁶ Family Court Act 1046(a)(iii)

²⁷ <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>

at risk of harm *because of* the alleged drug misuse.²⁸ See below for a discussion of why New York’s law is in line with the public health consensus.

Rarely do cases that involve a positive toxicology for marijuana at birth go to trial. ACS regularly offers adjournments in contemplation of dismissal (ACDs), essentially deferred dismissals, in these cases, pursuant to Family Court Act §1039. An ACD is an order issued on the consent of the parties in which they agree to certain terms and conditions, including ACS supervision for a period of time up to a year, after which the neglect petition is dismissed. A requirement that the parent submit to regular drug testing and not test positive for marijuana is almost always a term of an ACD in a case that involves marijuana use. There is tremendous pressure on the parent to accept an ACD when offered. Given the significant delay experienced in family court, often the time that it will take for the case to go to trial is far longer than the supervision period with an ACD. As a result, allegations are rarely tested at trial, and ACS is not required to provide any proof for its assertion that marijuana use during pregnancy is harmful, much less present scientific evidence through expert testimony to support its allegation that marijuana use during pregnancy causes harm. The result of proceedings against women who give birth after having used marijuana, a substance the city has decriminalized and the state has now decided to legalize, is thus to impose enormous stress on the family, threaten family separation and to place the family under extended surveillance.

B. Ending Routine Drug Testing and Reporting Women Who Use Marijuana During Pregnancy Is a Step Toward Addressing the Racial Disparities in the Child Welfare System.

Similar to stop and frisk practices, the “test and report” practice of hospitals and child welfare authorities reveals extreme racial disparities. Despite similar or greater rates of drug use among white women, African-American women are ten times more likely to be reported to child welfare for a positive drug test.²⁹ The New York Daily News conducted a survey and found that “[p]rivate hospitals in rich neighborhoods rarely test new mothers for drugs, whereas hospitals serving primarily low-income moms make those tests routine and sometimes mandatory.”³⁰ A 2010 study of a hospital in Rochester demonstrated that despite race-blind testing guidelines, the hospital tested and reported greater numbers of women of color regardless of whether they met guidelines.³¹ Other hospitals had similar results.³² This evidence suggests and what we have seen

²⁸ *Dante M.*, 87 N.Y.2d at 78-79

²⁹ The Guttmacher Report on Public Policy, State Responses to Substance Abuse Among Pregnant Women, (December 2000, Vol. 3, No. 6)

³⁰ Terplan, Cannabis and pregnancy: Maternal child health implications during a period of drug policy liberations, 104 Preventative Medicine 46, Abstract (2017)<https://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mot-hers-marijuana-drugs-article-1.1227292#ixzz31hXS2sUE>

³¹ Ellsworth MA, Stevens TP, D'Angio CT. Infant race affects application of clinical guidelines when screening for drugs of abuse in newborns. *Pediatrics*. 2010;125(6):e1379–e1385.

³² Brenda Warner Rotzoll, Black Newborns Likelier to be Drug-Tested: Study, *Chicago Sun-Times*, Mar. 16, 2001 (noting that “[b]lack babies are more likely than white babies to be tested for cocaine and to be taken away from their mothers if the drug is present, according to the March issue of the Chicago

over the past decade in the Bronx is that great racial disparities exist in who is tested and who is reported as child abusers based on the use of marijuana.

It is unknown how many women have been drug tested by New York City hospitals and how their guidelines for who to test are administered. This is why we support Initiative 1426 as it calls upon ACS to report on investigations initiated by health facilities and include information about the subjects of the reports, including the ethnicity of the subject of the report. We suggest that it be expanded to all health facilities rather than just those facilities managed by HHC and that it be amended to require ACS to report on the race of each patient, as well as whether the infant was separated from his or her mother by the hospital or by ACS as a result of a positive drug test.

C. Ending the Practice of Drug Testing Women and Their Newborns and Reporting Those Who Test Positive for Marijuana Is Better for Maternal Fetal Health and the Well Being of Children.

The child welfare system's purpose is to protect children from harm. Charging women who used marijuana during pregnancy with child neglect does not serve this purpose and, as discussed below, has harmful consequences for maternal-fetal health and child well-being. Rather than serving the interest of children, the practice is based on the inflammatory rhetoric of the war on drugs and the resulting negative narrative of Black motherhood and does great disservice to children, families and communities.

For nearly two decades, the popular press was full of highly prejudicial and often inaccurate information about the effects of in-utero drug exposure. In 1986, when crack cocaine began to attract substantial media attention, six prestigious national news magazines and newspapers had featured over one thousand stories about crack: "Time and Newsweek each ran five 'crack crisis' cover stories [T]hree major network television stations ran 74 stories about crack cocaine in six months. . . . Fifteen million Americans watched CBS' prime-time

Reporter"); Troy Anderson, Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers, L.A. Daily News, June 30, 2008. Another study concluded that "Black women and their newborns were 1.5 times more likely to be tested for illicit drugs as nonblack women in multivariable analysis." Kunins et al, The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting. *Journal of Women's Health* (2007);16(2):245–255 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2859171/pdf/nihms-182195.pdf>

documentary ‘48 Hours on Crack Street.’”³³ This hype, that built on pre-existing stereotypes of Black motherhood went largely unchallenged.³⁴

But media hype and common knowledge are not the same as scientific and medical evidence. The media has attempted to undo the harm of its earlier reporting on drugs and motherhood,³⁵ with the New York Times most recently admitting that “[n]ews organizations shoulder much of the blame for the moral panic that cast mothers with crack addictions [during the 1980s and 1990s] as irretrievably depraved and the worst enemies of their children³⁶ Most importantly, starting in 2004, leading doctors and researchers in the field of prenatal exposure to illegal drugs have attempted to set the record straight.³⁷

The scientific literature of today uniformly acknowledges that any evidence of the impact of prenatal exposure to marijuana on fetal or child development is inconsistent and therefore inconclusive.³⁸ Several researchers have found no correlation between maternal marijuana

³³ Laura Gómez, Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure 14 (1997) (reporting that without knowing that cocaine was used by their mothers, clinicians could not distinguish so-called crack-addicted babies from babies born to comparable mothers who had never used cocaine or crack). See also John P. Morgan & Lynn Zimmer, The Social Pharmacology of Smokeable Cocaine Not All It’s Cracked Up to Be, in Crack In America: Demon Drugs And Social Justice 131, 152 (Craig Reinerman & Harry G. Levine eds., 1997); Ruth Rose-Jacobs et al., Do “We Just Know?” Masked Assessors Ability to Identify Children with Prenatal Cocaine Exposure, 23 Devel. & Behav. Pediatrics 340 (2002).

³⁴ See Dorothy Roberts, Unshackling Black Motherhood, 95 Mich. L.R. 938 (1997); Gómez, supra note 16; Morgan & Zimmer, supra note 16.

³⁵ Maia Szalavitz, The Demon Seed That Wasn’t: Debunking the “Crack Baby” Myth, City Limits Monthly, March 2004; Barry M. Lester et al., Data Base of Studies of Prenatal Cocaine Exposure and Child Outcome, 27 J. Drug Issues 487 (1997) (concluding that knowledge about the existence or extent of effects of prenatal cocaine exposure on child outcome was limited, scattered, and compromised by methodological shortcomings). In 2009 the New York Times tried to set the record straight in Susan Oakie, The Epidemic That Wasn’t, N.Y. Times, Jan. 27, 2009, at D1, available at <http://www.nytimes.com/2009/01/27/health/27coca.html>, as did the Washington Post in 2010 in Theresa Vargas, Once Written off, ‘Crack Babies’ Have Grown into Success Stories, Washington Post, April 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041502434.html>

³⁶ “Slandering the Unborn,” The New York Times, Editorial, December 28, 2018.

³⁷ Open Letter to the Media by David C. Lewis et al., Physicians, Scientists to Media: Stop Using the Term “Crack Baby” (2004).

³⁸ See e.g. David M. Fergusson et al., Maternal use of Cannabis and Pregnancy Outcome, 109 BJOG: Int’l J. Obstetrics & Gynecology 21, 21-22 (2002); Peter A. Fried et al., Growth of Pubertal Milestones during Adolescence in Offspring Prenatally Exposed to Cigarettes and Marijuana, 23 Neurotoxicology and Teratology 431, 432 (2001); Peter A. Fried & Andra M. Smith A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of Deficiency in Aspects of Executive Function, 23 Neurotoxicology and Teratology 1, 8 (2001); Dallas English et al., Maternal Cannabis Use and Birth Weight: A Meta- Analysis, 92 Addiction 1553, 1558-1559 (1997); Melanie C. Dreher et al., Prenatal Marijuana Exposure and Neonatal Outcomes in Jamaica: An Ethnographic Study, 93 Pediatrics 254, 254-256 (1994).

consumption and pregnancy outcomes.³⁹ Other studies have found a correlation between maternal marijuana use and small negative effects on birth weight or certain developmental markers. For example, one study indicated a possible correlation between marijuana smoking and a decrease in birth weight, although the author and others recognized no correlation after correcting for confounding factors, such as tobacco smoking and poverty.⁴⁰ Some researchers have found some slight beneficial correlation with birth weight or infant development.⁴¹ In contrast to heavy cannabis use, occasional use of cannabis before or during pregnancy did not have detectable adverse effects on birth weight, and appeared to increase mean birth weight, although it was not statistically significant. Other studies have found no detectable or consistent increase in the rate or severity of birth defects associated with marijuana use during pregnancy.⁴² Peter Fried, one of the most published researcher in this field has acknowledged that any definitive statement of the consequences of prenatal exposure to marijuana would be “problematic, presumptuous, and foolhardy.”⁴³

Despite these newer more carefully constructed studies, the non-scientific medical misinformation regarding the effect of drug use during pregnancy shaped the child welfare response we know today; one that is based on the “mythology of severe risk” of fetal harm from drug use during pregnancy.

None of these facts are meant to suggest that prenatal exposure to illegal drugs is benign. The current scientific evidence and medical consensus, however, suggests that the risks presented by the use of illegal substances, including marijuana, during pregnancy are no greater than risks associated with many other conditions and activities common in the lives of all people. Years of carefully constructed evidence based research conclude that no scientific basis exists for presuming that prenatal exposure to marijuana will inevitable adversely affect the newborn and does not support the practice of drug testing postpartum women, referring them to child welfare authorities, charging them with child neglect, and dissolving their families.

³⁹ See e.g., Fried et al., supra, at 436; Susan J. Astley et al., Analysis of Facial Shape in Children Gestationally Exposed to Marijuana, Alcohol and/or Cocaine, 89 *Pediatrics* 67, 67-77 (1992).

⁴⁰ Fergusson et al., supra, at 23-26. Dreher et al., supra, at 254-60; Katherine Tennes, Effects of Marijuana on Pregnancy and Fetal Development in Human, NIDA Res Monogr. 48-60 (1985); Fergusson et al., supra.

⁴¹ Dreher et al., supra, at 254-60; Tennes, supra; Fergusson et al., supra, at 25.

⁴² See, e.g., Albert J. Tuboku-Metzger et al., Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally, 13 *American J. of Perinatology* 1 (1996) (study of chronic cocaine use among pregnant subjects finding no direct effects on the health or development of newborns). See also Mishka Terplan & Tricia Wright, The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth Versus Reality, 30 *Journal of Addictive Diseases* 1-5 (2010)(review article concluding that no “well-designed cohort studies” or “systematic reviews...have shown an association with cocaine and anomalies”); Charles R. Bauer, Acute Neonatal Effects of Cocaine Exposure During Pregnancy, 159 *Arch Pediatric Adolescent Med.* 824-834 (2005)(study of newborn infants prenatally exposed to cocaine finding no “abnormal anatomic outcomes”); Rose-Jacobs et al., supra note 16.

⁴³ Affirmation on file at The Bronx Defenders.

Physician reporting requirements also put healthcare providers in an ethical bind by pitting them against the interests of their patients and discouraging women from seeking prenatal care, putting both mothers and babies at risk. The American College of Obstetricians and Gynecologists (ACOG) has been on record in opposing the requirements since they were introduced. In its most recent statement on the issue, ACOG explains:

Although legal action against women who abuse drugs prenatally is taken with the intent to produce healthy birth outcomes, negative results are frequently cited. Incarceration and the threat of incarceration have proved to be ineffective in reducing the incidence of alcohol or drug abuse. Legally mandated testing and reporting puts the therapeutic relationship between the obstetrician-gynecologist and the patient at risk, potentially placing the physician in an adversarial relationship with the patient. In one study, women who abused drugs did not trust health care providers to protect them from the social and legal consequences of identification and avoided or emotionally disengaged from prenatal care. Studies indicate that prenatal care greatly reduces the negative effects of substance abuse during pregnancy, including decreased risks of low birth weight and prematurity. Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus.⁴⁴

ACOG specifically recommends that there be no civil penalties and the threat of child removal as a result of drug screens for marijuana.⁴⁵

Moreover, the response of drug testing and reporting women and their newborns makes them vulnerable to family separation, which is well known to be harmful to children. As the Federal Government's Children's Bureau Child Welfare Information Gateway emphasizes, "Removing children from their families is disruptive and traumatic and can have long-lasting, negative effects."⁴⁶ The UC Berkeley Department of Psychology summarized the research⁴⁷ as follows:

Psychological research indicates that forced separation of families, especially the separation of young children from their primary caregivers, carries enormous risks of severe and potentially irreparable harm. Forced separation may lead to acute trauma,

⁴⁴ American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist (2011, reaffirmed 2014).

⁴⁵ American College of Obstetricians and Gynecologists, Committee on Obstetric Practice, *Marijuana Use During Pregnancy and Lactation*, Committee Opinion 722, (Oct. 2017).

⁴⁶ U.S. Children's Bureau. "In-Home Services in Child Welfare." March 2014. Available at: https://www.childwelfare.gov/pubPDFs/inhome_services.pdf

⁴⁷ The research is also detailed and summarized in Vivek Sankaran and Christopher Church, "Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care." 19 UPenn. J. of Law & Social Change, 207, 211-12 (2016). Available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1197&context=jlasc>.

which can trigger increased vulnerability to mental illnesses, including depression, anxiety, and posttraumatic stress disorder, and can impair children’s neurological, social, and cognitive development. Long-term outcomes known to be associated with childhood trauma include substance misuse, depression, suicide, and poor physical health.⁴⁸

While there are undoubtedly cases where the harm of remaining in the home would outweigh the harms of separation, there is no basis whatsoever for treating a parent’s use of marijuana alone as justifying the decision to knowingly inflict these significant harms on a child. Indeed as one expert has noted, “even in environments where cannabis is legal, pregnant women may end up involved with Child Protective Services. In states where substance use is considered child abuse this may be especially catastrophic. Above all, care for pregnant women who use cannabis should be non-punitive and grounded in respect for patient autonomy.”⁴⁹

These harms are even more significant for children removed from their mothers at or soon after birth. Studies in the context of prison nurseries have observed that “[p]rison nurseries remove separation created by maternal incarceration as a threat to a child’s development, at least during early infancy.”⁵⁰ One study thus found that “[c]hildren who spent time with their mother in a prison nursery had significantly lower mean anxious/depressed and withdrawn behavior scores than children who were separated from their mother in infancy or toddlerhood because of incarceration” and that “[i]n contrast, separation due to early maternal incarceration is associated with much higher rates of insecure attachment to both the mother and alternate caregiver. Separation may damage a developing attachment, thus increasing the likelihood of poor developmental outcomes.”⁵¹ This research confirms the intuitive point that children do better when they remain with their mother at birth when they can first develop secure attachments.

In fact, the removal of a child from the parent harms not only that child, but threatens to harm children born after the removal. A study released just this week and published in the Canadian Medical Association Journal concludes that “[w]omen whose first child was placed in out-of-home care had more than twice the rate of inadequate care during the pregnancy of their second child than women whose first child was not placed (33.0% v. 13.4%).” The study notes that “[a]mong mothers whose first child was placed in out-of-home care, the odds of inadequate prenatal care were not affected by the timing of the placement of the first child or by the mother’s reunification status with her first child.”⁵² In other words, the removal of the first child

⁴⁸ “Psychology Department members cite research against family separations.” Available at <https://blogs.berkeley.edu/2018/07/12/psychology-department-members-cite-research-against-family-separations/>

⁴⁹ Terplan, Cannabis and pregnancy: Maternal child health implications during a period of drug policy liberations, 104 Preventative Medicine 46, Abstract (2017).

⁵⁰ Byrne MW, Goshin LS, Joestl SS. Intergenerational transmission of attachment for infants raised in a prison nursery. *Attachment & Human Development*. 2010; 12:375–393

⁵¹ Goshin, L. S., Byrne, M. W., & Blanchard-Lewis, B. (2014). Preschool outcomes of children who lived as infants in a prison nursery. *The Prison Journal*, 94(2), 139–158.

⁵² E. Wall-Wieler et al., Prenatal Care Among Mothers Involved with Child Protection Services in Manitoba: A Retrospective Cohort Study, *CMAJ* February 25, 2019 191 (8) E209-E215. Available at: <http://www.cmaj.ca/content/191/8/E209>.

is associated with the tremendous disparity in inadequate care, not whether or not that child is in care at the time of the second pregnancy. The authors observe that “previous research has identified a fear of detection or involvement with child protection services as an important barrier for at-risk pregnant women, potentially leading to disengagement from, avoidance of or delayed presentation to prenatal care. We expect this fear to be intensified for pregnant women who had their first child taken into care by child protection services because they may fear this happening again.” This observation is consistent with our experience in the Bronx.

In addition to harms to maternal-fetal health, children and families, child welfare involvement harms entire communities that last for generations.⁵³ It is critical for families and communities that marijuana reform address the consequences of the child protection response of “test and report” that have been experienced by communities of color for decades.

II. The Child Welfare System Uses Parental Marijuana Use as Justification for Numerous Intrusions into a Family’s Life

Outside of the context of pregnancy, ACS and family courts often use a parent’s use of marijuana as a justification for further intrusions in a family’s life. While marijuana use is often listed as a neglect allegation, it can also be the basis for initiating an investigation, supervising a family for longer periods of time, rejecting relatives who offer to be resources for children who are separated from their parents, limiting visitation or separating a family, even when marijuana use is not an official allegation against the parent. Once a parent has child welfare involvement, ACS and the family court will base their many decisions about the family in part on a parent’s marijuana use. These decisions negatively impact children, as they increase the possibility of removal, system involvement, and rejection of relatives. In our capacity as counsel to thousands of parents every year, The Bronx Defenders has witnessed the many, often insidious, ways the system rationalizes intrusion into family life because of marijuana use.

A. ACS Should Adopt A Policy Not to File Cases for Civil Child Neglect Based on Allegations of Marijuana Use Where There is No Other Indicia of Neglect.

As described above, a significant number of cases that are based solely on a parent’s marijuana use involve allegations that a baby or mother tested positive for marijuana at the baby’s birth. ACS also files many cases alleging marijuana use outside the confines of pregnancy. In these cases, ACS requests services relating to marijuana use, even when there is no evidence of any impact of the parent’s marijuana use on his or her parenting or children. Too

⁵³ See also Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 459 (2003) (“Members of affected families may suffer enduring harm psychologically, financially, and in countless other ways from the stresses of removal and its aftermath (leading to divorce, job loss, etc.)”); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES (July 21, 2017), <https://perma.cc/6A3T-WPLH>(discussing research that children removed and sent to foster care had higher delinquency rates, teen birthrates, a higher likelihood of going to prison as an adult, and lower earnings).

often, there is little to no inquiry into the nature of the parent's marijuana use and whether the use actually impacts parenting. As such, ACS's requests for services relating to marijuana use often fail to be tailored to the needs of the family and the child safety issues identified, assuming they exist. This is why The Bronx Defenders supports resolution 0740 because it calls upon ACS to adopt a policy not to separate a child from his or her parent based on marijuana use alone. Because court ordered supervision and conditions, including services, for families to stay together are often experienced as stressful and invasive and often fail to actually contribute to a family's well being, we would recommend that this resolution be expanded to call upon ACS to adopt a policy that it not file a case for court ordered supervision of a family based on marijuana use alone as well.

- For example, one client told ACS that she smoked marijuana to deal with her anxiety. ACS filed a neglect petition against her, alleging that she neglected her children because she did not go to an evaluation with a CASAC (credentialed alcoholism and substance abuse counselor) that ACS scheduled for her. At the first court appearance, ACS requested the client to submit to random drug tests, engage in drug treatment, undergo a mental health evaluation, and accept preventive services in her home. ACS never alleged that the children were actually harmed or placed at risk of harm because of the client's marijuana use.
- ACS alleged another client had marijuana accessible on a kitchen table, on one occasion had a guest in the home who used marijuana, and reported she had used marijuana. At the first court date, ACS stated they had no concerns for the health or safety of the children, yet still charged the mother with neglect and asked her to take a drug test, undergo a CASAC evaluation, and submit to a mental health evaluation.
- According to ACS, another client neglected his children because he smoked marijuana and was not in a drug treatment program. ACS never alleged, nor was there any proof, that the client's use of marijuana harmed his children in any way. While ACS requested a release of the children to him, they also requested, and the family court granted, that he take random drug tests, undergo a CASAC evaluation, and accept homemaking services in the home. ACS also withheld a favorable resolution for the client when he did not want to testify against the mother of his children about her marijuana use.
- Finally, a fourth client was accused of neglecting her children because she reportedly smoked marijuana about 10 times per month and was not engaged in a drug treatment program. While ACS requested a release of the children to her, ACS conditioned the release upon the client participating in a daily drug treatment program, ultimately causing her to lose two part-time jobs and jeopardizing the family's housing.
- Some of our clients have been required to engage in services related to marijuana use, even when ACS has not filed a petition against them and they are not a respondent in the case. One client was not a respondent on the case involving his children. The court ruled against releasing the children to their mother and before the court would release the

children to their father, our client, ACS requested and the court required that he pass a drug test because he had a conviction for marijuana possession several years prior.

- Another client had a long-term partner who lived with her and who also used marijuana. ACS never filed a petition against our client's partner, but did ask the family court to force the partner to leave the home. The family court instead ordered that the partner could never be alone unsupervised with the children unless he engaged in a drug treatment program.

B. ACS Should Adopt A Policy That It Does Not Reject Family Resources for Children Because of Marijuana Use Past or Present.

In cases where the family court removes our client's children for other allegations, ACS has often rejected our client's family members because of marijuana use by the relative. This in turn has led to longer stays in foster care, placement with strangers and separation of siblings. This is why The Bronx Defenders recommends that Resolution 0740 be expanded to urge ACS to adopt a policy whereby it does not reject family resources for children based on marijuana use or past convictions for marijuana and is required to inform a parent and counsel of the barriers to placement of a child with that relative.

- For example, one client put forward her mother as a resource for her five oldest children. ACS opposed the children's placement with the maternal grandmother because the case worker had observed marijuana, belonging to an adult son, in the family home. For four months, the five children were separated and living in three different foster homes, all of them strangers to the children.
- The mother of another client was also initially rejected for her alleged marijuana use. The boys stayed at the foster care agency reception center for two months before the family court allowed them to go with their grandmother, over ACS's objection. The court required the grandmother, among other things, to attend random drug tests and an evaluation with the CASAC should any of the tests be positive for marijuana.
- When a third client had a new baby, ACS opposed having the baby reside with two family members who had admitted to using marijuana and instead sought to keep the newborn in foster care with strangers. The court disagreed, however, and placed the baby with the family members.
- Another client put forward her sister as a resource for her two children when ACS removed them from her care. The client's sister shared that she had a criminal conviction from over ten years prior regarding marijuana possession, and the Court and ACS required her and her husband to take a drug test before considering placing the children with her.
- In another case, our client's children were placed in foster care with their paternal great-aunt, with her consent. During the pendency of the case, ACS removed the

children from the home because the great-aunt stated she used marijuana. Our client requested that the children be returned to the aunt, and the family court granted the request on the conditions that the aunt submit to drug tests. The Court issued a ruling that ACS could not remove the children for a positive marijuana test on its own. When our client wished to relinquish custody of her children to their great-aunt, however, ACS purposefully delayed the order being entered until the great aunt tested negative for marijuana.

C. ACS Should Adopt a Policy That It Does Not Separate Families or Fail to Expand Family Contact Because of Marijuana Use

Of all the ways ACS and the courts punish families where a parent uses marijuana, the most consequential are those situations where they separate the family or delay reunification because of marijuana use. In many instances, marijuana use is the sole basis for the separation. This leads to further trauma for the children, as they spend time out of their parents' care. This is why The Bronx Defenders supports Resolution 0740.

- For example, ACS alleged that one client was accused of selling marijuana and having it accessible to her children in the home. She was issued just a desk appearance ticket to appear in criminal court, but ACS conducted an emergency removal and separated the children from their mother. The client and her partner asked for a hearing to return the children, which the family court granted, on condition that the client leave her permanent housing, enter a shelter, submit to random testing and undergo an evaluation by a CASAC.
- In another instance, ACS would not agree to our client returning to the family home with his children and their mother because he continued to use marijuana and was not engaged in a drug treatment program. He remained out of the home for months until he began testing negative for marijuana.
- Similarly, in another case, ACS would not agree to expand visitation between our client and his children from agency supervised visits to visits supervised by a relative because he continued to use marijuana, and was not engaged in a drug treatment program. Despite the fact that the agency supervised visitation between our client and his children had gone well, ACS denied the expansion to more meaningful parent-child contact because of marijuana use.
- ACS removed another client's children from him and filed a petition alleging marijuana use, marijuana being accessible in the home, and having a dirty home. Our client requested a hearing for the return of his children to his care. During the six weeks while the hearing was pending, our client engaged in a drug treatment program, as ACS had requested, to address his marijuana use. However, the insurance co-pays were financially prohibitive, leading our client to request that ACS make those payments. Despite their position that our could not be reunited with his children without a drug treatment

program, ACS refused to pay. The family court ordered ACS to pay, and ACS settled the hearing six weeks after they removed the children from their parents.

- ACS filed a case against another client with allegations unrelated to marijuana use. Over time, our client engaged in services and was making progress toward the return of her children. After our client said that she used marijuana, both ACS and the court refused to allow our client to have any overnight visits with her children until she tested negative for marijuana.
- For one 16-year-old client, the court and ACS denied her the opportunity to visit with her baby at her mother's home because of her alleged marijuana use. The maternal grandmother was a certified foster parent and our client's baby was placed in her care. This denial led our client to lose bonding time with her baby, as she was only allowed visitation at the foster care agency.

Recommendations

- The Bronx Defenders supports Initiative 1426 as it calls upon ACS to report on investigations initiated by health facilities and include information about the subjects of the reports. We suggest that it be expanded to all health facilities rather than just those facilities managed by the New York City Health and Hospitals Corporation. We also recommend that it be amended to require ACS to report on the race of each patient and whether the infant was separated from his or her mother by the hospital or by ACS as a result of a positive drug test.
- The Bronx Defenders supports Initiative 1161 as it requires ACS to enhance its reporting and report on the main allegations that led to the receipt of a report and so that there is greater transparency around when marijuana use is the basis for an investigation.
- The Bronx Defenders supports Resolution 0740 as it calls upon ACS to implement a policy that a person's mere possession or use of marijuana does not by itself result in family separation. We recommend that the resolution be expanded to also require ACS to adopt a policy that mere possession of marijuana without indicia that a child is neglected does not by itself result in the filing of a neglect petition for court ordered supervision or result in the rejection of family resources for children who must otherwise enter foster care.
- The Bronx Defenders supports Resolution 0746 as it calls on New York State to pass legislation requiring the New York Department of Health to create clear and fair regulations for the drug testing of pregnant women and for pregnant women to be informed of their rights prior to testing. Specifically, we recommend that the City Council support the enactment of Assembly bill 5478, with the amendment that it specifically apply to postpartum women and their newborns and require notice of the legal consequences of a positive test and clear informed consent from a pregnant or postpartum woman prior to drug testing her or her infant.

- The Bronx Defenders supports Resolution 0075 as it calls on New York State to pass the Marijuana Regulation and Taxation Act (MRTA) which includes a number of proposed changes to the law addressing marijuana use by parents.
- The Bronx Defenders recommends that the City Council pass a resolution calling on New York State to adopt a law that would require the Office of Family Services to review the list of people on the SCR with indicated cases, determine which of those people have indicated cases based solely on marijuana use, and amend and seal their cases.
- We recommend that the City Council pass a resolution calling on New York State to pass legislation reforming the SCR to remove unfair barrier to employment for parents, shortens the time a parent remains on the SCR for certain allegations, and make it easier to amend and seal one's case on the SCR. so that it does not harshly penalize parents and needlessly interfere with their ability to economically support their children. reform the SCR.