

**New York City Council
Justice System Committee
New York City Council, General Welfare
Hearing on Family Separation in New York City
November 27, 2018**

**Written Testimony of The Bronx Defenders,
By Emma Ketteringham**

The Bronx Defenders (“BxD”) 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 intakes 1,000 to 1,500 new parents each year. During fiscal year 2018, we were assigned to represent 1,585 parents with approximately 3,500 children.

Last Spring, our nation witnessed the forced separation of 2,500 children from their parents on the US-Mexico border. In addition to seeing and hearing the brutal

inhumanity, we also heard from many experts who explained the traumatic impact of the forcible separation of a child from his or her parent and the life-long physical and biological consequences. Dr. Charles Nelson, professor of pediatrics at Harvard Medical School warned that when children are forcibly separated from their parents...

“their heart rate goes up. Their body releases a flood of stress hormones such as cortisol and adrenaline. Those stress hormones can start killing off dendrites — the little branches in brain cells that transmit messages. In time, the stress can start killing off neurons and — especially in young children — wreaking dramatic and long-term damage, both psychologically and to the physical structure of the brain. “The effect is catastrophic. . . . There’s so much research on this that if people paid attention at all to the science, they would never do this.”¹

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

“Separating children from their parents contradicts everything we stand for as pediatricians - protecting and promoting children’s health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short - and long-term health. This type of prolonged exposure to serious stress - known as toxic stress - can carry lifelong consequences for children.”²

The harm was described as irreparable, causing children toxic stress, permanent emotional damage and long-lasting difficulty with learning, mood regulation, and the ability to make emotional and relational attachments. The systematic family separation of these children from their parents was the shocking culmination of a number of policy decisions by different administrations aimed at Mexicans, Central Americans, and other Latinx immigrants.

In New York City, government officials do not intentionally inflict harm on children and their families to serve a political purpose. Rather, the child welfare system

¹Wan, W. (2018, June 18). What Separation from Parents does to Children: The Effect is Catastrophic. Retrieved from: https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.81ec56a153df

²American Academy of Pediatrics. (2018). AAP Statement Opposing Separation of Children and Parents at the Border. Retrieved from: <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx>

deliberately removes children from their homes over concerns for their safety and well being. The devastating consequences of family separation to a child, however, are the same no matter the reason. The New York Court of Appeals has recognized that foster care should be a last resort holding that “a child may be forcibly removed from his family only when that child is at imminent risk of serious harm”.³ Children often experience the physical separation from their families as rejection or loss and do not understand why it has occurred. Placement in foster care and subsequent placement changes affect children’s ability to build healthy attachments.⁴ It is well known that children exiting foster care face a host of negative life circumstances and outcomes.⁵ One recent study found that by age twenty-four, nearly sixty percent of former male foster children had been convicted of a crime, and by age 26, almost 75 percent of the young men had been incarcerated. Eighty-two percent had been arrested.⁶ Surveys have found that nearly one third of homeless youth and well over half of victims of child trafficking had experience in foster care.⁷ Even for children who are on the margin of placement, they are more likely to have better outcomes when they remain home with their families as opposed to in out of home care.⁸ In light of the law and the documented harm to children of family separation, it is the City of New York’s legal and moral imperative to ensure that proper safeguards are in place so that children are not separated from their families unnecessarily and that families have adequate legal representation and social work advocacy.

Mechanism of Family Separation

To understand the work that lies ahead to ensure a fair and just child welfare system, it is important to first understand the mechanism by which families are separated. Every case begins with a phone call to the state central register reporting

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

⁴ For a summary of this research see Sankaran, Vivek and Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, Penn Law, 2017.

⁵ See generally Catherine R. Lawrence *et al.*, *The Impact of Foster Care on Development*, 18 *Dev. & Psychopathology* 57 (2006); K. Chase Tovall & Mary Dozier, *Infants in Foster Care: An Attachment Theory Perspective* 2 *Adoption Q.* 55 (1998); U.S. Gov’t Accountability Office, *GAI-12-270T, Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions* 7 (2011); Patrick J. Fowler *et al.*, *Pathways to and From Homelessness and Associated Psychosocial Outcomes Among Adolescents Leave the Foster Care System*, 99 *Am. J. Pub. Health* 1453 (2009).

⁶ Jennifer L. Hook & Mark E. Courtney, *Employment of Former Foster Youth as Young Adults: Evidence from the Midwest Study* 9 (Chapin Hall at the University of Chicago, 2010), available at www.chapinhall.org/sites/default/files/publications/Midwest_IB3_Employment.pdf.

⁷ “Missed Opportunities: Youth Homelessness in America,” Chapin Hall and Voices of Youth Count, November 2017.

⁸ Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *Am. Econ. Rev.* 1583, 1584 (2007).

suspected child maltreatment. If the call is accepted, it is transmitted to the local child protection agency which, in New York City, is the Administration for Children Services (ACS). ACS makes contact with the family and the child within 24 hours of the report and commences an investigation. ACS has 60 days to investigate before determining whether the investigation is substantiated or unsubstantiated. During the investigation parents are questioned, documentation is requested, and children might be referred for a medical examination. ACS might refer the family for preventative services and offer the family an array of resources to address the issues the family is facing. Investigations can last days, weeks or months with repeated interviews, home visits, and conferences with the family to assess the risk in the home and even safety plan to mitigate the risk in the home. Parents are often asked to cooperate with ACS, attend conferences, and agree to participate in various services. Services offered to the family might include therapy, substance abuse treatment, parenting classes, or in-home preventive services.

ACS might decide to file a case in court to obtain court supervision of the family, but not seek to separate the children from their family. Or ACS might decide that the children are at serious risk of harm in the home and seek to separate the children from the family while the case is pending. Parents who cannot afford a private attorney are not given access to legal advice during the investigation and are often unaware of their rights and responsibilities or the consequences of the decisions they make during the investigation.

Part 2 of article 10 of the Family Court Act sets forth three ways in which a child may be separated from their family in response to an allegation of child maltreatment and pending the outcome of a child protection case: (1) a preliminary order of the court *after* a petition for neglect or abuse is filed under FCA 1027; (2) a preliminary order of the court *before* a petition is filed; and (3) emergency removal of a child from their parent without a court order and before a petition for neglect or abuse is filed in family court. The statute creates a continuum of consent and urgency and mandates a hierarchy of required review before a child is separated from his or her family.

Under the first scenario, a child is not removed immediately upon investigation of a report of suspected maltreatment. Rather, ACS files a petition alleging the neglect or abuse of the child and seeks a hearing under FCA 1027 for the removal of the child from the home. At this hearing, the parent appears and is represented by counsel. If ACS determines there is not enough time to file a petition, the next step is not an emergency removal, but the second scenario: an *ex parte* removal by court order under FCA 1022. In order for an *ex parte* removal to be justified the parent must be absent or

have refused to consent to the removal, and the parent must have been informed of ACS's intent to remove the child. In addition, there must be insufficient time to file a petition and hold a preliminary hearing. Finally, in the third scenario, section 1024 of the Family Court Act provides for the emergency removal of a child without a court order. An emergency removal is justified only if danger to the child is so immediate that there is no time to apply for an *ex parte* order. The purpose of these sections is to avoid a premature unnecessary removal of a child from his home by establishing procedures for early judicial oversight and determination.

Under New York law, family separation should occur only when remaining in a parent's home presents an imminent danger to the child's life or health and would be contrary to the child's best interest. "A court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests." See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (N.Y. 2004). Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means such as court orders or services.

When a court temporarily separates children from their families pending trial in abuse and neglect cases, parents may request the return of their children under Section 1028 of the Family Court Act. Because of the harm of family separation, there are strict timelines under which these hearings must commence. Once a parent requests a 1028 hearing, the law requires that "such hearing shall be held within three court days" and may not be adjourned "except upon good cause shown." N.Y. Fam Ct Act 1028. Likewise, a hearing under Family Court Act Section 1027 must commence the next day after the filing of the petition and continue on successive court dates. See N.Y. Fam. Ct. Act 1027. The purpose of these provisions is to ensure that determinations to separate a family are reviewed expeditiously.

Family separation does not just occur at the start of a family court case. Families can be separated by ACS at any point in time throughout the pendency of a family court case. It is our experience that families who are under court supervision live in constant fear of the looming threat of losing their children to foster care.

Trauma

The manner by which family separation occurs in the child welfare system goes against everything we know about minimizing the trauma of separating a child from their parent. Removals are traumatic, hasty, and often require a caseworker or police officer to physically separate a child from their parent. Outside of court, many removals occur when parents and children do not expect them, in the middle of the night, and with police present. Parents are rarely given the opportunity to prepare and reassure their children, organize and pack their belongings, and say goodbye. Instead, they describe the look of terror on their children's faces as they are taken out of their beds by a stranger.

Caseworkers sometimes use the element of surprise or ruse to remove children hastily. Parents describe being told to go down the hall to gather their child's belongings only to return and find their child already taken. Parents have been whisked into a separate room at ACS or at PATH, while their kids are taken out of the building.⁹ In other instances, a parent may wait in court all day for a judge to hear an application by ACS for removal; if the papers are not filed timely, however, they leave court knowing they may face an emergency removal at any time that night.

Even family separations that occur in court are conducted hastily without sensitivity to the emotions involved or the needs of the children. Parents often leave the courtroom to find their child no longer on the bench outside, but being led away by a stranger. Some parents are instructed to check their children into the daycare in the courthouse, and are not allowed to say goodbye or explain what is happening if the court orders their placement in foster care. Some are forced to hand their newborns over to ACS caseworkers to be delivered to strangers, even when loving family members ready to care for them are sitting nearby. Parents are given little information about where their children are being taken, how they will be cared for, and often days pass before they see or hear from them again. The way that family separation routinely occurs in New York City contributes to the harm of family separation on children and families.

Since New York City first contracted with institutional providers to represent parents in 2007, the foster care census has been reduced by almost over 50% (from over 17,000 to under 9,000 children) and there has been no evidence or indication of an increased occurrence in child abuse. This progress is a result of the Administration for

⁹ Similar methods of removal were used by ICE agents on the US-Mexico border. See CBS News 60 Minutes Investigation, The Chaos Behind Donald Trump's Policy of Family Separation on the Border (aired Nov. 25, 2018) (parents described being told their children were being taken to a doctor for a brief appointment and never returning).

Children's Services' stronger commitment to prevention and to keeping families together. The reduction in our city's foster care population is also the result of stronger institutional representation for parents provided by New York City during this same period. This robust representation often results in the reversal of unnecessary family separations and holds the agency more accountable than ever before.¹⁰ Although things are better, there is a lot more that needs to be done.

Poverty

It is a widespread misconception that children are separated from their families in the child welfare system because their parents have abused or abandoned them. Poverty is actually the leading predictor of child welfare involvement and studies show that families who are "below the poverty line are twenty-two times more likely to be involved in the child protection system than families with incomes slightly above it."¹¹ Allegations of neglect which include a parent's failure to provide adequate food, shelter or medical care compose the majority of child welfare cases in New York City despite salacious media stories that single out isolated stories of child abuse. High poverty rates mean these families are less likely to have access to necessary resources such as stable housing, counseling, and childcare services without which they may be determined neglectful by the child welfare system.¹² Research shows that 30% of America's foster children could be safely in their own homes if their parents had safe, affordable housing,¹³ and yet another shows housing to be more important than substance abuse in determining whether children remain with their families. Nearly half of families (47%) whose children are removed from their homes have trouble paying for basic necessities.¹⁴ Although the vast majority of poor families never come to the

¹⁰ Recognizing the critical role strong parent's defense organizations play in strengthening families and preventing family separation, the Children's Bureau recently issued a memorandum and described quality parent's counsel as an important partner in preventing family separation through the child welfare system. See "Reshaping child welfare in the United States to focus on strengthening families through primary prevention of child maltreatment and unnecessary parent-child separation", Dep't of Health and Human Svcs, Admin. for Children and Families (November 2018).

¹¹ Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 1, 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015)

¹² Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy (2018); Fluke, *et al.* A Research Synthesis on Child Welfare Disproportionality (Jan. 2011).

¹³ Deborah S. Harburger & Ruth Anne White, *Reunifying Families, Cutting Costs: Housing_Child Welfare Partnerships for Permanency Supportive Housing*, 83 *Child Welfare* 493 (2004)

¹⁴ National Survey of Child and Adolescent Well-being (2005, April). CPS Sample Component Wave 1 Data Analysis Report
http://www.acf.hhs.gov/programs/opre/abuse_neglect/sscaw/reports/cps_sample_report_revised_090105.pdf.

attention of child protection authorities, poverty is still the best predictor of family separation by the child welfare system.

This plays out in the Bronx with devastating consequences for the borough's children. The Bronx has the highest rates of eviction, unemployment, and public benefits enrollment in the City. According to the 2014 American Community Survey, 43.3 percent of children under 18 live below the poverty line. Community District 1, encompassing much of the South Bronx where our office is located, has a median income of just \$16,800 per year, with 60 percent of residents receiving some kind of public assistance. According to data provided by the Office of Court Administration, in 2017 1,191 Bronx children were separated from their families; Bronx children represent over 30% of the children separated from their families in New York City.¹⁵ Because of their relative poverty, Bronx children are particularly vulnerable to family separation and its short term distress and long lasting negative consequences.

Race

The extent to which children of color are disproportionately vulnerable to the negative consequences of family separation is profound. In the state of New York, African American children make up 16% of New York's general population and 48% of New York's foster care population.¹⁶ In New York City, African American children accounted for 27 percent of the children under the age of eighteen in the city but a staggering 57.1 percent of the children separated from their families in foster care. In contrast, 24 percent of the children in New York City were white, but white children comprised only four percent of the foster care population.¹⁷ In addition to being more likely to have contact with New York City's child welfare system, families of color fare worse than white families once a case has been opened. Studies show that children of color are more likely to be separated from their families than white families, even under the same circumstances of risk.¹⁸ Furthermore, the harm of separation is more likely to be exacerbated for children of color because they spend longer time separated from their families, change placement more frequently, are less likely to receive necessary

¹⁵ Data provided by the Office of Court Administration. (2017) Table 10: Family Court Disposition of Original Abuse (NA) & Neglect (NN) Petitions: Temporary Removal of Children From Home 2017. Retrieved from:

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

¹⁶ New York Profile Transition-Age Youth in Foster Care (Distributed by Indigent Legal Services in November of 2018 and on file with The Bronx Defenders).

¹⁷ Tina Lee, *Catching A Case: Inequality and Fear in New York City's Child Welfare System*, at 5-6 (2016).

¹⁸ See, e.g., U.S. Gov't Accountability Office, GAO-07-816, *African American Children in Foster Care: Additional HHS Assistance Needed to Help States REduce the Proportion in Care* 8 (2007).

services, less likely to ever reunify with their families, and they are more likely to age out of foster care without being adopted.¹⁹ Although the intention of New York City's child protection system may not be to separate children of color from their families, children of color are the most likely to suffer the consequences.

Given that poverty is the main driver of a family's child welfare involvement and family separation, that the system is plagued by deep historical racial disproportionality, the negative impact of family separation on children in the short and long term, and the inhumane ways that families are separated on a daily basis, we can and must do better. We must do nothing less than ensure that there exist adequate safeguards against unnecessary traumatic family separation, so that it is a system we would trust to investigate our own families.

I. Require greater reporting and transparency by ACS regarding family separation.

In order to prevent unnecessary family separation by the child welfare system in New York City, we must better understand exactly how ACS operates when it separates children from their parents. Transparency should be required of the following data points including, but not limited to:

(a) the circumstances and allegations that led ACS to attempt to separate families,

(b) the number of CSC's conducted and the recommendations regarding family separation that result;

(c) the number of times ACS exercised its emergency removal power, under what circumstances, and the reasons why seeking court review was not possible,

(d) the number of times ACS sought a court order to remove a child and the outcome,

(e) the time it took for ACS to file a petition after removing a child pursuant to its emergency power,

(f) the number of times ACS removes a child even during the pendency of a family separation hearing,

(g) the number of family separations conducted because ACS failed to approve a family resource in a timely manner, and

(h) how soon after a family separation did a family visit occur.

¹⁹ See Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy (2018); Fluke, et al. *A Research Synthesis on Child Welfare Disproportionality* (Jan. 2011).

The city currently maintains data on the number of children placed in foster care. It is unclear, however, what these numbers show. For example, does this number include the number of children separated from their families on an emergency basis pursuant to FCA 1024, but who the court did not order placed when ACS filed their case in court? Does this number include the number of children separated from their families by order of the court but returned home after the court conducted a hearing pursuant to FCA 1027 or FCA 1028? Without this information ACS lacks a method of determining what family separation was justified and what was unnecessary trauma to the city's most vulnerable children and families.

For example, according to 2017 data reported by the Office of Court Administration (OCA), 406 Bronx children were removed from their homes on an emergency basis pursuant to FCA 1024 without a court first reviewing that decision.²⁰ This number is twice as many children separated from their families for a purported emergency than in any other borough. We do not know whether ACS was justified in removing these children without first seeking court review as the law requires. Nor do we know the factual basis or circumstances surrounding the removal and whether they were true emergencies. We do not know whether these children ultimately were separated from their families by the court upon review of ACS's decision or whether they were returned after having been traumatically and needlessly separated. Without this information, we miss the opportunity to learn what safeguards are necessary to avoid the family separations that are made in error and why Bronx children are particularly vulnerable to this method of separation. We also miss the opportunity to identify the services and supports for Bronx families that might be lacking. We cannot begin to solve the problem if we can't properly diagnose it.

The data currently maintained by ACS also does not tell us how many applications ACS makes to the court for children to be separated from their families, the basis of those applications, and whether they are denied and for what reasons. This information is critical to understanding ACS's culture regarding family separation, the safeguards it has in place against unnecessary separations, the relationship between ACS and the community, whether ACS makes decisions consistently or in response to political pressure, and the role of a strong parent defense bar in reducing unnecessary family separation in New York City. ACS has repeatedly claimed that the foster care

²⁰ Data provided by the Office of Court Administration. (2017) Table 10: Family Court Disposition of Original Abuse (NA) & Neglect (NN) Petitions: Temporary Removal of Children From Home 2017. Retrieved from: <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/Family-Court-statistics2017.pdf>

population has decreased because ACS has prioritized family prevention over family separation and their culture has changed. Such claims cannot be analyzed if we don't know how often ACS requests the court to separate a family and fails, or when children who are removed by the agency are quickly returned after the court conducts a hearing.

In order to truly understand the breadth of family separation, consider how we can safeguard against it happening unnecessarily, and provide families with the services and supports that they need in order to avoid it, we must fully understand its scope. We recommend that the City Council amend existing ACS reporting requirements to include detailed information about each time they separate or seek to separate a child from their family. This information will enable the Council to determine what supports, services and safeguards can prevent unnecessary removals even in families where some risk exists.

II. The City Council should reduce unnecessary family separation in New York City by funding legal representation and social work advocacy for parents during child welfare investigations and at child safety conferences where decisions to separate families are made.

Representation and advocacy during a child protection investigation, before a case is filed and before a child is separated from his or her parents, is not funded in New York City. Contracts for parent representation only pay for an attorney to be assigned when the case is filed in court which is days, weeks, and sometimes months after ACS opens an investigation into a family. Parents routinely participate in the investigation alone and unadvised and by the time a parent meets an attorney at the first court appearance, ACS may have already removed the children or may have determined to seek a court order to separate the family. In our experience, the agency's decision to remove children from their homes is often due to a parent's uninformed refusal of an offered service, a breakdown in communication between the parent and the caseworker, a misunderstanding, a mistake of fact, or a condition in the parent's life that could be addressed with legal and social service assistance. All of these situations could be avoided if the parent had access to a legal representation and social work advocacy during the investigation while the critical decisions about family separation are made.

Erica²¹ is a mother of two who recently began divorce proceedings from her husband to keep her children safe. When her children's father witnessed a fight between Erica and her husband, he called the police and Erica was arrested. ACS

²¹ Names and identifying details have been changed to protect our client's confidentiality

exercised their emergency removal powers and separated Erica's children from her. Erica's children remained separated from their mother at the children's center over the weekend. As soon as Erica was released, Erica reached out for legal assistance with ACS and, as a result, a lawyer from BxD was able to counsel Erica about her rights, responsibilities, and options. Erica chose to cooperate with ACS and attend the child safety conference conducted by ACS before going to court. A BxD parent advocate attended the Child Safety Conference with Erica and helped Erica explain to ACS the history and circumstances of her relationship with her husband and her plans to divorce him. With this context, ACS learned that Erica was not a danger to her children; rather, she was a survivor of domestic violence taking affirmative steps to end the relationship and protect her children. Erica asked for assistance in seeing an order excluding her husband from her home, and ACS agreed that it was in the children's best interest to return them to their mother's care.

All of the institutional providers of parent representation in New York City provide as much preventive advocacy during a child protection investigation as they can. At The Bronx Defenders, we provide early representation to families in the Bronx with a small amount of private seed money. Our data evidence demonstrates the astounding impact on families. During FY 2018, we advised 378 parents during ACS investigations. Of those parents, 239 (63%) were never charged with abuse or neglect in court. For another four parents, the investigations are ongoing but ACS has not filed a case of abuse or neglect as of the date of this testimony. Of the 135 cases (36%) filed in family court, unnecessary family separation was prevented and families often remained together. In 102 of the 135 cases, the children remained home with one of their parents, and in 17 cases arrangements were made so that children could live with family members. In only 16 of the 378 cases -- four percent -- were children separated from their parents and placed in foster care with caretakers they did not know. Representation of parents during child welfare investigations prevents and reduces the harm of family separation.

Likewise, our Healthy Mothers, Healthy Babies program provides targeted support, planning, and advocacy to our pregnant clients who have children in foster care and are vulnerable to having their newborn separated from them at birth. When a baby is born to a family with older siblings in foster care, no matter the reason for the older children being in care, the parent is investigated and ACS determines whether the newborn can remain safely at home. During FY 2018, our HMHB team worked with 210 pregnant and postpartum women, 81 of whom gave birth during the fiscal year. With support prior to and during the inevitable ACS investigation at birth, of the 81 newborns, 58 (72%) remained with their mothers and 17 (20%) were placed with family members.

Only six babies (eight percent) born to mothers working with HMHB during their pregnancy and the child protection investigation were placed in foster care with strangers.

Providing parents with legal representation and social work support and advocacy during an investigation helps engage parents early in the process, address barriers to necessary services, provide missing information, correct mistakes and smooth over misunderstandings all to avoid needless traumatic family separation of NY City children. Without institutional support and funding for this work, we will not be able to continue our preventive advocacy work which will not only have a negative impact on the families we serve, but on the system as a whole. Funding lawyers and advocates to represent parents during the investigation is a common sense solution that will prevent unnecessary traumatic family separation.

III. City Council should ensure that city hospitals are not unnecessarily separating newborns from their families.

While family separation is a traumatic experience for children of any age, newborns are especially vulnerable to the effects of separation from their families, whose caregivers serve as an extension of their own regulatory systems.²² Yet, city hospitals in New York City are separating babies from their mothers based on unjustified and unlawful “social holds.” A social hold is when a hospital holds a baby in the hospital while discharging his mother home without court order. As discussed above, ACS can exercise its emergency removal power and remove a child without court order, but most go to court within 24 hours of that removal so that the court can review that decision. When hospitals conduct social holds they are bypassing the statute’s requirement that the decision to separate a child from their family be reviewed by a court.

Michael’s²³ newborn baby was placed on a social hold by the hospital because the social worker learned that ACS was supervising the family. Though Michael informed the hospital that his two older children were home and the legal case had resulted in an ACD (Adjournment in Contemplation of Dismissal), the hospital discharged the mother home and held the baby in the hospital overnight. ACS had not exercised its emergency removal powers. Nor had a court issued an order removing the baby from his family’s care. The hospital held the baby because they could not

²² Beatrice Beebe et al., A Systems View of Mother-Infant Face-to Face Communication, 52 Dev. Psychol. 556 (2016).

²³ Names and identifying details have been changed to protect our client’s confidentiality

reach the ACS worker to clarify that the newborn could be released to his parents. Neither parent was permitted to remain with the newborn in the hospital overnight and the newborn was denied critical bonding with his parents. Only when the hospital social worker was able to reach ACS was Michael's baby released to his parents.

The Council should work with the Hospitals and Health Corporation (HHC) to require that hospitals report the number of infants that they place on social holds, the circumstances surrounding these decisions, the length of time children are held by the hospital, and whether the infants are ultimately separated from their families or discharged home. Depending on the results of the report, training for hospital staff on their legal responsibilities when they separate a child from their parent should be implemented. To avoid unnecessary separations, the Council should further require ACS to develop a system by which hospitals can immediately reach child protective decision makers when they require information or permission from the agency to release a newborn to a parent's care.

IV. The City Council should use its power and influence to ensure that the family courts in New York City have adequate judges, court parts, and hours to accommodate family separation hearings.

When ACS or a family court temporarily separates children from their families pending trial in abuse and neglect cases, the law provides the parent due process. The statutory scheme in New York ensures that parents can challenge the decision in a timely manner. Once a parent requests a 1028 hearing, the law requires that "such hearing shall be held within three court days" and may not be adjourned "except upon good cause shown." N.Y. Fam Ct Act 1028. Likewise, a hearing under Family Court Section 1027 must commence the next day after the filing of the petition and continue on successive court dates. See N.Y. Fam. Ct. Act 1027. Even were it not a moral obligation to ensure that the decision to separate a family be made thoughtfully and expeditiously, it is a legal one.

As a result of policies and practices in the Family Court and a lack of resources and time, however, parents of children who have been separated from them frequently have family separation hearings that do not comport with the requirements of due process and last far beyond the prescribed time periods. In our experience, 1027 hearings are often not started within 24 hours of the child's removal because there are not enough court hours in the day to accommodate all of the necessary hearings. Hearings often last for days, even weeks, and are heard in just ten minute increments. All the while, children languish separated from their families often to be returned at the

hearing's conclusion. Even when the court does not grant ACS's application to separate a child from their family and issues a no status ruling during the pendency of the hearing, ACS removes the child anyway, citing its emergency powers. Such removals are an abuse of the agency's emergency powers. All the while families remain separated. Since the death of Zymere Perkins, we have seen an increase in the number of ACS applications to separate a child from his or her parent, either through an order of protection or a removal to foster care. This has contributed to the significant delay in due process.

In the summer of 2017, The Bronx Defenders conducted a review of a sampling of 1028 hearings in our clients' cases. We found common problems among the hearings that we reviewed, including the following:

- Hearings took between one and six months, with many taking three or more months.
- Hearings took between ten and twenty-four court appearances to conclude.
- Hearing appearances were only rarely scheduled on consecutive days.
- Hearing appearances were often more than a week apart.
- Hearing appearances were usually scheduled in thirty-minute increments.
- It was common for less than half of the allotted time to be used for testimony.
- It was common to spend five or more minutes on scheduling the next appearance.
- Counsel for the parents did not waive time and often objected to delay.

In each of the hearings examined in the study, the presiding judge found that our client did not present an imminent risk to the child and ordered the reunification of the family. Between the time of removal and the time of reunification, parents and children in these cases suffered precise harms in addition to the trauma inherent in family separation that expedited proceedings under Section 1028 were designed to avoid, including, by way of example: A six-year-old child placed in stranger foster care who cried often for her mother and who began expressing suicidal thoughts; a parent being separated from her four-month-old baby until that baby was almost eight months old; and a child being beaten by residents in the facility where he had been temporarily placed following his removal from his mother.

Our client Ruth's case is a recent example of how a lack of sufficient court resources results in unnecessary family separation. Ruth's baby was released to her care on the condition that she remain in a mother-child residential treatment program. When she left the program following harassment by another resident, she immediately contacted BxD and notified ACS that she had left and went to her grandmother's home. Her grandmother had previously been Ruth's own foster parent when Ruth was in foster

care herself and the grandmother's home had been cleared as a safe place for the baby. Although ACS never notified the Family Court of the change in Ruth's circumstances, BxD filed a motion to appear before the Court the next day, seeking permission for Ruth and her baby to reside with her grandmother. Ruth, her grandmother, the baby, and a number of extended family members appeared in Court for a previously scheduled conference and to support the request for Ruth and the baby to stay with her grandmother. ACS opposed this relief, citing the grandmother's expunged family court case, decades old domestic incident reports between the grandmother and the grandmother's husband, the grandfather, and a possible old unspecified conviction of the grandfather's from over a decade ago. The Court was unable to hear the case that day because there were too many other cases on the calendar and the court has a mandatory cut off time of 4:30 PM. All cases that are not heard, even those that involve family separation, are bumped to the next day. Off the record, however, the Court strongly encouraged ACS to settle the matter and avoid needless family separation by telling the parties that if he could call the case, the baby would likely be released to the grandmother, despite ACS's objections. The Court urged ACS to consider this arrangement for the night in order to avoid unnecessary trauma to the child. Instead, ACS removed the newborn from Ruth in that moment in Court and placed the baby at the ACS Children's Center in downtown Manhattan. The next day when the case was heard, the baby was placed with Ruth's grandmother in the Bronx. The separation of the child from his family could have been avoided if the Court had adequate time and resources to handle the volume of cases.

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

V. The City Council should use all of its power to influence the Mayor's Office of Criminal Justice (MOCJ) to fund civil housing and benefits advocates in the contracts for parent representation.

An extensive body of research shows that family separation can be avoided or shortened if parents have access to advocates to help them obtain or maintain suitable housing, food, income and other public benefits. As discussed above, housing and income instability and their related stress on a family are often the root cause of child welfare involvement and traumatic family separation. The child welfare system is not designed or equipped to address the roots of the problems of families in the system.

The services and supports that it offers seek to address individual failings through therapeutic interventions, rather than the concrete needs like housing, food, and income that all families need to be healthy and thrive. Indeed, the housing subsidy available to child welfare involved families is a mere \$300 dollars a month which hardly makes a dent in family rent in New York City. Additionally, family separation often results in a family's loss of housing and income further destabilizing a family making it harder for parents to fulfill requirements for their children to be returned. Legal teams that include civil legal services to address collateral legal issues (such as housing, public benefits, domestic violence, paternity, child support, immigration, and work issues) that leave families vulnerable are key components of a coordinated primary prevention approach that avoids unnecessary family separation.

Our client Anna's story is an example of how issues with housing can threaten family stability and prolong family separation and how access to a civil legal advocate can counter that threat. Anna is the mother of three children and her eldest child was separated from his family and placed in foster care due to allegations that Anna failed to meet his health needs. Anna had made progress in securing necessary home-based services so that her son could come home when a dispute with her landlord threatened her progress. After Anna complained about conditions and unaddressed repairs in her apartment, her landlord called the police and ACS to report her and get her evicted. Anna was able to secure a BxD housing attorney who succeeded in preventing an eviction long enough for her to identify an alternative housing option located in the Bronx near all of the services she had accessed for her son. Ultimately, Anna and her children, with the help of her civil advocate were able to obtain a NYCHA apartment and reunite with her son.

Despite their effectiveness in preventing unnecessary traumatic family separation, there is presently no funding for housing or public benefits advocates in the parent representation contracts. When faced with no food in a family's cupboards, ACS caseworkers are often at a loss as to what they can do. Public benefits advocates can get to the root of the issue with a family's income, represent the parent in a fair hearing, and ensure that a parent receives benefits sufficient to care for their children. We urge the city council to use its leverage to influence MOCJ to adequately fund this critical piece of parent representation.

Conclusion

The child welfare system in New York City can and should be designed to keep children safe and protect them from the considerable harm that comes from needlessly

separating them from their families. These must be treated as equal, rather than competing priorities. Only by truly understanding family separation and how it is conducted in New York City can we begin to understand the work necessary to establish safeguards and re-orient the agency and its culture to one that seeks to keep families together and avoid the trauma and harm of family separation whenever possible. In addition, we need to recognize robust family defense has greatly contributed to the reduction in the foster care census over the last decade and we need to expand and build on that model by providing parents with access to multi-disciplinary teams during child protection investigations and access to civil advocates to assist with housing, income, and benefits. Finally we must tackle the incredible delay experienced by litigants in our city's family courts and prioritize timely access to justice when a family is at risk of being separated.