New York City Council
Committee on General Welfare
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Written Testimony of The Bronx Defenders By
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Thank you for the opportunity to testify in support of New York City Council's Child Welfare Package. The stakes could not be higher for our clients - parents living in the borough with the highest concentration of child protection involvement in the city. In many ways, depriving a parent of the right to raise his or her own child is "more grievous" than a prison sentence; some have even called the termination of parental rights the "civil death penalty."[1] Yet, every day, we see far too many parents in New York City facing the unimaginable loss of their children without the benefit of legal counsel; children facing the trauma of being removed from their homes unnecessarily; and child protection services operating without the transparency necessary to ensure that decisions about family separation are made fairly and equitably. Although the intention of the child protection system might not be to dissolve low income families of color, the families who are most surveilled and most often dismantled are poor and overwhelmingly and disproportionately Black and Latinx.

We are encouraged that the City Council is calling for greater accountability by the child protection system and seeking to rectify some of its most harmful inequities. Our experience as practitioners shows that access to quality representation at every stage of a child protection proceeding—from the moment when the Administration for Children's Services (ACS) initiates an investigation to a parent's hearing to have their name removed from the State Central Registry when an investigation is indicated—improves outcomes. In short, quality representation prevents unnecessary family separations in low-income communities of color and mitigates the very real economic harm that results from system involvement. These bills are a step toward the transparency necessary to more fully understand the harms of the

[1] E.G., Stephanie N. Gwillim, The Death Penalty of Civil Cases: The Need for Individualized Assessment and Judicial Education When Terminating Parental Rights of Mentally Ill Individuals, 29 St. Louis U Pub L Rev 341 (2009) (citing *In re K.A.W.*, 133 S.W.3d 1, 12 (Sup. Ct. Mo. 2004); see also In re Smith, 77 Ohio App. 3d 1, 16 (1991) (A termination of parental rights is the family law equivalent of the death penalty in a criminal case. The parties to such an action must be afforded every procedural and substantive protection the law allows.")

system to New York City's most vulnerable families and fulfill the need of low-income parents for access to counsel at every stage of the process.

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

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

I. BxD Supports the City Council Bills Requiring the Administration for Children's Services to Inform Parents of Their Rights Including During a Child Protection Investigation, Including the Right to Be Represented by an Attorney, and to Provide Information about Obtaining an Attorney. (Int. Nos. 1736, 736, 1718, 1728, 1715, 1729)

Taken together this group of bills, with some modifications, are a significant step forward to ensuring that all parents, regardless of their income, are advised of their rights

during a child welfare investigation and are given access to an attorney. We have represented thousands of parents. We meet the vast majority of our clients when they first appear in family court and we are assigned. This is after parents have already been in contact with city agencies for weeks, or even months and sometimes years. They have already been interviewed by caseworkers, and often detectives, had their home inspected, and have been asked by child welfare officials to make their children available for physical observation, interviews, and sometimes medical evaluations. Parents are also often asked to submit to evaluations and drug screens themselves. Parents are forced to navigate investigations alone and often traumatic family separation, that could have been avoided, has occurred by the time we meet them in court.

Our clients have told us that ACS does not tell them that they have rights during the investigation. Nor are they told that they have the right to request that ACS obtain a court order before they enter their home or speak to their children. On the contrary, they are told, in no uncertain terms, that they must allow ACS into their homes and to speak to their children alone, even without judicial authorization. Our clients have been asked to sign releases, often blank releases, essentially assigning away their right to privacy regarding deeply personal medical and treatment information. To be sure, there are emergency situations where ACS might have to take intrusive action. The law allows for that in narrow emergencies. But our experience shows that there are far more situations where ACS could obtain a court order and parents, if they knew their rights, could demand that they do so. But the normal course of action by ACS is to pressure a parent to participate. It is therefore critical that a process be in place to notify people of their rights when confronted with an ACS investigation and to put them in contact with organizations that can provide legal representation. Without this being a requirement, the rights of parents against government intrusion have no meaning.

It is equally critical that parents have access to legal representation at the end of an investigation that does not result in a family court filing. Many investigations are "indicated" (meaning ACS found some credible evidence of maltreatment), but are not serious enough to warrant court intervention. Under the current system, even if a parent is not brought to court, they will be listed on the State Central Registry of Child Abuse and Neglect ("SCR"), which limits their employment options for up to 28 years. Currently, if parents are not brought to court but listed on the SCR, they have no access to legal representation to clear their names from the SCR.

a. BxD Supports the City Council Bills Requiring ACS to Provide Parents with Warnings about Rights at the Start of an ACS Investigation (**Int. No. 1736**; **Int. No. 1718**; **Res. No. 736**)

While people face a possible loss of their liberty in a criminal case, parents under ACS investigation face the horrific possibility of losing their children. Integral to an arrest and the start of any criminal case is the reading of Miranda Rights. These warnings have become so ubiquitous that any person living in the United States could likely recite the warnings on command. Communication of these rights signals to individuals and to government officials that these rights are important, taken seriously, and that there are expectations for how the government interacts with its citizens before it interferes with fundamental rights.

The law is clear that ACS cannot enter homes and interview children without a court order or their parents' permission. Yet in child protection cases where a parent's fundamental right in the care and custody of their children is at stake, ACS does not communicate basic rights to parents and often tells parents that if they fail to cooperate with ACS demands, regardless of whether they have a court order, their children will be taken. Parents are often manipulated and coerced into complying with ACS's demands. They receive no explanation of their rights during an investigation, are rarely informed of the allegations against them and are not told of their right to speak to an attorney. Every parent should be made aware that ACS cannot enter a person's home, look in every room, and demand that their children be forced to speak to a stranger alone without permission or a court order. And every parent should be told that they have the right to consult an attorney.

Children will not be made less safe if parents are made aware of their rights. ACS has emergency powers to remove a child in imminent danger without prior court review and a family must allow ACS to enter their home and speak to their children when they have obtained a court order to do so. These mechanisms for ACS to conduct investigations under lawful authority or intervene on behalf of a child in danger before a case has been filed in court include ways to conduct an investigation[2], conduct emergency removals,[3] obtain various types of specific orders,[4] or even to seek orders of protection ex parte.[5] Furthermore, the manipulation and draconian approaches taken by ACS to enter family homes leads parents, and often their children who witness their parents' rights being violated and their parents being

[2] Family Court Act § 1034 provides that the family court "may order the child protective service of the appropriate social services district to conduct a child protective investigation as described by the social services law and report its findings to the court."

[3] Family Court Act § 1022 provides that "[t]he family court may enter an order directing the temporary removal of a child from the place where he or she is residing before the filing of a petition under" Article 10 of the Family Court Act."

[4] Family Court Act § 1023 provides that the family court can make various orders including, but not limited to, orders of temporary removal, orders for the provision of services, and temporary orders of protection pursuant to Family Court Act § 1029.

[5] Family Court Act § 1029 provides that the family court, upon the application of any person who may commence a proceeding under Article 10 of the Family Court Act, "for good cause shown, may issue a temporary order of protection, before or after the filing of such petition."

disrespected, to distrust the very child welfare officials who will be working with the family over the course of a case. Requiring ACS to clearly communicate to a parent their rights and their right to consult an attorney will result in earlier engagement by parents and ACS's delivery of services will not be undermined by an abuse of authority.

BxD supports City Council **Int. No. 1736** and **Int. No 1718**, preferably combined into one bill and with several modifications described below. Additionally, BxD urges the City Council to pass **Res. No. 736** to use its influence to encourage the New York State Legislature to pass legislation codifying a Parent's Bill of Rights which mirrors the language we are suggesting for **Int. No. 1736**. It is critical that ACS be required to inform parents of their rights in plain language, orally and in writing, and in the designated city wide languages. This information should be given to parents or caretakers upon first contact with a caseworker who is investigating the family. Additionally, ACS should provide parents with the contact information for legal service providers who can advise them about their rights and responsibilities when it comes to an ACS case. These warnings should make parents aware that absent a warrant or entry order for the family court, they have the right to refuse ACS entry into their home and are not required to allow ACS to speak with their children or examine their bodies. These rights are central to our understanding of privacy in any other context and should still exist for families, even if allegations have been made.

At a minimum, these rights should include:

- The right to know the allegations that have been made against you.
- The right to not let ACS staff into your home absent a court order.
- The right to remain silent and to know that anything you say can be used against you.
- The right to seek legal representation during an ACS investigation.
- The right of a parent to decide, absent a court order, whether their child will be interviewed or examined.
- The right, absent a court order, to decline ACS requests, including requests to sign releases or take drug tests.

b. <u>BXD Supports City Council **Int. No. 1728**, Requiring ACS to Ensure Parents Have Access to Independent Counsel at All Stages of ACS Involvement</u>

BxD strongly supports **Int. No. 1728**, which would ensure that parents, regardless of income, have access to an attorney during a child welfare investigation with a major and important qualification that is discussed below. This bill recognizes the government intrusion that takes place during an ACS investigation and the critical decisions that are made before a

case is filed and a parent is assigned an attorney, including often unnecessary family separation. This bill positions all parents, regardless of economic ability, to be advised and represented by counsel when they are being investigated and are at risk of losing their children.

While we support the impetus for the bill and firmly believe that all parents and caretakers should have the benefit of counsel in all stages of a child welfare investigation, the bill must guarantee that representation of parents remains completely independent of ACS. In the criminal legal system, it has long been understood that the independence and autonomy of defense counsel is a prerequisite for effective representation of people facing criminal charges. The same principle holds true in the child welfare system. Parents and caretakers facing investigation by the government and potential loss of their children need and deserve counsel that is not in any way beholden to the agency prosecuting the investigation. Put simply, ACS, the agency that oversees the prosecution of child protection cases, must have no direct or indirect supervision over the legal representation of parents who are the subject of an investigation.

The benefits of a parent having access to an attorney to represent them during a child protection investigation cannot be overstated. It is our experience that ACS's decision to remove children or seek court involvement is often due to a parent's misguided refusal to cooperate; a breakdown in communication between the parent and the investigating caseworker; a misunderstanding or mistake of fact on the part of the caseworker, or a condition in a parent's life that could be addressed with access to monetary or effective social support. When an attorney is available to represent a parent during an investigation, a parent can be fully advised of their rights and responsibilities during the investigation and the consequences of their decisions. The process can be fully explained and the parent's rights in the care and custody of their children protected. Parents are *more*, not less likely to participate meaningfully in case planning and to provide information critical to ACS's investigation, identify their strengths and resources, and address the issues that brought their children to the attention of the child protective system. In the event that a family separation or safety plan[6] is ultimately necessary, advocates can help a parent identify family members who can care for the children, avoiding the trauma of a removal. Having legal assistance during this process does not make children less safe or make it more difficult for caseworkers to do their jobs. On the contrary, children are best cared for when their parents are fully informed about their legal rights, responsibilities, and options.

[6] A safety plan is an arrangement made by ACS and the family to keep children at home safely. This can include an order of protection, another relative moving into the family home, a parent's participation in services, or services being placed in the home.

The benefits to case outcomes are also clear. 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 despite it not being funded. At BxD, we provide early representation to families in the Bronx with funding from the City Council Right to Family initiative that began this year. Our experience doing early representation with private funding during fiscal year 2018 demonstrates the astounding positive impact on families when parents have access to attorneys and advocates during an investigation. Of the parents we represented during an investigation, 62% were never charged with abuse or neglect in court. Only 11% of families we represented during the investigation experienced foster care placement. Representation of parents during child welfare investigations reduces the harm of family separation. Furthermore, court filings can often be avoided altogether, saving valuable court resources and time for the cases that actually require them.

Having lawyers available to represent parents during child protection investigations is important in the interest of equity. The experience of navigating child welfare investigation without representation and advocacy is a problem unique to poor communities. In more privileged families, where parents have the resources to hire a lawyer, a parent is not forced to participate in an ACS investigation without legal representation. **Int. No. 1728** is thus an important step towards equalizing the experience of parents with the child protection system, regardless of background or economic status. This bill positions all parents, regardless of economic ability, to be advised and assisted by counsel and to seek the assistance in navigating the child welfare system.

c. <u>BXD Supports **Int. No. 1715** and **Int. No. 1729**, Giving Parents Access to Counsel for SCR Fair Hearings.</u>

BxD strongly supports **Int. No. 1715** and **Int. No. 1729** which will ensure that parents have information about the SCR and access to representation in hearings to clear their names. This complicated process involves an administrative review and, if denied, an evidentiary hearing, in order to have the record of neglect or abuse amended and sealed. If a parent is unable to seal their record, their name remains on the State Central Registry, severely limiting their employment options and ability to support their family, for up to 28 years.

These bills are all the more critical because of the racial inequities involved. Data from the Office of Children and Family Services demonstrates that people of color are disproportionately excluded from the wide range of jobs that require an SCR clearance because Black and brown children make up a substantially higher percentage of the children whose

parents are listed on the SCR.[7] This bill would ensure that all parents have access to legal representation and is a step toward addressing the economic injustice that disproportionately harms families of color in the city.

At BxD, with money from the City Council's Right to Family Initiative, we are able to provide some representation to parents who seek to amend and seal their SCR record. We have seen first hand that when a parent has an attorney, they are often able to prevail and have access to economic opportunities to support their families. It is critical that parents have access to counsel and the opportunity to clear their name and provided meaningful support to their families.

II. BxD Supports City Council Bills Enhancing Transparency of the Child Welfare System

BxD supports the City Council's initiative to hold ACS accountable for its practices and to better understand which communities are experiencing the harm. In order to truly understand how families become involved with the child welfare system, it is crucial that data be gathered about how the system functions. This includes data about how and why cases are reported, what takes place during an investigation, and which people in our community are bearing the burden of these invasive inquiries through government surveillance and family separation.

a. City Council **Int. No. 1716** and **Int. No. 1727**, Requiring Reporting on Emergency Removals, Will Enhance Transparency and Oversight of the Most Extreme Exercise of State Power over the Family.

An emergency removal of a child from his family is the most extreme action ACS can take and one of the most traumatic events a child or his parents can experience. Emergency removals often happen abruptly, without the opportunity for a parent to reassure a child that where they are going is safe or to know where their child is going and when they will see them again. Greater transparency about when ACS conducts emergency removals (taking a child out of a home before the case has been heard by a family court judge) is necessary to better understand how the harm of unnecessary emergency removals is distributed across communities and address existing disparities.

[7] Racial and Ethnic Disparities in the Child Welfare System: New York City Compared to Rest of State (Black children in comprise 42% of children with indicated reports on the SCR compared to 42% of children in New York City overall).

Under the Family Court Act, an emergency removal is justified only if the danger to a child is so immediate that there is no time to apply for an *ex parte* order from the court prior to a removal and after all other possible safety interventions have been exhausted.[8] In our experience, emergency removals are conducted far too often before measures that would keep a child safe in his own home have been exhausted and in situations where the circumstances do not justify emergency intervention at all. Many times, once a parent is assigned an attorney at the first court date, the removal is reversed by a judge or upon agreement between the parent's attorney and Family Court Legal Services (FCLS). Children in the poorest neighborhoods are disproportionately subjected this needless trauma. For example, according to data provided by New York City Family Court, the number of emergency removals in the Bronx is twice as high as in any other borough.[9]

Although ACS reports generally on the number of judge-approved emergency removals it conducts each year,[10] ACS does not report the total number of children who are subjected to emergency removal; the race, ethnicity, income, and zip code of the families involved; or how many removals are not ultimately approved by a judge. Little is known about the circumstances that lead to removals; how removal practices might vary across the city; whether there truly was no time to seek court approval; what efforts were made, if any, to keep the child safe in his home; or whether the removal was approved or reversed once the case was filed in court.

BxD supports City Council **Int. No. 1716** and **Int. No. 1727**, which together would require ACS to report more specifically on its emergency removal practices. These bills would require ACS to provide quarterly reports detailing the total number of children subjected to

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[8] 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. 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.

[9] 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

[10] See ACS Monthly Flash Report, available at https://www1.nyc.gov/site/acs/about/flashindicators.page.

emergency removal, as well as the race and ethnicity of these children and their caregivers. In addition, ACS would be required to report on families' household income; single-parent households; and where the family resides. We suggest that this data be further disaggregated by community district and zip code. We recommend the following data points be included in the bills:

- the substance of the allegations that resulted in ACS's to attempt to separate families,
- if the allegation is for drug or alcohol abuse, specifics about the substance alleged
- the number of Child Safety Conferences (CSC) conducted, the location of the CSC, and the recommendations regarding family separation that result;
- the number of times ACS exercised its emergency removal power, under what circumstances, and the reasons why seeking court review was not possible,
- the number of times ACS sought a court order to remove a child and the outcome,
- the time it took for ACS to file a petition after removing a child pursuant to its emergency power,
- the number of times ACS removes a child during the pendency of a family separation hearing,
- the number of family separations where children did not go to a family resource; and
- how soon (in hours and days) after a family separation did a family visit occur.

These additions will better inform the City Council regarding the disproportionate use and or abuse of the emergency removal power in low income Black and brown communities, as well as about what information is used to determine when to effectuate an emergency removal, and how often they are reversed by the court when reviewed.

b. City Council **Int. No. 1161**, **Int. No. 1717** and **Int. No. 1719** Are Necessary to More Fully Understand and Address the Disparities in the System.

BxD supports City Council **Int. No. 1161, Int. No. 1717,** and **Int. No. 1719** which will require ACS to report on the demographics of the families involved at each stage of the child protection proceeding. The bills will also require ACS to implement a plan to address racial, ethnic, and income disparities in the system, and the length of time that it takes families to get in touch with their children if they have been removed and placed in foster care, or transferred to another borough.

Children of color are profoundly and disproportionately vulnerable to the negative consequences of family separation. In New York State, Black children make up 16% of the general population, but 48% of the foster care population.[11] In New York City, Black children account for 22.7% of children under the age of eighteen, but a staggering 52.8% of children separated from their families in foster care. In contrast, 25.5% of the children in New York City are white, but white children comprise only 5.5% of the foster care population.[12]

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 similar circumstances.[13] Moreover, the harm of separation is more likely to be exacerbated for children of color because they spend more time separated from their families, change placement more frequently, are less likely to receive necessary services, are less likely to ever reunify with their families, and are more likely to age out of foster care without being adopted.[14] 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.

City Council **Int. No. 1717, Int. No 1719** and **Int. No. 1161**, together, require enhanced reporting by ACS about its process of investigation and the demographics of the families involved with the system. Specifically, the bills would require reporting about the number of caseworkers employed by ACS, their level of experience, caseloads, and numbers of supervisors, disaggregated by role. Additionally, they would require reporting on the number of investigations ACS conducts. In addition to identifying ACS practices, the bills seek to gather demographic information about the parents and children involved at the different stages of child welfare involvement. Furthermore, the bills would require ACS to report information about annually about the number of children in foster care, and how long it takes parents a family members to contact their children if they have been removed and placed in foster care or transferred to another home, and whether or not this placement is within their borough. Gathering this information is essential to highlight racial, ethnic, and income disparities that are prevalent in the child welfare system.

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[11] 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).

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

[13] *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).

[14] *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).

BxD supports these bills but encourages the City Council to push for more information. It is important that data include the aggregate number for each type of investigation, and where investigation involves drug use, this data should be further broken down by substance, regardless of whether the substance is legal or illegal. Further, the information should reflect aggregate numbers of: (a) cases marked substantiated versus cases marked unfounded; (b) cases where non-court mandated services were offered to the family, including preventive services; (c) cases filed in court; (d) cases where the children were emergency removed. Finally, any reports should include the length of time in hours or days a child spent in the Children's Center prior to placement in a foster home or with a relative, and the length of time in hours or days it took for the family of a foster care youth to be in direct contact with that youth after such youth was taken into ACS custody or transferred between placements, provided as an average number and disaggregated by borough.

c. BxD Supports **Int. No. 1426** Calling for Greater Transparency in HHC Hospital Drug Testing Practices.

We see a number of child welfare investigations begin after a hospital reports a pregnant person, postpartum person or their newborn to the State Central Register[15] ("SCR") because that person and or their newborn tested positive for an illegal drug at birth. Although a positive toxicology test alone does not in and of itself suggest that an infant is harmed or is at risk of harm, often newborns who test positive for an illegal drug are held at the hospital and separated from their mothers during the critical time of maternal-infant bonding due to a report made to the SCR.[16] It is unknown how many women are drug tested by medical facilities in the Bronx, how many tested positive for what drug, or how many or what proportion of the women who tested positive were reported to child welfare authorities.

In our experience, hospitals do not always obtain a woman's consent, let alone informed consent, for a 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 cannabis. Drug testing in this manner is inconsistent with the most recent written policy of the Health and Hospital

[15] The SCR receives telephone calls alleging child abuse or maltreatment within New York State. Thereafter, SCR staff relay information from the calls to the local Child Protective System for investigation.

[16] New York law does not require reporting to the State SCR a positive drug test of a mother or newborn at birth. Still, nearly 27,000 new reports are added to the SCR each year, many of those related to drug use and positive tests at birth. 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."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, XXXX 2019.

Corporation (HHC).[17] HHC's policy does not require prenatal or postpartum toxicology testing; instead it identifies ten risk indicators that may be considered in determining whether to test.[18] 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**.[19]

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.

Extraordinary race disparities exist in who is subjected to drug testing and who is reported to child welfare officials. This disparity has its roots in the media fueled "crack epidemic" in the late 1980s and early 1990s, where women who used drugs, specifically women of color in urban areas, were demonized based on non-scientific misinformation regarding the effects of drug use during pregnancy.[20] We know now that the sensationalization of the crack epidemic in the main-stream media was highly prejudicial and presented often

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[17] 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.
[18] Id. at 2.
[19] Id. at 3.
[20] 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 documentary '48 Hours on Crack Street.'" *See* 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 Reinarman & 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).

inaccurate information about the effects of in-utero drug exposure.[21] This racist narrative, went largely unchallenged for decades, however, and today's child protection system continues to reflect and reinforce that racist, unsupported narrative.[22]

Similar to stop and frisk practices, the "test and report" practices of hospitals and child welfare authorities reveals extreme racial disparities. Despite similar or greater rates of drug use among white women, Black women are ten times more likely to be reported to child welfare for a positive drug test.[23] 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."[24] 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.[25] Other hospitals in other cities across the nation had similar results.[26] This evidence, as well as what we have seen over the past decade in the Bronx, suggests that great racial disparities exist in who is tested and who is reported as child abusers.

It is unknown how many women have been drug tested by New York City hospitals or how hospital guidelines are administered. This is why we support **Int. No. 1426**, which calls upon ACS to report on investigations initiated by health facilities and include information about the subjects of the reports, including the ethnicity and race 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 and ethnicity of each patient, as well as whether the infant was separated from his or her mother by the hospital or by

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[21] The Editorial Board, "Slandering the Unborn," *The New York Times*, Dec. 28, 2018, https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html.

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

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

[24] 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-mothers-marijuana-drugs-article-1.1227292#ixzz31hXS2sUE

[25] 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.

[26] Brenda Warner Rotzoll, Black Newborns Likelier to be Drug-Tested: Study, Chicago Sun-Times, Mar. 16, 2001 (noting that "[b]lack babies are more likely than white babies to be tested for cocaine and to be taken away from their mothers if the drug is present, according to the March issue of the Chicago Reporter"); Troy Anderson, Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers, L.A. Daily News, June 30, 2008. Another study concluded that "Black women and their newborns were 1.5 times more likely to be tested for illicit drugs as 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

ACS as a result of a positive drug test. Ultimately, a comprehensive approach to this pervasive issue will require legislation at the state level and the collection of information is critical to this effort.

III. BxD Supports State Central Registry (SCR) Reform and Urges the City Council to Use Its Influence to Ensure the SCR Bill (S6427A/A8060) Becomes Law (Res. No. 1057, Res. No. 1066)

BxD urges the City Council to use it's influence to encourage Governor to sign the SCR Bill (S6427A/A8060) into law. This bill was passed the Senate and Assembly and is awaiting signature from Governor Cuomo. Placement on the SCR, impacts thousands of New Yorkers each year. In fact, nearly 27,000 new reports are added to the SCR each year.

Indicated cases disproportionately affect low income families of color creating economic instability and furthering income inequality along racial lines. According to data from the Office of Children and Family Services (OCFS) in 2016, black children are the subjects of indicated reports at 2.69 times the rate of white children, and Latinx children are the subjects of reports at 1.58 times the rate of white children[30]. In contrast, only 6% of parents with indicated cases are white, while 42% of indicated reports are about Black, and 40% are Latinx.[27] OCFS concluded that for all of New York State that "[B]lack children make up a substantially higher percentage of the child welfare population at each stage in the process than their share of the general population of children," including being reported to the SCR[31].

Currently a parent's name can remain on the SCR for up to 28 years. This intrusive, systemic tool of surveillance keeps thousands of New Yorkers in a cycle of poverty, unable to work and support their families. If signed into law, this new law will reform the SCR in a number of positive ways. It will change the legal standard available to parents in administrative hearings from the lowest legal standard of some credible evidence, to a preponderance of the evidence, which is the same standard used when the cases are prosecuted in the family courts. It will allow parents to submit proof of rehabilitation to be considered by the judge when making a decision in their case. Further, this bill will also reduce the number of years a person's name remains on the registry. Specifically, parent's record will be available to employers, in most cases, for 8 years and for certain categories of employers (daycare, headstart, and early intervention), for 12 years, a significant decrease from the current 28 year

[27] Strengthen Families by Alleviating Collateral Consequences of Reports to the State Central Register, PLAN (May 2018).
[30] Black Disparity Rate: Unique Children in SCR Reports CY (2016)
[31] Racial and Ethnic Disparities in the Child Welfare System: New York City Compared to Rest of State (Outside of NYC) 2009 Compared to 2010 and Comparison of Selected Counties (July, 2011)

mandate. Finally, the bill also provides for automatic sealing in cases where a Family Court Judge has dismissed the case following a fact finding hearing or upon successful completion of an agreed upon adjournment in contemplation of dismissal ("ACD") or a suspended judgement.

Through our representation of clients, we see that so many child protective cases stem from issues of poverty such as lack of food, clothing, and shelter, or kids missing school. These situations should not sentence parents and their children to decades of poverty, generational foster care, and continued family disintegration. We believe that the SCR bill, awaiting the Governor's signature, is an important first step in shrinking the damaging effect the SCR has on marginalized and over-policed communities of color.

Conclusion

The child welfare system in New York City can and should be designed to keep children safe and families intact. This priority is furthered by legal representation and informed decision making at every stage of a proceeding from the investigation to SCR name clearing. Furthermore, only by truly understanding the complexities of the child welfare system and how the harms of the system are distributed can we start to address its inequities. We support the city council's child welfare package as a step toward realizing these goals.