



**BROOKLYN  
DEFENDER  
SERVICES**

**The Bronx  
Defenders**

**Redefining  
public  
defense**



**Testimony of the Article 10 family defense providers:**

**Brooklyn Defenders Service, The Bronx Defenders, Center for Family Representation, and  
Neighborhood Defender Service of Harlem**

**Presented before**

**The New York City Council Committee on General Welfare**

**Oversight hearing: The Child Welfare System During COVID-19**

**June 14, 2021**

This testimony is submitted jointly by Brooklyn Defender Services (BDS), the Bronx Defenders (BxD), Center for Family Representation (CFR) and the Neighborhood Defender Service of Harlem (NDS). Our offices are the primary providers of mandated legal representation to indigent parents in Article 10 cases filed in family court in each of our boroughs (collectively the “family defense providers”). Together, we have created a model of interdisciplinary representation for parents charged with abuse or neglect and at risk of losing their children to the foster system. Our model connects clients with attorneys, social workers, and parent advocates to provide comprehensive representation and advocacy both in and out of court. We thank the Committee on General Welfare for the opportunity to testify about the family regulation system<sup>1</sup> during the COVID-19 crisis.

The COVID-19 pandemic altered every aspect of city life and has brought into sharp relief race disparities and inequities in our social service systems, including in our health, education, employment, and legal systems. The harrowing cascade of physical and mental health consequences, economic devastation, the lack of access to desperately needed material resources, and social disruption have fallen disproportionately on the families we serve: low-income

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<sup>1</sup>Commonly referred to as the “child welfare system” or the “child protection system,” defenders and parent advocates have followed the leadership of directly impacted people and adopted “family regulation system” language to reflect the system’s prioritization of and roots in surveillance and control over genuine assistance to families living in poverty, who struggle to access quality health and mental health treatment, basic necessities, and appropriate education and services for children with disabilities. For more information about this language shift *see*, Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint (June 16, 2020 5:26 a.m.), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.

communities and Black and Latine people. Already, New York City’s family regulation system is unequally applied, largely targeting poor families, the majority of which are Black<sup>2</sup> and Latine.<sup>3</sup> The COVID-19 crisis has exacerbated the harm of family separation for parents and children, created conditions ripe for families to be targeted by the family regulation system, and slowed the progress towards reunification for families already before the family court. It has also made the filing of termination of parental rights petitions—an attempt to dissolve a family—more likely because cases are pending longer and families are less able to fulfill service plan requirements mandated to regain custody of their children.

As public defenders, we bear witness to the racist, classist, and ableist forces restricting our clients’ access to resources and opportunity. Much of our time and effort as advocates is spent trying to mitigate the harm of these systems that are oppressive, structurally inequitable by design, and which bear down most heavily on Black, Latine, and low-income communities. These forces limit access to necessities such as affordable housing, food, education, and health care. They also interfere with our clients’ liberty and their ability to remain with their families. The pandemic has only increased economic inequality and the criminalization of poverty, exposing growing gaps in access to critical resources.

We join the growing chorus of voices calling for pronounced and sweeping changes to how our city responds to families in crisis and in need of material resources and support in order to raise healthy children and our future leaders. As we discuss in greater detail below, the Administration for Children’s Services (ACS) response to COVID-19 exacerbated the devastating effects and consequences of the crisis. Specifically we focus on the following areas:

- ACS’s continued intransigence, which has resulted in ongoing and protracted family surveillance and separation, and the need for the City Council to invest directly in families and divest from ACS;
- ACS’s perfunctory effort to follow its own policies with respect to families’ access to technology, which in turn curtailed our client’s parental and due process rights, as well as their ability to have meaningful and engaging contact with their children;
- ACS and foster agencies’ suspension of (and continued dramatic restriction of) in-person parenting time which devastated families’ efforts towards reunification;
- the unprecedented disruption in families’ access to mandated services and the subsequent and harmful delay in family reunification.

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<sup>2</sup> Forty-four percent of the children in foster care in New York are Black and 26% of the children in foster care in New York are Latine. *See* Child Trends, State-level data for understanding child welfare in the United States, Foster Care: Federal Fiscal Year 2017 (Feb. 26, 2019).

<sup>3</sup> We use the term “Latine” through our testimony as a non-gendered term that is more accessible and pronounceable in the Spanish-language. For more information about the use of this term, please *see* Andrea Merodeadora, Latino, Latinx, Latine: The Grammatical Gender Neutral in Spanish, *available at* <https://puentera.medium.com/latino-latinx-latine-a3b19e0dbc1c>.

## **I. The City Council Should Invest Directly in Families and Divest from ACS, Whose Failures Have Resulted in Ongoing and Protracted Family Surveillance and Separation**

When this pandemic began last year, no one knew what long- and short-term impacts New York City would experience. With budgets stripped and resources made fallow overnight, the existing system of family regulation and policing, like so many other systems, was forced to shift priorities. In conducting this triage, the system's values have been laid bare.

Despite breathless prognostications in major media outlets across the country last year, there are no indicators that there has been any decrease in child safety, even according to ACS's own analysis. In this rare interstitial moment between what was, what is, and what will be, when we have the opportunity to think about how to make the lives of New York City's most vulnerable families better, it behooves us to interrogate what we mean by "child safety" and ask why ACS positions "child safety" on a pole opposite from "parental rights" and family integrity.

Two decades ago, Professor Dorothy Roberts articulated this question with foresight that is unfortunate in its continued relevance:

The mission of state agencies is not to promote children's welfare. Rather, their purpose has become child protection: they try to protect children from the effects of society's colossal failure to care enough about children's welfare. The system is activated only after children have already experienced harm and puts all the blame on parents for their children's problems. This protective function falls heaviest on African American parents because they are most likely to suffer from poverty and institutional discrimination and to be blamed for the effects on their children.<sup>4</sup>

She goes on to say that "[i]t seems Orwellian to call what the child welfare system does 'serving' families, when the vast majority of its clients are 'served' against their will."<sup>5</sup> True public services positioned to help families without strings attached or the threat of punishment or surveillance looming do not exist because, "child protection has absorbed virtually all of the system's resources, leaving nothing for families who simply need help."<sup>6</sup> In other words, "[j]ust

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<sup>4</sup> Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 74 (2002).

<sup>5</sup> *Id.* at 79.

<sup>6</sup> *Id.* at 85.

as police don't make communities safe, CPS affirmatively harms children and their families while failing to address the structural causes for their hardships.”<sup>7</sup>

Thankfully for New York City's families, the number of petitions filed in Family Court by ACS has reduced greatly during the pandemic, again without any measurable increase in harm to children. This fact directly counters the narrative that ACS makes our city's families and children safe. In thinking critically about the meaning of “child safety,” we must not only theorize about harm that we worry might go unnoticed, and instead focus on harm that is right under our noses: our universal and unequivocal experience is that in the overwhelming majority of cases, ACS does not approach families with compassion, empathy, openness or support, despite what they report to City Council. Instead, ACS approaches families with mistrust, disrespect, suspicion and punishment. ACS does not affirmatively seek the best outcomes for families or give parents any help or benefit of the doubt; instead, it reflexively defaults to assuming the worst-case scenario and makes determinations based on institutional self-preservation over the safety of a child or the strength of a family. Separating families always causes harm, intrusive surveillance causes harm, and that harm is rained down disproportionately on New York City's most vulnerable families, those that are already most impacted by the pandemic.

ACS's approach did not become more family-friendly or child-safety-oriented during the pandemic and in many cases became more lackadaisical and intransigent. For months at the beginning of the pandemic, parents that were on the path to reunification suddenly had no ability to see their children, no ability to comply with service plans, and no ability to petition the court to modify existing orders to bring their families together in those very frightening early days. With no way to advance their cases, families remained under so-called “supervision” of ACS, continually surveilled by this government agency, often without any legitimate basis to do so. Despite ACS's collective testimony at the June 14th hearing, we experienced no discernable increase of speed in resolution of cases. In fact, during the pandemic, the pace at which cases resolve has slowed to that of a snail. Contrary to ACS's presentation we received no communication from ACS, either collectively or at our individual agencies, identifying cases that ACS sought to resolve quickly. Quite to the contrary, each of our individual organizations took the initiative to schedule regular meetings with ACS leadership and went to great lengths to collect and present to ACS information on cases where family reunification and/or case resolution was imminent but for the limits created by pandemic. We have all done this with some success but not because we have experienced any comprehensive commitment by ACS to adjust its approach to ensure that families are reunified and cases are resolved as quickly as possible.

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<sup>7</sup> Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint, June 16, 2020, *available at* <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.

Before, during, and as we suspect will continue after the pandemic, ACS continues to commit the same easily resolvable failures -- not providing basic discovery for months into a case; not appearing in court or to provide accurate or thorough reports to the court regarding a family's progress towards reunification; threatening to call in new cases against families for discontinuing services after the legal case is concluded and where there are no safety concerns; lack of communication between ACS lawyers and caseworkers regarding settlement of cases. The list goes on. The impact is that ACS, with the imprimatur of the court, conducts extended surveillance over our clients, who are already struggling in a pandemic that is disproportionately affecting low-income Black and Latine communities.

Moreover, structural challenges inherent in the family courts were exacerbated by the COVID-19 crisis. Throughout the pandemic, judges have prioritized quick completion of hearings to terminate parental rights and the issuance of permanency hearing orders, even without conducting permanency hearings, while refusing to timely hold statutorily-required emergency hearings to reunify families. Given the disproportionate representation of non-white families in family regulation proceedings there is only one way to interpret these actions – as prioritizing the separation and destruction of Black families and families of color over their preservation and reunification. This phenomenon is not new, but the impact of the pandemic has made its existence that much more clear. New York City's courts are rife with racism. City Council should support efforts to create a robust and comprehensive review of how racism functions within New York City Family Courts and work with community members who are impacted by the family regulation system to develop a system for accountability.

ACS has presented its three current Family Enrichment Centers (FEC) and plan to dramatically expand the number of these centers as a successful effort to address “racial equity and inclusion in the communities that have suffered disproportionately during the COVID-19 pandemic” and “reduce . . . child welfare involvement.”<sup>8</sup> What ACS fails to address is that all three current centers are run by organizations that also run foster care agencies, that all are staffed by mandated reporters under ACS' purview, and that independent of the massive funding needed for these centers, ACS already has the power to reduce its harmful impact on marginalized families by proactively reunifying families, agreeing to withdraw or dismiss court cases to end ACS surveillance, and actively providing families tangible resources rather than rote service referrals.

In addition it has repeatedly been found that simply providing funds to families—for shelter, clothing, food, and other basic necessities—reduces reports of neglect.<sup>9</sup> When the City removes children from their families, and places children in the foster system, foster parents are

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<sup>8</sup> NYC Children, *Request For Proposals Expansion of the Family Enrichment Center Expansion Overview*.

<sup>9</sup> Kim Eckart-Washington, *Fighting Poverty Reduced Child Neglect Cases*, Futurity, January 2021, <https://www.futurity.org/child-neglect-poverty-eitc-2508382-2/>.

given money to provide necessities for the children in their care. Those funds - along with these funds set aside for ACS run centers should be put directly into the hands of parents and community-based organizations engaged in mutual aid efforts. Families need resources, not surveillance and family separation. Beyond this straightforward investment in marginalized communities, parents should be able to access free, competent support when navigating opaque systems—including special education services and the Department of Education, the Office for People with Developmental Disabilities, affordable and public housing systems, and prenatal and labor and delivery support. Our offices have been able to connect families to these services, referrals, and supports, thanks to City Council initiatives and private foundation funding. It should not take an ACS investigation or court case, or for families to have to turn to ACS' centers, for parents to be connected to wrap-around services that help families meet their basic needs. We are committed to continuing to bridge this gap for the families we serve, but we urge the City to invest in support and resources for families and divest from surveillance and separation.

ACS is a bloated government bureaucracy and the City Council should support any effort to divert funding away from ACS and towards community organizations with a demonstrated track record of providing support and keeping families together, trusted community organizations that are not beholden to ACS. It cannot be overstated -- there is an inherent conflict for the government agency that is tasked with prosecuting parents and separating families to also be responsible for supporting them. New York City's families do not need more policing and surveillance by ACS. They need access to resources and support.

The same easily resolvable issues, banal incompetence, and indifference to human suffering that existed in the family regulation system before the pandemic now delay reunification and extend surveillance for the low-income Black and Latin families we serve, and does so in a time where family connections and the sacredness of the home space has become paramount for most people. We ask that the City Council move beyond ACS's self-congratulatory testimony on June 14, 2021 and work with impacted communities to create systems of accountability throughout the family regulation system.

## **II. ACS's Perfunctory Effort to Follow Its Own Policies With Respect to Families' Access to Technology Harshly Impeded Parental and Due Process Rights Hindering Their Ability to Have Meaningful and Engaging Contact With Their Children**

The COVID-19 crisis has exacerbated the striking inequality in access to technology faced by low-income people from ethnically and racially marginalized communities, and greatly compounded the already myriad harms of the family regulation system. For families trapped in the family regulation system, access to technology became critical to each and every aspect of the family court case and ultimately to family reunification—from maintaining contact with their

children, to accessing the courts and responding to the various demands required of parents under ACS and family court supervision.

Even before the COVID-19 crisis, many of our clients could not afford market-rate phones with data plans. But, with parts of the Bronx, Brooklyn, Manhattan, and Queens hit the hardest by the coronavirus<sup>10</sup> and all of the resulting collateral consequences,<sup>11</sup> including job loss, housing instability, food insecurity, and mental and emotional strain, access to necessary technology became simultaneously even more difficult to gain, yet even more critical to have. Again, as a practical matter, our clients often do not have the technology or the wireless capacity required to appear reliably on video with Microsoft Teams (previously Skype For Business), Zoom, and other video conferencing platforms. The lack of wireless capacity is due to a number of factors including multiple family members sharing the wireless for school and work or because the family lives in a New York City shelter - not all are fully equipped with strong reliable wireless capability. In addition to a widespread lack of wireless capacity, our clients are usually only able to access video conferencing platforms like Teams and Zoom on their cellphones; they do not have computers or iPads or tablets and so have more limited capacity on their device to accommodate the video stream. In multiple cases we have seen, the video strains a wireless connection on a cellphone to the point where the sound is inaudible. This impedes our client's ability to follow and participate effectively in their own proceedings, visit with their children, and engage in court and ACS mandated services. Parents and families are the experts of their own lives - without their meaningful input in court proceedings, judicial and ACS decision-making is undoubtedly hindered. Technology gaps greatly disadvantaged our clients forced to navigate a virtual family regulation system.

### **i. Visitation**

For the majority of families with children in the foster system, parent-child visitation was greatly curtailed or halted altogether throughout much of the pandemic, despite orders and guidance requiring that visitation be maintained with the least family regulation system intervention and monitoring possible.<sup>12</sup> For much of the COVID-19 health crisis, many families were limited to visitation by phone or video due to social distancing requirements. While social distancing mandates and the inability to gather with loved ones is inherently difficult and isolating, social distancing requirements wreak particularly acute harm on families with children

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<sup>10</sup> *Which Are The "Hardest-hit" COVID-19 Neighborhoods?*, NYC Neighborhood Opportunity Network, <https://www1.nyc.gov/site/neon/programs/covid-neighborhoods.page>.

<sup>11</sup> James Parrott, *Covid-Caused Economic Hardships Broadly Felt And Rising*, Center For New York City Affairs (Oct. 16, 2020), <http://www.centernyc.org/reports-briefs/2020/10/16/cnycas-covid-19-economic-update>.

<sup>12</sup> See *ACS Emergency Guidance for Foster Care Providers: Casework, Contacts, Family Time and Family Team Conferences*, NYC Administration for Children's Services (last revised June 4, 2021), available at <https://www1.nyc.gov/assets/acs/pdf/covid19/guidancefostercarecontacts.pdf>; see also *Memorandum to Foster Care Provider Agencies*, NYC Administration for Children's Services (March 31, 2020), available at <https://www1.nyc.gov/assets/acs/pdf/covid19/casepractice.pdf>.

removed to the foster system. The effects of family separation are compounded by social distancing mandates and show up in trauma responses, in hopelessness, in increasing needs for clinical interventions, and in repeated cycles of difficulty.<sup>13</sup> In any context, virtual parent-child visitation is an unacceptable substitute for in-person visitation, but the issue is even worse for families lacking access to phones and data plans sufficient to conduct these visits.<sup>14</sup>

Restrictions on in-person visitation and the shift to virtual visitation, combined with our clients' lack of access to technology, also threatened parents with the loss of their parental rights, and dissolution of their families. For example, parents we represent who have been fighting to reunify with their children through participating in court ordered services and consistent visitation with their children, were thwarted in their efforts as in-person visitation was either curtailed or stopped altogether. As advocates we saw countless therapeutic visitation agencies to which ACS frequently referred parents, as well as ACS field offices and foster agencies, close their physical spaces to families across the city. Frequently ACS and foster agencies shifted the burden to parents to obtain, on their own, the resources necessary to remain in contact with their children. Without consistent visitation, children continued to languish in the foster system, and due to the 1997 federal statute, the Adoption and Safe Families Act (ASFA), which requires and indeed financially incentivizes states to file a petition seeking termination of parental rights (TPR) for most children who have been in the foster system for 15 of the previous 22 months, families are pushed perilously closer to TPR.

Just as family separation by way of incarceration or ICE detention is deeply harmful for families involved in the criminal legal or immigration system, family separation by way of family regulation system intervention causes long-lasting harm to children and their parents or caregivers that reverberates across generations.<sup>15</sup> The intense trauma can have lifelong repercussions in children's development. Visitation, even virtual, while far from ideal, can mitigate some of this harm.

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<sup>13</sup> Children's Bureau, Admin. Children & Families, Dept. Health & Human Servs., *Dear Child Welfare Legal and Judicial Leaders Letter* (Mar. 27, 2020), available at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/covid19-letter.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/covid19-letter.pdf) (noting that, "Family time is important for children and parent well-being, as well as efforts toward reunification. Family time is especially important during times of crisis.").

<sup>14</sup> See Elizabeth Brico, *Limited Technology Access Prevents Kids in The Child Welfare System from Connecting With Parents*, Prism (May 28, 2020), <https://prismreports.org/2020/05/28/limited-technology-access-prevents-kids-in-the-child-welfare-system-from-connecting-with-parents/>.

<sup>15</sup> See Children's Bureau, Child Welfare Information Gateway, *In-Home Services in Child Welfare* (Mar. 2014), [https://www.childwelfare.gov/pubPDFs/inhome\\_services.pdf](https://www.childwelfare.gov/pubPDFs/inhome_services.pdf) (Research has shown that removing a child from his or her parent is disruptive, traumatic, and likely to have long lasting negative consequences on the child); see also Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U Rev. L. & Social Change 523, 527 (2019), available at [https://socialchangenyu.com/wp-content/uploads/2019/07/Shanta-Trivedi\\_RLSC\\_43.3.pdf](https://socialchangenyu.com/wp-content/uploads/2019/07/Shanta-Trivedi_RLSC_43.3.pdf) (noting that "Notably, while the term ['harm of removal'] is phrased in the singular—'harm'—there is no single 'harm' of removal, but rather numerous independent and overlapping 'harms.'").

## ii. Access to ACS And Court Mandated Services

In addition to many parents with children in the foster system being relegated to virtual parent-child visitation, cell phones and internet devices such as tablets became the primary vehicle through which parents could access ACS and court mandated services and ACS case planning meetings. The inability to participate in mandated services and case planning often results in prolonged family separation and puts families at grave risk of TPR. Again, when combined with ASFA's mandates and incentives, the impact of curtailed service engagement due to lack of access to technology is even more consequential.<sup>16</sup>

As noted above, we have clients who, though approaching the ASFA deadline, had been working tirelessly to complete ACS requirements and court mandated services in order to have their children returned to their care, only to be derailed and their family unity placed in jeopardy due to an inability to pay their cell phone bill. We have countless clients who live in New York City shelters without adequate access to WiFi and, but for free WiFi provided in certain public spaces (e.g. McDonalds and public libraries)—which during the worst days of the health crisis were inaccessible—would have been unable to engage in almost all aspects of their court mandated services. We also know that the most marginalized communities in our city are also the most surveilled by ACS.<sup>17</sup> Still, our clients were expected by ACS and the courts to show up in a timely and consistent way to their therapeutic appointments, parenting classes, and groups, without means to access those virtual spaces.

To be clear, so long as ACS continues to regulate and police families, ACS should both continue to accept parents' participation in virtual services, as virtual services have allowed many parents to meet ACS and court demands without derailing other critical aspects of their lives, including but not limited to obtaining and maintaining employment and engaging in their children's remote schooling. But for a shift to virtual services, without a concurrent commitment to providing parents with the technology needed to access those services simply reproduces and further exacerbates the structural inequalities inherent in the family regulation system.

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<sup>16</sup> See Andrew C. Brown & Chris Gottlieb, *Stop The Clock For Kids in Foster Care*, New York Daily News (Sept. 29, 2020, 11:00 a.m.), <https://www.nydailynews.com/opinion/ny-oped-stop-the-clock-for-kids-in-foster-care-20200929-kroi47cjm5arvgfftisphkyome-story.html>.

<sup>17</sup> A 2019 report examining New York City's Administration for Children's Services (ACS) found that rates of ACS investigations were four times higher in the community districts in New York City with the highest rates of child poverty, on average, than the 10 districts with the lowest child poverty rates. The data revealed what Black, Brown, and low-income parents have been living and demanding attention to for years: a striking overlay of high ACS intervention and surveillance, child poverty, and heavily Black and Latinx areas, supporting the conclusion that ACS system of regulation and criminalization of poverty. See Angela Butel, *Data Brief: Child Welfare Investigations And New York City Neighborhoods*, The New School Center for New York City Affairs (June 2019), available at <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5d12746c3cdaa000017dfc2a/1561490541660/DataBrief.pdf>.

### iii. Access to Court

Unreliable access to technology also limited, and continues to limit, parents' ability to participate in their own defense in both family court, and ACS planning meetings, both of which have been held virtually since March 2020. From accessing court and participating in an emergency hearing requesting the return of your children to your care, to participating in child safety conferences and family team conferences all depend on access to a cell phone with a data plan or WiFi capability. Even obtaining legal counsel during the initial court intake appearance became a challenge during the COVID-19 health crisis.<sup>18</sup> While parent defense legal providers came together to create a flier with the contact information of each parent defender office so that parents would know how to get in touch with legal counsel when a case had been filed against them, throughout the COVID-19 crisis parents reported never receiving the flier from ACS. In many cases, legal providers were unable to contact parents who lacked access to technology. While as COVID wore on, ACS did improve in its distribution of the fliers, ACS remained (and continues to remain) resistant to providing parents with information on how to contact legal providers at the most critical moment: ACS's initial point of contact with a parent or caretaker. Despite ACS's arguments to the contrary, throughout COVID, and presently, ACS waits until after caseworkers have already questioned parents and caretakers and gathered valuable information that could and would be used against that parent in family court.

### **iv. ACS is an agency with immense resources, yet ACS fails to provide families with critically needed material resources including, but not limited to, necessary technology.**

Despite the critical importance of a parent's access to technology for every aspect of family regulation system involvement during the COVID-19 crisis, ACS, an agency with a multibillion dollar budget, has failed to adequately and in a timely and robust manner respond to this need. As early as March 2020, ACS issued guidance that encouraged ACS caseworkers and foster agency staff to provide phones to parents in order to facilitate necessary and court-ordered contact between parents and their children during the pandemic, and to facilitate parents' continued participation in programs and services. Moreover, the Federal Children's Bureau issued guidance clarifying that the purchase and operation of cell phones for children and youth in the foster system, and their parents, among others, is an allowable cost under certain federal funding streams made available to states.<sup>19</sup> Specifically, the Federal Children's Bureau advised, "[t]he purchase of a cell phone for a parent . . . can meet a title IV-B program purpose if it is determined that it will facilitate needed communications for case management purposes between

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<sup>18</sup> Prior to the COVID-19 crisis, most parents met their attorney on the day of intake in the physical courthouse, a practice that became impossible once the family court houses were shut down.

<sup>19</sup> See Children's Bureau, Admin. Children & Families, Dept. Health & Human Servs., *Letter From Children's Bureau Regarding The Use of Federal Funds For Cell Phones And Personal Protective Equipment* (Apr. 17, 2020), available at [https://www.acf.hhs.gov/sites/default/files/documents/cb/letter\\_on\\_federal\\_funds.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/letter_on_federal_funds.pdf).

such individual and the agency case worker, or allow the parent to participate in a remotely-located court hearing or visitation with the child.”<sup>20</sup>

While the directives are clear, and while there have been some successes, implementation of the guidance has been uneven at best. Parents and our offices’ attorneys, advocates, have to intervene on a regular basis to ensure parents are equipped with the technology they need to stay in contact with their children, the courts, and their providers. We found that we had to push for these resources to be provided on a case-by-case basis, and that many caseworkers and caseplanners were unaware of the guidance and reluctant or unwilling to provide cell phones or other technology. Further exacerbating this issue was ACS’s lack of transparency around its guidelines. As recent as ACS’s June 4, 2021 emergency guidance, ACS failed to provide *any* transparency around the circumstances under which the agency should purchase technology, identify appropriate types of technology to be purchased (including smartphones, tablets, WiFi access and/or cell phone data plans), or provide tips for getting the technology to parents. Without clear guidance, many of our clients face protracted delays and sometimes, obstruction, when trying to obtain necessary technology from foster agencies.

The COVID-19 crisis has made clear that ACS is not a system of support. If the New York City Council is committed to supporting and investing in Black, Latine, and low-income communities then it should heed the call that those communities have long been making: invest in community based systems of support, entirely independent of ACS.

### **III. Suspension of In-Person Parenting Time by ACS and Agencies During the COVID-19 Pandemic Has Been Severely Damaging to Families and Has Had a Devastating Effect on Family Reunification**

The importance of frequent, high-quality, in-person parenting time while a child is separated from their parent cannot be overstated. Parenting time helps children and parents cope with separation and loss while they are in foster care and is essential to maintaining or, for very young children, building a strong parent-child bond. Frequent in-person family time reduces the trauma of removal and expedites reunification, allowing parents to participate in parenting responsibilities and demonstrate their parenting skills. With the start of the COVID-19 pandemic and Governor Cuomo’s NY Pause Executive Order issued on March 13, 2020, family time for the vast majority of children subject to the family regulation system came to a complete and immediate halt. ACS and foster agencies unilaterally restricted in-person parenting time, despite court orders from before the pandemic and despite ACS,<sup>21</sup> New York State Office for Children

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<sup>20</sup> *Id.*

<sup>21</sup> NYC Children, *ACS Emergency Guidance For Foster Care Providers: Casework Contacts, Family Time And Family Team Conferences*, April 16, 2020, Revised June 4, 2021, available at <https://www1.nyc.gov/assets/acs/pdf/covid19/guidancefostercarecontacts.pdf> (“Providers should attempt to continue visits according to current visiting plans and court orders, in person if consistent with the health and safety of the child, parent, case planner and foster parent.”).

and Family Services (OCFS),<sup>22</sup> and the federal Dept. of Health and Human Services Children's Bureau's<sup>23</sup> guidance encouraging foster agencies across the state to remain open and continue to facilitate in person visitation using necessary precautions.

CFR conducted an internal survey of families who were separated during the pandemic during May and June of 2020, comparing their parent/child visitation before and after the NY Pause Executive Order. After March 13, 2020, of the 753 families included in the survey, about 75% who had been having in-person parenting time with their children had their visits restricted to virtual visitation only. Alarming, of our clients whose children were in foster care and could only connect to them through virtual visits following March 13, 2020, 36% of the children were under the age of three and over 50% were under the age of five. Parents of any child at that young age recognize how difficult it is to engage meaningfully with them by phone or on a screen, no less to develop and grow a parent-child bond.

Many parents struggled to access even this minimal parenting time since virtual contact is dependent on access to technology and many parents did not have reliable phone service and WiFi. ACS' own guidelines recognized this problem and advised foster agencies to assess the technology needs of families and purchase technology necessary to facilitate virtual parenting time. But despite this guidance, many parents never received any such technological assistance. CFR's survey showed that by May 18, 2020, only 12 parents reported receiving financial assistance to facilitate virtual visitation.

Even today, as nearly 60% of adults in New York City are fully vaccinated, families continue to have limited in-person family time. ACS guidelines recommend "at least biweekly" in-person visitation.<sup>24</sup> While certainly not sufficient, prior to the pandemic families would typically have family time two times per week for two hours. Currently, many families continue to have in-person visits only once per week or even once every other week. For children at ACS' Children's Center, parents struggle to see their children at all. We work with one parent who has only been permitted two in-person visits in the last eight months. Agencies, and ACS, are not moving quickly enough back to pre-pandemic levels of visitation, and each agency has, and continues to handle, parenting time differently.

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<sup>22</sup>See New York State Office of Children and Family Services, Novel Coronavirus of 2019 Disease (COVID-19) Guidance for Foster Care and Preventive Staff, March 20, 2020, available at

<https://ocfs.ny.gov/main/news/2020/COVID-2020Mar20-Guidance-for-Foster-Care-and-Preventive-Staff.pdf>

<sup>23</sup> See Department of Health and Human Services Children's Bureau Letter (Mar. 27, 2020), available at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/covid19-letter.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/covid19-letter.pdf); see also Children's Bureau, Admin. Children & Families, Dept. Health & Human Servs., *Ensuring Continuation of Critical Court Hearings*, (Dec. 4, 2020), available at

<https://www.acf.hhs.gov/sites/default/files/documents/cb/ensuring-continuation-critical-court-hearing.pdf>

<sup>24</sup> City of New York Administration for Children's Services, Policy and Procedure #2013/02, *Determining the Least Restrictive Level of Supervision Needed During Visits for Families with Children in Foster Care*, available at <https://www1.nyc.gov/assets/acs/policies/init/2013/C.pdf>.

While some agencies critically examined whether supervised agency visits were necessary or whether less restrictive community visits could occur safely during the pandemic, many others failed to consider creative alternatives to permit in-person family time to continue throughout the pandemic. Some agencies also thought more critically about facilitating virtual family time. While some permitted parents to visit virtually only at the allotted times that they would have had in-person visits, others recognized the limits of virtual parenting time and scheduled every-day contact for shorter periods of time, particularly with young children who are unable to engage for any significant length of time in virtual phone or video visits.

This failure to have in-person family time over the last fifteen months will have devastating and long-term effects on the reunification of the Black and Brown families most impacted by New York City's family regulation system, particularly for those families with young children who have had little in-person contact with their parents. Virtual visitation can not substitute for in-person family time and yet regular, frequent visits between parents and children is nearly always a prerequisite to children coming home. Federal law instructs agencies to seek to terminate a parent's rights to their children, permanently and forever, when they have been separated for 15 out of 22 months, absent a compelling reason not to do so.<sup>25</sup> This law was not suspended or modified during the pandemic, which means parents are at greater risk of losing their rights to raise their children through no fault of their own. Agencies should critically examine each case and find a compelling reason not to file termination proceedings when parents have been unable to visit and plan due to the pandemic.

City Council should hold ACS and foster care agencies accountable for the way they responded to the pandemic and the efforts they did, and did not make, to facilitate reunification, and should call on agencies not to file termination of parental rights proceedings against parents who were hindered in their ability to maintain or build strong bonds with their children due to the lack of in-person parenting time during the pandemic.

#### **IV. COVID-19 and the Subsequent Lockdown Severely Limited Access to Mandated Services and Has Had a Devastating Impact On Family Reunification**

ACS recommends a service plan for nearly every family and parent facing allegations of abuse and neglect in family court. The intention may be to create a plan aligned to the specific needs of each family and that will keep a family united. However, our experience is that these plans are almost always unduly lengthy, rote and untailed, cumbersome, and wholly attenuated from the tangible resources and supports a family needs. Moreover, rather than timely and meaningfully assisting families in accessing these services, ACS often leaves parents to locate and enroll in these services on their own - forcing parents already experiencing the trauma of ACS involvement to navigate language access needs, inaccessible health insurance, high-costs,

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<sup>25</sup> Adoption and Safe Families Act (ASFA), 42 USCA § 675(5)(E).

and unfamiliar jargon. Social workers and advocates in our offices work tirelessly to assist parents to navigate this process and access services.

In spite of the lack of helpful and accessible services plans, ACS and the Court consider this service plan vital to resolve the alleged safety concerns within a family dynamic. Parents are then mandated by the court to complete a litany of these services in order to reunify with their children, keep their children in their care, or to end ACS surveillance. Enrollment, engagement, and completion of these services within the strict time frame dictated by ASFA is absolutely vital for parents working to reunify with their children in foster care, and make the difference between reunification and the permanent termination of parental rights.

At the start of the COVID-19 lockdown, access to these crucial in-person services was abruptly discontinued – mental health counseling, substance use treatment, parenting classes, and more were cancelled or delayed indefinitely. Some parents never heard from their service providers or ACS to learn how to re-engage in these services. Many more parents waited months before being able to re-engage in services or finding new providers. Others had to work incredibly hard just to obtain the needed technology to engage in new virtual services, and to reestablish trusting and supportive virtual relationships with their providers. The instability and delay caused by this unexpected and unprecedented disruption in services then delayed families making progress towards reunification and had an immeasurable negative impact - becoming the basis to curtail parenting-time and visitation, prolonging ACS surveillance, and hindering favorable legal resolutions.

This interruption in access to services has and continues to have a devastating result for families who are nearing the fifteen-month deadline for reunification mandated by ASFA – even just a few months of delay can entirely upend a successful plan for reunification under this pressing timeline. During the pandemic, in New York City, the reunification rates of separated families have gone down: there were only 1,830 reunifications in 2020, as compared to 2,309 in 2019 -- a decrease of over 20%.<sup>26</sup> Given the fifteen-month timeline, we fear that once we return to some level of normalcy, there will be an absolute flood of Termination of Parental Rights (“TPR”) proceedings, meaning that many parents and children will experience the irrevocable termination of their families because of the obstacles created by the pandemic.

We share the experience of one such family here: Prior to COVID-19 pandemic, ACS had already filed a TPR petition against Ms. H. However, after hard fought litigation in Court, she was ordered to have some unsupervised parenting time with her children - a tremendous feat. At that time, Ms. H had already completed a substance use treatment program, domestic violence counseling, parenting skills for children with special needs, was engaged in therapy and using a visitation coach. Her only remaining service was to continue to engage with this visitation coach and to join her children’s counseling sessions. All these services – along with the three sets of foster parents her children lived with, the two-hour distance between her and the agency, and the need for one-on-one visits with each of her children had created a complicated schedule for her family’s visits. As such, prior to the onset of the pandemic, Ms. H was working diligently to

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<sup>26</sup> Julia Lurie, *Mommy, How Come I Only See You on the Phone? The unending tragedy of foster care during a pandemic*, Mother Jones, March 22, 2021, <https://www.motherjones.com/crime-justice/2021/03/mommy-how-come-i-only-see-you-on-the-phone/>

manage a nearly impossible list of services, schedules, and visits, while also parenting her children through the trauma of separation. The pandemic completely disrupted her children’s mental health services, the family’s visit schedule, and their access to a visitation coach. After the start of the pandemic, Ms. H never saw her child in-person again, before ultimately surrendering her parental rights in the fall. The gap in these crucial support services meant that her children weren’t receiving therapy they needed and she wasn’t able to participate with them to better understand their needs and support them.

While we believe that no family should be held to an arbitrary and punitive legal deadline unrelated to a family’s best interests and wellbeing, we strongly recommend, in accordance with guidance issued by both OCFS and the federal Dept. of Health and Human Services Children’s Bureau,<sup>27</sup> that ACS instruct foster care agencies to consider the COVID-19 pandemic a “compelling reason”<sup>28</sup> to not request a permanency goal change from reunification to adoption, to decline to file a TPR petition, and to provide a family more than fifteen months to reunify. Doing so is just a small recognition of the tremendous impact of the last year on already marginalized families.

The vast majority of New York City families separated by ACS are Black and Latine, and from the same communities and neighborhoods most impacted by the COVID-19 pandemic, meaning that while working to reunite their families, and navigate the complexities of reengaging in virtual services, parents were also grieving the loss of loved-ones and support networks, working essential jobs or losing employment, facing housing instability, and coping with the stress of a global pandemic.

## **RECOMMENDATIONS:**

- The City Council should divest from ACS and invest the money in community solutions which provide families with support and funding to raise healthy and well children, including a flat family living wage, housing subsidies, and child care.

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<sup>27</sup> See Office of Children and Family Services, *Letter addressing the Children’s Bureau’s June 23, 2020 guidance regarding the filing of TPR petitions during the pandemic* (September 16, 2020) (citing Children’s Bureau, Admin. Children & Families, Dept. Health & Human Servs., *Letter From Children’s Bureau Regarding The Significant Stress that the COVID-19 Pandemic Has Placed On The Child Welfare System* (June 23, 2020), available at [https://www.acf.hhs.gov/sites/default/files/documents/cb/parental\\_rights\\_adoption\\_assistance.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/parental_rights_adoption_assistance.pdf).

<sup>28</sup> “Notwithstanding any other law to the contrary, whenever: the child shall have been in foster care for fifteen months of the most recent twenty-two months; or a court of competent jurisdiction has determined the child to be an abandoned child; or the parent has been convicted of a crime as set forth in subdivision eight of this section, the authorized agency having care of the child shall file a petition pursuant to this section unless based on a case by case determination: (A) the child is being cared for by a relative or relatives; or (B) the agency has documented in the most recent case plan, a copy of which has been made available to the court, a compelling reason for determining that the filing of a petition would not be in the best interest of the child; or (C) the agency has not provided to the parent or parents of the child such services as it deems necessary for the safe return of the child to the parent or parents, unless such services are not legally required...” N.Y. Soc. Serv.Law §384-b(3)(l)(i).

- The City Council should urge ACS to instruct foster care agencies to consider the COVID-19 pandemic, subsequent lockdown, and impact on visits, services, and general stability a “compelling reason” to warrant an exception to filing a termination of parental rights petition under the statute (N.Y. Soc. Serv. Law §384-b(3)(1)(i)) and ASFA.
- The City Council should urge ACS to continue to accept parents’ virtual participation in ACS and or court mandated services and programs.
- The City Council should require ACS to provide parents with appropriate technology when needed, without delay, and require ACS to set forth written, publicly available, clear guidelines for how, when, and on what timeframe ACS will provide parents with such technology. This requirement should not be limited to the COVID-19 pandemic.
- The City Council should direct ACS and each agency to report on what if any efforts they made to facilitate visits where a lack of technology impacted the family, and the number of families who were assisted.
- The City Council should direct ACS to report on the specific visitation each foster care agency has offered to families separated during the pandemic; this report should include the number of families, changes in visits at the beginning of the pandemic and any improvement in visits in each of those families situations, by quarter; this should include the number of families who to date do not have visits that comport with ACS’s own guidelines.
- The City Council should invest in community based organizations that can supervise visits in the community, for example YMCAs, churches, and other community organizations.

Thank you for your consideration. For more information, please contact:

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