TESTIMONY OF:

Nila Natarajan – Supervising Attorney, Family Defense Practice
BROOKLYN DEFENDER SERVICES

Presented before

The New York City Council Committee on General Welfare and Committee on Hospitals

Joint Oversight Hearing on the Impact of Marijuana Policies on Child Welfare

And

Intro 1161-2018, Intro 1426-2019, Res. 0740-2019, Res. 7426-2019.

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My name is Nila Natarajan and I am a Supervising Attorney in the Family Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy in approximately 30,000 cases in Brooklyn every year. This has included thousands of people arrested for marijuana possession or sale, and people fighting deportation, eviction, or a loss of custody or parental rights due to marijuana-related allegations or convictions. We are grateful to the New York City Council for holding this hearing and taking an in-depth look at how the child welfare system treats marijuana use in New York City – including its deep-seated and stark racial inequities. We strongly support the two bills and two resolutions proposed by the City Council and appreciate this opportunity to comment on them.

BACKGROUND

BDS is the primary provider of legal representation to parents in child welfare cases in Brooklyn Family Court, one of the busiest family courts in the country. New York State law does not allow marijuana use to be the sole basis for removing a child from a parent; making a finding of neglect against a parent; or denying that parent visitation with their child. Yet my colleagues and

I witness these and other extreme and prolonged consequences of parental marijuana use in family court every day – even when there is no evidence that a parent uses marijuana in the presence of their children or that the children are in any way harmed by the parent's use.

Just last week, in a case we picked up on the first day the neglect petition was filed, ACS requested that, as a condition of allowing our client's child to remain with her, she submit to a Credentialed Alcoholism and Substance Abuse Counselor (CASAC) evaluation and *ongoing* random drug screens. The petition filed against our client essentially only made allegations of homelessness. When questioned about the basis for the request for the evaluation and drug screening, ACS stated that our client admitted to using marijuana prior to becoming pregnant, seven months earlier. Although ACS had *not* raised marijuana use as a basis for neglect, ACS still threatened the removal of our client's child if she refused to submit to random drug screens and asked the court to hold a hearing on that matter if she did not submit.

Given the widespread use of marijuana by people across race and income levels, it is not surprising that many low-income parents use marijuana to relieve stress, manage pain or nausea, or enjoy recreationally with friends. Unlike their wealthier, more privileged counterparts, however, our clients' marijuana use routinely has life-altering consequences. At minimum, it may lead to an indicated case that remains on their record for up to 28 years, or to it may lead to even more serious consequences, such as the filing of allegations of neglect against them in family court, and may even create a barrier to the return of their children to their care if they have been removed for other reasons.

Sometimes, as with new mothers who test positive for marijuana at the hospital after giving birth, marijuana use is the initial allegation that triggers the filing of a neglect case. More often though, in Brooklyn, marijuana use is raised later in the course of a neglect case, when a parent is required to complete drug treatment for marijuana use as part of their "service plan," which they must complete to get their children home or to close their ACS case. Marijuana use is too often the allegation or alleged safety concern that follows a parent for the longest time – the unfinished issue that delays reunification and drags out state surveillance for years. A parent's ability to achieve total abstinence becomes more important than their commitment to their families and their ability to safely care for their children – due, we believe, to the stigma of marijuana use by Black and Latinx parents. Family Court and ACS often make little to no distinction between recreational or thoughtful use of marijuana by a parent, and the use of drugs that has a harmful impact on children, even though the law specifically prohibits the *misuse*, and not simply the use, of drugs and alcohol.[1]

The vast majority of the people we represent are people of color living in poverty, raising their

[1] Family Court Act Section 1012 specifically defines a "neglected child" as "a child less than eighteen years of age whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care…by misusing a drug or drugs…" FCA §1012(f)(i)(B); *Nassau County Dep't of Social Servs. ex rel. Dante M. v. Denise J.*, 87 N.Y.2d 73 (1995) (per curiam)(The Court held that"[a] report which shows only a positive toxicology for a controlled substance generally does not in and of itself prove that a child has been physically, mentally or emotionally impaired, or is in imminent danger of being impaired." The Court of Appeals stressed that "[r]elying solely on a positive toxicology result for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child.")

children in homeless shelters or public housing, and in highly-policed neighborhoods, making them vulnerable to government surveillance. Similar to the ways in which the possession or use of marijuana may be used as a pretext to "stop-and-frisk" a person based on their race or the neighborhood they live in, suspected or actual marijuana use can be used as a pretext for child welfare involvement, government supervision of a family, and even the removal of children from their home.[2]

Even though it is now generally accepted that recreational or medical marijuana use can coexist with responsible, loving parenting, the people we represent, because of their poverty, race, and the surveillance over their lives, come under harsh and misplaced scrutiny. It is clear that the moral judgment imposed upon our clients surrounding their marijuana use is a direct reflection of class and race-based prejudice.

DRUG TESTING UPON THE BIRTH OF A CHILD

Racial disparities have been well-documented at many points in the health care delivery system, and we know that mothers of color and poor mothers are more likely to be drug-tested in child birth than white mothers, more likely to be reported to child welfare agencies, and more likely to be investigated by the state.[3] Positive drug tests often lead to further invasive investigation, the filing of a family court case, and possibly the removal of children. Our office continues to represent clients who face neglect allegations and the removal of their children due to their marijuana use during, before and even after pregnancy.

Many of the people we represent utilize public and private hospitals that predominately serve low-income patients for prenatal care, labor, and delivery. It is common for our clients and their newborns to be drug-tested at birth, often without their knowledge, without their informed consent, or even despite their explicit refusal. Our understanding is that the Health + Hospitals' (H+H) policy requires verbal consent to drug testing during or after labor, but many people who have been tested at a hospital report that they were not asked permission for the hospital to test themselves or their babies. Drug testing without informed consent is often applied selectively, disproportionately impacting poor women and women of color using government-funded health care,[4] and is out of step with professional standards.[5] This is particularly disturbing because in

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[2] Burrell, Michelle. "Child Welfare Needs to Have It's 'Stop-And-Frisk Moment.' *The New School Center for New York City Affairs*. http://www.centernyc.org/child-welfare-needs-to-have-its. June 27, 2018.

[3] Chasnoff, Ij, Hj Landress, and Me Barrett. "The Prevalence of Illicit-drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida." International Journal of Gynecology & Obstetrics 33, no. 4 (1990): 389. doi:10.1016/0020-7292(90)90575-6.

[4] Open Society Foundations. "Expecting Better: Improving Health Care and Rights for Women Who Use Drugs." https://www.opensocietyfoundations.org/sites/default/files/expecting-better-improving-health-and-rights-for-pregnant-women-who-use-drugs-20181016.pdf (2018), at 8, citing Amnesty International "Criminalizing Pregnancy: Policing Pregnant Women Who Are Using drugs in the USA." https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf (2017), at 40.

[5] The American Congress of Obstetricians and Gynecologists (ACOG). "Toolkit on State Legislation: Pregnant Women and Prescription Drug Abuse, Dependence and Addiction." https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/NASToolkit.pdf?dmc=1&ts=20190226T1940529955 ("ACOG policy states that urine drug tests should *only* be used with the patient's consent and to confirm suspected or reported drug use, including for women who present at **hospitals for labor and delivery**.")

our experience hospitals are not using confirmatory testing or the most reliable testing,[6] and there are no drug testing guidelines or requirements for hospitals, as there are in other contexts.

Given the dearth of scientific evidence proving that a person's use of marijuana during pregnancy is harmful to a child,[7] particularly when that child has not also tested positive for marijuana, the choice to test a person for marijuana during labor is in and of itself unnecessarily invasive and may only lead to worse outcomes for the family. As far as we know, there is no standard of care that is different for a newborn who tests positive for marijuana, and a mother's positive test for marijuana does not provide any useful information about a new parent's current ability to care for a newborn.[8] On the contrary, the heightened scrutiny and separation of infants from their mothers after birth that occurs when a mother or child tests positive for marijuana at birth have clear negative consequences to neonatal development.[9] Evidence also shows that routinely testing pregnant mothers and newborns is bad public health policy. It may cause women to avoid seeking prenatal care or other treatment because of a fear that their newborns will be removed. As such, there is no clear medical or child protective justification for testing birthing parents for marijuana.

DRUG TESTING PARENTS AT THE INVESTIGATIVE STAGE WHEN THEY DO NOT HAVE ATTORNEYS

Parents who come into contact with the child welfare system are frequently asked to submit to drug tests during the investigative stage of a case when they have no right to counsel and no access to an attorney for legal advice. Case workers do not advise parents that they have no obligation to take a drug test without a court order. Parents often agree to these invasive tests because they are not told they have a right to refuse, and are fearful of negative consequences, including losing custody of their children. Instead, parents are regularly informed by ACS that if they refuse to submit to a drug test, a negative inference will be made that the test would have been positive. Even if a parent consents to a drug test and the results are negative, that parent's time, resources, dignity, and right to privacy have been undermined. Parents who do test positive are frequently told by ACS that they need to complete a drug treatment program and abstain from using marijuana without an assessment of whether the parent's marijuana use is negatively impacting the children. Thus, parents go into substance use disorder treatment programs unnecessarily when they are busy juggling jobs and caring for their children – and taking up spots that are may be sorely needed by people with true substance use disorders.

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[6] ACOG. "Even with consent, urine testing should not be relied upon as the sole or valid indication of drug use. Positive urine screens must be followed with a definitive drug assay…Routine urine drug testing is not highly sensitive for many prescription drugs and results in false positive and negative results that are misleading and potentially devastating for the patient, including accusations of child abuse and neglect."

[7] Connor, et al. "Maternal marijuana use during pregnancy is not an independent risk factor for adverse neonatal outcomes after adjusting for confounding factors." Obstet Gynecol. 2016 Oct;128(4):713-23. doi: 10.1097/AOG.0000000000001649. Available at https://www.ncbi.nlm.nih.gov/pubmed/27607879.

[8] ACOG. "Urine drug tests are not a substitute for verbal, interactive questioning and screening of patients about their drug and alcohol use…Testing does not provide valid or reliable information about harm or risk of harm to children."

[9] Open Society Foundations, at 15.

ACS' TOTAL ABSTINENCE POLICY IS INAPPROPRIATE AND DISPROPORTIONATELY AFFECTS PEOPLE OF COLOR WHO ARE THE PRIMARY TARGET OF THE CHILD WELFARE SYSTEM

In our experience, ACS requests total abstinence from marijuana from the majority of parents regardless of whether that use is recreational or whether there exists any evidence that a parents' use directly impacts their ability to safely care for their children. This is out of step with the requirements of the Family Court Act, which allows for a finding of neglect only where there is proof of *mis*use of drugs, *and* where that *mis*use is directly impacting their ability to provide adequate care or meet children's basic needs [emphasis added].

In our experience, ACS' treatment of marijuana use in child welfare-involved families demonstrates a conflation of use and misuse. Our clients who admit marijuana use or test positive for marijuana even once are usually referred by ACS to participate in rigorous drug treatment programs and/or continue to submit to random requests for drug testing indefinitely. These referrals have a coercive effect before a case has been filed, when the specter of a possible court case or child removal looms. We also see this effect after a case has been filed, when completion of treatment can be a prerequisite to expanded visitation, reunification, and/or ending state surveillance over a family.

Directing users of marijuana to drug treatment programs regardless of the degree and nature of use both misdirects scarce substance use treatment resources and the limited time and resources of our clients. Drug treatment programs have demanding and cumbersome schedules: Depending on the treatment center, parents may be expected to go to treatment several times per week, for several hours each day. Participating in these treatment programs limits our clients' ability to seek and maintain employment, to pursue an education, and to spend needed time with their children.

Underserved communities of color have long been over-policed in the war on drugs. Similarly, in the child welfare system, marijuana prohibition and the insistence on total abstinence results in the systemic separation of poor families and families of color; this stands in stark contrast to the apparent absence of any legal action or drug treatment requirements imposed upon the white male author of an op-ed in *The New York Times* proclaiming the benefits of illegal marijuana use in parenting.[10]

We call on the City Council to increase the transparency and accountability of ACS and H+H in their investigation and reporting of marijuana-related cases; to be a leader in efforts to increase protections for patients by requiring informed, written consent for drug testing; and to call for a clear policy by ACS prohibiting adverse action against a parent for the mere possession or use of marijuana. Ultimately, we believe a culture shift to end the stigmatization and kneejerk condemnation of parents of color who use marijuana or other drugs is needed, and we hope that change could be engendered, in part, by a strong statement against disproportionately enforced and harmful prohibition policies as well as routine drug testing mothers at childbirth.

[10] Mark Wolfe, *Pot for Parents*, N.Y. TIMES, Sept. 7, 2012 at http://www.nytimes.com/2012/09/08/opinion/how-pot-helps-parenting.html.

RECOMMENDATIONS

Res. 0740-2019 - Possession or Use of Marijuana Does Not Create an Imminent Risk of Harm Requiring Removal

BDS strongly supports this resolution. Current New York law does not allow the possession or use of marijuana to be the sole basis for the removal of the child from a parent, and ACS' policy should reflect this basic legal principle. However, the resolution should also reflect that current law does not allow for the possession or use of marijuana to be the sole basis for a finding of neglect, either. As such, we urge the Council to align this resolution to the law and call upon ACS to draft and implement a policy that the mere possession or use of marijuana does not form the basis of a finding of neglect.

Similarly, we also urge the Council to call on ACS to implement a policy that the possession or use of marijuana alone cannot be the sole basis of an indicated case in the State Central Register or the sole basis to delay reunification of a family. Marijuana should be treated like alcohol – it should only be part of child protective investigation where it is clear that it is being misused to the point that the children are being harmed as a direct result.

A strong and clear statement from the Council and ACS will help us move towards a more equitable system that is better equipped to assist in keeping families safe and together.

Res. 0746 - Regulations for Hospitals on Drug Testing Those Who Are Pregnant or Giving Birth

BDS strongly supports this resolution. We further urge the Council to call on the State Legislature to pass- and the Governor to sign legislation requiring the Department of Health to amend the law to require that all hospitals, both public and private: obtain *informed written consent* before drug testing a patient; use only scientifically sound confirmed drug testing; offer regular, mandatory, comprehensive, and evidence-based training for staff on the effects of parental marijuana use on children; and ensure that patients giving birth and their newborns not be tested for marijuana because there is no medical or public health reason to justify such a test.

Further, rather than wait on the State Legislature, Governor, and the Department of Health to implement urgent and needed policy changes, we call on the Council to take action to require H+H to create and implement these changes now. It is our position that the current H+H policy requiring verbal consent for drug testing is not being implemented or documented in medical records, and is simply insufficient to ensure the privacy of patients or a full and accurate assessment of the risk of harm to a child.

Int. 1426-2019 – Reporting on Investigations Initiated by ACS Resulting from Drug Screenings at Facilities Operated by NYC Health and Hospitals

BDS supports this bill. However, because many of our clients and other low-income parents seek prenatal treatment and give birth at private hospitals, we urge the Council to require ACS to also report on investigations resulting from drug screenings performed at private hospitals. Without this information, this bill would only allow us to see a portion of the impact of hospital drug screenings. We also urge the Council to require reporting regarding the specific hospital that

conducted the test, as well as the specific drug testing method used by the hospital, including whether there was any follow-up or confirmation drug testing completed.

Int. 1161-2018 – Enhanced Reporting on the Child Welfare System

BDS supports this bill and urges the Council to require reporting that disaggregates substance abuse allegations into the specific drug misuse alleged, and that race be a required reporting category as well as ethnicity.

Additional Recommendations

1.) Given the frequent, coercive, and often baseless requests for parents to submit to drug testing during the initial investigation phase of a case, prior to the filing of a petition in court, and therefore, prior to the assignment of counsel for those who cannot afford legal representation, we urge the Council to call on ACS to implement a policy requiring ACS to inform every parent about their right to decline to take a drug test and to abandon their practice of taking negative inferences when parents decline a test. This aligns with parent advocates' request for the Council to develop a Parent Bill of Rights, similar to Miranda warnings that are required during arrest.

2.) With access to legal counsel before a court case is filed, parents with child welfare involvement would have the guidance needed to make informed decisions that would lead to better outcomes. New York City family defender offices have proposed a new and innovative initiative to fund pre-petition legal advocacy and social work assistance, which would reduce unnecessary court filings and family separations. We respectfully urge the City Council to fund this new initiative.

CLIENT STORIES

Included here, please find accounts of our client's cases, representing just a small fraction of families whom we represent who are negatively impacted by ACS and H+H's current policies around marijuana use.

When **Ms. K** went to the hospital to give birth to her daughter, hospital staff told Ms. K that all women giving birth are tested for drugs, so she should just tell them whether she would test positive for marijuana. Ms. K then admitted to using marijuana a couple of days prior. This admission spurred continued questioning and investigation of Ms. K. Ms. K's newborn daughter was then removed and placed in non-kinship foster care, where she remains. Ms. K was asked to complete a substance abuse program and to test negative for marijuana. Ms. K was also required to abstain from drinking as well. Over the course of more than a year, Ms. K took part in a substance use treatment program, which she completed. Ms. K was also required to participate in individual therapy, complete a parenting skills program and an anger management program, and have supervised visitation with her daughter. Ms. K completed all requested services and remains in individual mental health treatment. ACS continued to seek a finding of neglect against Ms. K, and her child remains in foster care.

Ms. G's children were removed from her care due to an unexplained injury to one of the children. After obtaining medical records, it was clear that Ms. G had a reasonable explanation

consistent with the injury. At that point, the children had already been removed from Ms. G's care for several months, and the only barrier to returning the children to her care was her marijuana use. Ms. G's children were only returned to her care once she completed a drug treatment program and consistently tested negative for marijuana. Thus, her marijuana use prolonged reunification of the family by seven months.

Ms. A's case began when ACS was contacted after she and her child tested positive for marijuana at her child's birth. At first, ACS did not file a case against Ms. A, but insisted that she engage in drug treatment for her marijuana use. When Ms. A did not, ACS filed neglect charges against her. When Ms. A did not complete drug treatment after the filing, the Court granted ACS' request to remove Ms. A's three-month old from her care. Ms. A immediately entered an inpatient drug treatment program, where she had to consistently test negative for nearly two months before her children were returned to her care. Ms. A successfully completed the mother-child program and ACS agreed to the dismissal of her case.

When **Ms. P** gave birth to her child, she was very forthcoming with the hospital about having used marijuana occasionally in the past, including a few times during her pregnancy. The hospital then tested Ms. P and her child. Ms. P tested positive for marijuana and her child tested negative. Ms. P was a young mother, but prior to giving birth, she moved to New York to remove herself from a destructive environment, found employment, entered into a mother-child program and shelter, registered for parenting courses, and began GED courses. ACS filed a neglect case against her and due to her marijuana use, ACS sought to place her daughter in foster care. Ms. P's child remains removed from her care in spite of her safe visits with her daughter, because she was not able to complete an inpatient mother-child drug treatment program and continues to use marijuana.

Ms. P and her child tested positive for marijuana at her child's birth. ACS was called and for 16 months, Ms. P engaged in a drug treatment program at ACS' request. When Ms. P continued to recreationally use marijuana, ACS filed allegations of neglect against her, alleging that she failed to voluntarily engage in a drug treatment program, and sought an order that the court granted excluding Ms. P from her home. Ms. P visits with her child nearly every day without any reported safety concerns, but cannot be alone with him, or return to her home, because she continues to use marijuana and has not entered a drug treatment program.

Ms. B's older child was removed from her care, and placed in foster care, due to allegations of excessive corporal punishment. After completing an array of services, Ms. B's contact with her child was limited to supervised visits, and her child's placement in foster care continued for more than two years because she continued to test positive for marijuana. Ms. B's younger child was then removed from her care at birth due to her and her child testing positive for marijuana. Ms. B had to consistently test negative for marijuana for five to six months before her children were returned to her care.

Ms. F tested positive for marijuana at her child's birth which triggered ACS entering her life and filing allegations of neglect against her. ACS recommended that she engage in a parenting course, domestic violence counseling, a drug treatment program, and a mental health evaluation. Daunted by this litany of services, Ms. F decided to arrange for her mother to care for her child. ACS continued to pursue a finding of neglect against Ms. F, and though she visits with her child nearly every day without any reported safety concerns, and continues to plan for her child to

remain with her mother, ACS continues to request that Ms. F complete a drug treatment program for marijuana.

Ms. G and her child tested positive for marijuana when her child was born. A report was called in by the hospital and ACS requested that she complete a drug treatment program, and that she continue to submit to drug tests for nearly two months before filing a neglect petition that included allegations regarding marijuana use. ACS only made one visit to Ms. G's home in this two-month time. ACS continues to request that Ms. G complete a CASAC evaluation, random drug screens, a parenting course, a mental health evaluation, and preventive services. Ms. G uses marijuana to treat her pain from a herniated disc in her back; she believes this is a healthier option than prescription pain medications.

Ms. H was young and inexperienced, and not entirely prepared for motherhood when she gave birth to her first child. When her child was born, she was drug tested at the hospital without her knowledge or explicit consent and she tested positive for marijuana. After a hearing, the Brooklyn family court granted ACS' request to remove Ms. H's newborn from her care. Thankfully, the appellate court disagreed, and permitted Ms. H to keep her newborn in her care. The process of giving birth, immediately being brought to court, anticipating the worst possible outcomes through the course of an emergency hearing, and testifying on her own behalf was a harrowing experience for Ms. H. As a new mother, what she really needed to safely care for her child was meaningful support. ACS ultimately agreed to dismiss Ms. H's neglect case just three months later.

Ms. P drank hemp tea during the course of her pregnancy. At the birth of her fourth child, her newborn tested positive for marijuana. ACS filed neglect allegations against Ms. P, raising previous ACS involvement from nearly 7 years prior, and alleging that her older children were derivatively neglected due to her marijuana use. The children were released to her care but the Court ordered that Ms. P allow ACS to make announced and unannounced visits to her home.

Ms. R was seventeen years old and in foster care herself when she gave birth to her son. Ms. R is open and honest about her ongoing marijuana use and takes steps to ensure that her child is in the care of others – including her group home staff or the child's grandmother – when she uses marijuana. There has been no indication that her marijuana use has in any way affected her ability to safely care for her son. Still, ACS has sought to remove Ms. R's son from her care three times in three months due, in part, to her marijuana use. Ms. R, exhausted by the constant ACS and Court surveillance, has consented to stop using marijuana.

Ms. B's newborn tested positive for marijuana when he was born. ACS became involved, filed neglect allegations against Ms. B, and then asked that she submit to ongoing drug tests, test negative for marijuana, complete a drug treatment program, and engage in mental health treatment. Ms. B continued to dutifully care for her children without any reported safety concerns and cooperate with all recommended ACS mandates. However, ACS would not agree to a dismissal of the case until more than one year after the birth of the child. The ongoing court case and ACS supervision prevented Ms. B from being able to join her family in another state, where she would have had much needed support.

Ms. J's ACS involvement began when she was alleged to have left her 15 year old home alone. ACS insists that Ms. J and both of her teenage children submit to drug tests. While there is no

indication that Ms. J's marijuana use currently interferes with her ability to safely care for her children, ACS requests that Ms. J engage in a drug treatment program and continues to request that her children submit to drug tests, over the objection of their attorney.

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We thank the City Council for your time and attention to these issues, and hope you consider BDS a resource as we continue to work toward fairness in the child welfare system.

If you have any question about this testimony, please contact Daniel Ball at dball@bds.org or (347) 592-2579.