

March 28, 2022

Hon. Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Hon. Andrea Stewart-Cousins
Democratic Leader, New York State Senate
188 State Street LOB - Room 907
Albany, NY 12247

Hon. Carl Heastie
Speaker, New York State Assembly
New York State Capitol Room 349
Albany, NY 12247

RE: New York State Family Defender 2022 Legislative Priorities

Dear Governor Hochul, Senate Majority Leader Stewart-Cousins, and Assembly Speaker Heastie:

As New York's family defense organizations, we write to share our legislative priorities for 2022, which seek to shrink the pathways to the state's foster system, minimize the long lasting and traumatic effects on those who have survived what is often referred to as the family regulation system,¹ and shift power and autonomy back to the families and communities most impacted by this system, as they know best what support and resources they need to thrive and raise the next generation of New Yorkers. Together, our offices represent thousands of parents and caregivers in child neglect and abuse proceedings in New York family courts every year. Much like the criminal legal system, the system in which children are removed from their parents has been and continues to be profoundly shaped by structural racism and operates by surveilling and punishing low-income families and communities of color, particularly Black and Latine communities. This system reinforces racial and economic inequality by treating poverty as child neglect, unnecessarily separating families and shifting resources to the family regulation system rather than directly providing support and resources needed by the families it is meant to serve.

¹Defenders and parent advocates have followed the leadership of directly-impacted people and adopted the phrase "Family Regulation System" to describe what has traditionally been called the "child welfare system" or the "child protection system," to reflect the system's prioritization of and roots in surveillance, punishment, and control rather than genuine assistance to and support of families living in poverty.

Over the past two years, New Yorkers have faced unimaginable hardship due to the COVID-19 pandemic. As powerfully noted in this year's State of the State address, the COVID-19 pandemic did not produce all of the problems facing New Yorkers today, rather it has "exposed and magnified the cracks in our society that had been too easy to ignore before."² Among the faults laid bare by the pandemic are the race and class disparities and inequities in our social service systems, including, but not limited to, our health, education, employment, and housing systems, and in our legal systems. The pandemic has brought into sharp relief what communities most impacted by the family regulation system have long said: the family regulation system is not a system of support or safety, rather it is a system of surveillance and control. Data supports the conclusion that the family regulation system is not a system of safety. The first wave of the COVID-19 pandemic vastly reduced New York City's family regulation's operations and the number of children and families under the gaze of mandated reporters. While the media stoked unfounded fears that this reduction in surveillance would usher in a hidden child maltreatment epidemic, studies reveal and family regulation system leadership acknowledge that narrative to be false.³ In fact, as New York City began to reopen and children had renewed exposure to mandated reporters, reports of child maltreatment did not increase nor did the rate at which investigations are indicated increase.⁴ Put simply, reduced family regulation and surveillance did not cause children to be less safe.

New York is at a critical moment and is ripe for transformation. Despite the difficulties that lie ahead, we echo Governor Hochul's powerful words: this is a moment of great possibility, and we must "meet this moment by acting decisively and with urgency." The unimaginable loss and trauma of family separation at the hands of the family regulation system here in New York can no longer be met with silence and inaction. The stakes could not be higher for our clients and their children. The harms of even short periods of family separation are well-documented.⁵ Depriving a parent of the right to raise his or her own child has devastating consequences for both parent and child, and some have even called the termination of parental rights the "civil

² Governor Kathy Hochul, New York State of the State, January 5, 2022, *available at* <https://www.governor.ny.gov/sites/default/files/2022-01/2022StateoftheStateBook.pdf>.

³ Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 11 Colum. J. Race & L. (forthcoming 2022); *see also* Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System*, The New Republic (Aug. 18, 2021), *available at* <https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system>; and *see* Michael Fitzgerald, *No evidence of Pandemic Child Abuse Surge in New York City, But some See Other Crises for Child Welfare System*, The Imprint (June 15, 2021 7:25 p.m.), <https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991>.

⁴ Arons, *supra* note 3; Fitzgerald *supra* note 3.

⁵ *See, e.g.*, American Academy of Pediatrics, Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://www.aap.org/enus/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx> (explaining that "highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children."); Vivek Sankaran, *Out of State and Out of Luck*, 25 Yale L. & Pol'y Rev.

death penalty.”⁶ In addition to families that are separated, each year, tens of thousands of New York families endure the harms of lengthy, invasive, and stressful investigations, and ongoing surveillance. Investigations can be harmful to children and have serious long-term consequences for families.⁷ The process is stressful to parents, who have their homes searched, are subjected to repeated surprise visits, are expected to miss work for investigatory meetings, and may face the loss of their jobs or stigmatization by their communities. The disruption can be even more traumatic to children, who often are woken in the middle of the night, questioned by investigators, and strip searched by government officials. Throughout the process, parents and children live in fear that they might be torn apart. For our clients, government surveillance starts as early as pregnancy and extends to controlling how New Yorkers are able to raise their children — oftentimes with little understanding of the rights that are being violated through this surveillance.

To shrink the pathways through which New York’s most marginalized families are funneled into the family regulation system, and to ensure that families currently navigating this system are treated with dignity and respect, New York must invest in policies rooted in equity, fairness, and human dignity, and invest in communities and community-based, non-punitive supports that are wholly outside of this system. Below, we share our budget and legislative priorities that will support families, minimize family separation and save New York money.

I. Investment in New York Families: Funding Family Defense

Our offices support the New York Office of Indigent Legal Services’ (ILS) \$9 million proposed appropriation to fund parent representation caseload relief and quality improvement. New York State has funded efforts to reduce caseloads for criminal defense providers, but it has not taken similar steps to do so on the family defense side. Family Court cases, especially Article Ten and Termination of Parental Rights (TPR) cases, are among the most traumatic for families. Given what is at stake in these proceedings, including the temporary or permanent loss of custody of a child, it is critical that parents are represented by quality counsel with the expertise, time, and resources necessary to dedicate to these important cases. Family defense attorneys need sufficient time to work with their clients to access supportive resources, investigate defenses, make discovery demands, identify and interview witnesses, file motions and prepare for hearings.

⁶ 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.”)

⁷ J. EMOTIONAL & BEHAV. DISORDERS 200 (2001),

http://www.mtfc.com/2001_Smith_Stormshak_Chamberlain_Bridges%20Whaley.pdf.

The crisis in the representation of parents in New York’s family courts has long been known. In 2000, New York City’s Public Advocate issued a report outlining the crisis. That same year, the Appellate Division First Department’s Committee on Representation of the Poor held public hearings to examine the quality of representation for the poor and found that low-income parents do not have sufficient legal representation. In 2018, nearly two decades later, the Chief Judge’s Commission on Parental Legal Representation heard from many public defense providers, clients, and others about problems within the family court system, including the need for reduced caseloads and improved access to professional services. In June 2021, ILS released [Caseload Standards for Parents’ Attorneys in New York State Family Court Mandated Representation Cases](#) to determine appropriate maximum caseload standards. Current caseloads across the state are much higher than these recommendations. Now that ILS has issued caseload standards for parental representation, it is time for New York to meet its obligation and invest money to ensure each of its counties are able to meet those standards.

New York’s counties cannot bear the cost of quality family representation alone. The modest funding sought by ILS would allow family defense offices to move toward the recommended caseload standards. New York’s investment of this money would be an important first step towards demonstrating its commitment to strengthening families in crisis.

II. Family Defense Legislation

We strongly support the following legislation, which would significantly reduce the harms of the family regulation system, and urge you to pass and sign these bills as soon as possible.

The Family Miranda Rights Act Requires Caseworkers Investigating Reports of Child Maltreatment to Notify Parents and Caretakers of Their Rights - S05484A (Brisport) / A06792 (Walker)

Everyday, parents and caretakers across New York, in particular Black, Latine, and low-income caretakers, are investigated by family regulation system caseworkers and are threatened with the potential removal of their children without being advised of their fundamental constitutional and statutory rights. The failure to inform parents of their rights results in confusion, distress and panic, and often leads to unnecessary and traumatic removals of children and court intervention. Moreover, because privileged families are not targeted by the system at nearly the same rates, are more likely to be aware of their legal rights, and have the means to consult an attorney, Black, Latine, and low-income parents largely shoulder the harms of a system that does not affirmatively inform those it investigates of their rights. Importantly, this legislation does not create new rights; it simply recognizes that parents and caretakers deserve to be told what rights they have during investigations. The goal of the system — happy and healthy children living at home safely with their families — is best achieved when parents and caretakers are fully informed of their rights and responsibilities. This legislation requires workers to advise parents

and caretakers of the allegations made against them, that any statements they make may be used against them, and that they have the right to contact an attorney.

The Anti-Harassment in Reporting Act Requires Non-Mandated Callers Making Reports of Suspected Child Maltreatment to Provide Their Name and Contact Information - S07326 (Brisport) / A07879 (Hevesi)

New York's system of allowing anonymous reports to the statewide child abuse and neglect hotline encourages abuse of the reporting system, leading to harassment and wasted resources. Even though the hotline permits non-mandated callers to make reports confidentially, malicious false reports have become commonplace because of the option to report anonymously. This bill would eliminate New York's anonymous reporting system by requiring that all non-mandated reporters provide their name and contact information, which will remain confidential and only be made available to the investigating agency. The problems presented by malicious reporting have been especially acute for domestic violence victims, families of color, and low-income families. Domestic violence advocates in particular have voiced concern that the current system allows perpetrators of domestic violence to harass ex-partners through anonymous false reports against them. Anonymous reporting also impedes legitimate child maltreatment investigations, because investigators have no way to verify an anonymous reporter's identity, contact them to gather additional information, or assess their credibility. **The Anti-Harassment in Reporting Act** offers a simple solution: remove the option to report anonymously and require that every caller provide their name and contact information when making a report to the hotline. This will allow investigations to proceed and sensitive information to be kept confidential, both from the general public and from the person accused of abuse or neglect.

The Informed Consent Act Prohibits Non-Consensual Drug and Alcohol Testing and Screening of Pregnant and Perinatal⁸ People and Newborns - S04821 (Salazar) / A04285 (Rosenthal)

While family separation is a traumatic experience for children of any age, newborns are especially vulnerable to the effects of separation from their parents. Even though New York hospitals are not required to drug test pregnant people and their newborns or to report a positive drug test to the Statewide Central Register of Child Abuse and Maltreatment (SCR), healthcare providers routinely test without obtaining informed consent even when it is not medically indicated and report results to the SCR when not legally required. "Test and report" practices disproportionately target low-income Black and Latine pregnant people, postpartum people and their newborns and make pregnant people fearful of accessing prenatal care, which is critical to positive maternal/fetal outcomes. "Test and report" also exposes new parents and their newborns

⁸ "Perinatal" relates to the time, usually a matter of weeks, immediately before and after birth.

to the risk of family separation, which is at odds with medical and public health experts who have found that newborns and caretakers have better health outcomes when they remain together. This legislation would require health care providers to obtain written and verbal informed consent before drug testing or screening new parents and newborns, and would require that a drug test or screen be given only if it falls within the scope of medical care being provided to the pregnant person, perinatal person, or newborn.

The Preserving Family Bonds Act Allows Post-Termination Contact Between Children and Their Birth Parents or Siblings in Termination of Parental Rights Proceedings When in the Best Interest of the Child - S04203 (Savino) / A02199 (Joyner) (2021 bill numbers; previously passed by the Legislature and vetoed by the Governor in 2021)

The Preserving Family Bonds Act - legislation strongly supported by advocates for children - gives judges the authority to allow children to maintain contact or visit their parents or siblings after parental rights have been terminated, in a manner that is safe and appropriate, when it is in the best interest of the children to stay connected with their families. We are deeply disappointed by Governor Hochul's decision to veto the Preserving Family Bonds Act in spite of the strong support from young people and their advocates. Research shows that children benefit from strong, healthy family bonds, including continued contact with their birth families after they have been adopted. Current law in New York provides for open adoption and post-termination contact when a parent voluntarily surrenders his or her parental rights, but deprives courts of the authority to allow for contact between children and biological parents after a parent's rights have been involuntarily terminated, even if that contact is deemed to be in the interest of the child. The difference between a voluntary surrender of parental rights and an involuntary termination by the court is a procedural one; it has nothing to do with the strength of the bond between the parent and their child, or the child's need and desire to maintain some form of contact with their family of origin following adoption.

The Parental Equity Act Ensures Equity in Establishing Parental Rights for All Fathers of Children in the Foster System S6389 (Brisport) /A07347 (Hevesi)

In New York, only certain fathers have the right to consent to or prevent their child's adoption, and only these "consent" fathers are entitled to challenge the state's attempt to permanently remove them from their child's lives. In the case of adoption from the foster system, the current law threatens to deprive nearly all unmarried fathers of children removed by the state of their right to a trial. These fathers are not considered "consent" fathers because they have not provided child support during the time their child was placed in a foster home, even though they have not been given an opportunity to do so. When a child is removed from their parent's custody, the state regularly identifies a man as the father of a child and arranges for visits between the father and his child; gives the father a service plan setting forth the steps he needs to take to have his

child in his care. At the same time, foster agencies routinely ask courts to conclude that this same man is not in fact a father with the right to consent to or veto his child's adoption solely because he failed to pay child support. The Parental Equity Act would end this disparate and unconstitutional treatment and ensure that all parent-child relationships are protected equally.

The Adjournment in Contemplation of Dismissal Act Gives Judges in Article 10 Matters the Discretion to Grant Adjournments in Contemplation of Dismissal (ACDs) - S07173 (Bailey)

This legislation gives family court judges another option for resolving neglect cases. After a neglect petition is filed, many parents and caretakers take substantial steps to address the safety issues that led to the family court case by engaging in services, including preventive services, drug treatment and mental health counseling, and cooperating with agency supervision. Under this proposed bill, family court judges will be able to consider and grant an ACD for those families for whom an ultimate finding of neglect would be more harmful than helpful, and in cases in which the circumstances in the home have improved since the filing of the petition. Increasing the dispositional options available will allow judges to address the specific circumstances of each family and craft orders that meet individual needs and ensure the best short- and long-term outcomes for parents and children.

Conclusion

We urge you to invest in parental representation to protect the rights of parents and to reduce the number of families separated by New York's foster system and to pass and sign these six important pieces of legislation. If you have any questions about any of these bills, please contact Miriam Mack at miriamm@bronxdefenders.org.

Signed:

Allegany County Public Defender's Office
Allegany-Cattaraugus Legal Services, Inc.
The Bronx Defenders
Brooklyn Defender Services
Center for Family Representation
Chemung County Public Advocate's Office
Chief Defenders Association of NY (CDANY)
Erie County Assigned Counsel Program
Genesee County Public Defender
The Legal Aid Society of Nassau County
The Legal Aid Society of Westchester County
Monroe County Conflict Defender's Office
Monroe County Public Defender's Office

Neighborhood Defender Services of Harlem
New York State Defenders Association, Inc.
NYU Law Family Defense Clinic
Onondaga County Bar Assoc. Assigned Counsel Program
Ontario County Office of the Conflict Defender's Office
Queens Defenders
Steuben County Public Defender's Office
Tompkins County Assigned Counsel Program