



**TESTIMONY OF:**

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Commission on Parental Legal Representation**

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**I. Introduction**

Lisa Schreibersdorf is the Executive Director and Founder and Lauren Shapiro is the Director of the Family Defense Practice at Brooklyn Defender Services (BDS). We thank the New York State Commission on Parental Legal Representation for this opportunity to submit written testimony about existing legal services and suggestions for reforms to ensure high-quality legal representation for parents eligible for assigned counsel in family law cases. We also request an opportunity to provide oral testimony.

BDS is a public defender office in Brooklyn, representing nearly 35,000 low-income New Yorkers each year who are arrested, charged with abuse or neglect of their children or face deportation. BDS provides a wide range of additional services to our clients, including assistance with housing, benefits, employment, education, immigration, and other legal and social service needs.

The Family Defense Practice (FDP) was founded in 2007 when New York City first sought to shift the representation of parents in child welfare proceedings from exclusively an 18b panel to a system that includes institutional providers.<sup>1</sup> This change emerged from more than a decade of advocacy by attorneys, bar associations and parent groups, all of whom pointed out the stark inadequacies in the assigned counsel system as it existed at that time. FDP, since its inception, has sought to bring the highest quality interdisciplinary representation to our clients, including remedying the inadequacies of the past system while continually adding resources and services to meet our clients' multi-faceted needs.

In its eleven years of service to the Brooklyn community, BDS' Family Defense Practice has represented nearly 11,000 respondents in Kings County Family Court in Article 10 (abuse or neglect), Termination of Parental Rights, custody, paternity, family offense, and visitation cases and has helped more than 20,000 children remain safely at home or leave foster care to reunite with their families. Based on this experience, we are in a unique position to discuss how institutional representation can ensure more just and fair outcomes for families affected by the child welfare system and improve the efficiency of the court system.

Due to a dramatic increase in filings in Article 10 cases in Brooklyn, FDP has grown in the past two years. At this time, we have over 50 attorneys, including 13 supervising attorneys, who provide high-quality legal representation to clients in Brooklyn Family Court. We currently have about 12 social workers who identify the needs of our clients and their families to ensure that families obtain the benefits and services to which they are entitled. Our paralegals and administrative staff, numbering more than 10 staff members, help our attorneys by writing and filing motions, obtaining records, maintaining our Case Management System, filing appeals and organizing voluminous case files. Our Law and Appeals Unit, in conjunction with our *Pro Bono* Counsel and law firm partners, work on issues of law at the trial and appellate level that have an important impact on our clients' cases and involve novel issues of law or require extraordinary resources. Cultivating legal issues in the appellate courts has helped ensure government accountability and the enforcement of our clients' legal rights. This has resulted in greater guidance to the trial courts with regard to many important issues, such as the due process requirements before a Family Court incarcerates a client, parents' statutory right to 1028 hearings, and the court's ability to vacate findings of neglect once a parent has demonstrated rehabilitation.

The vast majority of our clients are charged with allegations of neglect rather than abuse. Most of these cases are poverty-related and the allegations often include domestic violence or excessive corporal punishment, leaving children home alone, poor housing conditions, or allegations that children are not attending school. A large number of our clients struggle with mental health and/or substance abuse issues or are facing other challenges to parenting, such as cognitive delays. Many of our clients are or were in foster care themselves. While our clients usually have many needs that impact their ability to keep their families together, in our experience the vast majority of these families suffer more trauma from being separated than from

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<sup>1</sup> See Martin Guggenheim & Susan Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. 44, 45 (2013), available at <http://www.cfnny.org/wp-content/uploads/2013/07/A-New-National-Movement-in-Parent-Representation-Clearinghouse-Review.pdf>.

staying together with supports in place. In fact, many of our clients' children stay in the home during the pendency of the case while the parent and family receive needed services. Our goal in these cases is to identify the conditions that brought the family to a crisis and for our social workers to address these issues in coordination with the Administration for Children's Services ("ACS") and, if the child is in foster care, with the foster care agency. We work hard to keep children home with their families, and when they are separated, to bring them home as soon as possible once services are in place and the court can be assured the children will be safe.

Only approximately 8 percent of our cases involve allegations of abuse. These cases involve more serious allegations and these children often are removed immediately from the home. These are some of our most complex cases and often require extensive litigation and expert testimony challenging faulty medical evidence, over-reliance on circumstantial evidence, or *res ipsa* allegations where the parents do not have an explanation for the injury or the medical findings or the explanation is not consistent with the injury. In each of these situations, a well-prepared defense attorney who can analyze the facts of the case is essential to avoiding unnecessary family separation and termination of parental rights. Many of the parents charged with these more serious allegations can safely reunify with their children, even if there is a finding against them. These families would not receive a chance at reunification but for the wealth of resources BDS provides through our specialized expertise, social workers and related legal practices.

In all cases, our legal representation focuses on a full investigation of the factual allegations against our client while addressing the legal requirements necessary to establish the charge against our client. At the same time, our social workers fully assess our clients' needs and take advantage of every resource possible to maximize the parent's ability to reunify their family. In some cases, after several years of seeking reunification, we may recommend that the client agree to a family member or other trusted caretaker providing primary care to the child so that our clients can avoid termination of parental rights through subsidized guardianship or a conditional surrender. This advice is difficult for parents to accept and can only be provided after a strong attorney and social worker/client relationship has been developed and after all possible options to help the parent safely reunify with their child have been exhausted. We have been successful in serving these roles for our clients because of our office's strong client-centered culture.

In our experience, the vast majority of our clients care deeply for their children and very much want to have their children in their care. Our experience stands in stark contrast to the pervasive but false narrative that parents charged with abuse or neglect do not care about their children and that children are "better off" away from the parents. Even if they may be unable to fulfill the sometimes harsh standards imposed on them by the child welfare system, they work to the best of their ability to be the best parents they can be despite enormous obstacles, such as deep poverty, racism and a lack of education or opportunity.

The New York State legislature has declared that it is in children's best interest to live with their parents "because the child's need for a normal family life will *usually best be met in the home of its birth parent.*"<sup>2</sup> The Social Services Law further says that "the state's first obligation is to

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<sup>2</sup> See N.Y. Soc. Serv. Law § 384-b(1)(a)(ii).

help the family with services to prevent its break-up or to reunite it if the child has already left the home.”<sup>3</sup> The research also bears out that children belong with their parents whenever possible and that placement in foster care results in worse outcomes for children.<sup>4</sup> In our experience, the optimal outcome is children remaining with their families whenever it can be safely achieved, even when parents are less than perfect, as all parents are. Nothing less is required by the law. The foster care system is not a substitute for families. Children in foster care are likely to be moved multiple times; do not have the same opportunity for bonding with adults; are more likely to be arrested as they get older; and more likely to have children at a younger age.<sup>5</sup> Foster care is not a panacea and should not be seen as anything but a temporary stop on the way to family reunification, except in very limited circumstances.

One of the most important benefits achieved by family defense providers such as BDS’ Family Defense Practice has been a drastic reduction in the number of children removed initially and the shortening of the amount of time children remain in foster care.<sup>6</sup> Zealous representation with additional support and resources is the only way to secure the rights of parents and children while ensuring the fairness and effectiveness of the entire child welfare system. It is our firm belief that adequately-resourced interdisciplinary family defense representation is essential to providing the court with the information it needs to properly follow the law in maintaining family relationships and should be adopted as the model by this Commission.

## **II. The Effectiveness of the Institutional Model**

BDS clients benefit from the broad range of expertise and resources available to them because they are represented by a multidisciplinary, institutional defender office. Our clients receive comprehensive client-centered representation from attorneys who work closely with family defense social workers, while also obtaining advice and representation from our criminal defense, immigration and civil justice practices. As an interdisciplinary practice, FDP social workers assist our clients in identifying and accessing the services they need to address the issues that brought them into contact with ACS and to keep their families together safely. Our organizational knowledge allows our clients to benefit from years of a variety of professional experiences. Our extensive training of new attorneys imparts the information and skill-building they need to provide high-quality representation in a complex area of law from the very start.

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<sup>3</sup> N.Y. Soc. Serv. Law § 384-b(1)(a)(iii).

<sup>4</sup> See, e.g. Reva I. Allen, Alex Westerfelt, Irving Piliavin, & Thomas Porky McDonald, ASSESSING THE LONG TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (Child Welfare League of America, 1997), cited in Allon Yaroni, Ryan Shanahan, Randi Rosenblum, & Timothy Ross, *Innovations in NC Health and Human Services Policy: Child Welfare Policy*, VERA INSTITUTE OF JUSTICE POLICY BRIEFS, Jan. 2014, available at <http://www.nyc.gov/html/ceo/downloads/pdf/policybriefs/child-welfare-brief.pdf>.

<sup>5</sup> Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007) [hereinafter “Doyle 2007”].

<sup>6</sup> Center for New York City Affairs, The New School, *Watching the Numbers: A Six-Year Statistical Survey Monitoring New York City’s Child Welfare System* (November 2016), available at [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5849a22f725e254385d753eb/1481220657883/FINAL\\_Watching+the+Numbers\\_2016.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5849a22f725e254385d753eb/1481220657883/FINAL_Watching+the+Numbers_2016.pdf).

Supervisors work very closely with both junior and senior attorneys on their cases to ensure the high quality of representation and the sharing of information.

Our model has been shown to improve outcomes by reducing the number of children removed from their families as well as expediting reunification for those children who are removed.<sup>7</sup> One of the ways we have made the biggest difference is by reducing the amount of time children spend in foster care. BDS actively litigates, when appropriate, early on in the life of the case, through emergency hearings under Family Court Act §§ 1027 and 1028, to ensure that children never enter foster care unless absolutely necessary and, if they do, that the amount of time they spend in foster care is as short as possible. We litigate over 40 emergency hearings each month (or about 500 a year) to keep children home or have them returned from foster care, resulting in hundreds of children never entering foster care or returning home more quickly.

**Provision of legal services to family defense clients with housing and benefits, criminal, immigration and education issues:** Situated in an office that provides comprehensive criminal and civil legal services to clients, FDP is uniquely positioned to connect clients with in-house experts who can help with a range of issues that directly affect the child welfare case.

- *Civil Justice Practice:* FDP advises parents about their eligibility for homeless shelter services, public assistance, Medicaid and SSI. Where collateral civil legal issues arise, FDP clients are referred to BDS' Civil Justice Practice where BDS attorneys can advise or litigate on behalf of clients with housing or entitlement matters. For example, attorneys in CJP have helped parents establish eligibility for temporary family shelter; win hearings to overcome denials of public housing; and overcome the denial of placement in temporary housing by the Department of Housing Services. CJP attorneys represent parents in fair hearings dealing with public assistance reductions and discontinuances, and they litigate on behalf of parents in housing court to maintain stable housing and obtain repairs of unsafe living conditions. Many of our clients would not be able to achieve family reunification but for the internal resources we have on-site to ensure their housing is suitable and stable, one of the most important elements the family court looks at when determining a family's ability to remain together.
- *Criminal Defense Practice:* Over 20 percent of FDP clients have a related criminal case and BDS provides integrated representation on these overlapping cases. This type of representation ensures that the Family and Criminal courts are working in unison regarding Orders of Protection, visitation and long-term planning for the family. Our attorneys bring an understanding of the criminal case and criminal law which provides valuable information to the court and helps expedite a final resolution in Family Court.

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<sup>7</sup> See ACS/NYC Criminal Justice Coordinator data analysis comparing child welfare outcomes for institutional providers versus 18b attorneys (2013), attached. As the data shows, in Brooklyn for example, *inter alia*, in BDS' cases a lower percentage of children were remanded at intake and within one year compared to 18B cases; a larger percentage of BDS clients were reunified prior to disposition; a lower number of children re-entered foster care after return; and the median time to fact-finding was quicker (8.5 months vs. 10.5 months).

- *Immigration Practice:* All non-citizen clients are screened for potential immigration remedies, such as Domestic Violence and Trafficking Visas, green cards and potential asylum claims. Often, the development of the immigration issues will directly affect the outcome of the Family Court matter.
- *Education Unit:* We regularly see cases involving allegations of educational neglect. Upon further investigation, we learn that the underlying issue is that the child's needs have not been fully understood or the school is not meeting the child's special needs. Our education unit works with children and families to identify needs and assures that the school education plan meets those needs and that the services are being provided adequately.

**Supervisory structure:** Our supervisory structure ensures that our attorneys are properly identifying factual and legal issues on their clients' cases. It also provides accountability. Supervisors become familiar with clients' cases and can respond in emergencies, step in to cover hearings or motions and provide continuity when attorneys leave the practice. Our office has developed written procedures regarding supervisory expectations to ensure high quality representation in every case. The supervisory structure also provides a mechanism for clients or other stakeholders to provide feedback on an attorney's performance. Supervisors ensure quality control through in-court supervision, review of papers and trial preparation, and performance evaluations.

**Training of staff:** We have developed an extensive training program for new attorneys covering every aspect of Article 10 proceedings, including both substantive law and practical litigation skills. Each year, a class of new attorneys receives a comprehensive training manual and a six week entry-level training. We also present ongoing monthly trainings and CLEs to enhance attorneys' professional development and build on the substantive knowledge and litigation skills of the more experienced attorneys. At bi-weekly attorney meetings, we discuss a wide range of issues, from emerging areas of the law to new ACS policies.

**Language Access:** FDP recruits attorneys and social workers from different backgrounds who speak many languages because clients greatly benefit from working with attorneys and social workers who speak their primary language. Reflecting the diversity of Brooklyn, our staff speaks over ten different languages, including Spanish, Russian, Haitian Creole, Mandarin, Cantonese, Arabic, Urdu and Bengali. Over a third of our staff is bilingual. Clients who do not speak English as their first language benefit from being paired with FDP staff attorneys who speak their language, and who, in many cases, have contacts with community-based agencies and familiarity with a client's cultural or religious background, a factor which is often relevant in an Article 10 case. Attorneys who can communicate with clients in their primary language enhance the attorney-client relationship and vastly improve the quality of representation that BDS provides our clients.<sup>8</sup>

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<sup>8</sup> See, e.g., Jayesh M. Rathod, *The Transformative Potential of Attorney Bilingualism*, 46 U. MICHIGAN J. LAW REFORM 863-920 (2013).

**Specialized expertise in substantive areas:** We have attorneys who specialize in particular areas of law or practice, thereby developing skills and institutional knowledge, thus improving the quality of representation and adding value in the courtroom.

- *Medically-Complex Cases, Including Res Ipsa Cases:* FDP has represented many clients who have suffered the nightmare of seeking help for a sick or injured child, only to be accused of causing the injury or condition. Even if they believe the injury happened in the care of another, not being able to explain the cause of the injury or condition can lead to investigation by ACS and charges of abuse in family and/or criminal court and removal of the children from their care. For these parents, having an attorney who understands the medical science that could uncover the real cause of the child's injury is often their only hope. To meet that need, we have a supervisor who focuses exclusively on medically-complicated cases. Defending parents in these cases requires knowledge of various medical topics ranging from pediatrics to neurology, genetic diseases, radiology, endocrinology, dermatology, forensic pathology, and infectious diseases.
- *Custody Cases:* Each year, approximately 10 percent of our clients have additional custody cases filed, amounting to between 250-300 custody petitions per year. These cases often last a year or two after the Article 10 case is resolved. At any given time, we have approximately 50 custody trials pending. These cases involve complex litigation, including forensics. BDS has an attorney specializing in custody whose expertise enables her to settle many cases using creative negotiation advocacy and to handle trials when settlement is not possible. She also trains staff on custody matters.

**Motion Practice:** FDP has leveraged our institutional knowledge to great advantage in our motion practice. On average, we file between 15 to 20 motions a week. FDP maintains a database of model briefs and motions that represents over eleven years of written advocacy for our clients. Attorneys use these models as starting points to engage in zealous motion practice in settled and emerging areas of the law. For our clients seeking to reunify with their children, our motion practice keeps the process moving forward as quickly as possible. For example, our attorneys regularly file motions to compel ACS to provide our clients with necessary services. We also move to ask the court to order unsupervised and/or overnight visits when the client and family are ready to do so. For our clients whose children are home and who face meritless neglect allegations, we file dispositive motions seeking dismissal. Finally, in some cases, we file motions to seek the end of supervision of cases that no longer need to be in court. Our robust motion practice helps resolve cases more quickly and has the added bonus of keeping the population of foster care children as low as possible.

**Technology:** Our office's online case management system, developed and improved over many years, enables staff members to instantly access up-to-date information on all of our FDP cases. This enhances our ability to respond to frequent emergencies, new filings and enables our attorney/social work teams to share information about cases so that information is immediately available to attorneys while they are in court. Our relationship with the court has allowed us to

access court data as well, which enhances our ability to advise clients and ensure our records are updated.

**Collaborations:** FDP is involved in numerous collaborations with other stakeholders in the courts and the child welfare system with the goal of improving outcomes for children and families. We meet regularly with court personnel to discuss issues of shared concern regarding the effective operation of the Kings County Family Court. We are involved in ongoing, fruitful collaborations with ACS and other parent and children's advocacy organizations to: decrease the number of children unnecessarily removed from their homes without court order, improve access to housing assistance for ACS-involved families, design and implement fair and effective guidelines for working with parents affected by mental illness, enhance access to preventive services tailored to parents with intellectual disabilities, and increase families' access to services in their primary language as well as other issues as they arise.

### **III. The Interdisciplinary Practice of an Institutional Model**

The goal of our attorneys and staff is to reduce the number of children who enter foster care and where foster care placement does happen, to work towards reunification in as brief a period of time as possible. We learned early on that social work support is vital to addressing the complex needs of our clients and ensuring that we support them both inside and outside of the courtroom. Our interdisciplinary model involves attorneys working side by side with our team of licensed social workers; all supported with the back-up of paralegals, administrative professionals, supervisors and personnel in other practice areas within BDS. This interdisciplinary approach, which involves social workers as equal partners in the representation, is the core principle upon which our success has derived. Our clients must have professional advice and assistance for their social service needs to make tangible gains in mental health, substance abuse, trauma, domestic violence and issues related to poverty.

FDP social workers support clients through every step in their Family Court case, often meeting them on their first day in court. Social workers, attorneys and clients work closely together as a team to develop a service plan and legal strategy based on the client's goals. Social workers perform comprehensive and on-going family assessments that help to identify the family's needs to ensure that appropriate services and interventions are put into place. Social workers also advocate for clients at ACS and foster-care agency conferences, and collaborate with attorneys to ensure continuity between in-court advocacy, agency practice and what is happening in the life of the client.

FDP's social work team has developed close relationships with community-based organizations and efficiently connects clients with service providers that are able to meet a client's specific needs. In one example, an FDP social worker was available in court on the day ACS filed an Article 10 petition seeking to remove a client's newborn baby because of concerns about the young parent's past history in foster care, her mental health and her ability to care for her newborn on her own. Without any family support, this young client risked losing her child if she did not find a mother-child program. The FDP social worker immediately identified a mother/child program to accept the family and offer the needed mental health services so this



mother was able to keep her newborn and experience the baby's first smile, first words and first steps, while she learned how to be a good parent.

Approximately 20 percent of FDP clients are immigrants and many do not speak English as their first language. FDP's social work team, along with BDS immigration practitioners, have developed close relationships with community-based programs serving New York's immigrant communities and is able to connect clients to culturally competent service providers and access to services in their native language. For clients who do not qualify for medical insurance, FDP's social work team has worked hard to identify programs that will accept clients on a no-fee basis.

One of the most important roles of FDP's social work team is to build trusting relationships with clients and ensure their voices are heard outside of court. Social workers travel across the five boroughs to attend child safety conferences and family team conferences at ACS and foster care agencies and advocate for appropriate service plans that meet the needs of the individual family. They also advocate for clients regarding visitation, placement, and reunification issues. FDP has been successful in avoiding removals and failed trial discharges by attending out-of-court conferences to advocate and problem-solve using their knowledge of their cases and the social service landscape in New York. FDP's social work team is also expert in mediating and problem-solving issues that can arise between clients and child welfare professionals, foster parents and/or service providers.

FDP's social workers provide crisis management and intervene in emergency situations. For example, in a case where ACS sought to remove a client's disabled child and her three siblings, an FDP social worker with expertise in Office for People with Developmental Disabilities (OPWDD) services worked closely with the attorney to identify specific services available to this family through OPWDD. In this case, the assigned ACS worker was not familiar with OPWDD services, and it was only through information presented to the court by FDP, obtained with the assistance of the FDP social worker, that the judge was able to understand that this child with cerebral palsy was eligible for several home based services that could ensure that she and her siblings remain safely at home.

BDS strongly believes that our interdisciplinary model is integral to FDP's success. We urge the Commission to recommend that New York State adequately fund social workers, parent advocates and other support staff to ensure that any parent facing allegations of abuse and neglect have access to interdisciplinary representation.

#### **IV. Caseload Standards**

Over the past eleven years, caseloads in the Family Defense Practice have steadily grown. This is due, in part, to the fact that these cases may last many years. Even with our best efforts to expedite cases, there are many factors that prolong the outcome of cases, including ongoing custody battles, appeals, the birth of another child, loss of housing or other forms of stability and an ever-increasing backlog in the courts. In addition, there has been a surge of cases over the past

two years resulting in a 54 percent increase in Article 10 filings.<sup>9</sup> Although New York City has supported our work from the beginning, the lack of a clear, articulated understanding of what resources are required for our work has sometimes made it difficult to advocate for sufficient resources to meet the ever-increasing caseloads. For this reason, we strongly recommend that the Commission implement case caps for Article 10 cases that are similar to those that exist in criminal cases.

In 2010, New York State passed legislation that required providers of indigent criminal defense representation to meet a case cap that was to be executed and implemented by the Office of Court Administration (“OCA”). OCA was also authorized to contribute financially to the offices in New York City to help effectuate meeting those caseload targets. Since that time, OCA has assisted BDS and other city offices to meet the case cap standard. Providers in turn use the statutory requirement as a benchmark to ensure adequate funding from the City. More recently, as part of the evolving landscape of funding for representation on criminal cases, the Office of Indigent Legal Services (“ILS”) was empowered to create statewide caseload standards that are now implementing with the assistance of funds provided by the Governor in the state budget. These additional funds are breathing life into the right to counsel in criminal cases by ensuring that lawyers have the time they need to follow leads on the factual allegations, research and argue issues of law and to visit with and interview clients. The implementation of these standards is significant improvement in the ability of the New York City offices, BDS included, to provide the services our clients need and are legally entitled to in criminal cases.

Attorneys for the children also have case load caps pursuant to 22 NYCRR § 127.5. Therefore, the only gap in similar standards is in the representation of respondents in Family Court. As an organization that works with OCA and ILS to meet case cap standards in criminal cases, BDS can say without doubt that the creation of a case load for attorneys representing parents in Article 10 cases would make a significant difference in terms of ensuring that adequate resources are provided by New York City for this work. We would recommend that ILS be tasked with determining what the standard should be, and we would welcome the opportunity to contribute our expertise and experience to any such process.

We firmly believe that a lawyer should not have more than 50-60 pending clients at any given time. However, the fluctuations in caseload combined with the difficulty in predicting future filings has resulted in periods of time when our attorneys are carrying caseloads of over 90 clients. We know firsthand that as caseloads increase, attorneys have less time to file motions, to read discovery in advance to assess defenses, to reach out to opposing counsel to propose settlement of cases, to think long term about their cases, including how to avoid a parent’s rights from being terminated, to refer clients for collateral services, and to strategize with social workers about how to resolve cases according to the family’s needs. When attorneys have higher caseloads, they have no choice but to put out the proverbial fires day in and day out, which means they spend most of their time litigating emergency hearings, dealing with client

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<sup>9</sup> Abigail Kramer & Angela Butel, *Child Welfare Surge Continues: Family Court Cases, Emergency Child Removals Remain Up* (The New School Center for New York City Affairs, July 2018), available at <http://www.centernyc.org/child-welfare-surge-continues> (finding a 54 percent jump in Family Court petitions between October 2016 and May 2018, over a corresponding timespan beginning in 2014).

emergencies and crises, responding to motions filed by opposing counsel and spending a large part of their day in court on regularly scheduled appearances. Attorneys can only act in a defensive posture and are left with insufficient time outside of court to resolve cases through strategic planning and negotiation. This type of practice is not sustainable and results in higher attrition rates, causing caseloads to grow even further. Furthermore, when caseloads reach a certain level, our office is forced to take resources from other services, such as administration and social workers thereby reducing the effectiveness of our office as a whole and breaking down the very foundational benefits of an institutional provider. The benefits of a reasonable caseload cannot be overstated.

Based on our experience with the criminal case caps, BDS is making the recommendation that the Office of Indigent Legal Services be tasked with creating case load standards for providers of parental representation. Of course, our hope would be that those caseload standards would be codified in legislation as the other caseload standards have been.

*“Clients” vs. “Cases”*: In considering the need for caseload caps, OCA should be aware that the number of *cases* each attorney is handling is much higher than the number of *clients* being represented. Each client has an original Article 10 case, which could involve several petitions or children, often with their own unique needs. Throughout the course of representation in Article 10 proceedings, additional cases may be filed involving newborn petitions, petitions to violate orders, custody cases, family offense cases, paternity cases, and/or Termination of Parental Rights (TPR) cases. In addition, attorneys are responsible for litigating interim appeals, which are litigated on an expedited time frame, and are generally filed by the Administration for Children’s Services when we prevail at an emergency hearing. Last year, we litigated over 20 appeals, most of them in this expedited manner. Related cases are filed in 18 percent of our cases. We have represented almost 11,000 clients in 26,328 Article 10 petitions and another 5,318 related petitions, including 2,193 custody cases, and 784 Termination of Parental Rights cases.

*Average Length of Case*: Despite our efforts to expedite our cases, consistent with our clients’ goals of reducing the amount of time that they are involved in the family court system, the average length of our cases is over two years. These cases usually require an increasing amount of work as the case progresses. Our cases last an average of two years but we have many cases that last substantially longer. 16 percent of our cases last longer than two years and almost 9 percent last longer than three years. (These older cases are still open and therefore are not even included in the average length of time that a case lasts.) For example, we currently have 450 cases that are more than two years old and 90 cases that are more than five years old. These long-term cases are all cases that we are actively litigating.

Older cases require ongoing attention and advocacy, just as newer cases do, and they often require more work than newer cases. At a minimum, we are appearing in permanency hearings every six months. These hearings can be extensive, such as when we are seeking family reunification or unsupervised visits over the agency’s objections, or where there are a number of children with different statuses, placements and permanency. Although Family Court Act § 1089(a)(3) requires that permanency hearings be completed within 30 days, permanency hearings often are adjourned for many months at a time and require multiple half-hour

appearances to complete. If a Termination of Parental Rights (“TPR”) petition has been filed—and often it has been—that proceeding will involve extensive discovery and litigation, and can take more than a year to complete. TPR proceedings themselves can also result in even further litigation, such as when a parent is accused of having violated the terms of a suspended judgment entered at the conclusion of the TPR trial.

Fundamentally, Article 10 cases take a long time to resolve because families’ lives are constantly evolving. For child-welfare-involved families, changes in life circumstances often result in new litigation, such as a death or illness in the family, loss of a job or housing, or the birth of a child. In addition to permanency hearings and TPR cases, litigation at this stage of a case can involve ACS violation petitions, motions to restrict visits, motions to fail a trial discharge or remove children, and/or motions to change placement of the children when there is a change in the foster family situation. Respondent attorneys file motions for payment for needed services, motions for unsupervised visits, and motions for trial or final discharge of children to their parents’ care. Any caseload caps must take into account the long length of Article 10 cases and ensure that parents have attorneys with the time and resources necessary to provide them with high-quality representation at every stage of their case, no matter how long their case lasts.

*Recommendation:* The criminal caseload standards are based on the average number of new cases that attorneys begin representation on in a year. Due to the fact that most criminal cases are resolved within one year from their initiation, that intake model works fairly well in those cases. The same is not true of Article 10 cases. These cases last a very long time and with a consistent intake, attorney caseloads will continue to rise for many years. Therefore, it is important that any standard that is developed for these cases look at the *pending* load of the office/attorneys rather than the annual intake.

## **V. The Need for Funding for Article 10 Pre-Petition Advocacy**

Pre-petition access to counsel would help prevent unnecessary removals and Family Court litigation by giving parents who are under investigation by ACS access to expert legal advice and social work advocacy before ACS seeks removal of children or files an Article 10 petition in Family Court.

BDS currently engages in pre-petition advocacy on a limited basis on behalf of current clients of BDS or individuals who come to our community office. Through legal advice and informal advocacy, we are often able to resolve ACS cases in ways that prevent unnecessary removals without court involvement. For example, in one recent case, the family originally came to ACS’ attention because of abuse allegations which turned out to be unfounded. However, in the course of the investigation ACS discovered that the child had many school absences and began investigating the mother for educational neglect. The mother reached out to our office, and we assigned a social worker to advocate for her. The social worker discovered that the child had significant special needs and his mother had been transferring him between different schools hoping to find a school that could meet his needs. After BDS helped her obtain a placement for the child in a special education school, the child’s attendance improved and the case was resolved without an Article 10 petition ever being filed.

BDS has also been able to engage non-custodial parents in cases in which they would not otherwise have taken part in court proceedings, thus expanding the family resources available and improving outcomes for children and families. For example, our Mandarin-speaking staff has worked with numerous immigrant families in which a parent works out of state for long portions of time. Between the geographic distance and the language barrier, ACS is often unable to communicate with or even serve process on these parents. In many of these cases our staff have successfully reached out to these parents and explained the court process to them with the result that these parents have had the opportunity to make an informed choice to participate in Article 10 proceedings regarding their children.

However, most parents experiencing an ACS investigation are unlikely to have access to counsel. We often see petitions filed in situations in which earlier access to counsel could have resolved the underlying issues and prevented the Article 10 petition from being filed. For example, BDS currently represents a young mother in a case alleging educational neglect and lack of stable housing. The family was homeless and had been bounced between various shelters all over New York City for most of the school year. The Department of Homeless Services repeatedly found the family ineligible for shelter on the grounds that they could reside with the maternal grandmother, who herself had an ACS case when our client was a child and our client had been removed from her care due to maltreatment. Our client was scared that her own children would be unsafe living in the same home with her mother, so each time she was found ineligible for shelter she returned to the PATH intake office to reapply.

The negative effects on school attendance for families being found ineligible for shelter and bounced around the city between different placements is well documented.<sup>10</sup> Our client wanted to minimize disruption in her daughter's schooling by waiting until they finally obtained stable housing to enroll her in the local school. But that process took far longer than she anticipated. In the meantime, ACS had received a report that the nine-year-old had not been attending school, and when they tried to investigate they were unable to make contact with the mother because she was moving around. After filing, BDS was immediately able to assist her in establishing her shelter eligibility and obtaining a stable shelter placement. She enrolled her daughter in school, and her daughter finished the school year and was promoted to the next grade. If BDS had been able to assist this mother when the ACS case was first called in, we could have helped her establish shelter eligibility so that she would have had a place to stay and enroll her daughter in school, eliminating the need for an Article 10 filing entirely.

Institutional providers of parent representation should be funded to provide pre-petition representation. We could operate a hotline for parents who are the subject of an ACS investigation and parents could receive legal advice and, where appropriate, social work advocacy. Our social workers would be made available to attend conferences with parents prior to filing and immediately intervene to provide services and avail the parent of BDS's resources. Often the involvement of social workers in ACS case conferences results in better outcomes by

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<sup>10</sup> See, e.g., Elizabeth A. Harris, *For New York City's Homeless Children, Getting to School Is the Hard Part*, N.Y. TIMES, Oct. 10, 2016, available at <https://www.nytimes.com/2016/10/11/nyregion/for-new-york-citys-homeless-children-getting-to-school-is-the-hard-part.html>.

increasing the parent's participation and by helping to inform a positive outcome. This facilitates the creation of service plans that better reflect the particular needs of the family, preventing unnecessary litigation and keeping children safely at home. Expanding this advocacy to include parents who are the subject of ACS investigations would expand these benefits to more families, thus obviating the need for removals and court involvement in many of these cases.

## **VI. Conclusion**

Since the creation of institutional providers in 2007, the number of children in foster care has been reduced from 16,675 children to fewer than 9,000 in 2018. This is true despite the increase in the number of annual filings over the last 18 months. The model we have employed, which emphasizes the collaborative efforts of lawyers and social workers to help families stay together has had monumental success and has contributed to the dramatic reduction in the use of foster care.

While BDS and the other providers are very pleased with the gains that have been made towards promoting fairness and justice in the child welfare and family court systems in the past eleven years, there is a good deal of work that can be done to improve legal representation to parents in New York City. First and foremost, this Commission should analyze and seek to enforce reasonable caseload limits for Article 10 cases as the most important step in ensuring that attorneys have the time and opportunity to ensure justice for each and every client and their children.

Thank you for considering BDS' comments and observations. If you have any additional questions, please reach out to Lauren Shapiro at [lshapiro@bds.org](mailto:lshapiro@bds.org) or 347-592-2510.