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## COVID-19 Reflections on Resilience and Reform in the Child Welfare System

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# COVID-19 REFLECTIONS ON RESILIENCE AND REFORM IN THE CHILD WELFARE SYSTEM

*Kele Stewart\* and Robert Latham\*\*†*

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## INTRODUCTION

The collision of two pandemics — COVID-19 and structural racism — has exposed and exacerbated structural inequalities that trap low-income families and people of color in cycles of poverty and other disparate economic and health outcomes.<sup>1</sup> The beleaguered child welfare system, which disproportionately serves low-income families from communities of color, is no exception.<sup>2</sup> The COVID-19 public health crisis necessitated unprecedented changes to a system that struggled to meet the needs of children and families in ordinary times. Critics have long argued that the child welfare system undermines family relationships by intervening in situations that do not warrant the coercive force of state intervention and failing to provide effective services to facilitate timely family reunification.<sup>3</sup> For children in care, the system lacks the capacity to provide appropriate case management and services to its large caseloads and lacks appropriate placements and placement instability — key contributors to educational delays and untreated psychological or emotional needs.<sup>4</sup> This was the context in which the pandemic hit.

As the pandemic loomed large, media reports warned of children at risk of undetected abuse and halted oversight measures for children already in

1. See Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [https://perma.cc/XX2F-DKSG].

2. See John Fluke et al., *A Research Synthesis on Child Welfare Disproportionality and Disparities*, CTR. FOR STUDY SOC. POL'Y 1, 6 (2010); Martin Guggenheim, *Let's Root Out Racism in the Child Welfare System, Too*, CHRON. SOC. CHANGE (June 15, 2020, 2:00 AM), <https://chronicleofsocialchange.org/child-welfare-2/lets-root-out-racism-child-welfare-too/44327> [https://perma.cc/PYL4-9TWP]; Daniel Heimpel, *Silence Can Be Complicity in Violence Against Black Families*, CHRON. SOC. CHANGE (June 9, 2020, 7:16 AM), <https://chronicleofsocialchange.org/opinion/my-complicity-in-violence-against-black-families/44152> [https://perma.cc/MU7Q-TWL4].

3. See CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 92–95 (2014); see also DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 228–40 (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 FUTURE CHILDREN 104, 107 (1998).

4. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE OUTCOMES 2008–2011: REPORT TO CONGRESS EXECUTIVE SUMMARY iv (2013) [hereinafter CHILD WELFARE OUTCOMES 2008–2011], [https://www.acf.hhs.gov/sites/default/files/cb/cwo08\\_11.pdf](https://www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf) [https://perma.cc/W9ME-3X6X]; David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 PEDIATRICS 336, 341–42 (2007); Kele Stewart, *The Connection Between Permanency and Education in Child Welfare Policy*, 9 HASTINGS RACE & POVERTY L.J. 511, 521–22 (2012).

the system.<sup>5</sup> They raised concerns that there would be a spike in maltreatment as children were isolated at home with caregivers experiencing increased emotional and financial stressors, while having minimal in-person contact with key mandatory reporters of abuse like teachers and doctors.<sup>6</sup> Commentators also worried that children were at increased risk because many key functions that provide oversight of, and services to, children in care could no longer be done in person and migrated online or were halted altogether.<sup>7</sup> While these concerns were well-meaning and some reflected sound hypotheses, they were largely based on anecdotal information, and the foreboding tone was infused with biased assumptions about the low-income and Black, Latinx, and Native American families who make up a disproportionate share of the nation's child welfare system.<sup>8</sup>

The reliance on anecdotes to shape the narrative was doubly confounding because objective data are readily available. For example, every month Florida publishes a rich set of data on its system in public dashboards.<sup>9</sup> Child Protective Service (CPS) agencies in other states maintain similar types of data even if they are not as readily available on a public website. The Florida dashboards show a range of system metrics such as the number of children under investigation or the number of children in care, and a wide range of performance measures such as the number of children receiving timely medical services or the number of children placed with siblings. The

5. See Sakshi Venkatraman, *Experts Fear Child Abuse Will Increase with Coronavirus Isolation*, NBC NEWS (Mar. 27, 2020, 10:12 PM), <https://www.nbcnews.com/news/us-news/experts-fear-child-abuse-will-increase-coronavirus-isolation-n1170811> [<https://perma.cc/C935-DH7K>].

6. See *id.*

7. See Morgan Welch & Ron Haskins, *What COVID-19 Means for America's Child Welfare System*, BROOKINGS (Apr. 30, 2020), <https://www.brookings.edu/research/what-covid-19-means-for-americas-child-welfare-system> [<https://perma.cc/SPT2-C62L>].

8. See Venkatraman, *supra* note 5; see also *An Emergency Policy Response to the Coronavirus (COVID-19)*, CHILD.'S HEALTHWATCH (Apr. 20, 2020), <https://childrenshealthwatch.org/wp-content/uploads/CHW-COVID-federal-for-web.pdf> [<https://perma.cc/VXG8-X5RU>]; Welch & Haskins, *supra* note 7. American Indian/Alaska Native children are 2.4% of the national foster care population, but only 0.9% of the general population; Black or African-American children are 24.3% of the foster care population, but only 13.8% of the general population. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 3 (2016) [hereinafter RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE], [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf) [<https://perma.cc/3X62-ZJAV>]. Nationally, Hispanic children (of any race) are slightly underrepresented in foster care but are overrepresented in particular states and localities. See *id.*

9. See *Florida's Child Welfare Statistics at-a-Glance — July 2020*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/index.shtml> [<https://perma.cc/6DN6-U4AH>] (last visited Oct. 8, 2020).

dashboards contain data from 2003 to the present and can be filtered down to the regional and county levels to explore trends over geography and time.

The Authors obtained the data underlying the dashboards via a public records request.<sup>10</sup> The data cover the placement history of over 300,000 anonymized children in Florida's system since the early 2000s to the present. The dataset includes demographic and geographic information, placement types, and the reasons for children's entries and exits from care and placement settings. This is an incredibly rich dataset that permits analysis down to the individual child, placement, and calendar day.

Focusing on three critical facets of the child welfare system — reporting and investigating maltreatment, placement and other system metrics, and permanency — this Essay explores how the pandemic impacts the child welfare system and how the system should respond. Analyzing Florida's public data and emergency policies, this Essay provides a more data-driven picture of the pandemic's impact on the child welfare system during the first six months after states imposed stay-at-home policies. This Essay also contextualizes recommendations for how the system should respond within an analysis of how the system typically functions and reforms that were sought or implemented before the pandemic.

The heightened attention to vulnerable children and racial inequality during the pandemic, as well as the upheaval the crisis caused, presents an opportunity to think critically about the system and create opportunities for forwarding momentum on long-overdue reform. The child welfare system has been known to make reactionary policy swings in response to relatively small numbers of high profile, tragic cases. Rather than responding based on anecdotal, biased alarms, data should drive the ongoing response to the pandemic towards a more equitable and community-based approach to helping vulnerable children and families.

## I. THE CHILD WELFARE SYSTEM AND TWO PANDEMICS

This Part begins with a brief description of the child welfare system and a summary of critiques long advanced by scholars and advocates that the system is ineffective. This Part describes media coverage during the pandemic, warning that school closures and stressors associated with the pandemic put children at significant risk. The final section of this Part discusses racial disproportionality in the child welfare system, which received renewed attention given the nation's focus on structural racism in the wake of George Floyd's death.

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10. The Authors obtained this Florida Safe Families Network placement history data via a records request placed on July 15, 2020, to the Florida Department of Children and Families.

### A. A Beleaguered System in Need of Reform

The United States child welfare system is a complex bureaucratic apparatus of private and public agencies that monitors parents or caregivers for actual, perceived, and prospective abuse, abandonment, and neglect.<sup>11</sup> The system's adversarial model gives the states power to investigate reports of maltreatment and, for substantiated reports, coercively intervene in a host of ways, including removing children from their homes and assuming custody.<sup>12</sup> Mandatory reporting laws in all 50 states require that teachers, childcare providers, doctors, and others report suspicions of abuse and encourage high-volume reports;<sup>13</sup> much of the system's resources are devoted to investigating and proving parental fault.<sup>14</sup> If allegations of abuse or neglect are substantiated and meet a threshold for legal intervention, the state's CPS agency will begin a civil case, typically called a dependency proceeding, aimed at resolving the circumstances that gave rise to the case, and the CPS agency will determine whether the child will be reunified with their family or permanently placed with an adoptive family or another guardian.<sup>15</sup> CPS agencies provide services to parents, who must quickly follow the agency's plan to address the issues that triggered state intervention or risk permanently losing custody of their children.<sup>16</sup>

Removal of children from their families and into foster care is CPS agencies' most drastic intervention mechanism.<sup>17</sup> Critics argue that the system undermines family relationships and is ineffective because, not only is removal itself extreme and traumatic, but also the state does not address the root causes that brought the family to the state's attention.<sup>18</sup> Once the state intervenes, it typically adopts a cookie-cutter approach. Parents are

11. See *How the Child Welfare System Works*, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS. 2 (Feb. 2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/MGD7-29KC>].

12. See Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 929–30 (2014).

13. These professionals, who may face fines, professional discipline, or criminal prosecution for failing to report suspected maltreatment, are commonly referred to as mandatory reporters. See generally CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019) [hereinafter MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT], <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/7HUT-E7FE>].

14. See Gupta-Kagan, *supra* note 12, at 929–30.

15. See *How the Child Welfare System Works*, *supra* note 11, at 4.

16. See *id.* at 5–6.

17. See Vivek Sankaram et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1163 (2019).

18. See HUNTINGTON, *supra* note 3; ROBERTS, SHATTERED BONDS, *supra* note 3; Sankaram et al., *supra* note 17, at 1163; Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–34 (2019).

required to take standardized parenting, domestic violence, and other classes, often with little direct connection to the family's most pressing problems and often in formats that simply do not provide meaningful or culturally responsive help. Despite recent declines in the overall number of children in foster care, the system lacks the capacity to provide appropriate case management, services, and supports to its large caseloads.<sup>19</sup>

Removal itself is harmful, causing lasting psychological trauma, and the experiences for children who remain in foster care for extended periods can be even more traumatic.<sup>20</sup> Children in foster care often do not receive appropriate educational, medical, and therapeutic care and remain in the system for too long — increasing the likelihood of exacerbated emotional and behavioral challenges.<sup>21</sup> At the same time, deteriorating relationships with their birth or original families mean that children lack opportunities to develop nurturing support systems that will last into adulthood.<sup>22</sup> The negative outcomes of teens who age out of foster care<sup>23</sup> — such as homelessness, lack of academic and employment skills, and high incarceration and mental illness rates — further suggest that the state is an inadequate substitute parent.<sup>24</sup>

The system is in perpetual crisis, prompting over three decades of calls for reform.<sup>25</sup> The system targets large numbers of children from low-income families, while simultaneously failing to detect and intervene in a smaller number of tragic cases of severe abuse.<sup>26</sup> Seventy-five percent of cases in

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19. See CHILD WELFARE OUTCOMES 2008–2011, *supra* note 4; Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 FUTURE CHILDREN 6 (2004).

20. See Trivedi, *supra* note 18, at 527–34.

21. See *id.* at 541–50.

22. See *id.* at 528–33.

23. Children age out of foster care at age 18, or at age 21 in states that have adopted extended foster care. In 2019, 20,445 youth aged out of foster care. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERV., AFCARS REPORT (2020), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport27.pdf> [<https://perma.cc/VS3Q-ZLCQ>].

24. See Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 184 (2008).

25. See, e.g., Richard D. Krugman, *Child Abuse and Neglect: Critical First Steps in Response to a National Emergency: The Report of the US Advisory Board on Child Abuse and Neglect*, 145 AM. J. DIS. CHILDREN 513 (1991); see also Bass et al., *supra* note 19, at 5–30.

26. See, e.g., Lizette Alvarez, *A Mother's Tale: Drugs, Despair and Violence; A Life Mired in Urban Ills Ends in a Daughter's Death*, N.Y. TIMES (Nov. 27, 1995), <https://www.nytimes.com/1995/11/27/nyregion/mother-s-tale-drugs-despair-violence-life-mired-urban-ills-ends-daughter-s-death.html> [<https://perma.cc/7RY4-BQLC>]; Carol M. Miller & Audra D.S. Burch, *Innocents Lost*, MIA. HERALD (Mar. 16, 2014), <https://media.miamiherald.com/static/media/projects/2014/innocents-lost/> [<https://perma.cc/N2AM-JEKK>] (*Innocents Lost* is a Miami Herald investigative report

the child welfare system are for neglect, relating to issues associated with poverty such as unstable housing, lack of childcare, inadequate mental health and medical services, and substance abuse.<sup>27</sup>

### B. Alarms of Calamity Due to the COVID-19 Pandemic

On March 11, 2020, the World Health Organization declared the rapidly spreading coronavirus outbreak a global pandemic.<sup>28</sup> Many U.S. states started implementing mandatory stay-at-home orders,<sup>29</sup> and public and private institutions shifted to remote work where possible. As the pandemic loomed large, advocates and commentators warned that the pandemic could put children at risk of undetected abuse and halt the oversight measures for children already in the foster care system.<sup>30</sup> Federal law requires states

documenting the tragic deaths of children who were already known to Florida's CPS agencies); *see also* Gupta-Kagan, *supra* note 12, at 897, 929–30 (arguing that the system would be better equipped to deal with the smaller subset of truly egregious cases if it used a public health approach to funnel out the large number of cases based on neglect and poverty).

27. In 2017, 74.9% of substantiated reports nationwide were for neglect. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2017 ii (2019), <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf> [<https://perma.cc/MU94-ASV8>]. In its most recent reporting, the federal government changed its maltreatment-types reporting system to a reporting system that counts victims with a single maltreatment type, rather than the previous system that double counted victims with multiple maltreatment types. In 2018, 60.8% of victims were neglected only, 10.7% were physically abused only, 7% were sexually abused only, and 0.1% were victims of sex trafficking only — 15.5% have two or more maltreatment types. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2018, at 21 (2020) [hereinafter CHILD MALTREATMENT 2018], <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf> [<https://perma.cc/9D62-6MNT>]. The relationship between child maltreatment and poverty are complex, and theories about the association include that maltreatment is indirectly caused by parental poverty, detected because of poverty, or defined by parental poverty. *See* LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 38–45 (1989); ROBERTS, SHATTERED BONDS, *supra* note 3, at 27–47; *see also* Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119 (2006).

28. *See Virtual Press Conference on Covid-19*, WORLD HEALTH ORG. (Mar. 20, 2020), [https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3\\_2](https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3_2) [<https://perma.cc/KX9H-BNR5>].

29. *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/4B3A-LUR3>] (reporting that the following states implemented mandatory statewide stay-at-home orders: Washington, Oregon, California, Alaska, Hawaii, Idaho, Nevada, Arizona, Montana, Colorado, New Mexico, Kansas, Texas, Minnesota, Missouri, Louisiana, Wisconsin, Illinois, Michigan, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, Ohio, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Pennsylvania, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine).

30. *See* Venkatraman, *supra* note 5.



receiving federal funding to include a state law requiring mandatory reporting of abuse and neglect by individuals specified in state law.<sup>31</sup> As a result, all states have a mandatory reporting law; some require everyone who suspects abuse or neglect to make reports, while others designate certain professionals like medical providers, teachers, and social workers to report suspected abuse and neglect. The most fervent concern media reports cited was that there would be undetected maltreatment as school closures and stay-at-home orders precluded in-person interactions between children and professionals mandated to report abuse like teachers, doctors, after-school providers, and social workers.<sup>32</sup> As Darcel Clark, the Bronx District Attorney, noted,

[y]ou would think that when we see a decrease in the number of incidents and reports, that would be a good thing: “Oh my God, that means kids are safer” . . . . But it’s just the opposite.

Those people who would ordinarily see our children . . . their teachers, the pediatricians, social workers, camp counselors, etc., since they don’t have eyes on them now, we don’t know what’s happening with them.<sup>33</sup>

There were also concerns that the pandemic would create added stressors that would lead to increased maltreatment. As parents and children were isolated at home, commentators and some experts predicted that an increase in stress, mental illness, housing instability, and domestic violence would result in increased levels of child maltreatment.<sup>34</sup> Independent of the focus on the foster care system, there is public attention to increased risk for domestic violence during the pandemic, and commentators cited evidence that domestic violence and child maltreatment are linked.<sup>35</sup> Community-level risk factors correlated with maltreatment such as poverty, unemployment, and drug and alcohol abuse are all predicted to increase as a

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31. The Child Abuse Prevention and Treatment Act, Pub. L. No. 115-271 (codified as amended at 42 U.S.C. §§ 5105–5119c (2019)).

32. See Welch & Haskins, *supra* note 7.

33. Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried.*, N.Y. TIMES (Aug. 7, 2020) (quoting the Bronx District Attorney, Darcel Clark), <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html> [<https://perma.cc/2SZ8-3FEG>].

34. See Darcey Merritt & Cassandra Simmel, *Barriers to Child Protection During COVID-19: Considering the Impact on Child Maltreatment*, IMPRINT (Apr. 22, 2020, 2:00 AM), <https://imprintnews.org/child-welfare-2/covid-19-barriers-considering-the-impact-on-child-maltreatment/42632> [<https://perma.cc/2WLB-MCAS>]; see also Adam Pertman, *Protecting Children Must Be Part of the Next Stimulus Package*, IMPRINT (Apr. 17, 2020, 6:14 AM), <https://chronicleofsocialchange.org/child-welfare-2/child-welfare-must-be-part-next-stimulus-package/42563> [<https://perma.cc/WPV7-T5A5>].

35. See Welch & Haskins, *supra* note 7.

result of the financial fallout from the pandemic.<sup>36</sup> Commentators also worried that it would be more difficult to detect abuse because maltreatment investigations would halt or would not be as comprehensive due to new policies and practices to minimize health risks to agency staff and families.

For families already involved with the system, many key functions could no longer be done in person and were halted altogether or migrated to a virtual format<sup>37</sup> — including case managers and Court Appointed Special Advocates (CASA) or Guardian Ad Litem (GAL) visits,<sup>38</sup> court hearings, and physical and mental health services. In many places, weekly visits between parents and children in foster care stopped, even if temporarily, or were converted to online visits.<sup>39</sup> There have reportedly been delays in the reunification process because of court closures and an unprecedented conversion to virtual court, or interruptions in the parenting, domestic violence, substance abuse, and other services critical to family reunification.<sup>40</sup> Getting a child reunified also hinges on stable housing and steady employment, which are more likely to be in jeopardy due to the economic crisis. There is also a fear that it will be more difficult to recruit foster parents during the pandemic and that existing foster parents will be less willing to keep children in their homes out of fear of contracting the virus.<sup>41</sup>

With the anticipation that there will be “pent-up demand” for foster care services once mandatory reporters have access to kids, “new demand” due to economic stressors, and a slowdown in exits from the system on the back end, there was a prediction that maltreatment rates would rise followed by

36. *See id.*

37. *See* David Crary, *Coronavirus Roils Every Segment of US Child Welfare System*, ASSOCIATED PRESS (Mar. 28, 2020), <https://apnews.com/934c9870c2e27cbd98886bd080d3b992> [<https://perma.cc/QS7B-AGD4>].

38. Court Appointed Special Advocates (CASA) refers to national and state organizations that recruit and train judge-appointed individuals, primarily volunteers, to gather information and make recommendations to the court about the best interests of the child. *See Court Appointed Special Advocates (CASA)*, CHILD ADVOC. SERVS., <https://childadv.net/casa> [<https://perma.cc/9UQH-7M3Z>] (last visited Oct. 8, 2020). In Florida, this role is performed by the Guardian Ad Litem (GAL) program. *See About Us*, GUARDIAN AD LITEM FOR CHILD., <https://guardianadlitem.org/about-us/> [<https://perma.cc/3FEE-E5BP>] (last visited Oct. 28, 2020).

39. *See* Caroline Radnofsky, *Foster Kids Who Can't Visit Parents Are Struggling Under Coronavirus Isolation*, NBC NEWS (Apr. 2, 2020, 4:37 AM), <https://www.nbcnews.com/news/us-news/foster-kids-who-can-t-visit-parents-are-struggling-under-n1172476> [<https://perma.cc/KFZ7-U84W>].

40. *See* Crary, *supra* note 37.

41. *See* Eli Hager, *Coronavirus Leaves Foster Children with Nowhere to Go*, MARSHALL PROJECT (Mar. 24, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/03/24/coronavirus-leaves-foster-children-with-no-where-to-go> [<https://perma.cc/6LSB-DPM7>].

an increase in the number of children in out-of-home care.<sup>42</sup> Despite these concerns, there were some commentators who question the inevitability of a spike.<sup>43</sup> Paul Dilorenzo, the Executive Director of The Philadelphia Children’s Alliance, a mental health services provider, notes that the idea of a surge once things “return to normal” may be flawed.<sup>44</sup> He argued that a return to life after COVID-19 will happen gradually and at different paces in different parts of the country; child welfare service providers have continued to monitor and support families during the pandemic, albeit differently, and there is no data to support the surge theory.<sup>45</sup> Rather, he suggested, we should think about how we can seize the “opportunity of supporting parents and children at an earlier stage and in a more comprehensive, holistic way.”<sup>46</sup> This Essay heeds that call by providing a data snapshot and an example of how data might be used to inform a prevention and family-focused response.

### C. A Spotlight on Longstanding Racial Inequality

Three months into the pandemic, after a string of racialized killings and incidents coupled with reports about the disproportionate COVID-19 death rates among Black and Latinx people,<sup>47</sup> the murder of George Floyd by a police officer triggered a flash point in America’s reckoning with its long

42. See Fred Wulczyn, *Looking Ahead: The Nation’s Child Welfare Systems After Coronavirus*, IMPRINT (Mar. 30, 2020, 6:01 AM), <https://chronicleofsocialchange.org/child-welfare-2/looking-ahead-the-nations-child-welfare-systems-after-coronavirus/> [<https://perma.cc/F5R9-NEK2>].

43. See Paul Dilorenzo, *Questioning the Inevitability of a Child Welfare Surge*, IMPRINT (May 6, 2020, 7:29 AM), <https://chronicleofsocialchange.org/opinion/questioning-inevitability-of-child-welfare-surge/43145> [<https://perma.cc/HZQ8-8TCP>]; Eli Hager, *Is Child Abuse Really Rising During the Pandemic?*, MARSHALL PROJECT (June 15, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/06/15/is-child-abuse-really-rising-during-the-pandemic> [<https://perma.cc/ZF6W-4M57>].

44. See Dilorenzo, *supra* note 43.

45. See *id.*

46. *Id.*

47. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/EZ3P-DNN7>]; see also David Weiner et al., *Covid-19 and Child Welfare: Using Data to Understand Trends in Maltreatment and Response*, CHAPIN HALL UNIV. CHICAGO (Sept. 2020), <https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf> [<https://perma.cc/ZSV6-D5SM>] (providing a conceptual frame and analytical process to better understand the impact of the economic conditions caused by the pandemic on child abuse and neglect, and proposing that the child welfare system focus on efforts to support and stabilize families to prevent child maltreatment).

history of racism.<sup>48</sup> Protesters took to the streets demanding an end to police brutality and divestment of the carceral system, and public and private institutions from every sector started a communal reflection on structural racism.<sup>49</sup> This conversation indicted the foster care system.<sup>50</sup> One only has to walk the hallways of the juvenile court in Miami, New York, Chicago, and other cities to see the overwhelmingly Black, Latinx, and low-income families that serve as evidence of a Jim Crow system.<sup>51</sup>

Almost 20 years ago, Dorothy Roberts's seminal book, *Shattered Bonds*, combined sociological research with legal and historical analysis to document the ways in which the child welfare system polices, regulates, and destroys Black families and communities.<sup>52</sup> Today, her critique still rings true. While national disproportionality rates have gone down in the past two decades, Black children remain significantly over-represented in the foster care system.<sup>53</sup> Even more alarming, Black children experience disparate treatment and unequal adverse outcomes at every stage of the child welfare decision-making process.<sup>54</sup>

Efforts to reduce racial disproportionality and disparity have been piecemeal, largely isolated to local community initiatives, and not sustained.<sup>55</sup> Much of the research and national policy focus to date has

48. See Jennifer Calfas & Elizabeth Findell, *Protests Sparked by George Floyd Fuel Moves to Defund Police*, WALL ST. J. (June 7, 2020, 10:05 PM), <https://www.wsj.com/articles/protests-sparked-by-george-floyd-killing-set-to-resume-as-some-leaders-dial-back-enforcement-11591542085> [<https://perma.cc/99B7-LQDA>].

49. See *id.*

50. See Michelle Chalmers, *In Memory of George Floyd*, AMPERSAND FAMS. (June 2, 2020), <https://ampersandfamilies.org/2020/06/02/georgefloyd/> [<https://perma.cc/536K-EF5F>]; Guggenheim, *supra* note 2; Heimpel, *supra* note 2.

51. The institution of chattel slavery in the United States explicitly created a racial hierarchy and an institutional and structural means to devalue and oppress Black lives for the benefit of the white race. Slavery, and later Jim Crow, made Blackness mean inferiority, subservience, marginality, and exploitability. The devaluing of Black families has been part of that scheme beginning with, during slavery, the rape of Black women, breeding of Black children for labor, invalidity of Black marriages, separation of Black families due to sale. See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 216–18, 377 (2019); ROBERTS, *SHATTERED BONDS*, *supra* note 3; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 19 UCLA L. REV. 1474 (2012).

52. See ROBERTS, *SHATTERED BONDS*, *supra* note 3, at 228–40.

53. “Disproportionality . . . refers to the difference in racial representation of children in a service population when compared to their representation in the general population.” Susan J. Wells, *Disproportionality and Disparity in Child Welfare: An Overview of Definitions and Methods of Measurement*, in *CHALLENGING RACIAL DISPROPORTIONALITY IN CHILD WELFARE: RESEARCH, POLICY AND PRACTICE* 4 (Deborah Green et al. eds., 2011).

54. See Fluke et al., *supra* note 2.

55. For example, the Alliance for Racial Equity in Child Welfare, a project of the Center for the Study of Social Policy, and several of the Casey organizations have worked with CPS agencies in different states and localities on initiatives to address child welfare disproportionality. See, e.g., *Alliance for Racial Equity in Child Welfare*, CTR. FOR STUDY

centered around trying to understand the reasons for disproportionality. Oversimplified, there are two schools of thought — one that views disproportionality as a function of poverty, and the other that centers racism as the cause of the child welfare system itself.<sup>56</sup> Regardless of the view and complexities of causality, it remains the case that Black and Brown children are more likely than other children to end up in child welfare and suffer a host of negative health, education, and well-being outcomes.<sup>57</sup>

While there has been some attention to disproportionality and disparity in child welfare, there has been insufficient progress, and state and local data continue to reveal alarming rates of disproportionality and disparity.<sup>58</sup> Some advocates argue that many of the central policies in the current system — including mandatory reporting laws, vague definitions of neglect, and policies favoring speedy termination of parental rights and incentivizing adoption — drive disproportionality.<sup>59</sup> This has led to a burgeoning foster

SOC. POL'Y, <https://cssp.org/our-work/project/alliance-for-racial-equity-in-child-welfare/> [<https://perma.cc/8JQC-36P6>] (last visited Oct. 8, 2020).

56. See Wells, *supra* note 53; Heimpel, *supra* note 2; see also RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE, *supra* note 8.

57. Although Black/African-American children are 13.8% of the population, they are 24.3% of children in foster care. RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE, *supra* note 8, at 5–9; Fluke et al., *supra* note 2.

58. See RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE, *supra* note 8; Fluke et al., *supra* note 2; see also *Reducing Racial Disparity and Disproportionality in Child Welfare: Programs*, CAL. EVIDENCE-BASED CLEARINGHOUSE FOR CHILD WELFARE, <https://www.cebc4cw.org/topic/reducing-racial-disparity-and-disproportionality-in-child-welfare/> [<https://perma.cc/8Z97-Z9XN>] (last visited Aug 30, 2020). In 2009, the Alliance for Racial Equity in Child Welfare identified steps 11 states were taking to reduce disproportionality and disparities in the child welfare system. See generally ALL. FOR RACIAL EQUITY IN CHILD WELFARE, POLICY ACTIONS TO REDUCE DISPROPORTIONALITY AND DISPARITIES IN CHILD WELFARE: A SCAN OF ELEVEN STATES (2009), <http://www.antiracistalliance.com/PolicyActionstoReduceRacialDisproportionalityandDisparitiesinChildWelfare.pdf> [<https://perma.cc/UBW4-TEAR>]. It identified Florida as a state that established a task force, commission, or committee to study, review, or oversee the issue; required annual reports; encouraged community participation among churches; had adoptive and foster recruitment efforts; and had public forums, focus groups, symposia, and public education. See *id.* In Florida today, Black children are 1.8 times more likely to be the subject of a CPS investigation than white children and are 1.7 times more likely to be in foster care than white children. Among 15- to 17-year-olds, Black children are 2.1 times more likely to be in foster care. See *Florida's Child Welfare Statistics at-a-Glance — July 2020*, *supra* note 9 (using this data, the Authors computed the numbers in the Article. These computations are on file with the Authors).

59. See ROBERTS, SHATTERED BONDS, *supra* note 3, at 228–40; Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT'L BLACK L.J. 247, 263 (2004); *Our Systems Meant to Help Are Hurting Black Families*, NAT'L INST. FOR CHILD.'S HEALTH QUALITY, <https://www.nichq.org/insight/our-systems-meant-help-are-hurting-black-families> [<https://perma.cc/59U5-BY3P>] (last visited Aug 30, 2020); see also Samantha O'Brien, *The Racist Underside of Child Welfare*, CHARLES HAMILTON Hous. INST. FOR RACE

care abolition movement that, like the abolition movement among criminal justice advocates, argues that the system's very existence is imbued with racism and cannot be reformed.<sup>60</sup>

The widespread reckoning in the wake of George Floyd's death has caused some to urge federal and state policymakers and child welfare stakeholders to deal more urgently with racism in the child welfare system.<sup>61</sup> Critics point out that many public and private agencies within the child welfare system performed obligatory "we stand in solidarity with Black lives" statements without any real acknowledgment of the child welfare system's role in destroying Black families.<sup>62</sup> Black Lives Matter movement leaders have called for defunding the police and reallocating resources to community-based solutions like violence prevention, education, living-wage jobs, and affordable housing.<sup>63</sup> Some of these same solutions are the types of prevention and public health approaches some child welfare advocates and scholars demanded for many years.<sup>64</sup> As Dorothy Roberts warned, however, criminal justice reformers should not make the mistake of viewing the current child welfare system as part of the solution because of its role in regulating and punishing Black families.<sup>65</sup>

The coincidence of demands for racial justice with the COVID-19 pandemic also helped to illuminate the ways in which the alarmism around

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& J. (Sept. 13, 2017), <https://medium.com/houstonmarshall/the-racist-underside-of-child-welfare-70232bac3cfc> [<https://perma.cc/9HFB-2DJN>].

60. See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM) [hereinafter Roberts, *Abolishing Policing*], <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/6QTU-42FQ>]; see also Erin Miles Cloud, *Toward the Abolition of the Foster Care System*, SCHOLAR & FEMINIST ONLINE (2019), <https://sfoonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/> [<https://perma.cc/2WMP-LWHP>].

61. See Guggenheim, *supra* note 2; Heimpel, *supra* note 2.

62. See Guggenheim, *supra* note 2; Heimpel, *supra* note 2.

63. See Juliette Rihl, *Activists Call for Defunding the Police. Here Are 6 Key Facts About the \$115 Million Pittsburgh Police Budget.*, PUBLICSOURCE (June 18, 2020), <https://www.publicsource.org/activists-call-for-defunding-the-police-here-are-6-key-stats-about-the-115-million-pittsburgh-police-budget/> [<https://perma.cc/G4J9-V43M>]; see also Eric Levitz, *Defunding the Police Is Not Nearly Enough*, INTELLIGENCER (June 12, 2020), <https://nymag.com/intelligencer/2020/06/defund-the-police-not-enough-black-lives-matter.html> [<https://perma.cc/Y8RU-2JW4>].

64. See, e.g., ROBERTS, SHATTERED BONDS, *supra* note 3, at 228–40; Annette R. Appel, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997); Martin Guggenheim, *Issues Surrounding Initial Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 359 (2005); Gupta-Kagan, *supra* note 12, at 929–30.

65. See Roberts, *Abolishing Policing*, *supra* note 60.

fears of a grim spike in maltreatment is a racially biased narrative.<sup>66</sup> As David Kelly, Special Assistant to the Associate Commissioner of the Children's Bureau, noted,

[t]here remains a deep-seeded distrust and lack of faith in the poor families and families of color that disproportionality [sic] populate the child welfare system. It may not be as blatantly visible in all places and all times as it has been historically and can be quite implicit, but it is there just below the surface, insidious . . . .

. . . .

. . . It is important to be mindful of the unfair pictures that foreboding narratives paint of poor families experiencing challenges . . . .

. . . .

If we are truly a field and a society that looks to data and facts to help us understand the world, it is time to put to rest the preconceived notion and prejudiced narrative that parents are a danger to their children, because in the overwhelming majority of families involved with child welfare that is simply not the case. It is true that some children may be exposed to increased risk and danger during this time, and we should not ignore or dismiss the signs of abuse, but we do not have data to suggest that is the most typical scenario.<sup>67</sup>

This Essay presents a snapshot of data from the first six months of the pandemic to provide a preliminary understanding of how policy and social changes during that time impacted the child welfare system. Far from showing a catastrophic collapse of the system, the data suggest that in many ways it continued as normal, and on some measures it improved.

## II. IMPACT OF COVID-19 ON FLORIDA'S CHILD WELFARE SYSTEM

The effects of the pandemic should be understood in the context of ongoing trends in the system. Focusing on Florida, this Part looks at how the foster care system functioned prior to and after the emergence of COVID-19.

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66. See Richard Wexler, *A "Child Advocacy Center" Makes a Startling Discovery: The More You Prevent Poverty, the More You Prevent Child Abuse!*, NCCPR CHILD WELFARE BLOG (May 10, 2020), <https://www.nccprblog.org/2020/05/a-child-advocacy-center-makes-startling.html> [<https://perma.cc/Z75E-P6WN>].

67. David Kelly, *Family Is Essential*, 21 CHILD.'S BUREAU EXPRESS 5 (2020), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=217&sectionid=2&articleid=5593> [<https://perma.cc/9866-CM22>].

### A. Pre-COVID-19 Florida CPS Agency Practices and Data Trends

Much like the criminal system, the child welfare system is a pipeline. It begins with a suspicion of child maltreatment and a report to a state agency for investigation.<sup>68</sup> An investigator questions the family, neighbors, teachers, and doctors about the child and must decide whether to close the investigation without state intervention, refer the family to voluntary community services, or remove the child from the home.<sup>69</sup> The vast majority of investigations close out with no action by the state. According to Florida DCF's public data, in Fiscal Year 2018–2019, only about 6% of investigations resulted in the removal of a child.<sup>70</sup> Removal rates from investigations were over twice as high for infants ages 0 to 4 (9.2%) as adolescents ages 15 to 17 (4.2%).<sup>71</sup>

Once removed from their home, a child may be placed in foster care with strangers, relatives, or non-relatives.<sup>72</sup> Some children, mostly older youth, are placed in group homes and institutional settings.<sup>73</sup> While the child waits in foster care, the state provides services to their parents.<sup>74</sup> The parents are given a limited amount of time to overcome the issues that brought the case into the system or face termination of their parental rights. Custody of their child may be permanently transferred to another person through adoption or guardianship.<sup>75</sup> For parents who have engaged in egregious abuse or families that are facing chronic or intractable problems that the system does not believe it can resolve, almost all states have an expedited process to bypass rehabilitation and proceed directly to termination of parental rights.<sup>76</sup>

68. See FLA. STAT. ANN. § 39.201 (West 2019).

69. See *id.*

70. See *Percent of Children by Child Population and Child Welfare Event Florida*, FLA. DEP'T CHILD. & FAMS. [hereinafter *Percent of Children*], <https://www.myflfamilies.com/programs/childwelfare/dashboard/child-welfare-event.shtml> [https://perma.cc/N96A-9G3Y] (last visited Oct. 16, 2020).

71. *Id.*

72. See *Child Welfare: Placement in Out-of-Home Care Data*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/placement.shtml#1> [https://perma.cc/5F89-WWE3] (last visited Oct. 16, 2020). Florida has long had more children in relative care than placed with strangers, but since 2017, the number of relative placements has decreased and foster homes overtook relative homes in 2019.

73. See *id.*

74. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., UNDERSTANDING CHILD WELFARE AND THE COURTS 2 (2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [https://perma.cc/Q8D9-K3ZS].

75. See *id.* at 3.

76. See CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2017), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> [https://perma.cc/3N8Q-NTG8].



Since at least the 1980s, Florida has mandated that all persons must report suspected child maltreatment to an abuse hotline.<sup>77</sup> The willful and knowing failure to report is a third-degree felony.<sup>78</sup> People who report in their professional capacity are required to provide their name and relationship to the child; all other reporters have the option of remaining anonymous.<sup>79</sup> Most reports come from professionals: in FY 2019–2020, 16% of calls to the hotline were made by family or parents of the child, 13% were anonymous, and 71% were from professionals.<sup>80</sup> Most professional reports came from the criminal justice system (26% of all calls), followed by schools (16%) and health care workers (16%).<sup>81</sup>

Not all calls refer to familial child abuse. Calls to the hotline can also allege maltreatment committed by institutional caregivers like daycares or schools.<sup>82</sup> The hotline also fields “special conditions” calls that describe situations where families need assistance, but there are no allegations of maltreatment by a caregiver.<sup>83</sup> These calls include child-on-child sexual abuse, parents in need of assistance to obtain services for their children, and situations involving foster parents.<sup>84</sup> Typically 8% of calls involve special conditions.<sup>85</sup>

The number of calls to the hotline in Florida has been remarkably steady over the last decade, rising gradually from 23,000 per month in 2010 to nearly 30,000 in 2020.<sup>86</sup> The increase in calls has not meant an increase in investigations, however. About 21% of calls were screened out in 2015, compared to a high of 37% in February 2020.<sup>87</sup> Counter to the trend of increased calls, *screened-in calls* alleging maltreatment by a child’s parent or custodian have gradually *decreased* by 12% from about 13,700 per month in August 2018 to 12,100 in February 2020.<sup>88</sup> The monthly call volume also

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77. See FLA. STAT. ANN. § 39.201 (West 2019).

78. See *id.* § 39.205.

79. See *id.* § 39.201.

80. Public records request made August 2020 (on file with Authors).

81. *Id.*

82. See FLA. STAT. ANN. § 39.201.

83. See FLA. DEP’T CHILD. & FAMS., CF OPERATING PROCEDURE NO. 170-4, CHILD WELFARE: CHILD MALTREATMENT INDEX (2018), <https://www.myflfamilies.com/admin/publications/cfops/CFOP%20170-xx%20Child%20Welfare/CFOP%20170-04,%20Child%20Maltreatment%20Index.pdf> [https://perma.cc/V7ZP-7VS3].

84. See *id.*

85. *Child Intakes Received — Statewide*, FLA. DEP’T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/intakes-received.shtml> [https://perma.cc/WK53-PMAP] (last visited Oct. 8, 2020).

86. *Id.*

87. *Id.*

88. *Id.*

exhibits seasonal variations. The number of calls alleging in-home maltreatment typically rises 7%–9% in spring and fall each year and decreases 12% during the summer months.<sup>89</sup> These calls also typically fall 9% in December.<sup>90</sup>

Calls to the abuse hotline can result in referrals to voluntary services to families to prevent the need for removal of the child.<sup>91</sup> Removal of the child from home, however, remains a legally available state intervention for children who have experienced maltreatment or who are at imminent risk of substantial harm.<sup>92</sup> Since about 2015, Florida has seen a gradual reduction in children removed from their homes due to maltreatment.<sup>93</sup> In April 2015, nearly 1,700 children per month were removed, compared to 1,300 in October 2019.<sup>94</sup> That is a 24% decrease. Removals typically increase 8% above the yearly average in the late summer and hit their lowest point at 12% lower than average in December.<sup>95</sup>

Racial disparity in the investigation process is well documented. In Florida during FY 2018–2019, the investigation rate was significantly lower for white children (471 per 10,000 children in the general population) than for non-white children (866 per 10,000 children in the general population).<sup>96</sup> Likely because of this significant disparity in investigations, the removal rate for white children (62 per 1,000 investigations) was higher than for non-white children (56 removals, respectively).<sup>97</sup> The data reveal that non-white children underwent significantly more investigations, but fewer of those investigations resulted in the need for removal. It is against this background that COVID-19 hit Florida.

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89. *Id.*

90. *Id.*

91. See FLA. DEP'T CHILD. & FAMS., CF OPERATING PROCEDURE NO. 170-5, CHILD PROTECTIVE INVESTIGATIONS (2019), <https://www.myflfamilies.com/admin/publications/cfops/CFOP%20170-xx%20Child%20Welfare/CFOP%20170-05%20%20Child%20Protective%20Investigations/CFOP%20170-05,%20%20%20%20Child%20Protective%20Investigations.pdf> [https://perma.cc/CV2K-CJYC].

92. See FLA. STAT. ANN. § 39.401 (West 2014).

93. See *Children & Young Adults Entering Out-of-Home Care — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/c-entering-ooh.shtml> [https://perma.cc/VF3B-UMTP] (last visited Oct. 8, 2020).

94. *Id.*

95. *Id.*

96. *Percent of Children*, *supra* note 70.

97. *Id.*

## B. Post-COVID-19 Florida CPS Agency Practices and Data Snapshot

### *i. Calls to the Hotline*

In March 2020, nearly every county in Florida moved its schools online. Anticipating declines in calls to the hotline, Florida released a special flyer reminding teachers that they are mandatory reporters. It included reason for concern not only if a child communicates that they feel unsafe or is in a dangerous environment, but also more nebulous signs like lack of attendance on virtual calls, avoidance of contact after numerous calls, or significant change in mood or behavior.<sup>98</sup> The campaign raises questions about the overbreadth of mandatory reporting schemes because all children (and adults) likely experienced changes in mood or behavior caused by the unprecedented pandemic. School systems experienced many challenges with online education that may explain the lack of attendance on virtual calls, rendering those types of factors too universal to justify a reasonable suspicion of neglect or abuse.<sup>99</sup>

Despite the outreach to teachers and editorials in major news outlets, calls to the hotline did fall briefly.<sup>100</sup> In March, calls alleging in-home maltreatment dropped a modest 5% lower than expected.<sup>101</sup> That is not abnormal compared to the variation seen over a typical year or the longer trends seen in screened-out calls. In April, however, calls dropped significantly by 19%, making it the lowest single month's number of calls since Florida began reporting data in 2004. The dip was short lived, though. By May, calls were only 10% below expected, and they rebounded to 10% and 13% *above expected rates* in June and July, respectively.<sup>102</sup>

Looking solely at the number of abuse calls cannot answer whether the pandemic left children at risk. Most calls do not lead to verification or

98. See *The Classroom May Be Empty, but Our Kids Still Need You More Than Ever*, FLA. DEP'T. EDUCATION (2020), <https://www.myflfamilies.com/covid19/docs/Infographic-C19-OCW-Educators-Final.pdf> [<https://perma.cc/7K3Z-U3BS>].

99. See *id.*; Scott Travis, *Florida Schools Struggle to Keep Virtual Attendance*, S. FLA. SUNSENTINEL (Apr. 17, 2020, 6:30 AM), <https://www.sun-sentinel.com/news/education/fl-ne-schools-online-learning-deadline-looming-20201028-qtr155v76rfrzj2mst47rrbzia-story.html> [<https://perma.cc/U9LB-MBA6>].

100. See *Child Intakes Received — Statewide*, *supra* note 85.

101. *Id.* The difference here was calculated using seasonal decomposition. The process removes the normal seasonal fluctuations and long-term trends (in this case in a six-month median window) to provide a measure of unexplained variations. For a full description, see ROBERT H. SHUMWAY & DAVID S. STOFFER, *TIME SERIES ANALYSIS AND ITS APPLICATIONS* (4th ed. 2017).

102. *Child Intakes Received — Statewide*, *supra* note 85. For comparison, in-home maltreatment calls during Hurricane Irma dropped 11% in September 2017, and rebounded slightly by 2%–3% over the following months. *Id.*

removal, and time spent on unfounded investigations consumes resources investigators could use to improve the conditions and prevent the removal of a child who could safely remain at home with appropriate supports and services.<sup>103</sup> Whereas March and April are normally two of the busiest months of the year for investigators in Florida, the reduction in calls through April left many investigators in an unusual situation: they had time to work their pending cases more thoroughly. A local child abuse investigation coordinator reported in the media that investigators' caseloads during the pandemic were the lowest in recent memory.<sup>104</sup>

Investigations continued throughout the pandemic with adapted procedures to ensure investigators' safety. Florida law allows 60 days for investigations, with only limited exceptions for cases with an open criminal investigation, where a child has died, and where the child is missing.<sup>105</sup> CPS agencies provided protocols requiring frontline workers to maintain 6 feet of social distancing, practice hand-washing hygiene, wear personal protective equipment, and ask screening questions to determine if someone in the household or their close contacts exhibited COVID-19 symptoms.<sup>106</sup> Some CPS agencies also advised investigators to do expedited assessments or site visits and conduct interviews outside if possible and appropriate.<sup>107</sup>

#### *ii. Placement into Foster Care*

Despite predictions to the contrary, the reduction in calls in April and May did not notably affect the number of removals two months later in June and July. Instead, removals went slightly up for those months: 4% and 6% higher than expected. Again, April was the most atypical month, with removals down 16% based on calls made in February.<sup>108</sup>

103. This is one reason many commentators have called for the elimination of mandatory reporting laws.

104. See Christopher O'Donnell, *Florida Child Abuse Reports Fall 40 Percent, but Experts Fear Abuse Hidden by Pandemic*, TAMPA BAY TIMES (May 21, 2020), <https://www.tampabay.com/news/health/2020/05/20/florida-child-abuse-reports-fall-40-percent-but-experts-still-fear-abuse-hidden-by-pandemic/> [<https://perma.cc/J6PT-U4T2>].

105. See FLA. STAT. § 39.301 (West 2019).

106. See *COVID-19: Guidance for CPI and API Frontline Team Members*, FLA. DEP'T. CHILD. & FAMS. (Mar. 23, 2020), [http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/Final-COVID19-Guidance\\_for\\_CPI\\_API\\_Frontline%20\\_Team\\_Members.pdf](http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/Final-COVID19-Guidance_for_CPI_API_Frontline%20_Team_Members.pdf) [<https://perma.cc/WY3X-KGW8>]; *COVID-19: Suggested Use of Personal Protective Equipment for DCF Frontline Team Members*, FLA. DEP'T. CHILD. & FAMS. (Mar. 29, 2020), [http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/Final-COVID-19-Required\\_Use\\_of\\_PPE\\_.pdf](http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/Final-COVID-19-Required_Use_of_PPE_.pdf) [<https://perma.cc/2BKX-N39Z>].

107. See *COVID-19: Guidance for CPI and API Frontline Team Members*, *supra* note 106.

108. *Children & Young Adults Entering Out-of-Home Care — Statewide*, *supra* note 93.

The demographics of children who were removed did change, however, with significantly different patterns for children based on age and race. Newborn babies saw almost no change in removal rates (down a very typical 5%) during the pandemic, whereas infants ages one to four saw a moderate decrease in April (15%) and relatively normal rates thereafter.<sup>109</sup> Young, school-age children ages five to twelve saw the largest decrease in April (22%), but then again relatively normal rates after that, with a small rebound in July (13%).<sup>110</sup> Finally, teens saw removals drop 17% in April and 21% in May, followed by an enormous 27% rebound in June.<sup>111</sup> Overall, Black children saw an extremely high reduction in removals in April (30%) compared to all children (15%), but then a much higher rebound in the summer (16% in June and July for Black children compared to 5% and 7% for all children).<sup>112</sup>

The reasons for removals also shifted during this period. The maltreatment type with the highest number of removals has long been parental substance abuse. Drug cases saw very little change during the pandemic. About 570 children (plus or minus the normal monthly variations and ongoing trend shifts) in Florida are removed each month related in part to their parents' use of drugs.<sup>113</sup> In April, the number was 3% below expected at 568, and in May, it was down only 4%.<sup>114</sup> Removals for drug abuse rose 14% in July, with 649 children entering care under that maltreatment type.<sup>115</sup> Such spikes, however, are not uncommon in the data. Similarly, domestic violence removals never saw a significant dip in April, but increased nearly 25% in June, also a normal rate of variation.<sup>116</sup> Conversely, inadequate supervision removals were down 27% in April, but have remained fairly normal ever since.<sup>117</sup>

Other maltreatment types showed a dip and rebound pattern. Physical abuse removals were down 20% in April and 15% in May, but rose above expected by 30% in June and 15% in July.<sup>118</sup> Sexual abuse removals saw an even more pronounced dip and rebound, in part because the number of children removed under this category is so small, typically around 30–50 per

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

month. Sexual abuse removals were down 40% in March and April (26 and 23 removals respectively), but rebounded 52% in June to 49 removals.<sup>119</sup>

The data does not show the reasons for these changes. Possible explanations include abuse reporters having less access to certain children, abuse reporters and the state using different risk thresholds for action during the pandemic, and investigators having more time to investigate — and support — families due to lower caseloads. The result was that a higher proportion of children were removed for maltreatment as opposed to environmental hazards and other circumstances more squarely related to poverty and neglect.

### *iii. System Performance Metrics*

There were also notable shifts in the operation of the foster care system during this time. The number of children in foster care and relative care remained nearly constant during the pandemic, but the number of children in group care dropped 5% from 1,900 to 1,800 from March to July.<sup>120</sup> Much of that reduction in group homes came from children who ran away: there were 144 foster youths on the run in March and 200 in April.<sup>121</sup> Many of the children who ran were non-white, female youth who lived in group homes.<sup>122</sup>

The pandemic also greatly affected the number of foster children in correctional settings. The number dropped 33% from 203 in March to 137 in July — this was the fewest Florida foster children in jail since data became available in 2004.<sup>123</sup> Black children saw a 35% decrease in incarceration from 82 to 53 children.<sup>124</sup> Non-Hispanic, white children saw a more modest 18% decrease from 61 to 50 children.<sup>125</sup>

Florida's system saw mixed results on measures of child well-being during the pandemic. Unsurprisingly, foster children's access to routine medical care decreased. Only 75% of children received timely dental care, the lowest since its peak of 95% in 2013.<sup>126</sup> The percent of children obtaining timely medical care was 93%, down from the near-constant rate of

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119. *Id.*

120. The Authors obtained this Florida Safe Families Network placement history data via a records request placed on July 15, 2020, to the Florida Department of Children and Families.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Children Receiving Dental Services in the Prior Seven Months — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/receiving-dental.shtml> [https://perma.cc/YL4S-CKU3] (last visited Oct. 6, 2020).

97%.<sup>127</sup> There was no notable change in medical nor mental health hospitalizations.<sup>128</sup>

Many standard system performance measures were not notably impacted by the pandemic. Florida, in fact, saw a very slight increase in the percent of children who were seen by a case manager every 30 days at 99.5%,<sup>129</sup> possibly due to the expansion of virtual visits. There was no measurable change in the percent of children who re-entered care in less than 12 months of reaching permanency,<sup>130</sup> and there was also no notable change in the number of sibling groups placed together.<sup>131</sup> Importantly, though, Florida does not publish data on the number of children who had visitation with their parents, the number of parents who successfully are linked to services and complete them, or the number of cases that experience significant delays in the statutory timeframes.

Florida did improve one measure during the quarantine: placement stability. The federal standard for a state is 4.12 placement changes per 100,000 bed days in care.<sup>132</sup> At the beginning of the quarantine, Florida met the federal standard on placement stability for the first time in nearly five years.<sup>133</sup> Florida's rate dropped from 4.27 changes before the pandemic to 3.76 changes during the pandemic.<sup>134</sup> There were notable differences among the children by race. White children's rate dropped from 3.96 to 3.59 (a decrease of 9%), while Black children's rate dropped from 5.02 to 4.20 (a

127. *Children Receiving Medical Services in the Prior Twelve Months — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/receiving-medical.shtml> [https://perma.cc/3XHF-LPH3] (last visited Oct. 6, 2020).

128. The Authors obtained this Florida Safe Families Network placement history data via a records request placed on July 15, 2020, to the Florida Department of Children and Families.

129. *Children Under Supervision Seen Every Thirty Days — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/seen-30.shtml> [https://perma.cc/W7R7-MJTL] (last visited Oct. 6, 2020).

130. *See Children Achieving Permanency and Not Re-Entering Care w/in 12 Months — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/do-not-reenter-within-12.shtml> [https://perma.cc/R9YL-MN2G] (last visited Oct. 6, 2020).

131. *See Sibling Groups Where All Siblings Are Placed Together — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/siblings-together.shtml> [https://perma.cc/PWK7-CUYZ] (last visited Oct. 7, 2020).

132. *Placement Moves per 1,000 Bed Days in Out-of-Home Care — Statewide*, FLA. DEP'T CHILD. & FAMS., <https://www.myflfamilies.com/programs/childwelfare/dashboard/moves-1000.shtml> [https://perma.cc/7GW4-TZHB] (last visited Oct. 7, 2020).

133. *Id.*

134. *Id.*

decrease of 16%).<sup>135</sup> This was a significant improvement for Black children but still above the federal standard.

Finally, the pandemic appears to have slowed some children's exit from care. Overall, exit rates did not vary much during the pandemic, in part because exits had been falling for approximately a year prior. Exits increased a modest 8.4% above expected in April and have exhibited typical numbers thereafter.<sup>136</sup> There are some notable differences in each exit type, however. Reunifications have been consistently lower during the pandemic, decreasing 11% in May and then 16% in August.<sup>137</sup> Guardianships, which have been on the gradual decline in Florida for years, decreased 28% in March, but were up slightly April through May before dropping again in August.<sup>138</sup> Adoptions saw the biggest change over the months of the pandemic, with a drop from a median of 320 adoptions per month in April to 200 per month in August. This is consistent with reports that many circuits have halted trials for termination of parental rights, suggesting the adoptions that are occurring were either pending prior to the pandemic or the result of voluntary surrenders or defaults.

Taken together, the data suggest that the pandemic effectively slowed the system down, if only for a few months. Reporters made fewer calls but without significantly reducing the number of children who were removed compared to the historical trends. Investigators had more time and shifted the types of cases they focused on, while case managers saw children more consistently. Placements did not disrupt as frequently, and fewer children saw the inside of a jail. The court system paused the steps leading up to involuntary termination of parental rights and adoption and gave everyone a chance to breathe, but moderately decreased the rate of reunification in the process. As a result, Black children briefly saw a reprieve from some of the most damaging parts of the process that had disproportionately fallen on them and their families for decades.

### III. REFLECTIONS ON RESILIENCE AND REFORM

Given the significant health and economic consequences of the pandemic, it is reasonable to anticipate that the effects of the current crisis will have a long-term impact on families that were vulnerable even before the

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135. *Id.*

136. *Children & Young Adults Exiting Out-of-Home Care — Statewide*, FLA. DEP'T CHLD. & FAMS., <https://www.myflfamilies.com/programs/childWelfare/dashboard/cya-exiting-ooH.shtml> [https://perma.cc/Q6DP-852S] (last visited Oct. 7, 2020).

137. *Id.*

138. *Id.*



pandemic.<sup>139</sup> Evidence from the Great Recession of 2007 to 2009, and predictions from economists, suggest that low-income families will experience the greatest financial instability and slowest recovery from the current financial crisis.<sup>140</sup> Job loss, increased burden of childcare responsibilities, increased evictions, and housing stability will all compound pre-existing inequities and fall disproportionately on people of color, immigrants, and low-income people.<sup>141</sup> If the child welfare system continues to respond in its usual way — equating poverty with maltreatment — then the concerns about an explosion in child welfare cases could become a self-fulfilling prophecy. There have been other periods of exponential increases in caseloads where a combination of forces led to more children entering the system and slower exits.<sup>142</sup> But that explosion is not inevitable. As David Kelly noted, “if we take a closer look through a less judgmental and reactionary lens, we might be able to see the depth of resiliency that is present and the remarkable efforts poor parents make to get by on the smallest fraction of what many of us have.”<sup>143</sup> The pandemic presents an opportunity to provide economic relief, connect children and families with much-needed supports and services, and bend the arc of justice in favor of long-overdue reform of the child welfare system.

This Part focuses on three areas for reform — eliminating mandatory reporting statutes, expanding prevention services to avoid removal and support family reunification, and increasing funding for services to support economically vulnerable families. The reason for focusing on these particular reforms is that, to the extent the pandemic places additional stress on low-income families, children should not be removed from their families for factors that are associated with poverty. Rather, we should seek to improve community-based resources and ensure that families have the necessary financial, housing, and other services to meet their needs. The COVID-19 pandemic should push us further in the direction of prevention, rather than having a knee-jerk reaction in the direction of expanded removal. This data snapshot underscored the importance of having data and understanding long-term trends, rather than having a reactionary response. This data snapshot showed that, even with a temporary drop in calls to the abuse hotline, the child welfare system continued to remove children at similar rates as in the past. Notably, a shift in the reasons for removals; more removals for reasons such as substance abuse and physical abuse and fewer removals for neglect, suggests that the system focused more on objectively

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139. See *An Emergency Policy Response to the Coronavirus (Covid-19)*, *supra* note 8.

140. See *id.*

141. See *id.*

142. See Wulczyn, *supra* note 42.

143. Kelly, *supra* note 67.

provable maltreatment types, rather than the more subjective, poverty-based grounds that sweep in a disproportionate share of low-income families of color. Black children saw a reduction in their removal rates due to this shift. Although it is just a point-in-time snapshot, and we do not have explanations for the data, it raises the possibility that we can continue to shift the child welfare system to remove children only in the most serious cases, while providing sufficient services and resources to families so that children can remain safely in their communities. Interestingly, although we do not know why, there were also benefits for children already in care who saw more placement stability and a decline in referrals to the juvenile justice system. It begs the question of why we cannot achieve those results in normal times, and although it is beyond the scope of this Essay, it is important to understand the reasons for these results.

### A. Reduce High Volume Reports by Eliminating Mandatory Reporting

The focus on mandatory reporters as part of the narrative that children are at heightened risk of undetected maltreatment presents an opportunity to reconsider the utility and effectiveness of a mandatory reporting scheme. States adopted mandatory reporting statutes in the late 1960s in response to Dr. C. Henry Kempe's research identifying the battered child syndrome.<sup>144</sup> Initially envisioned with a limited scope — primarily for doctors to report serious physical abuse — reporting requirements have been substantially expanded to include a long list of mandated reporters and required reporting of a broad range of harms that could be classified as abuse and neglect of varying types.<sup>145</sup> Eighteen states now require mandatory reporting by everyone in the state, while the others require reporting by a specified list of professionals.<sup>146</sup> Florida requires the reporting of even subjective suspicions of maltreatment. Mandatory reporting has been criticized because of this broad scope.<sup>147</sup>

Removing mandatory reporting would eliminate some of the pressure that creates the high volume of reports that sweep in large numbers of low-income and minority families for neglect. There is no evidence that

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144. See Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 45 (2013).

145. See Gupta-Kagan, *supra* note 12, at 929–30.

146. See MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 13.

147. See Gupta-Kagan, *supra* note 12, at 931 (citing SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW, & POLICY 30–33 (2d ed. 1999)).

147. See *id.*

mandatory reporting laws have made our system any safer.<sup>148</sup> The data discussed in this Essay suggest that the reduction in calls during the pandemic did not reduce the number of removals. In fact, removals increased slightly, suggesting that higher-risk calls were made and investigated. The data presented here are also consistent with studies showing that when states have universal mandatory reporting, the subsequent higher call rates correspond to higher rates of confirmed neglect, not physical abuse.<sup>149</sup> Increased reporting does not lead to fewer child fatalities,<sup>150</sup> and comparison to similar legal systems with narrower reporting mandates provides no evidence of better safety outcomes.<sup>151</sup> There are many better ways to identify and support families suffering from poverty than a call to the hotline.

Much of the concern about reporting during COVID-19 stemmed from the fact that with children out of school, teachers could no longer make reports. Reports indeed decreased during the pandemic. But it does not necessarily follow that children were more at risk. Educational personnel is often the largest source of child welfare referrals with, for example, 20.5% of reports nationally in 2018 coming from schools.<sup>152</sup> However, when compared with other professional reporters, one study found that reports from school personnel were the least likely to be substantiated after investigation nationally and in most states.<sup>153</sup> Reports from schools are also a major source of anti-Black inequity in the system. Kathryn Kruse's analysis of data from the National Child Abuse and Neglect Data System found that educational professionals are twice as likely to report Black

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148. *See id.*

149. *See* Grace W. K. Ho, Deborah A. Gross & Amie Bettencourt, *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 AM. J. PUB. HEALTH 709, 710 (2017); *see also* Gupta-Kagan, *supra* note 12; Vincent J. Palusci & Frank E. Vandervort, *Universal Reporting Laws and Child Maltreatment Report Rates in Large U.S. Counties*, 38 CHILD. & YOUTH SERVS. REV. 20 (2014).

150. *See* DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 27 (2d ed. 2004).

151.

Jane Waldfogel's comparison of [child welfare systems in] the United States and Britain United Kingdom (which does not have mandatory reporting) found that this relatively high level of reports did not lead to better child safety outcomes; if anything, children suffered less repeat maltreatment in Britain, which is without mandatory reporting.

Gupta-Kagan, *supra* note 12, at 936 (quoting JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION* 64 (1998)).

152. *See* CHILD MALTREATMENT 2018, *supra* note 27, at 8.

153. *See* Kathryn S. Kruse, *Educational Personnel as Reporters of Suspected Child Maltreatment*, 35 CHILD. & SCHS. 147, 148 (2013).

children than white children, which was a higher disparity than all other professionals except social workers and medical providers.<sup>154</sup>

There is also evidence that some mandatory reporters view reporting as their sole responsibility and forego other types of help they might provide the family. In other words, once a report is made, reporters assume they have done what is needed to get the family appropriate support.<sup>155</sup> A recent study by Kelley Fong shows that school personnel sometimes make maltreatment reports to compensate for the school's and community's perceived lack of therapeutic and supportive services for children and families, but by channeling families to a punitive system, the schools destroy their relationships with families they could have helped.<sup>156</sup>

The punitive nature of the system also prevents families from asking for help for issues like mental health, substance abuse, prenatal care, or domestic violence, for fear that they will be reported or have their services interrupted after a report has been made.<sup>157</sup> Josh Gupta-Kagan has argued that the law thus stands in the way of a more appropriate public health response that would encourage people to seek needed services, allow service providers to deliver services without disrupting their confidential relationships, and encourage professionals to make direct referrals for services.<sup>158</sup> While the reasons for these findings are unclear, they provide further reasons to be cautious in interpreting the impact of fewer reports from schools.<sup>159</sup>

### B. Expand Prevention Efforts

The child welfare system should give potential reporters and families seeking help alternatives by doubling down on prevention services available

154. See Kathryn S. Krase, *Child Maltreatment Reporting by Educational Personnel: Implications for Racial Disproportionality in the Child Welfare System*, 37 CHILD. & SCHS. 89, 94 (2015).

155. See Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 14 (2004).

156. See Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 610 (2020).

157. There is no legal definition of the association between child welfare and domestic violence, leaving room for subjective determinations about when children are removed because their parents are being abused. Adult victims of domestic violence may be deterred from seeking help for fear of losing their children, and all families do not require the level of intervention provided by the child protection system. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 120–21 (2001). Another example is that pregnant women who are using drugs may not seek prenatal care because they fear disclosure of drug use would jeopardize custody of current children or the newborn. See Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-public Health Response*, 75 UMKC L. REV. 789, 819 (2007).

158. See Gupta-Kagan, *supra* note 12, at 933–34.

159. See *id.*

in their communities. Federal child welfare policy tends to swing between family preservation and permanency. Family preservation includes preventing removal altogether by providing families with services that allow children to remain safely at home, and when children are removed, prioritizing placements with relatives.<sup>160</sup> Permanency driven policies, on the other hand, emphasize speedy resolution of child welfare cases, most often in the direction of adoption and severing parental rights.<sup>161</sup>

Federal law has recently shifted priorities in favor of family preservation. The Family First Prevention Services Act (Family First), signed into law on February 9, 2018, overhauls the funding structure in Title IV-E and Title IV-B of the Social Security Act, which funds a significant part of the child welfare system.<sup>162</sup> Title IV-E funds could previously be used only for children already in foster care, certain administrative expenses, training, and adoption and guardianship assistance. Family First allows federal reimbursement for mental health services, substance use treatment, and in-home parenting skill training to prevent children from entering foster care, eliminating time limits for the provision of family reunification services, and establishing model licensing requirements for foster homes.<sup>163</sup> In response to barriers states face in transitioning their child welfare system, Congress passed the Family First Transition Act a year later to provide financial relief to states while they ramped up their ability to implement the Family First Act.<sup>164</sup> With the added challenges of the pandemic, it may be easy for states and local communities to become further delayed or sidetracked in implementing the Family First Act. Family First is not a panacea, and critics worry that it does not go far enough in spurring needed child welfare reform, but it uses the power of the federal purse to push states in the direction of prevention, and that direction should not be derailed.<sup>165</sup>

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160. Family First Prevention Services Act, Pub. L. No. 115-123, §§ 50711–50782, 132 Stat. 170 (2018) (representing a federal shift in favor of funding and policies that seek to provide services to prevent children from entering the foster care system).

161. The Adoption and Safe Families Act, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116 (1997) (codified as amended at 42 U.S.C. § 1305) (responding to concerns that children were languishing in care. This represented a shift in favor of permanency by imposing deadlines for reunification efforts, and incentivizing termination of parental rights and subsequent adoption).

162. See Family First Prevention Services Act, Pub. L. No. 115-123, §§ 50711–50782, 132 Stat. 170.

163. See *id.* §§ 111, 121, 131.

164. See H.R. 1865, 116th Cong. (2020).

165. See Elizabeth Jordan & Amy McKlindon, *The Family First Transition Act Provides New Implementation Supports for States and Tribes*, CHILD TRENDS (Mar. 10, 2020), <https://www.childtrends.org/publications/the-family-first-transition-act-provides-new-implementation-supports-for-states-and-tribes> [<https://perma.cc/X737-LF7V>]; see also Lindsey Getz, *A Closer Look at Family First — the Pros and Cons of Recent Foster Care Legislation*,

Child welfare providers, once involved with a family, should be intentional about preventing removal. The pandemic shows that agencies can show significantly more grace towards struggling families than has historically been given. Anecdotes reported in the media suggest that child welfare agencies, otherwise exclusively focused on removing children, have been more sympathetic to the needs and challenges faced by families. For example, a newspaper reported that the Marshfield Child Advocacy Center, which typically served as an intake site for children, started delivering food and assisting families with emergency financial support to help pay rent, electricity, and phone bills.<sup>166</sup> Media reports from New York noted that investigators responding to reports of neglect found that they were related to struggles with COVID-19. In one case, investigators decided against removal from a home where there was no food and instead delivered food from a pantry to the family. In another, they provided tablets to children who had been reported as truant from online schooling.<sup>167</sup> These are approaches that should be taken even outside of a national crisis. Moreover, states should strengthen their community-based services and prevention efforts, even beyond what is available through the federal child welfare funding streams.

Advancing family preservation policies also requires attention to reunifying families after children are removed. The Adoption and Safe Families Act (ASFA) requires that child welfare agencies seek termination of parental rights if a child has been in foster care for the last 15 out of 22 months, while simultaneously incentivizing adoption.<sup>168</sup> Parents must, within a year, show that they have remediated the circumstances that brought them into the system. CPS agencies assign parents to cookie-cutter tasks like completion of parenting classes or domestic violence classes with no proven efficacy and that are not tailored to address the family's most critical needs or culturally appropriate.<sup>169</sup> Under the watchful eye of the state, every challenge the family confronts becomes evidence of their unfitness as a parent.

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SOC. WORK TODAY, [https://www.socialworktoday.com/archive/exc\\_0319.shtml](https://www.socialworktoday.com/archive/exc_0319.shtml) [<https://perma.cc/WE53-X638>] (last visited Aug. 31, 2020).

166. See Gina Barton, 'No One Is There to Point It Out': Experts Say More Child Abuse Is Likely Happening — but with Kids at Home, It's Not Being Reported, MILWAUKEE J. SENTINEL (May 7, 2020, 1:54 PM), <https://www.jsonline.com/story/news/2020/05/07/wisconsin-child-abuse-reports-plunged-coronavirus-closed-schools/5177780002/> [<https://perma.cc/32U7-AQEG>].

167. See Stewart, *supra* note 33.

168. See H.R. 867, 105th Cong. (1997).

169. There is evidence that services to families of color in the child welfare system are inequitably distributed. See Fluke et al., *supra* note 2, at 16.

ASFA's rigid deadlines have also contributed to racial disparity in the termination of parental rights. Black children are 2.4 times more likely than white children to have their parents' rights terminated, with even higher odds in some states and localities.<sup>170</sup> Moreover, because Black children are less likely to be adopted, many are left in care as legal orphans.<sup>171</sup> The data from the pandemic show that the system can slow these timelines down without sacrificing safety or well-being measures. System reform includes eliminating ASFA's deadlines, emphasizing adoptions over family preservation, and providing families with meaningful, individualized help to reunify with their children safely.

### C. Increase Funding to Meet the Needs of Economically Vulnerable Families

Congress should also increase funding to existing child welfare streams that support prevention services<sup>172</sup> — for example, the Community-Based Child Abuse Prevention grants established by Title II of the Child Abuse Prevention and Treatment Act (CAPTA), which provide community-based grants to states specifically for abuse prevention services, and the MaryLee Allen Promoting Safe and Stable Families Program. Congress should also increase the federal Medicaid reimbursement assistance percentage (FMAP) rate for caregivers under the Family First prevention program. The FMAP is used to determine the federal share of costs for Title IV-E, as well as Medicaid and other federal programs. Family First provided that states would get reimbursed at 50% of the FMAP for prevention services until 2026, when states would be eligible for the full FMAP rate. This FMAP allocation should be increased to 100% immediately so that the state can access more federal funds to address potentially increased needs for prevention due to exacerbated stressors the pandemic created. It is also important that states deploy this federal funding in a way that targets communities that are most vulnerable to removals and addresses these additional stressors.

Congress has provided some short-term relief to the child welfare system as part of its COVID-19 stimulus packages, which are helpful but do not go

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170. See Christopher Wildeman, Frank R. Edwards & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 33 (2020).

171. See Fluke et al., *supra* note 2, at 45; see also Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1115 n.8 (2013); LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. POL'Y & L. 318, 348 (2010).

172. See Aubrey Edwards-Luce & Bruce Lesley, *How to Protect Children's Welfare in the Wake of COVID-19*, FIRST FOCUS CAMPAIGN FOR CHILD. (May 4, 2020), <https://campaignforchildren.org/blog/how-to-protect-childrens-welfare-in-the-wake-of-covid-19/> [https://perma.cc/95WN-RYQ6].

far enough. The Families First Coronavirus Response Act, enacted on March 18, 2020, authorized an increase of 6.2% to FMAP, which the Congressional Budget Office estimated would lead to a \$1.1 billion increase in federal Title IV-E funding.<sup>173</sup> Although FMAP's 6.2% bump is useful, states have argued that it is insufficient to cover the increased health and social service costs of the pandemic.<sup>174</sup> It should be noted that increasing FMAP for Medicaid will indirectly impact child welfare by ensuring that states have sufficient funding to address the medical needs of parents and children who contract COVID-19 or lose employer-funded health coverage. For child welfare funding, the increased FMAP will apply only to foster care maintenance, adoption assistance, and guardianship assistance payments.<sup>175</sup> As discussed earlier, FMAP should also immediately be used for reimbursement of prevention services, rather than waiting until 2026.

The second major federal stimulus package, the CARES Act, provided several forms of direct relief for families, including expanded unemployment benefits, immediate income support for individuals, and increased funding for the Supplemental Nutrition Assistance Program (SNAP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).<sup>176</sup> These all provided much-needed relief to help soften the economic fallout of the pandemic. The CARES Act also allocated \$6.3 billion in funding for the Administration for Children and Families, which has distributed the funds primarily to programs that assist low-income families with their energy bills and childcare needs. Of the \$6.3 billion, about \$45 million is being appropriated to the Stephanie Tubbs Jones Child Welfare Services program (part of Title IV-B of the Social Security Act) to augment the regular payment states this year.<sup>177</sup> Although a relatively small share of child welfare services, Stephani Tubbs Jones funds can be used on prevention services. Although more could be allocated for each of these stimulus initiatives, they are important sources of federal assistance for children in foster care and low-income families. It is critical that states and

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173. See Families First Coronavirus Response Act, Pub. L. No. 116-127 (2020). See generally EMILIE STOLTZFUS, CONG. RSCH. SERV., IN11297, FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) INCREASE AVAILABLE FOR TITLE IV-E FOSTER CARE AND PERMANENCY PAYMENTS (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11297> [<https://perma.cc/9YT3-3TAU>].

174. See Don Beyer, *States Desperately Need an Increased Federal Match for Medicaid*, JOINT ECON. COMM., [https://www.jec.senate.gov/public/\\_cache/files/eb64b31-994d-460b-9ec0-da51f006aba2/joint-economic-committee-medicare-fmap-final1.pdf](https://www.jec.senate.gov/public/_cache/files/eb64b31-994d-460b-9ec0-da51f006aba2/joint-economic-committee-medicare-fmap-final1.pdf) [<https://perma.cc/WCP6-TNAX>] (last visited Aug. 3, 2020).

175. See STOLTZFUS, *supra* note 173.

176. See H.R. 748, 116th Cong. § 6002 (2020).

177. See *id.*



local communities augment federal funding and target federal funds in a way that prioritizes the goal of preventing children from entering the foster care system.

### CONCLUSION

It is important that data inform the narrative about the pandemic's impact on the child welfare system, as well as the response by child welfare stakeholders. This data snapshot reveals that, despite a temporary reduction in reports, the child welfare system continued to detect abuse and neglect, particularly in the more objective maltreatment categories. The findings further call into question the historical approach of driving high volumes of neglect cases into the system and highlight the disproportionate impact of that approach on Black children. It also revealed that the system's response to the pandemic may have created conditions that may have improved aspects of the experience of children in foster care. If we can improve placement stability and keep children out of group homes and correctional settings during a pandemic, why can we not continue to do it in ordinary times?

Prior to the pandemic, we were in a moment when federal law articulated policies favoring prevention. Notwithstanding the fact that many more vulnerable families are likely to experience housing instability and economic stress even beyond the immediate health crisis, federal and state policymakers must continue on a path towards providing families with the financial resources and social services to meet their needs, rather than funneling more children into the child welfare system.