

NY Public Defenders Ask Leaders To Protect Parental Rights

By **Marco Poggio**

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For many families, the nightmare begins with a knock on the door in the middle of the night.

Child welfare social workers, often without showing official identification, show up unannounced and ask to be let in. They talk to children without their parents' presence. Sometimes they ask to take the children's clothes off so their bodies can be inspected.

Then, the social workers proceed to ask parents questions about their romantic relationships, mental health, possible substance abuse, criminal history, employment and housing. They ask about other children they may have who don't live with them.

"Getting an investigation is a harrowing experience," said Nila Natarajan, a public defender in New York City representing parents in family court. "It's a very, very, very invasive process. It's terrifying, particularly when we're talking about communities who know what that knock means, who know how scary it is, and know that it can lead to you kids being taken away right there and then."

Those communities, Natarajan said, are almost always made up of Black and brown people.

Advocates acknowledge that there are cases in which children are in danger in their own homes and should not be allowed to live with their parents. But the mandate of child welfare agencies is too broad, they say, and ends up being used as a prosecution tool, almost inextricably tinged with racial bias.

Eighteen public defender organizations across New York asked state lawmakers earlier this month to overhaul policies that often result in the separation of children from their parents, which they say disproportionately targets families of color.

In a letter, the organizations asked Gov. Andrew Cuomo and the state's top legislators to pass five bills aimed at defending parents against what they described as the government's overreach in deciding when, who and how to investigate cases of suspected abuse. Four of the proposed bills aim at setting safety mechanisms around the way people are drawn into the child welfare system.

"The system reinforces racial and economic inequality by treating poverty as child neglect, unnecessarily separating families and shifting resources to the foster system rather than providing the support and resources to the families it is meant to serve," the letter says.

Neither the governor's office nor the New York State Office of Children and Family Services, which regulates the state's child protective services, adoption and foster care systems, returned multiple requests for comment.

All of the bills were introduced during last year's legislative session. Now, advocates hope they will become law. Natarajan said the new legislation packet is the first step in reducing the harm that the system causes families in a multitude of ways.

Letting Parents Know Their Rights

The broadest bill would require caseworkers investigating child mistreatment to notify parents and caretakers of their rights — the noncriminal equivalent of a Miranda warning.

"When the children's services come in the middle of the night and knock on your door, people don't know their rights," said Christine Gottlieb, an attorney and co-director of New York University School of Law Family Defense Clinic, one of the organizations that signed the letter. "The investigators will tell you you have to open the door, you have to strip-search your children, you have to take a urine test so we can see if you're using drugs. And none of those things are true unless they have a court order."

In the criminal context, most people know that they have the right to remain silent when they're placed under arrest. But many parents don't know they have rights when the person knocking on the door is a child welfare social worker, she said.

Child services inspectors cannot enter a home without a court order, but families often don't know that. The bill, which was introduced last year by then-state Sen. Velmanette Montgomery, now retired, would make the notice mandatory. Gottlieb, whose clinic represents low-income families in New York City, most of them Black and Latino, said most of the house visits by inspectors of the Administration for Children's Services in New York City are not backed by court orders.

The bill addresses the "heart of the problem," the overstepping of the government into family matters, the same kind of abuse perpetrated by law enforcement and immigration, Gottlieb said.

"We have gone too far in these investigations," she said.

ACS said in an email statement that it acknowledges parents' "need" to understand their legal rights, but that that must be balanced with the child welfare system's obligation "to assess and protect child safety."

Stopping Anonymous Reports

Another bill supported by the advocates, including the Neighborhood Defender Service of Harlem, the New York State Defenders Association, The Bronx Defenders and the Brooklyn Defender Services, would eliminate anonymous calls reporting child mistreatment. While kept confidential, all people calling the child abuse hotline will have to provide their name and contact information.

Each year on average, ACS conducts about 55,000 investigations involving about 80,000 children, according to the agency. Two-thirds of those reports turn out to be unfounded, meaning there was no credible evidence of abuse or neglect.

In New York City, most of the calls made to report child neglect or abuse are made by public schools, followed by police, social services, and medical or mental services, according to data published by the Administration for Children's Services. The fifth most common type of calls are made by private citizens, which can report allegations anonymously if they choose to.

City data shows that in the two-month period ending in December, 1,413 calls to the New York State Central Register were made by private citizens.

Natarajan said the share of nonmandated callers is "significant" and said their reports are harder to track than those made by officials.

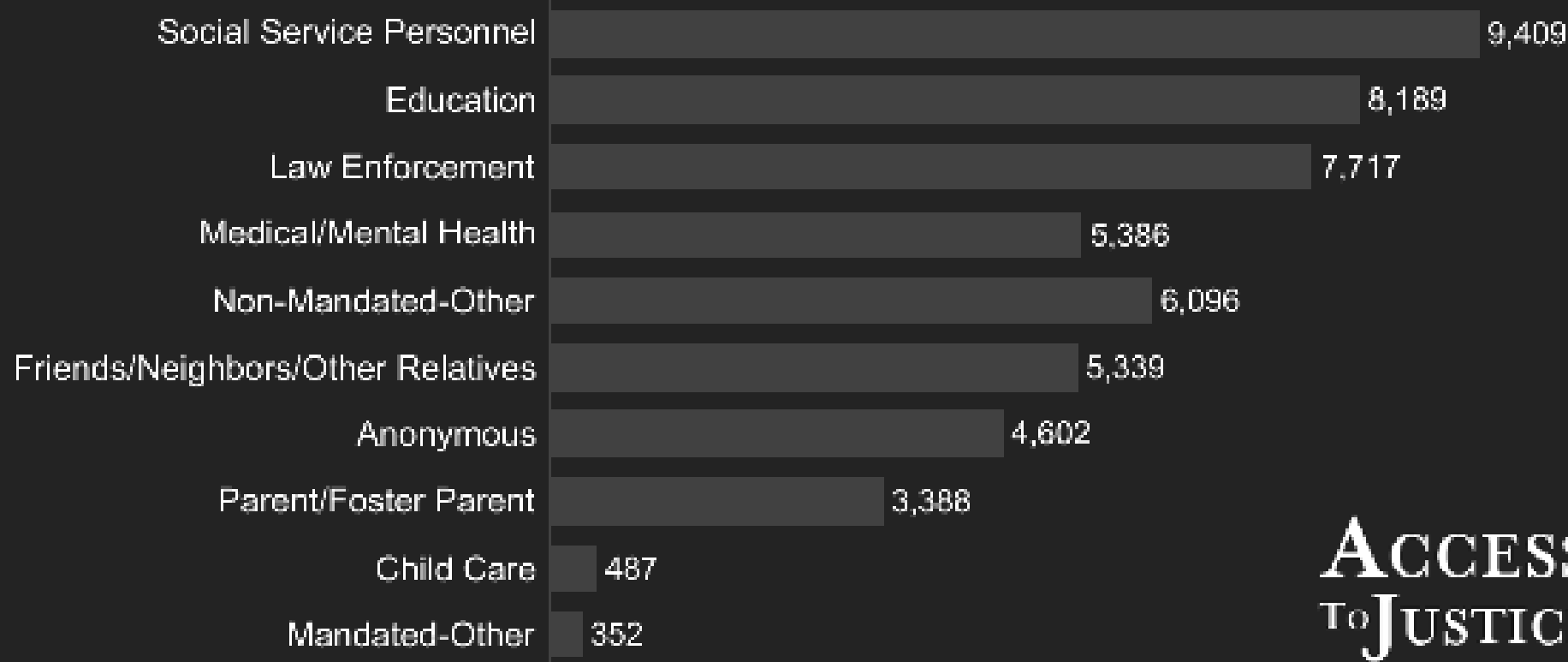
The proposed bill would require nonmandated callers to provide identifying information and contacts. Natarajan said that information would not necessarily be made available to the person who is the subject to the report, which in some cases could create safety concerns. Rather, the state would use it to reach out to the source of the complaint to try verify the allegations.

ACS defends anonymous calls as a crucial tool to investigate situations where children may be in danger. State law says child welfare agencies must follow up on every report of neglect or abuse. Natarajan said the practice is often used as a form of harassment. In gentrifying neighborhoods, she said, landlords "who want people out" sometimes make those calls to try to force tenants out of their homes.

"One way to harass people is to just keep making these calls," she said. "They don't have to leave their information and the state has to investigate every call."

Social Services Filed Highest Number of Reports in NYC, Followed by School Officials and Police

Private citizens filed 6,096 reports of child neglect or abuse in 2020, a significant share of the total number of reports. While government agencies and people acting in official capacity must include name and contact information, private citizens can file report anonymously.



Source: New York City Administration for Children's Services

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Child Welfare Becoming Surveillance

Throughout the decade that she has been working with The Bronx Defenders' "Healthy Mothers, Healthy Babies" project, which assists pregnant women involved in the child welfare system, Melissa Hamilton has noticed two trends.

One is that her clients are almost entirely Black and brown women. In the span of 10 years, only two of her clients were white.

The other trend has to do with the first steps women take after finding out they are pregnant.

"Typically, when a woman finds out she's pregnant, the first call would be to her mom, to her partner, or to her OB/GYN," Hamilton said. "The first people that our clients were calling were their lawyers."

The reason is fear, she said. Often, the involvement of child welfare agencies in a family's life begins at the hospital shortly after a woman gives birth. If health care workers become aware one of the parents has open child neglect or abuse cases, the hospital calls the child welfare agencies.

"What often happens is that the hospital tells the parents that they can't take the baby home until ACS comes and makes a decision about whether or not that baby can stay in their care," Hamilton said.

The "sacred" moment of birth, becomes tainted with government intrusion, she said.

"To have the state being a part of that is very intrusive," she said.

Many of the families involved in the child welfare system experience various forms of surveillance. They often live in public housing, where they feel firsthand the presence of police in

their neighborhoods. They rely on public benefits or hospitals to get basic care. Some of them live in the shelter system. In all of these environments, families are taxed by what advocates consider excessive intrusion of the government in their lives.

Child welfare agencies play a significant role in that surveillance, said Natarajan, who is a supervising attorney and policy counsel at Brooklyn Defender Services.

Families who are the subject of investigations by the ACS often live under a form of court-ordered supervision that allows the agency's inspectors to show up unannounced at their homes. But their authority is way broader. They can ask a parent to sign a HIPAA release to interview a therapist they might have seen years before or to see a child's pediatrician, regardless of what the initial allegations against the parent were.

In most cases, the supervision lasts at least one year.

"A year of the government being able to come to your house whenever they want," she said.

The family regulation system works parallel to, and to some extent, jointly with the criminal justice system, advocates say. But while the public understands how criminal justice policies have harmed disproportionately poor communities and people of color, it doesn't look at the child welfare system the same way.

"People hear 'family court' and might think it's a nice place to be, or maybe it's just about divorces or custody," Natarajan said. "I don't think they know that the government is actually prosecuting people, with real consequences."

Brooklyn Public Defenders has a department where attorneys practice in both criminal and family court proceedings, in some cases representing the same defendants on both fronts in cases stemming from the same allegations.

Families of color make up the bulk of child welfare investigations.

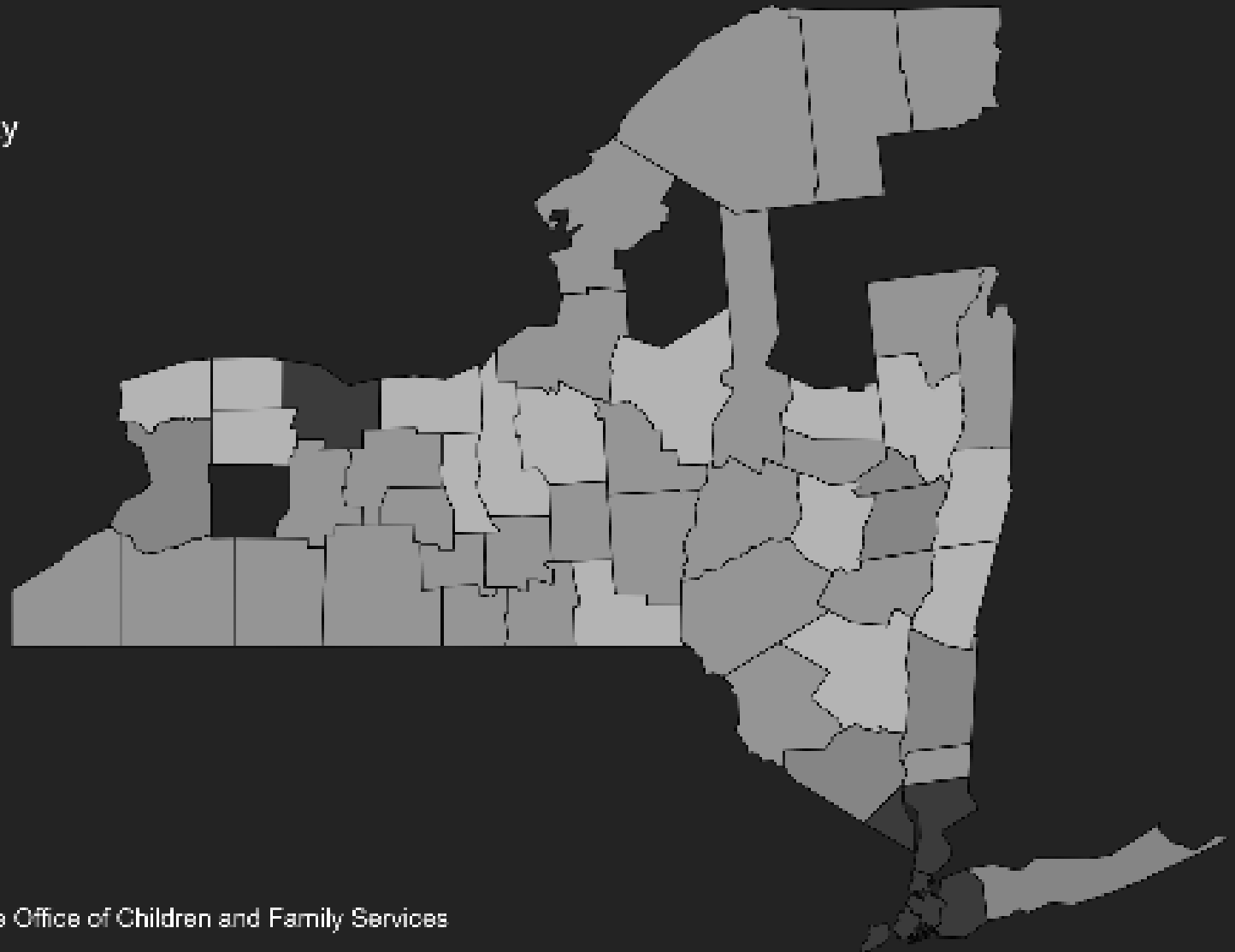
Data published by the New York State Office of Children and Family Services, which administers the New York State Central Register — the hotline for reporting child abuse — shows Black and Latino children are much more likely to be the subject of reports than their white counterparts. The disparity is greater for New York City, followed by the city's suburbs. The disparity is less pronounced in other areas of the state, where whites are an overwhelming majority of the population.

Child Abuse or Neglect Reports Disproportionately Involve More Children of Color Than White Children

Black children in New York City are nearly seven times more likely to be the subject of abuse and neglect reports made to the Statewide Central Register of Child Abuse and Maltreatment (SCR). The largest disparities are reported in urban areas, when more Black families live.

- No or Little Disparity
- Moderate Disparity
- High Disparity
- Extreme Disparity

The disparity index is calculated as the ratio between rate of unique black children in reports made to the Statewide Central Register of Child Abuse and Maltreatment (SCR) per 1,000 black children and the comparable rate for white children.





In commenting about the proposed bills, ACS said it supports implicit bias training for mandated reporters, people who make child abuse and neglect reports in an official capacity. It also said it would work with the state to reduce unnecessary and inappropriate reports to the state hotline.

"We are taking steps to address systemic inequities and reducing families' interactions with the traditional child welfare system," the agency said.

There's a long road ahead, advocates say.

Eliminating Unwanted Drug Testing

A different bill would prohibit nonconsensual drug and alcohol testing and screening of pregnant women before, during and after giving birth. Currently, women often undergo drug testing against their knowledge. When a test comes back positive, for instance, for marijuana, the hospital would report it.

Hamilton, a parent advocate working with The Bronx Defenders to assist families under child welfare investigations, said drug testing is almost always performed exclusively on pregnant women of color and their baby as soon as they are born, without the mother's consent. That happens both in public and private hospitals around the borough, particularly in areas where higher concentrations of Black and Latino people live, she said. Shortly after birth, newborns are "bagged," placed in bags that retain their urine, which then get tested for drugs. A positive test gives ACS a reason to take the newborn.

"They just test everybody," she said. "That's used as a source of why a child should be removed."

There are situations where drug testing is necessary, for instance when women appear to be intoxicated or don't feel well, Hamilton said, but in reality, drug tests are performed regardless based on the assumption a mother might have used drugs during pregnancy.

A friend of Hamilton who's a nurse at a Bronx hospital told her race determines who's tested for drugs.

"A white woman who comes in, she's not getting drug tested," Hamilton said. "So it's not happening just because there is a concern for the medical well-being of the child or the client. It's done as a way to regulate people."

ACS and hospitals march in lockstep about drug testing. The agency knows it's performed, and test results are one of the first topics social workers address during conferences with mothers, often happening bedside while they're recovering from childbirth, which will determine if the baby gets removed.

In a statement emailed to Law360, ACS said it agrees that nonconsensual drug and alcohol testing and screening of pregnant and perinatal people and newborns should be prohibited.

In November, the agency released new guidance on the use of drug testing of pregnant women in the child welfare system.

"This new guidance is part of our overall work to reduce unnecessary and inappropriate child welfare involvement, especially for families of color," ACS Commissioner David A. Hansell said in a statement accompanying the guidance. "The bottom line is that reports to the state child abuse hotline should only be made when there is a reasonable concern about the child's safety, and there are other routes to helping families access services they may need."

For many of Hamilton's clients, drug testing is a form of harassment. One time, a woman with two children in foster care who were in the process of getting discharged back to her walked into a hospital to give birth. She was drug tested without her knowledge. When tests results came back positive for marijuana, the woman adamantly denied she had smoked at any point during her pregnancy. Hamilton rushed to the hospital and questioned a social worker about the test.

"It's just what we do here," Hamilton recalled the social worker saying.

The woman asked to get tested again, and the second result came back negative. The hospital later explained that there was a "mix-up" with the urine testing, Hamilton said.

"They're so careless," she said. A positive drug test would have been enough for ACS to take all three of the woman's children away from her. Despite enormous stress for the mother, she was able to leave the hospital with her newborn. But many other stories don't end up that well, Hamilton said.

In general, a parent testing positive for drugs doesn't indicate he or she is abusive to their children. A drug test coming back positive for marijuana, for example, doesn't raise the definition of neglect established by child welfare agencies.

In the guidance, ACS said health care providers have a duty to report positive drug test results if they have "reasonable cause" to think a mother might be abusive toward her children — and that's based on "rational observations, professional training and experience" of health care workers.

But in reality, the practice of drug testing ends up being used as a punitive tool that hurts parents of color the most, Hamilton said.

"If you're a woman of color and it's known to the hospital that you smoked weed during the course of pregnancy is that much harder for you to have your baby home with you," Hamilton said. "There are other parts of the city where there are white women bragging about how smoking marijuana makes them a better parent."

Child Welfare Investigations by Community District in 2019

Investigations of child neglect or abuse tend to happen more often in poorer neighborhoods with higher concentrations of Black and Latino families.

Select

- # Investigations
- Poverty Rate
- % Black
- % Latinx

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Giving Judges More Discretion

Another proposed bill seeks to give judges presiding over parental rights cases the option to grant adjournments in contemplation of dismissal, commonly known by their acronym ACD and already used in criminal dispositions, which essentially would give a parent a chance to keep their children

even after a negative finding in an abuse case on the condition that they attend preventive services, drug treatment or mental health counseling, and cooperating with agency supervision.

"Most children are better off staying with their families in their communities," Gottlieb said. "Some need assistance. We should support them in their own homes, whenever possible."

And the last of the proposed bills addresses situations in which parents who have lost their parental rights as a result of a conviction or due to mental disability.

When a child has been living in foster care for a long time and gets adopted, natural parents are no longer allowed to see the child unless the adoptive parents agree.

In New York, judges cannot compel adoptive parents to allow visitations. Other states give courts the authority to issue visitation orders when they find it's in the best interest of children to see their natural parents.

Pushing to Change a "Draconian" System

Gottlieb, whose clinic was the first one in the country to represent parents in family court, said the policy changes were necessary to rein in a "draconian" child welfare system that puts too much emphasis on punishing parents for conditions that are often caused by poverty and too little in helping families through their challenges.

Over 50 percent of Black children in the entire country are subject to investigations by child protective services under suspicion of neglect or abuse, according to a study published in the American Journal of Public Health based on U.S. Census data and other official sources.

Despite the staggering number of investigations, only in a small fraction of those cases parents are found having harmed their children. That shows the system is aggressive in investigating allegations of child neglect and abuse, and that racial bias plays a crucial role, Gottlieb said.

"We're acting like those individual parents have done something wrong, and that's actually quite rare," she said.

The vast majority of cases filed by ACS in New York City are about neglect, not abuse. The agency defines neglect as situations in which parents fail to care for their children, give them adequate food, clothing or housing, or where children are malnourished, unsupervised or suffer minor physical conditions such as swelling, dislocations or sprains.

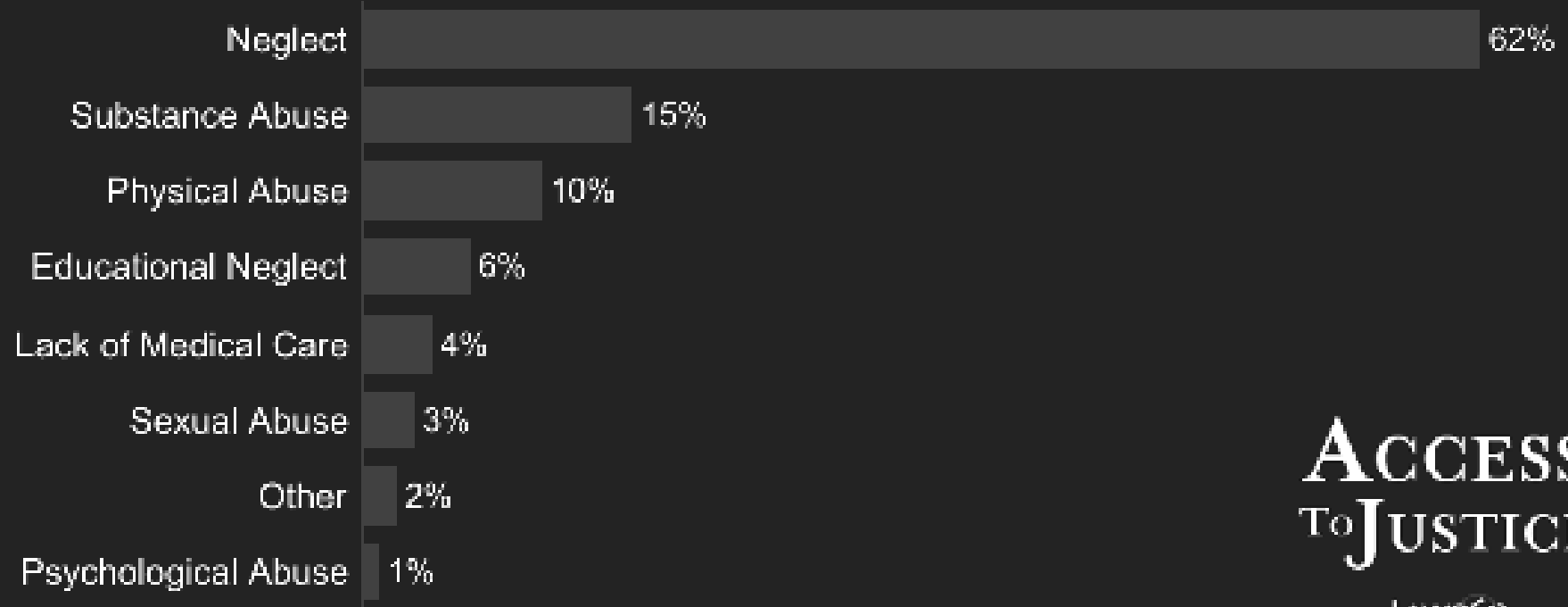
But the public perception is often more negative, Natarajan said. People are more likely to associate child welfare services with parents beating their children, or abuse drugs in their homes.

Much of that neglect is rooted in poverty, she said. Families who can't afford health insurance or pay rent are at high risk of being drawn into the child welfare system. The lack of safety nets leaves parents with little to hold onto. Government agencies fill in the voids by filing child neglect reports, which then turn into prosecutions. That exacerbates the street of living in poverty even more, Natarajan said.

"We as a society, whether it's through the police or through Child Protective Services, have decided that law enforcement and surveillance is the way we want to address the consequences of poverty and racism," she said.

Less Than One-Tenth of Child Abuse Reports in New York City Involve Physical Violence

The overwhelming majority of cases reported in 2020 involved neglect, which is classified as inadequate guardianship, inadequate food, clothing, shelter, lack of supervision, malnutrition, failure to thrive, swelling, dislocations and sprains.



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Source: New York City Administration for Children's Services

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Other western countries have been addressing child poverty by providing safety nets, such as subsidized daycare, socialized health services, visiting nurse programs, but in the United States that task falls squarely into the child welfare system, which tends to be punitive, Gottlieb said.

"There has been a growing sense that we went too far in invading family life," Gottlieb said, adding that it's almost always low-income families and families of color that are targeted by the child welfare system.

The push to limit parent-child separations for families involved in the child welfare system has been growing during the last two decades, but it wasn't until the reckoning on systemic racism took the national stage after the police killing of George Floyd that elected officials paid attention to how the system impacts people of color.

"We've been calling for this for years. No one was listening," Gottlieb said. "Now it's time to walk the walk."

Gottlieb said the reality of low-income people losing their children directly contradicts the child welfare system's purported aim to protect children.

"If we're really going to push back on structural racism, it can't be that good intentions are enough to justify things," Gottlieb said.

Advocates see the proposed bills are a starting point to adjunct the trajectory of the child welfare system. The long-term goal is to divert funds away from the system, and invest them in forms of support that help families that are struggling.

Advocates say a growing body of social science pointing to the harms of removal and family separation should inform public policy.

The way to make that change is to follow the lead of community-based organizations that know the impact of child welfare policies firsthand and are advocating for alternatives. Part of the task is to educate people about the risks involved in being dragged into the system, which parents sometimes turn to for help.

"You would be surprised by the number of people who have called ACS themselves as a parent and then wind up in court," Natarajan said.

Passing the proposed bills, which are the result of years of advocacy and on-the-ground legal research, will also require the support of the public at large, she said.

"The public should know that it's coming from people who have been impacted by this system and they're speaking from their experience," Natarajan said. "It's not just a bunch of lawyers who think this a good idea."

--Editing by Katherine Rautenberg.

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