

2020

Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change

Jane M. Spinak
Columbia Law School, spinak@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Courts Commons](#), [Family Law Commons](#), [Health Law and Policy Commons](#), [Juvenile Law Commons](#), [Law and Race Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Jane M. Spinak, *Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change*, LAW IN THE TIME OF COVID-19, KATHARINA PISTOR (Ed.), COLUMBIA LAW SCHOOL, 2020 (2020).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2685

This Book Chapter is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change

Jane M. Spinak, Edward Ross Aranow Clinical Professor of Law, Columbia Law School

Introduction

A couple of weeks into “shelter in place” orders, my husband forwarded to me a photo posted online. A young mother, her blond hair swept up into a messy bun, stares intently at her desktop screen. She sits at an antique wood table in her sweats and slippers, headphones in place, working while the sun streams in through sliding porch doors. Behind her, her five or six year old son is bound and gagged and duct taped to the floor. The joke is clear; staying at home with children during a pandemic while trying to get your work done, making sure they are keeping up with their school assignments, and remaining sane requires immense patience and fortitude or drastic measures. No black family would ever post such an image.

Posting an image of abusing your young child and knowing that it will be seen as a joke is a luxury most parents of color would never believe they have, especially parents living in poverty who are under the constant surveillance of the government. These parents live in heavily policed but underserved neighborhoods; they live in public housing, receive food stamps or cash assistance, and use public hospitals and clinics, head start programs, and food pantries; they have two or three jobs that until very recently were considered inconsequential and now are being touted as “essential” for the rest of us. Every decision they make has outsized consequences: pay rent or pay the dentist; leave the ten-year-old watching the three-year-old for fifteen minutes to buy groceries or put the laundry in the dryer at the laundromat down the street, or risk having no food in the fridge or clean clothes in the house when the visiting nurse comes to check on the asthmatic baby. In many of these neighborhoods, the consequences are called “catching a case,” which means being investigated by child protective services for neglecting or abusing your child, frequently leading to a proceeding in family court that can result in your children being removed from your care, participation in mandated services or treatment, court and agency supervision, and months or years of family disruption and surveillance. No joking around.

The COVID-19 pandemic has already wrecked greater havoc in poor neighborhoods of color, where pre-existing conditions exacerbate the disease's spread. Crowded housing and homelessness, less access to health care and insurance, and underlying health conditions are all factors that worsen the chances of remaining healthy.¹ Workers desperate for income continue to work without sufficient protective measures, moving in and out of these neighborhoods, putting themselves and their families at risk. During periods of greater disruption, tensions are heightened and violence more prevalent. Already some experts are warning of an onslaught of child maltreatment cases, citing earlier examples of spikes in foster care during drug epidemics and economic recessions.² Instead of panicking, thinking creatively and thoughtfully about appropriate responses and using the information and resources we already have may help to diminish such fears and improve the safeguards that are needed to protect the integrity of families and keep children safe.

Thoughtful guidance on moving forward has come from an unlikely source: the federal government. The Children's Bureau (CB) released a letter on March 27, 2020, informing state and local governments and courts that the federal statutory funding mandates pursuant to title IV-E of the Social Security Act for the provision of specified judicial hearings and determinations must be followed, balancing child-safety with public health directives. Child welfare agencies and courts can't just throw up their hands or close down in the face of disruption. "Prolonged or indefinite delays in delivering services and postponements of judicial oversight place children's safety and well-being in jeopardy; may lead to unnecessarily long stays in foster care; and are inconsistent with statutory and regulatory requirements."³ Sweeping orders ceasing, suspending,

¹ Sam Baker, Alison Snyder, Coronavirus Hits Poor, Minority Communities Harder, <https://www.axios.com/coronavirus-cases-deaths-race-income-disparities-unequal-f6fb6977-56a1-4be9-8fdd-844604c677ec.html>; Rate of Deaths, Illness Among Black Residents Alarms Cities, <https://www.nytimes.com/aponline/2020/04/06/us/ap-us-virus-outbreak-illinois-1st-ld-writethru.html?searchResultPosition=7>

² Fred Wulczyn, Looking Ahead: The Nation's Child Welfare Systems after Coronavirus <https://chronicleofsocialchange.org/child-welfare-2/looking-ahead-the-nations-child-welfare-systems-after-coronavirus/41738>; Nina Agrawal, The Coronavirus Could Cause a Child Abuse Epidemic, <https://www.nytimes.com/2020/04/07/opinion/coronavirus-child-abuse.html?referringSource=articleShare>

³ March 27, 2020 Letter of Commissioner Jerry Milner to Child Welfare Legal and Judicial Leaders <https://drive.google.com/file/d/1FJw04Hi795BodPcZ-EOKSGEbjBmJ9ICD/view>

or delaying court proceedings, the provision of essential preventive and rehabilitative services, or family time (visitation) between children in foster care and their parents and siblings should be avoided to diminish the likelihood that progress will be halted in preventing family disruption, reunifying families, or securing other permanency goals. Several of the CB's specific recommendations – access to counsel for parents and children, access to technological assistance without costs, creative approaches for visiting and services, and maintaining court processes – will be discussed at points throughout this chapter. What is worth noting overall is the CB's high expectations for child welfare agencies and the courts that monitor these agency actions to protect not just child safety but also family integrity.

Three R's Worth Reconsidering under COVID-19: Reporting, Reasonable Efforts, and Reunification

The complex system of child welfare and foster care has key points where life-altering decisions are made and where COVID-19 will have an impact now and for a long time to come. Looking at three of them sequentially provides a roadmap for how child welfare decisions are made and how the pandemic will affect them now and into the future. They also provide opportunities to rethink the ways in which child welfare and family court systems have continuously failed families and children.

1. Reporting

Every state has some form of registry for reporting potential abuse and neglect and maintaining records of those reports. Most states maintain a central registry that accepts reports by “mandatory” reporters, like doctors and teachers, or voluntary reporters, who may be allowed to report anonymously. The reports are used not only in child protection investigations but also later to screen individuals on the registry for jobs that involve children or other vulnerable populations.⁴ In 2018, over 4.3 million children were reported, though almost 1.9 million of those reports were “screened out” and not subject to further investigation. Of the reports left, after further investigation, sufficient evidence of risk of or actual maltreatment existed to “substantiate” the report or provide an alternative response of assistance to approximately

⁴ Establishment and Maintenance of Central Registries for Child Abuse or Neglect Reports, <https://www.childwelfare.gov/pubPDFs/centreg.pdf>

678,000 children.⁵ Even these numbers do not provide an accurate assessment of actual maltreatment. Some states require almost no evidence to substantiate a report and others have a very high standard. The percentage of these cases that will eventually be brought to court also varies tremendously, meaning that even with a substantiated report a parent may not be found to have maltreated their child by a court. Only about a quarter of the victims with “substantiated” reports resulted in any court action.⁶

How can these numbers help us think about the risk to children of greater maltreatment during the COVID-19 period and the likelihood that there will be less reporting during the widespread “shelter in place” practices being instituted? First, it is clear that the vast majority of reports do not result in state action because a child has been mistreated; there is a lot of noise in reporting. Hunches, vague suspicions, better-safe-than-sorry beliefs, passing the buck to someone else instead of figuring out how to be helpful, anonymous calls and instances of malicious false reporting still require state investigations that cost time and money. Reducing those types of reports because children are not as casually observed will reduce unnecessary family disruption and trauma and will give investigators more time to scrutinize when children are actually in danger, usually of serious physical or sexual abuse. Fewer reports based on unsubstantiated feelings and just passing the buck will also mean workers will have to do fewer in-person investigations, leaving them and the families they are investigating less exposed to COVID-19. Finally, and in particular in those states that have a very low threshold for substantiation, fewer parents will find themselves with records that prevent them from securing jobs in caretaking positions, often the only jobs available for low-income workers, especially women. When we come to the other side of the pandemic, if we’ve reduced unnecessary reporting and investigations, we can incorporate what we’ve learned to disrupt fewer families and keep children at risk actually safer.

⁵ Child Maltreatment 2018, Chapter 2, <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

⁶ Child Maltreatment 2018, Table 6-5 <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

2. Reasonable Efforts

Federal funding mandates require that before children can be separated from their families, except in clear emergencies, child protective services must make reasonable efforts to keep children safely at home. If a child is removed from a parent, reasonable efforts to reunify a family or, if this is not possible, to find another permanency option other than extended foster care, is also required.⁷ Since neglect is by far the most common form of maltreatment alleged (rather than physical or sexual abuse) and “no single fact about child abuse and neglect...has been better documented and established than their strong relationship to poverty and low income,”⁸ it would be a fair assumption that financial assistance and services would be the most reasonable of reasonable efforts. That, unfortunately is not the case. Instead, casework counseling, referrals to mental health and substance use services, and parenting classes are standard fare. Any of these may be necessary but the primary prevention of adequate income along with decent shelter, child care, and health care would do far more to reduce the relationship of poverty to child maltreatment. As COVID-19 sweeps through the poorest and least healthy neighborhoods, primary prevention is in even greater need. Some of the stopgap measures being adopted – one-time stimulus checks to low income families, loosened health insurance requirements for treatment, moratoriums on evictions and some debt, greater flexibility for unemployment insurance – could assist vulnerable families now and provide a template for greater government and societal financial responsibility going forward.

In the meantime, the secondary prevention measures that are often crucial to keeping children safely at home still need to be employed effectively. The CB letter urges all government authorities to be proactive in monitoring the availability of services and treatment, to utilize technology at no or reduced cost to enable greater participation in treatment and services, and to help facilitate resources for parents to access virtual arrangements. Of even greater importance are reasonable efforts to maintain family connections. In 1978, Drs. David Fanshel

⁷ Child Welfare Information Gateway. (2017). Child Maltreatment Prevention: Past, Present, and Future, at https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf#page=6&view=Prevention%20today

⁸ Pelton, L. H. (1994). The Role of Material Factors in Child Abuse and Neglect. In G. B. Melton et al. (eds.), *Protecting Children from Abuse and Neglect: Foundations for a New Strategy* (pp. 131-181). New York: Guilford. See also, Slack et al., *Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics*, at <https://journals.sagepub.com/doi/pdf/10.1177/1077559504269193>

and Eugene Shinn of the Columbia School of Social Work published a ground-breaking study of children in foster care, concluding that the important determinant of how well children fare in foster care and how likely they were to return home was parental visitation.⁹ Visitation, or what is now more appropriately being called family time, is ordinarily challenging to accomplish. Busy parents work, participate in programs or treatment, may have other family responsibilities, and often travel long distances to see their children. Children have school and afterschool activities, their foster parents or caseworkers may be unavailable to facilitate visits, visits can often trigger conflicting emotions and trauma for adults and children that require special attention, and coordinating outside of business hours is often impossible. Recognizing the crucial importance of family time – especially during times of crisis – the CB is encouraging creative solutions: figuring out which families may still be able to meet in person (including outdoors); whether there are relatives rather than staff who can facilitate contact; and maximizing the use of technological tools to connect families face-to-face.¹⁰

To reinforce the CB's position on family time, on April 6, 2020, the Commissioner of the CB, Jerry Milner, and his top aide, David Kelly, published a remarkable editorial on family integrity. Any discussion of child welfare during this pandemic period must include an acknowledgement of this editorial. In the forty years that I have practiced and taught in the child welfare realm, I cannot ever remember federal officials declaring unequivocally the importance of protecting the relationship of parents and children who have been separated by child welfare authorities and the destructive impact of even necessary separations.

When children are removed from their parents, even when necessary for their safety, and artificial visiting arrangements are imposed that prevent parents from being parents and children from being children, they become distanced and that can be harmful to parents and children alike. The effects of such distancing shows up in trauma responses, in hopelessness, in destructive behaviors, in increasing needs for clinical interventions, and in repeated cycles of difficulty within families...Further, it is not merely

⁹ Fanshel, D. and Shinn, E. *Children in Foster Care: A Longitudinal Investigation*. New York: Columbia University Press (1978)

¹⁰ March 27, 2020 Letter of Commissioner Jerry Milner to Child Welfare Legal and Judicial Leaders <https://drive.google.com/file/d/1FJw04Hi795BodPcZ-EOKSGEbjBmJ9ICD/view> at 2-3

a matter of longing for contact, it is a matter of healthy brain development, maintaining critical bonds, and prevention of trauma that can persist for generations.¹¹

The March 27 CB letter identifies lawyers – for agencies, for parents and for children – as central to ensuring that reasonable efforts to receive services and to maintain contact are enforced. They are expected not only to stay in close contact with their clients but to guarantee that family courts hear and determine cases. While neither parents nor children have a constitutional right to counsel in child protective proceedings,¹² many states have statutory mandates for the provision of counsel to both. In the last two decades, there has been a burgeoning movement to develop high quality institutional parent representation – now called family defense – that has begun to hold family court proceedings to high standards of due process as well as to safeguard the provision of reasonable efforts before, during, and after these proceedings. Many of these offices staff interdisciplinary teams of lawyer, social workers, and parent peer advocates to provide holistic representation. Family defense practitioners, as well as child advocates who are not “child savers” but “family savers”, have mobilized swiftly to follow the CB’s letter. They are challenging blanket court closures or suspensions of hearings, filing emergency writs and motions, pressuring for increased virtual access to courts, and demanding statewide adherence to the CB’s letter.¹³ This pressure has begun to have significant results: New York City Family Court has recently increased the number of virtual courtrooms available for essential and emergency matters and has increased the availability of reviewing on submission

¹¹ Jerry Milner and David Kelly, Top Federal Child Welfare Officials: Family is a Compelling Reason, The Chronicle of Social Change (April 6, 2020) <https://chronicleofsocialchange.org/child-welfare-2/family-is-a-compelling-reason/42119>

¹² See *Lassiter v. Department of Social Services*, 452 US 18 (1981)

¹³ Homepage of the Center for Family Representation at <https://www.cfrny.org/>; <https://citylimits.org/2020/03/30/covid-19-creates-deep-uncertainty-in-nycs-child-welfare-system/>; Rachel Blaustein, COVID-19 Creates Deep Uncertainty in NYC’s Child-Welfare (March 30, 2020); Texas Public Policy Foundation Letter to Jaime Masters, Commissioner Texas Department of Family and Protective Services (March 27, 2020) <https://chronicleofsocialchange.org/wp-content/uploads/2020/03/TPPF-Family-Advocates-Letter-to-DFPS-re-COVID-19.pdf>; Office of the Maryland Public Defender Parental Defense Division to Ms. Lourdes R. Padilla, Secretary, Department of Human Services <https://drive.google.com/file/d/1CaZlagytCiDz8atUdKzZ9DhVdHRiFnXL/view>

orders to show cause requesting emergency relief and stipulations.¹⁴ The California Judicial Council approved on April 7, 2020, new rules that certain dependency court proceedings must be held on their normal timeline to ensure the safety of children, including hearings on removals of children from their families; medical and medication-use requests; some motions to reunify families or terminate parental rights; and requests by former foster youth to re-enter care. Decisions about in-person family time must be made on a case-by-case basis, not by blanket order.¹⁵

3. Reunification

The Adoption and Safe Families Act (ASFA) was enacted in 1997, the Clinton Administration's response to children experiencing multiple placements and remaining far too long in foster care. The mandate was first and foremost to improve the permanency outcomes of children.¹⁶ And while reunification with parents nominally remained the primary goal of permanency, the time frames for reunification before considering termination of parental rights (TPRs) and potential adoption were accelerated dramatically, resulting in fewer reunifications of families and far more adoptions. ASFA's requirements that TPRs be instituted if a child has been in foster care 15 of the most recent 22 months were adopted with only some states instituting exceptions permitted by the law.¹⁷ In the decades since, the arbitrariness of these deadlines has precluded sufficient time for services and treatment to support successful family reunification and resulted in an entire generation of legal orphans, children neither returned home nor adopted as well as thousands of broken adoptions. Dr. Mark Testa has called this permanency focus on favoring adoption over other permanency goals as mistaking legally binding connections with psychologically lasting ones.¹⁸

¹⁴ New York State Courts Remain Open for Essential Business (April 6, 2020) <http://nycourts.gov/>

¹⁵ John Kelly, California Courts Must Hold Some Child Welfare Hearings, Try to Continue In-Person Family Visits, The Chronicle of Social Change (April 7, 2020) <https://chronicleofsocialchange.org/child-welfare-2/california-courts-must-hold-some-child-welfare-hearings-try-to-continue-in-person-family-visits/42135>

¹⁶ Public Law 105-89, The Adoption and Safe Families Act of 1997, <https://www.acf.hhs.gov/sites/default/files/cb/pi9802.pdf>

¹⁷ Intentions and Results A Look Back at the Adoption and Safe Families Act, <https://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF>

¹⁸ Post and Zimmerman, The Revolving Doors of Family Court, Confronting Broken Adoptions, <https://www.cfcnny.org/files/118689205.pdf>; Mark F. Testa, The Quality of Permanence--Lasting or Binding?

The COVID-19 emergency allows us to reconsider permanency priorities. It is easy to imagine many child welfare agencies and courts suspending some of the time frames for ASFA's permanency goals because of the lack of access to services and treatment or the inability to reboot suspended court calendars. But if, as Milner and Kelly say in their editorial, that the ASFA timelines do not "reflect what we know about treatment and recovery and do not reflect the contextual factors that are directly relevant to successful reunification...and the research lessons...that have revealed the timelines as lacking alignment with what many children and families need," then this is not about interim solutions before returning to old practices. Instead it is an opportunity to acknowledge the ways in which ASFA has failed to serve the needs of vulnerable children and families for almost a quarter of a century and to radically reconsider the ways child welfare systems surveil, supervise, and separate families.

Milner and Kelly's message is clear. Child welfare systems are not to stay calm and carry on. Instead, "This is a defining moment for us as a system; it has laid threadbare our lack of agility to meet family needs. We cannot allow our shortcomings to be held against families — to do so is the height of injustice and compromises the legitimacy of our system in our own eyes and those of the families we are privileged to serve."

Subsidized Guardianship and Kinship Foster Care As Alternatives to Adoption, 12 Va. J. Soc. Pol'y & L. 499, 499 (2005)

