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Child Welfare, Reasonable Efforts, and COVID-19

Anita Weinberg and Lilia Valdez*

INTRODUCTION

Article 19 of the United Nations Convention on the Rights of the Child (CRC) requires governments to protect children from all forms of violence, including violence in the home.¹ At the same time, Articles 3 and 5 obligate states to respect the rights and duties of parents to care for and make decisions on behalf of their children.²

Although the United States is not a signatory to the CRC, federal law also seeks to strike a balance between protecting children from harm by family members and recognizing the constitutional rights of parents to direct the care, control, and upbringing of their children.³ Before a child may be removed from a parent based on allegations of abuse or neglect, the state child welfare agency must make “reasonable efforts” to prevent or eliminate the need for removal of the child from his home; and if removed, “reasonable efforts” must be made to return the child home.⁴ Neither federal law nor regulations, however, define reasonable efforts, leaving states to interpret the meaning of the phrase. Usually, reasonable efforts are understood to include referral to and/or the provision of accessible and available resources, such as individual, group, and family counseling; mental health treatment; parenting classes; and homemaker services.⁵ Federal law also establishes time frames within which decisions regarding permanency for children, including termination of parent rights, must be made.⁶

The COVID-19 pandemic, however, has impacted children and families across the country, and child welfare agencies have struggled to make reasonable efforts under unprecedented conditions. Without strong reasonable efforts, families may not be provided adequate services to address the reasons for their child’s removal, children may remain in long-term foster care, or parental rights may be terminated as a result of federal timelines.

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¹ United Nations Convention on the Rights of the Child, art. 19, Nov. 20, 1989, 1577 U.N.T.S. 3.

² *Id.* at art. 3, art. 5.

³ *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

⁴ 42 U.S.C. § 671(a)(15) (2018). States risk losing federal dollars for their child welfare system if they do not comply with the statutory requirements. The Indian Child Welfare Act requires “active efforts” be made before these decisions can be made concerning Native American (Indian) families. 25 U.S.C. § 1912(d) (2018).

⁵ CHILD.’S BUREAU, STATE STATUTES: REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

⁶ *See* 42 U.S.C. § 675(5)(E) (requiring the state to file a petition to terminate parental rights if a child has been in foster care for fifteen of the last twenty-two months unless the child is placed with a relative, there is a compelling reason not to pursue termination of parental rights, or the state has not fulfilled its responsibilities under the service plan).

This article will briefly examine the ways in which the pandemic has disproportionately affected people of color, who are already disproportionately impacted by the child welfare system. It then will describe the challenges facing children and families in Illinois' child welfare system during the pandemic and its potentially devastating impact on them. The article will also discuss the responses of both the federal government and state courts to these challenges, and conclude with recommendations put forth by Illinois-based advocates seeking to address these challenges and defend the human rights of children.

I. COVID-19 EXACERBATES PRE-EXISTING INEQUITIES AND ADDS NEW CHALLENGES

COVID-19 has amplified and exacerbated inequities in society and challenges to human service systems that are intended to respond to the needs of marginalized groups of people and communities.⁷ Across the United States, people of color, specifically Black, Indigenous, and Latinx individuals, have a combined COVID-19 death rate more than 2.7 times that of their white counterparts.⁸ African Americans in particular have died at almost 1.5 times the rate of white people, totalling almost 74,000 Black lives lost due to COVID-19 as of March 7, 2021.⁹

Like COVID-19, the child welfare system also disparately impacts families of color. Across the country, including in Illinois, African American families are disproportionately represented within the child welfare system.¹⁰ Data from 2013 through 2019 suggests that relative to their percentage of the population, African American children are overrepresented at every decision point in the Illinois child welfare system, from investigations of reports of abuse or neglect, to removals, to length of time in care.¹¹ They, too, have been negatively impacted by COVID-19.

⁷ *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html (last updated Feb. 12, 2021); BRADLEY L. HARDY & TREVON D. LOGAN, THE HAMILTON PROJECT, RACIAL ECONOMIC INEQUALITY AMID THE COVID-19 CRISIS 2 (2020), https://www.brookings.edu/wp-content/uploads/2020/08/EA_HardyLogan_LO_8.12.pdf; see generally Matthew Johnson & Kaprea Johnson, *Utilizing the Six Generic Human Service Competencies and Ecological Systems Theory as a Basis to Understanding Barriers Faced by Marginalized Clients*, *Counseling & Human Services Faculty Publications*, 33 J. HUM. SERVS. 47 (2013) https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1020&context=chs_pubs.

⁸ *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Dec. 10, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race-december2020>.

⁹ *The COVID Racial Data Tracker*, ATLANTIC, <https://covidtracking.com/race> (last updated Mar. 7, 2021).

¹⁰ See generally Jude Mary Cénat et al., *Overrepresentation of Black Children in the Child Welfare System: A Systematic Review to Understand and Better Act*, 120 CHILD. & YOUTH SERVS. REV. 1 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S019074092032137X>.

¹¹ TAMARA FULLER ET AL., UNIV. OF ILL. CHILD. & FAM. RSCH. CTR., CONDITIONS OF CHILDREN IN OR AT RISK OF FOSTER CARE IN ILLINOIS: FY2020 MONITORING REPORT OF THE B.H. CONSENT DECREE 4-5 (2020), https://cfrc.illinois.edu/pubs/rp_20200818_FY2020BHRreport.pdf.

A significant number of children live in families who have experienced job loss, food insecurity, and vulnerable housing situations as a result of the pandemic.¹² This is especially true for low-income families and families of color.¹³ Many children have faced an educational divide during a time of remote learning, with limited access to the internet and educational guidance.¹⁴ Because elderly people and people of color are especially vulnerable to COVID-19,¹⁵ many children may have lost connections with grandparents, parents, aunts, and uncles, family members who often are their primary support system.

Families of children already involved in the child welfare system have likely experienced all of these additional stressors and trauma during the pandemic. They are also dependent on a system—already stretched thin—that is not equipped to respond to the impacts of the pandemic on children and their families.

Early in the pandemic, these limitations and fear of the virus left agencies overwhelmed and unable to provide in-person contact between children and their parents, or the full range of resources needed by children and families.¹⁶ As the pandemic stretched on, agencies and courts continued to face challenges.¹⁷ This is particularly concerning because in-person family time and services such as therapy, drug treatment, and parenting coaching are the main ways that reasonable efforts requirements are satisfied.¹⁸ Without adequate reasonable efforts, the chief mechanism by which families are preserved or reunited, children and their families are likely to remain separated. If these efforts cannot

¹² See KIM PARKER ET AL., PEW RSCH. CTR., ECONOMIC FALLOUT FROM COVID-19 CONTINUES TO HIT LOWER-INCOME AMERICANS THE HARDEST 4 (2020), [https://www.feedingamerica.org/sites/default/files/2020-10/Brief_Local%20Impact_10.2020_0.pdf](https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/#:~:text=Fully%2015%25%20of%20adults%20report,they%20are%20currently%20not%20employ ed; see also FEEDING AMERICA, THE IMPACT OF THE CORONAVIRUS ON FOOD INSECURITY IN 2020, at 1, 3, 7 (2020), <a href=).

¹³ See PARKER ET AL., *supra* note 12; FEEDING AMERICA, *supra* note 12.

¹⁴ See Morgan Polikoff et al., *Not All Kids Have Computers – and They’re Being Left Behind with Schools Closed by the Coronavirus*, USC DORNSIFE (May 8, 2020), <https://dornsife.usc.edu/news/stories/3213/not-all-kids-have-computers-and-theyre-being-left-behind-with-sc/>.

¹⁵ See Jeremy A.W. Gold et al., Ctrs. for Disease Control & Prevention, *Race, Ethnicity, and Age Trends in Persons Who Died from COVID-19—United States, May–August 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1517, 1517 (2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html](https://www.cdc.gov/mmwr/volumes/69/wr/mm6942e1.htm#:~:text=Analysis%20of%20114%2C411%20COVID%2D19,%25%20were%20non%2DHispanic%20Black; see also Older Adults, CTRS. FOR DISEASE CONTROL & PREVENTION, <a href=) (last updated Mar. 17, 2021).

¹⁶ See JERRY MILNER, CHILD. ’S BUREAU, DEAR COLLEAGUES LETTER 1 (Dec. 4, 2020) [hereinafter MILNER, DEAR COLLEAGUES LETTER], <https://www.familyfirstact.org/sites/default/files/Letter%20to%20the%20Field%20-%20Ensuring%20the%20Continuation%20of%20Critical%20Court%20Hearings.pdf>.

¹⁷ See JERRY MILNER, CHILD. ’S BUREAU, DEAR CHILD WELFARE LEGAL AND JUDICIAL LEADERS LETTER 2 (Mar. 27, 2020) [hereinafter MILNER, DEAR CHILD WELFARE LEGAL AND JUDICIAL LEADERS LETTER], https://www.acf.hhs.gov/sites/default/files/documents/cb/covid_19_childlegalandjudicial.pdf.

¹⁸ See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 81 (Linda Lange ed., 1987); see also ILL. DEP’T OF CHILD. & FAM. SERVS., PROCEDURES 315 PERMANENCY PLANNING § 315.200(a) (2016), https://www2.illinois.gov/dcf/aboutus/notices/Documents/Procedures_315.pdf.

be provided effectively, how will family preservation or reunification have a hope of being accomplished, and how will permanency for children be ensured?

II. REASONABLE EFFORTS CHALLENGES IN A PANDEMIC

The U.S. Department of Health and Human Services recognized the importance of reasonable efforts and the potential that they would not be made because of pandemic-related challenges confronting courts and agencies.¹⁹ The agency's Children's Bureau issued a series of letters to child welfare administrators and legal and judicial leaders stressing the importance of "case-by-case decisions in accordance with the facts of each individual matter."²⁰ Jerry Milner, the Associate Commissioner of the Children's Bureau, noted that the Children's Bureau could not waive federal requirements regarding decision making and timelines, "but expects that courts and states will work together to determine how best to balance child-safety related statutory requirements against public-health mandates."²¹ While the federal government made the continued need for reasonable efforts clear, states have struggled to meet the reasonable efforts requirement and have taken actions that undermine reasonable efforts, or failed to take action at all.

A. Restrictions on Visits

Despite guidance from the Children's Bureau, many states suspended visits between parents and their children in foster care and between siblings separated from one another while in care.²² The Illinois Department of Children and Family Services (DCFS) issued a blanket ban for supervised in-person visits on March 19, 2020.²³ A later action transmittal lifted the blanket ban, with plans for in-person visits to occur every other week by June 26 and a return to weekly in-person visits by July 15.²⁴ The action transmittal also required a return to bi-monthly sibling visits by the same date.²⁵ As concern rose about a

¹⁹ MILNER, DEAR CHILD WELFARE LEGAL AND JUDICIAL LEADERS LETTER, *supra* note 17.

²⁰ *Id.* at 2. See also JERRY MILNER, CHILD.'S BUREAU, DEAR CHILD WELFARE LEADERS LETTER 1 (Mar. 18, 2020) https://imprintnews.org/wp-content/uploads/2020/03/Dear-Child-Welfare-Letter_March-18-2020_with-signature.pdf; JERRY MILNER, CHILD.'S BUREAU, DEAR CHILD WELFARE LEADERS LETTER 1 (Apr. 17, 2020), https://www.acf.hhs.gov/sites/default/files/cb/letter_on_federal_funds.pdf (on file with author); JERRY MILNER, CHILD.'S BUREAU, DEAR STATE AND TRIBAL CHILD WELFARE LEADERS LETTER 1 (Apr. 27, 2020), <https://www.acf.hhs.gov/media/9258>; ERIC HARGAN, DEP'T OF HEALTH & HUM. SERVS., DEAR GOVERNORS LETTER 1 (Apr. 17, 2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/letter_to_state_governors.pdf.

²¹ MILNER, DEAR CHILD WELFARE LEGAL AND JUDICIAL LEADERS LETTER, *supra* note 17, at 1.

²² Tara Carone, States' Child Welfare COVID-19 Response (May 15, 2020) (unpublished fifty-state survey, Loyola University Chicago School of Law Civitas ChildLaw Center) (on file with author).

²³ ILL. DEP'T OF CHILD. & FAM. SERVS., ACTION TRANSMITTAL 2020.02: PARENT – CHILD AND SIBLING VISITATION 1 (2020), https://illinoiscasa.org/file_download/inline/33eb621b-2603-41fc-8877-b8efce2af54e. This was replaced on March 25, 2020 by DCFS ACTION TRANSMITTAL 2020.02 UPDATED (2020) (on file with author).

²⁴ ILL. DEP'T OF CHILD. & FAM. SERVS., ACTION TRANSMITTAL 2020.07, at 3, 5 (2020), https://www2.illinois.gov/dcf/DCFS/Documents/coronavirus/AT_2020.07_Visitation_%28final%29.pdf.

²⁵ *Id.* at 3.

surge in COVID-19 cases in the fall of 2020 and the state prepared to move into a more restrictive phase again, DCFS gave agencies discretion over visiting arrangements—whether in-person, blended, or virtual—so long as the decisions were made on a case-by-case basis,²⁶ and in-person visits occurred at least every other week for children whose case plan included a reunification goal.²⁷

Reasons for stringent restrictions on visits included concern about the health of the caseworkers responsible for facilitating visits, foster parents' concerns about being exposed to the virus, and concern that the children were also vulnerable.²⁸ In addition, the child welfare workforce has shrunk as a result of increased stress, illness, and family obligations.²⁹

Despite these legitimate concerns, the blanket ban policy disrupted the contact of children with parents and siblings, hurting their ability to maintain these relationships.³⁰ Concerned about this impact, the Cook County Office of the Public Defender unsuccessfully sought declaratory and injunctive relief in the Chancery Division of the Circuit Court of Cook County.³¹ The plaintiff parents asked the Chancery Court to enforce pre-existing orders from the Juvenile Court that provided for in-person supervised visits with their children.³² The complaint asserted that DCFS' blanket ban violated the plaintiff parents' rights under the pre-existing court orders, and sought an injunction to prevent enforcement of the action transmittal.³³ The plaintiffs claimed that the lack of contact was harming their children emotionally and physically, and causing the parents emotional distress and suffering.³⁴ The plaintiffs alleged that they had no adequate remedy other than the Chancery Court hearing because they all had filed emergency motions to restore visits in the Juvenile Court, but those hearings were delayed until a future date when the courts

²⁶ ILL. DEP'T OF CHILD. & FAM. SERVS., ACTION TRANSMITTAL 2020.11 UPDATED 4 (2020), https://www2.illinois.gov/dcf/aboutus/notices/Documents/AT_2020.11_UPDATED_-_Guidance_to_DCFS_AND_POS_staff_due_to_Spike_in_positive_COVID_cases_%2812-16-2020%29.pdf.

²⁷ *Id.* at 5.

²⁸ *See id.* at 1.

²⁹ *See* J. Jay Miller et al., *Child Welfare Workers and Peritraumatic Distress: The Impact of COVID-19*, 119 CHILD. & YOUTH SERVS. REV. 105508, 105512 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7516472/pdf/main.pdf>; *see also* ILL. DEP'T OF CHILD. & FAM. SERVS., ACTION TRANSMITTAL 2020.14: CHILD WELFARE STAFFING NEEDS DURING COVID-19 CRISIS 1 (2020), https://www2.illinois.gov/dcf/aboutus/notices/Documents/AT_2020.14_-_Child_Welfare_Staffing_Needs_During_COVID-19_Crisis_to_extend_AT_2020.06.pdf.

³⁰ *See, e.g.*, Jacqueline Singer & David Brodzinsky, *Virtual Parent-Child Visitation in Support of Family Reunification in the Time of COVID-19*, 2 DEV. CHILD WELFARE 153, 167 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/2516103220960154>.

³¹ *Buxton v. Ill. Dep't of Child. & Fam. Servs.*, No. 20 CH 4100, at 1 (Ill. Cir. Ct. May 18, 2020).

³² *Id.*

³³ *Id.* Illinois DCFS was not the only child welfare agency facing legal battles over in-person visitation bans. *See also* Complaint, *Child 1 v. Charles Baker*, No. 2020-1108 (Mass. Super. Ct. June 23, 2020) (bringing suit on behalf of families against the Massachusetts Department of Children and Families, alleging constitutional and statutory violations when the Department suspended most in-person visits between children and their parents).

³⁴ *Buxton v. Ill. Dep't of Child. & Fam. Servs.*, No. 20 CH 4100 (Ill. Cir. Ct.) (Compl., May 6, 2020)

would reopen for general business.³⁵ The Chancery Court rule that because the plaintiff parents were named parties in open pending abuse and/or neglect cases in Juvenile Court and that court continued to address the issues raised in the complaint, the Juvenile Court was the appropriate forum for the plaintiffs' grievances.³⁶

B. Unavailable or Inadequate Services

In addition to disruptions in visits, little attention was paid to the availability or adequacy of services for parents. While their children are in foster care, parents should receive high-quality, family-centered, trauma-informed services to help them strengthen their parenting skills, nurture their relationships with their children, and overcome issues that may have affected their parenting, such as trauma, psychological challenges, or substance abuse.³⁷ Depending on the needs of the child and family, in Illinois these services may include “case management; homemakers; counseling; parent education; day care; emergency assistance and advocacy assessments; respite care; in-home health care; transportation to obtain any of the above services; and medical assistance.”³⁸

Delivering and receiving these kinds of services virtually can be difficult and less effective for both providers and parents. Not all providers have the ability to provide their services online or have successfully transitioned to offering online services. Some providers do not have the technology and resources, such as internet bandwidth or capable devices, necessary to provide these services.³⁹ Further, the specific type of service may not be conducive to a virtual delivery. Many services require in-person contact; for example, homemaker services can include emergency caretakers, housecleaners, or someone to help with difficult in-home chores, and counseling can include infant stimulation therapy or hands-on parenting training.⁴⁰ In addition, parents may lack access to the internet or specific software, either because they cannot afford it or because the region in which they live has limited internet access. Though DCFS made 200 Google Chrome books available to parents in their offices across the state and expanded internet hotspots in low-served areas, this was insufficient to address the need.⁴¹ In Chicago, one in five families lack

³⁵ *Id.* at 8.

³⁶ *Buxton*, No. 20 CH 4100, at 3.

³⁷ ADMIN. FOR CHILD. & FAMS., CHILD.'S BUREAU, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH, NO. ACYF-CB-IM-21-01, at 4, 13 (2021).

³⁸ 325 ILL. COMP. STAT. ANN. 5/8.2 (West, Westlaw through P.A. 101-653); *see also* 20 ILL. COMP. STAT. ANN. 505/5(i) (West, Westlaw through P.A. 101-653).

³⁹ *See* Zara Greenbaum, *How Well Is Telepsychology Working?*, AM. PSYCH. ASS'N (July 1, 2020), <https://www.apa.org/monitor/2020/07/cover-telepsychology> (discussing how psychologists, psychiatrists, social workers, and others have attempted to continue their services virtually through the pandemic and how the greatest challenge has been rapidly rolling out remote care, which “exposed the field’s lack of readiness to broadly transition to the new modality”).

⁴⁰ 325 ILL. COMP. STAT. ANN. 5/8.2.

⁴¹ Response to Letter from Child and Family Working Group to Marc Smith, Acting Dir., Ill. Dep’t of Child. & Fam. Servs. and J.B. Pritzker, Governor, Ill. (July 29, 2020) (on file with author); ILL. DEP’T CHILD. & FAM. SERVS., PURCHASE OF SERVICE AGENCIES: FREQUENTLY ASKED QUESTIONS | COVID-19, at 3 (2020), <https://www2.illinois.gov/dcf/ Documents/coronavirus/DCFS%20->

access to broadband internet, and the families facing these connectivity problems are predominantly Black or Latinx.⁴² This is especially concerning given the demographics of families involved in the child welfare system in Illinois—disproportionately poor and of color.

C. The Impact on System-Involved Children and Families

The impact of the state responses on children, including limited services and restricted visits, has been profound. Therapeutic and substance abuse treatment counseling, parenting classes, and other services often are required before decisions about permanency can be made for a child.⁴³ Prolonged or indefinite delays in the delivery of services may lead to longer stays in foster care. Researchers have long recognized the strong correlation between regular parental visits and contact with the child and the child's ability to return home or be freed for adoption.⁴⁴ Progress in counseling, services, and ongoing contact between parents and their children helps workers assess family strengths and needs, builds attachments between parent and child, and documents family progress.⁴⁵ These types of reasonable efforts can help prepare families for reunification, or build a case for termination of parental rights.⁴⁶ Without visits—and other supports—it is difficult to accomplish reunification or move towards adoption, especially within the time frames established by federal law.⁴⁷ Further, with services increasingly delivered remotely, if at all, consistent quality in-person visits become even more vital to maintaining familial bonds, and for parents to demonstrate that they are gaining the skills and knowledge expected of them in their service plan. Limited parent-child contact and inaccessible or inadequate critical services has the potential to permanently harm the relationship between children and their parents, causing irreparable injury to parents' constitutionally-protected right to a relationship with their children.⁴⁸ Making matters worse, many juvenile courts across the country only held hearings to decide if a child should be removed from a parent,

[%20Message%20to%20POS%20-%20COVID-19%20Frequently%20Asked%20Questions%204-20-20%20new%20Qs%20only.pdf#search=chromebooks.](#)

⁴² See KIDS FIRST CHI. & METRO. PLAN. COUNCIL, DIGITAL EQUITY IN EDUCATION IN THE CORONAVIRUS ERA 4 (2020), <https://static1.squarespace.com/static/5b212dce5417fcd9ddec5349/t/5ea198c8f3110c4651d9db54/1587648715787/2-2020-Internet+Connectivity-FINAL.pdf>.

⁴³ ILL. DEP'T OF CHILD. & FAM. SERVS., PROCEDURES 315 PERMANENCY PLANNING, §§ 315.295-315.200 (2016), https://www2.illinois.gov/dcf/aboutus/notices/Documents/Procedures_315.pdf.

⁴⁴ See, e.g., Ner Littner, *The Importance of the Natural Parents to the Child in Placement*, 54 CHILD WELFARE 175, 181 (1975); DAVID FANSHIEL & EUGENE SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 93 (1978); Peg Hess, *Parent-Child Attachment Concept: Crucial for Permanency Planning*, 63 SOC. CASEWORK: J. CONTEMP. SOC. WORK 46, 47 (1982); Wendy L. Haight et al., *Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research*, 48 SOC. WORK 195, 195 (2003). See generally ESTABLISHING PARENT INVOLVEMENT IN FOSTER CARE AGENCIES (Karen Blumenthal & Anita Weinberg eds., 1984).

⁴⁵ ADMIN. FOR CHILD. & FAMS., *supra* note 37, at 13.

⁴⁶ See *id.* at 2-3.

⁴⁷ See 42 U.S.C. § 675(5)(E) (2018).

⁴⁸ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

not hearings related to visiting or permanency, making it impossible for parents to challenge agency decisions during the pandemic.⁴⁹

While data are not yet available, one can only conclude that insufficient reasonable efforts during the pandemic have disproportionately impacted children and families of color involved in the child welfare system. Before the pandemic, families of color were disproportionately represented in the child welfare system⁵⁰ and disproportionately had their children removed and parental rights terminated.⁵¹ During the pandemic, families of color have been disproportionately impacted medically and financially by COVID-19⁵² and more likely to have lower quality internet access, making it more difficult to access virtual child welfare services.⁵³ These inequities will continue to grow unless special attention is paid to the reasonable efforts that need to be made by the agencies serving these children and families.⁵⁴

III. WHAT DO REASONABLE EFFORTS REQUIRE DURING A PANDEMIC?

Because “reasonable efforts” is a nebulous concept not defined by federal law, it is difficult to determine with precision what is required of agencies even outside of a pandemic. A group of Illinois advocates, however, produced recommendations that

⁴⁹ There appears to be little consistency in how courts across the country, let alone individual jurisdictions, made decisions about whether or not to conduct hearings during the pandemic. Almost all courts held hearings to decide if a child should be removed from a parent due to abuse or neglect because they are considered emergency hearings; far fewer conducted hearings related to visiting, permanency, or return home decisions. *See, e.g., Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Apr. 5, 2021). For Illinois' response, *see, e.g., Order Regarding Illinois Courts Response to COVID-19 Emergency*, Ill. S. Ct., M.R. 30370 (eff. Mar. 17, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/031720-3.pdf>; *Order Regarding Illinois Courts Response to COVID-19 Emergency*, Ill. S. Ct., M.R. 30370 (eff. May 20, 2020), <https://courts.illinois.gov/SUPREMECOURT/Announce/2020/052020.pdf>; ILL. SUP. CT., SUPREME COURT GUIDELINES FOR RESUMING ILLINOIS JUDICIAL BRANCH OPERATIONS DURING THE COVID-19 PANDEMIC 1-2 (2020), https://courts.illinois.gov/Administrative/covid/052020_SC_GL.pdf. For Cook County, Illinois' response, *see, e.g., Order Regarding COVID-19 Emergency Measures*, Cook Cnty. Cir. Ct. G.A.O. No. 2020-01 (eff. Mar. 17, 2020), <http://www.cookcountycourt.org/Portals/0/Chief%20Judge/General%20Administrative%20Orders/GAO%202020-01.pdf?ver=2020-03-16-163631-480>, amended Mar. 16, 2020 and May 1, 2020; *Order Regarding COVID-19 Emergency Measures, Resumption of Operations*, Cook Cnty. Cir. Ct. G.A.O. No. 2020-02 (eff. July 6, 2020), http://www.cookcountycourt.org/Portals/0/Chief%20Judge/General%20Administrative%20Orders/6_26_20%20GAO%202020-02.pdf?ver=2020-06-26-130353-700.

⁵⁰ Cénat et al., *supra* note 10.

⁵¹ Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*, 25 CHILD MALTREATMENT 32, 33 (2020).

⁵² HARDY & LOGAN, *supra* note 7; *The Color of Coronavirus*, *supra* note 8; *The COVID Racial Data Tracker*, *supra* note 9.

⁵³ *See, e.g., KIDS FIRST CHI. & METRO. PLAN. COUNCIL*, *supra* note 42.

⁵⁴ While federal law allows exceptions to the requirement that states file a petition to terminate parental rights if a child has been in care for fifteen of the last twenty-two months if there is a compelling reason not to pursue termination of parent rights, it is not yet known how states and the courts will apply the limited “reasonable efforts” made and challenges to parents and children when interpreting these exceptions. 42 U.S.C. § 675(5)(E).

provide a good starting point for agencies and courts hoping to ensure adequate reasonable efforts are made. Early in the COVID-19 crisis, the group, which included advocates for children, youth, parents, and private child welfare agencies, was convened out of a shared concern for the impacts of the pandemic and DCFS decision-making on families in the child welfare system.⁵⁵ The group developed a list of actions it urged DCFS to take to ensure that the children and youth in their care, as well as their parents, have the resources and supports needed to maintain contact and work toward the appropriate permanency goals.⁵⁶ While not framed as a focus on reasonable efforts, some of the recommendations to DCFS speak directly to this issue and are highlighted below.

- Changes from pre-pandemic visiting arrangements should be based on the individualized needs and circumstances of each child and family.
- The circumstances of each individual child and family—including the safety and stability of the child’s placement—should be regularly assessed to address any health and safety concerns associated with the COVID-19 crisis, with plans developed immediately with the family to address them.
- Children and youth, in an age-appropriate manner, and their parents should be included in individualized decision-making regarding planning for visits and in reviewing how they are proceeding. Focus should include possible individuals who could supervise visits.⁵⁷
- Determinations on whether a family can use technology effectively when in-person contact is impossible must be made on a case-by-case basis.
- Families must have access to effective services identified in their service plans so the issues that brought the family to DCFS’ attention can be resolved.
- Caseworkers must be able to use technology effectively in order to interact with children and families.

⁵⁵ This effort was spearheaded by the *Civitas* ChildLaw Center at Loyola University Chicago School of Law. Among the organizations included were ones with experience working statewide and that represent children and youth in care, as well as groups that represent youth who have aged out of foster care. The working group began meeting in April 2020 and continues to meet. Conversations now also include key legislators and DCFS officials.

⁵⁶ Letter from Child & Fam. Working Grp. to Marc Smith, Acting Dir., Ill. Dep’t of Child. & Fam. Servs. and J.B. Pritzker, Governor, Ill., at 3-5 (July 28, 2020) (on file with author) [hereinafter Letter from Child & Fam. Working Grp.].

⁵⁷ Some states, organizations, and independent therapists have prepared webinars, articles, and guidance on ways to make virtual contact meaningful. See, e.g., *Virtual and In-Person Family Time – Lessons from COVID-19*, WASH. STATE ADMIN. OFF. OF THE CTS. CT. IMPROVEMENT TRAINING ACAD., <https://www.wacita.org/virtual-and-in-person-family-time-lessons-from-covid-19/> (last visited Apr. 5, 2021); Rachel Barr, *Using Media Effectively with Young Children and Virtual Visitation/Part One: Virtual Communication with Young Children*, CTR. FOR CHILD WELFARE (Apr. 7, 2020), <http://centervideo.forest.usf.edu/video/qpi/ylc/mediaeffect/qpistart.html>; Kate Rosenblum, *Supporting Meaningful Connections: Family Time Visits During a Pandemic*, CTR. FOR CHILD WELFARE (May 5, 2020), <http://centervideo.forest.usf.edu/video/qpi/ylc/spprtmeaning/qpistart.html>. See also Child Welfare Info. Gateway, *Tips for Supporting Virtual Family Time*, BULLS. FOR PROS., July 2020, at 3-4, https://www.childwelfare.gov/pubPDFs/bulletins_familytime.pdf.

- The totality of circumstances resulting from the pandemic should be considered when making permanency-related decisions.

This last recommendation states that the impediments that a parent(s) faced as a result of the pandemic must be considered when evaluating a parent's progress in meeting a service plan, recommending a change in a permanency goal, or deciding to file a termination of parental rights petition.⁵⁸ It then identifies the issues that must be considered: whether the parent(s) had a meaningful opportunity to demonstrate that they have made the necessary efforts to reunify with their children, and whether the parent(s) had meaningful access to treatment and services necessary to work toward reunification during the pandemic.⁵⁹ These should include consideration of pandemic-related challenges, such as illness, shelter-in-place requirements, lack of personal protective equipment, lack of suitable locations for family time, barriers to telehealth and other virtual contacts, and lack of transportation.⁶⁰

This has been a challenging time for families—especially Black families, families of color, and families living in poverty because of the disproportionate impacts of the pandemic—and for the agencies serving them. This is especially true for child welfare agencies. The recommendations listed above recognize the problems and obstacles DCFS faces in adequately addressing the needs of children and families with whom they work. The recommendations seek to ensure that children and parents receive effective services—especially if delivered virtually; that their contact with their case workers is meaningful; that decisions are made on an individual basis for each child, considering the strengths and challenges of each family; and that a parent's inability to access resources, effectively respond to inadequate delivery of services, or strengthen a relationship with their child due to limited opportunity for quality contact is not in and of itself used as a basis to move away from reunification and toward terminating parental rights or an alternative permanency goal.

Highlighting the importance of providing reasonable efforts, even during the challenges of the pandemic, Children's Bureau Associate Commissioner, Jerry Milner, and his Special Assistant, David Kelly, wrote that protecting family integrity is not an expendable effort: "The fact is, every day that goes by with restrictions on family time, reduced availability of treatment or other services for parents and delays in reunification efforts is a threat to family integrity."⁶¹

CONCLUSION

The pandemic's impact will be felt for years to come, including in the child welfare realm. The monumental decisions that agencies and courts make during this time, including whether to return a child home or to terminate parental rights, will have lasting effects on

⁵⁸ Letter from Child & Fam. Working Grp., *supra* note 56, at 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Jerry Milner & David Kelly, *Top Federal Officials: Family Is a Compelling Reason*, IMPRINT (Apr. 6, 2020), <https://imprintnews.org/child-welfare-2/family-is-a-compelling-reason/42119>.

children and families. These decisions will be made despite the fact that parents may not have received adequate services, quality contact with their children, or timely hearings in court. Agencies may point to a child's "best interests," or a child's "sense of time," as reasons for proceeding despite the lack of reasonable efforts made. Federal and state laws, however, allow for deliberative decision-making that takes into account individual circumstances.⁶² Before decisions regarding permanency for a child are made, agencies and courts must ensure that critical—and effective—services and supports have been made available to parents and their children. Courts must also ensure that parents have the opportunity to be heard in court and to advocate for contact with their children and for adequate and necessary resources and services. The pandemic does not lessen the agency's responsibility to make reasonable efforts; granted it does make it more difficult.

⁶² *Id.* See also MILNER, DEAR COLLEAGUES LETTER, *supra* note 16.