

**REFORMING NEW JERSEY RESOURCE FAMILY LICENSING:  
PLACING CHILDREN IN THE CARE OF THEIR  
UNDOCUMENTED FAMILY AND FRIENDS**

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### I. INTRODUCTION

The lack of immigration reform has resulted in a large and rising number of mixed legal status families. Family members cannot achieve common immigration or citizenship status despite their long period of residence in the United States, and the equities in favor of granting them common status, including close family ties.<sup>1</sup> Consequently, family unity and the best interests of children face considerable threats and unnecessary harm when immigration enforcement and the child welfare system intersect. Indeed, cases involving both the child welfare system and federal immigration enforcement are “awful legal and human conundrums.”<sup>2</sup>

From 2008 to 2012, an estimated 4.1 million undocumented immigrants in the United States lived with children under the age of eighteen.<sup>3</sup> About 84 percent of this group (or 3.5 million undocumented immigrants) resided with at least one U.S. citizen minor.<sup>4</sup> In New Jersey, for this same period, there were an estimated 123,000 undocumented parents of U.S. citizen children.<sup>5</sup> Minors in the child welfare system are often prevented from reuniting with their detained or deported parents. Detained parents are unable to access programs required by child protection service plans for family reunification. This denial often results in detained parents’ inability

<sup>1</sup> David Thronson & J. Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. AND FAM. CT. J. 1, 2, (2012), available at [https://cip.nebraska.gov/sites/cip.nebraska.gov/files/files/32/b3\\_handout29.pdf](https://cip.nebraska.gov/sites/cip.nebraska.gov/files/files/32/b3_handout29.pdf).

<sup>2</sup> Ryan Stanton, *Undocumented immigrants losing fight to keep children who are U.S. citizens*, THE ANN ARBOR NEWS (Apr. 15, 2012), available at <http://www.annarbor.com/news/undocumented-immigrants-losing-the-fight-to-keep-their-us-citizen-children/> (quoting Judge Donald Shelton, chief judge of the Washtenaw County Circuit Court).

<sup>3</sup> Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Feb. 26, 2015) <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

<sup>4</sup> *Id.*

<sup>5</sup> *Profile of the Unauthorized Population: New Jersey*, MIGRATION POLICY INSTITUTE, available at <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/NJ> (Data from the U.S. Census Bureau’s 2013 American Community Survey).

to regain custody of their child because when a child has been in foster care for fifteen out of twenty-two months, child welfare agencies are required to file a petition to terminate parental rights. Therefore, even after a parent's immigration proceeding concludes and it is in the best interest of the child to return home, the child may be permanently separated from her parent through the parent is fully capable of caring for her.

New Jersey has a large immigrant population and an overcrowded foster care system.<sup>6</sup> Thus, the obvious solution would be to keep children with their families and out of the child welfare system whenever possible, especially given that the New Jersey Division of Child Protection and Permanency's stated mission is to preserve and strengthen family life.<sup>7</sup> However, there are thousands of children currently in foster care who are unjustly separated from their families because of immigration enforcement.<sup>8</sup> In 2011, it was conservatively estimated that at least 5,100 children nationwide were living in foster care because their parents had been detained or deported.<sup>9</sup>

The Division of Child Protection and Permanency (the "Division" or "DCPP," formerly known as the Division of Youth and Family Services) is New Jersey's child protection and welfare agency, operating under the auspices of the Department of Children and Families ("DCF").<sup>10</sup> In the event that the Division must intervene to protect a child who has been abused, neglected, or whose health or safety is in danger, the Division will look for relatives to provide care.<sup>11</sup> If there are no relatives with whom a child may be placed, DCPP may recommend that the court place the

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<sup>6</sup> Nat'l Kids Count Data Ctr, *Children in Immigrant Families*, THE ANNIE E. CASEY FOUND., available at <http://datacenter.kidscount.org/data/tables/115-children-in-immigrant-families?loc=32&loct=2#detailed/2/32/false/869,36,868,867,133/any/445,446> (last visited Mar. 29 2016) (noting 733,000 children under the age of 18 are foreign-born or reside with at least one foreign-born parent.).

<sup>7</sup> See N.J. Div. of Child Protection & Permanency v. L.W., 87 A.3d 279, 284 (N.J. Super. Ct. App. Div. 2014) (emphasizing that the Division's primary mission is to help keep families together); see also N.J. STAT. ANN. § 30:4C-1 (West 2015).

<sup>8</sup> Applied Research Ctr., *Shattered Families: the Perilous Intersection of Immigration Enforcement and the Child Welfare System*, COLORLINES.COM at 5 (Nov. 2011), available at <https://www.raceforward.org/research/reports/shattered-families> (in the first half of 2011, the federal government removed more than 46,000 mothers and fathers of U.S. citizen children).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> N.J. STAT. ANN. § 30:4C-2(a) (2015).

<sup>11</sup> N.J. STAT. ANN. § 30:4C-12.1 (2015); see also DCCP v. K. N. 86 A.3d 158, 166 (N.J. Super. Ct. App. Div. 2014).

child with a resource family.<sup>12</sup> DCPD has discretion to determine whether a particular placement is appropriate for a child through its authority to license resource parents.<sup>13</sup> As a result, the problem may arise that instead of easing the trauma of separation from birth parents and life long guardians, children are embedded in the foster care system with complete strangers.<sup>14</sup>

This Note argues that in the context of mixed legal status families, New Jersey's current child placement policies and laws are inadequate as they do not further the goal of family reunification and are not in the best interests of children.<sup>15</sup> There are several solutions New Jersey can adopt that will allow undocumented immigrants to serve as resource family parents, including amending the Manual of Requirements for Resource Family Parents to prohibit discrimination with regard to licensing on the basis of immigrant legal status, and eliminating the presumption against placement with undocumented immigrants who wish to serve as kinship caregivers. Part II of this Note contrasts the importance of family reunification and placing a child with relatives or other interested persons, with New Jersey's current policies that serve to exclude undocumented immigrants as caregivers. Part III discusses recently proposed federal legislation that would ensure that immigration status alone does not disqualify a parent, legal guardian, or relative from being a placement for a foster child. Part IV explores similar legislation passed by California as well as proposed legislation in New York and Illinois, all highly concentrated immigrant states. Part V concludes by analyzing the reasons why New Jersey should adopt legislation to allow undocumented persons to serve as resource family parents.

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<sup>12</sup> Robert A. Fall & Curtis Romanowski, *NEW JERSEY FAMILY LAW RELATIONSHIPS INVOLVING CHILDREN* 571 (Gann Law Books 2015). A resource family parent is "any person with whom a child in the care, custody, or guardianship of the Department of Children and Families is placed by the department, or with its approval, for care." N.J. STAT. ANN. § 30:4C-26.6 (2015); Resource family parents can provide foster care, contract agency home care, kinship care, and adoptive care. N.J. ADMIN. CODE § 10:122C-1.2(b) (2015). See *infra* for further discussion.

<sup>13</sup> *Id.* See discussion *infra* Part II.B.1.

<sup>14</sup> Applied Research Ctr., *Shattered Families: the Perilous Intersection of Immigration Enforcement and the Child Welfare System*, COLORLINES.COM at 8 (Nov. 2011), available at <https://www.raceforward.org/research/reports/shattered-families>.

<sup>15</sup> Child placement refers to when a child, under the auspices of the Department, is placed in a resource family home because he or she cannot live with his or her own family due to neglect, abuse or other circumstances, or who is placed for the purpose of adoption. See N.J. ADMIN. CODE § 10:122C-1.3(b).

## II. OVERVIEW

A. *Division of Child Protection and Permanency and Resource Family Care*

The Division exercises general supervision over children for whom care, custody, or guardianship is provided, and conducts investigations in termination of custody and adoption matters.<sup>16</sup> The Division also investigates allegations of child abuse and neglect, makes arrangements to ensure that children are safe and protected, and helps families receive necessary treatment and services to prevent harm to their children.<sup>17</sup> If parents are incapable of providing safe, stable, and caring relationships, the Division looks to resource families (which includes foster families) to ensure the best outcomes for children.<sup>18</sup>

Foster parents are temporary caregivers to children in need of a home due to protective or other social service issues.<sup>19</sup> The Adoption and Safe Families Act ("ASFA") is a federal law that focuses on family reunification and children's need for permanency by limiting the time children can stay in foster care.<sup>20</sup> New Jersey law, which conforms to the provisions of ASFA, provides that if a child has been in foster care for fifteen out of twenty-two months, the Division is required to seek a termination of parental rights.<sup>21</sup> A resource family parent is given preference and first consideration as an adoption placement.<sup>22</sup> Adoption can take place only after parental rights are terminated.<sup>23</sup>

Kinship care refers to when "the resource family parent is not a parent of the child in placement but is related to the child through blood, marriage, civil union, domestic partnership, or adoption or is connected to the child or the child's parent by an established positive psychological or emotional relationship."<sup>24</sup> In the 1980s, both the crack/cocaine epidemic and the outbreak of the HIV/AIDS

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<sup>16</sup> N.J. STAT. ANN. § 30:4C-1.

<sup>17</sup> N.J. STAT. ANN. §§ 30:4C-1.1(c),(d).

<sup>18</sup> N.J. STAT. ANN. §§ 30:4C-1.1(e),(f).

<sup>19</sup> N.J. ADMIN. CODE § 10:122C-1.2(b)(1).

<sup>20</sup> Adoption and Safe Families Act of 1997, H.R. 867, 105 Pub. L. No. 89, § 103(a)(3)(E), 111 Stat. 2115, 2118 (1997).

<sup>21</sup> N.J. STAT. ANN. 30:4C-60 (2015); *see also* D.Y.F.S. v. N.J. 990 A.2d 712, 714 (N.J. Super. Ct. App. Div. 2010) (noting that "there is no long-term foster care in New Jersey").

<sup>22</sup> N.J. STAT. ANN. § 30:4C-26.7.

<sup>23</sup> N.J. STAT. ANN. § 30:4C-15(f).

<sup>24</sup> N.J. ADMIN. CODE § 10:122C-1.2(b)(3).

virus brought an increase in kinship care.<sup>25</sup> Grandparents make up the overwhelming majority of kinship caregivers.<sup>26</sup> Research attributes the increase in children living with grandparents since the 1970s to high rates of divorce and teen pregnancy, as well as increases in drug usage and incarceration.<sup>27</sup> In July 2014, DCF adopted a new out-of-home placement policy regarding placement of children with kinship caretakers who are undocumented immigrants.<sup>28</sup> This policy provides that in order for undocumented immigrants to serve as kinship caretakers, they must obtain a waiver of the home study provision that requires proof of legal residency from the Office of Licensing and an Individual Taxpayer Identification Number from the Internal Revenue Service. In addition, they must overcome a presumption against placement with compelling justification that permitting such placement is clearly in the child's best interest.<sup>29</sup> This policy is deficient and unreasonably burdensome, as it does not serve the best interests of children who are removed from the care of their parents.<sup>30</sup>

New Jersey's child protection laws have been influenced significantly by federal legislation. Federal policy supports child placement with relatives by requiring child welfare departments to make diligent efforts to reunite families. In 1962, Congress amended Title IV-E of the Social Security Act to provide that welfare payments may be given to relatives to avoid separating families where it is possible and desirable to prevent the removal of children.<sup>31</sup> The Personal Responsibility and Work Reconciliation Act of 1996 gave preference to relatives over non-relative caregivers when determining placement for a child.<sup>32</sup> The United States

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<sup>25</sup> Njeri Brown, *Grandmother's Rights: Why New Jersey's Grandmothers are not Taking Advantage of the State's Kinship Care Law*, 8 RUTGERS RACE & L. REV. 107, 108 (2006).

<sup>26</sup> *Id.* See also *In re Adoption of Child by Nathan S.*, 934 A.2d 64, 69 (N.J. Super. Ct. Ch. Div. 2006) ("New Jersey created kinship legal guardianship in part to afford legal rights and protections to grandparents who raise their grandchildren without either parent [and] to create stability for grandparents and grandchildren when adoption is not feasible.").

<sup>27</sup> Renee Ellis & Tavia Simmons, *Coresident Grandparents and Their Grandchildren: 2012*, U.S. CENSUS BUREAU (October 2014) available at <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf>.

<sup>28</sup> N.J. Dep't of Children & Families Policy Manual, *Placement of Children with Kinship Caretakers Who Are Undocumented Immigrants*, CP&P-IV-A-11-200, (effective July 21, 2014) available at [http://www.nj.gov/dcf/policy\\_manuals/CP&P-IV-A-11-200\\_issuance.shtml](http://www.nj.gov/dcf/policy_manuals/CP&P-IV-A-11-200_issuance.shtml).

<sup>29</sup> *Id.*

<sup>30</sup> See discussion *infra* Part II.B.4.

<sup>31</sup> 42 U.S.C.S. § 601 (2014).

<sup>32</sup> Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-

Supreme Court affirmed that the federal Immigration and Naturalization Act “establishes that congressional concern was directed at the problem of keeping families of United States citizens and immigrants united.”<sup>33</sup> Notwithstanding these federal policies, states are given broad discretion and limited guidance on to how to approach kinship care.<sup>34</sup> The state has to balance its *parens patriae* responsibility against the rights of parents.<sup>35</sup> New Jersey’s *parens patriae* obligation extends to all children residing in the state, “undiluted by the fact that they or their parents may be non-citizens.”<sup>36</sup>

The New Jersey Legislature has long recognized that it is in a child’s best interest to be placed with a relative or interested person who is willing and able to provide care and support for the child.<sup>37</sup> When DCF accepts a child into its care or custody, the Department has an obligation to search for and assess relatives who may be willing and able to provide care and support for the child.<sup>38</sup> The Department is required to discharge this obligation as part of federal funding requirements even if the child’s parents object.<sup>39</sup> The Legislature also intended that courts have authority to place a child with an appropriate relative, independent of any licensing decision made by the Department.<sup>40</sup> A trial judge may reject the Division’s placement decisions and independently determine whether a child’s best interests are served by a particular placement.<sup>41</sup> The best interest inquiry turns on whether the placement satisfies the state’s

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193, 333, 110 Stat. 2105 (1996).

<sup>33</sup> *Fiallo v. Bell*, 430 U.S. 787, 795 (1977) (citing H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957)).

<sup>34</sup> Rob Geen, *Permanency Planning with Kinship Foster Parents in KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE* 153, 155 (The Urban Inst. Press, 2003).

<sup>35</sup> *Segal v. Lynch*, 993 A.2d 1229, 1233 (N.J. Super. Ct. App. Div. 2010) (defining the doctrine of *parens patriae* as authority of the court to intervene when necessary to prevent harm to the child).

<sup>36</sup> *D.F.Y.S. v. M.Y.J.P.*, 823 A.2d 817, 833 (N.J. Super. Ct. App.Div. 2003) *cert. denied*, 832 A.2d 325 (N.J. 2003), *cert. denied*, 540 U.S. 1162 (2004).

<sup>37</sup> See, e.g., Michael Wald, *State Intervention on Behalf of ‘Neglected’ Children: Standard for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1967); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. Sup. Ct. 1986).

<sup>38</sup> N.J. STAT. ANN. § 30:4C-12.1 (2015).

<sup>39</sup> See Fall & Romanowski, *supra* note 12 at 573.

<sup>40</sup> *N.J. Div. of Child Protection and Permanency v. K.N.*, 86 A.3d 158, 158 (N.J. Super. Ct. App. Div. 2014).

<sup>41</sup> See *In re C.R.*, 835 A.2d 340, 347 (N.J. Super. Ct. App. Div. 2003); *In re E.M.B.*, 791 A.2d 256, 267-68 (N.J. Super. Ct. App. Div. 2002) (discussing the trial court’s inherent ability to review placement decisions by DCPD).

legislative goals and objectives by “providing a stable, safe and healthy environment for the child considering all circumstances surrounding the placement.”<sup>42</sup>

### *B. New Jersey Regulatory Background*

Licensing requirements for resource family parents are the same regardless of the type of care (i.e., foster or kinship) or relation to the child.<sup>43</sup> Consequently, all relatives or friends caring for children under the Division’s supervision are required to comply with the requirements and obligations of licensed resource parents.<sup>44</sup> Nevertheless, the Division may approve an unlicensed kinship caregiver for placement while a license is sought.<sup>45</sup>

Within DCF, the Office of Licensing is the governing regulatory body for licensing, and is also responsible for overseeing resource family homes.<sup>46</sup> The New Jersey Administrative Code (“Code”) outlines the resource family licensing procedures. At the outset, an applicant who submits a licensing application must be eighteen years of age and a resident of the State of New Jersey.<sup>47</sup> However, “residency” is not defined within the Code itself. The term has been defined differently in various New Jersey statutes.<sup>48</sup> It is not clear whether an undocumented person can be considered a resident of New Jersey for the purposes of resource family parent licensing.

#### *i. Application for a License*

The resource family parent application process is rigorous and comprehensive, in order to guarantee that caregivers are qualified and their homes are safe. The licensing process usually takes up to five months.<sup>49</sup> An applicant for a resource family parent license

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<sup>42</sup> State in Interest of L.L., 625 A.2d 559 (N.J. Super. Ct. App. Div. 1993) (referring to the Child Placement Review Act).

<sup>43</sup> N.J. STAT. ANN. § 30:4C-27.6.

<sup>44</sup> *Id.* See also D.Y.F.S. v. L.M., 65 A.3d 265, 274-75 (N.J. Super. Ct. App. Div. 2013) (concluding that the Division was not required to place a child with a third party who was identified by the parent but did not complete training).

<sup>45</sup> N.J. ADMIN. CODE § 10:122C-2.1(e).

<sup>46</sup> *Id.*

<sup>47</sup> N.J. ADMIN. CODE § 10:122C-2.1(b).

<sup>48</sup> N.J. ADMIN. CODE § 9A:5-1.1(b) (for higher education purposes, a resident is a person who has been domiciled within the state for a period of twelve months prior to enrollment); N.J. STAT. ANN. § 52:14-7(a)(4) (the residency requirement for state officers and employees defines a person’s principal residence as the state where a person spends the majority of their non-working time).

<sup>49</sup> N.J. Dep’t of Children & Families, *Foster and Adoption Services Licensing Information*, NJ.GOV, <http://www.nj.gov/njfofadopt/services/licensing/> (last visited

must complete an application listing references and, along with each adult member of the applicant's household, consent to a child abuse record information check and a criminal history background check.<sup>50</sup> Additionally, a resource family parent applicant is required to participate in pre-service and in-service training.<sup>51</sup> Furthermore, the licensing process involves a home study, which includes an inspection of the resource family home, an interview with the resource family parent, and other household members.<sup>52</sup>

Resource families contract with the Division to provide a child in placement with "a stable, safe, home-life, guided and cared for by accepting, nurturing adults . . ."<sup>53</sup> As far as health and safety of the home is concerned, a child is at no greater risk when she is placed with an undocumented immigrant who is willing and able to care for her and meets the resource family licensing requirements than when that child is placed with a documented person.

#### ii. Nondiscrimination Provision

The Manual of Requirements for Resource Family Parents includes a nondiscrimination provision concerning the licensing application.<sup>54</sup> DCF cannot discriminate based on the basis of race; color; ethnicity; national origin; disability; gender; religion; affectional or sexual orientation; gender identity or expression; parental status; birth status; or marital, civil union, or domestic partnership status.<sup>55</sup> Nondiscrimination based on civil union or domestic partnership status was added in 2009. This provision illustrates that the state seeks out the appropriate caregiver that is in the best interests of a child, regardless of the caregiver's personal characteristics.<sup>56</sup>

However, this provision needs to be amended to reference immigrant legal status so that relatives and other interested parties who are willing and able to provide a safe placement for a child can do so, regardless of their legal status.

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Mar. 21, 2015).

<sup>50</sup> N.J. STAT. ANN. §§ 30:4C-27.6-27.8.

<sup>51</sup> N.J. STAT. ANN. § 30:4C-27.6(f).

<sup>52</sup> N.J. ADMIN. CODE § 10:122C-2.1(d).

<sup>53</sup> D.Y.F.S. v. D.P., 29 A.3d 1116, 1122 (N.J. Super. Ct. App. Div. 2011).

<sup>54</sup> N.J. ADMIN. CODE § 10:122C-1.6.

<sup>55</sup> *Id.*

<sup>56</sup> *E.g.* Matter of Adoption of A Child by J.M.G., 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993) (determining a lesbian partner was entitled to adopt her partner's child); *see also* *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 536-537 (N.J. Super. Ct. App. Div. 1995).

## iii. Waivers

To receive an initial license, the resource family parent applicant must be in full compliance with “level I” requirements and full or substantial compliance with “level II” requirements.<sup>57</sup> Level I requirements deal with capacity limitations on the number of children residing in the home and requirements pertaining to the safety, health, and rights of children in placement.<sup>58</sup> Level II requirements refer to all other requirements not related to safety, health, and rights of children in placement.<sup>59</sup>

At the discretion of the Office of Licensing, the office may grant a waiver of a level II requirement for a kinship care applicant on a case-by-case basis.<sup>60</sup> Considerations for a waiver include the type or degree of hardship that would result to the applicant, the potential negative impact on the child if the waiver were not granted, and whether the waiver would adversely affect the health, safety, well-being or rights of any child residing in the resource family home.<sup>61</sup>

In 2008, Congress passed “Fostering Connections,” a law that increased federal funding for subsidized family guardianship in order to encourage child welfare departments to more fully include extended family members in the dependency process.<sup>62</sup> Federal regulations do not prohibit states from assessing kin differently from non-kin. Waiving certain licensing standards or providing different assessment options for kin gives states the flexibility to accommodate kin who are willing and capable of caring for children, yet unable to meet all of the resource family licensing requirements.<sup>63</sup> In New Jersey, resource family applications by relatives tend to encounter more challenges and delays than non-relative applications.<sup>64</sup> Despite implementing a team to monitor kinship applications, kinship applications still take more time to

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<sup>57</sup> N.J. ADMIN. CODE § 10:122C-1.5(a).

<sup>58</sup> N.J. ADMIN. CODE §§ 10:122C-1.4; 10:122C-1.3(b).

<sup>59</sup> N.J. ADMIN. CODE § 10:122C-1.3(b).

<sup>60</sup> N.J. ADMIN. CODE § 10:122C-2.2(b).

<sup>61</sup> *Id.*

<sup>62</sup> Applied Research Ctr., *Shattered Families: the Perilous Intersection of Immigration Enforcement and the Child Welfare System*, COLORLINES.COM (Nov. 2011), <https://www.raceforward.org/research/reports/shattered-families>.

<sup>63</sup> Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 THE FUTURE OF CHILDREN: CHILDREN, FAMILIES AND FOSTER CARE, 131, 138 (2004), [http://futureofchildren.org/futureofchildren/publications/docs/14\\_01\\_07.pdf](http://futureofchildren.org/futureofchildren/publications/docs/14_01_07.pdf).

<sup>64</sup> *Progress of New Jersey Department of Children and Families*, CTR. FOR THE STUDY OF SOC. POLICY, 1, 89 (July 17, 2014), [http://www.cssp.org/publications/child-welfare/class-action-reform/2014/Charlie-and-Nadine-H.-v.-Christie-Monitoring-Report-XIV\\_July-17-2014.pdf](http://www.cssp.org/publications/child-welfare/class-action-reform/2014/Charlie-and-Nadine-H.-v.-Christie-Monitoring-Report-XIV_July-17-2014.pdf).

resolve than non-kinship applications.<sup>65</sup> This situation should be remedied since it is in the best interests of children to be placed with relatives or others they are familiar with over strangers.<sup>66</sup> Therefore, the Division should be more lenient in granting waivers for undocumented immigrant caregivers.

iv. DCF Policy Manual on Placement with Undocumented Immigrants

Despite the large growth in New Jersey's immigrant population, it was not until 2014 that DCF recognized the demand for clarity on whether children could be placed with undocumented relatives.<sup>67</sup> In July 2014, DCF issued the "Placement of Children with Kinship Caregivers Who Are Undocumented Immigrants Policy" in order to establish procedures for such out-of-home placements.<sup>68</sup> Unfortunately, the policy is deficient, as it does not serve its stated purpose and the Division's overarching goal of promoting the best interests of children. Moreover, it arguably hinders the placement of children with caregivers who are undocumented.<sup>69</sup>

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<sup>65</sup> Compare *Id.* at 89-90 (noting that a new Resource Family Impact Team process was implemented to intensely monitor kinship applications with the expectation that it will assist in expediting the 150 day application process) with *Progress of New Jersey Department of Children and Families*, CTR. FOR THE STUDY OF SOC. POLICY, 100-101 (Nov. 4, 2015) (providing data from July to December 2014 that shows non-kinship resource family applications were resolved 20 percent more quickly than kinship family applications.).

<sup>66</sup> See, e.g., Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU 5, fn. 15 (2012) [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf) (noting that the importance of maintaining family relationships is addressed in the best interests of the child determinations in the laws of Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maryland, Missouri, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin, as well as the District of Columbia and the U.S. Virgin Islands).

<sup>67</sup> See *New Americans in New Jersey*, American Immigration Council (Jan. 1, 2015) <http://www.immigrationpolicy.org/just-facts/new-americans-new-jersey> ("The foreign-born share of New Jersey's population rose from 12.5% in 1990, to 17.5% in 2000, to 21.6% in 2013, according to the U.S. Census Bureau. New Jersey was home to 1.9 million immigrants in 2013, which is more than the population of the entire state of Nebraska.").

<sup>68</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 1-2.

<sup>69</sup> DCF has identified the need for review and development of its legislation, regulations and policies. In April 2015, DCF posted a job vacancy in the Office of Legal and Legislative Affairs for a Legal Specialist to serve as "the primary contact for questions surrounding Special Immigrant Juvenile Status as well as other related immigration circumstances." The Legal Specialist would also be responsible for providing "department wide trainings to staff on immigration." See NJ DCF, Job Vacancy Posting #052-15 (April 17, 2015), <https://info.csc.state.nj.us/VATS/PdfForms/20108.pdf>.

For a child to be placed with an undocumented immigrant willing to serve as a caregiver, the undocumented immigrant must meet the requirements applicable to all kinship placement caregivers, including background check requirements; the undocumented immigrant must also satisfy four additional prerequisites.<sup>70</sup> Regarding the identification needed for Child Abuse Record Information (“CARI”), many undocumented immigrants “could in fact prove their identity through legitimate documents such as foreign passports, consular identity cards or other verifiable documentation.”<sup>71</sup>

First, the policy provides that approval must be obtained from the Division’s Director or designee before a child can be placed with an undocumented immigrant caregiver.<sup>72</sup> Secondly, a waiver of the home study provision that requires non-U.S. citizen resource family applicants to provide evidence of legal residency (visa or United States Immigration and Naturalization Service documentation) must be obtained from the Office of Licensing.<sup>73</sup> The current policy indicates that the waiver procedures are outlined in a separate policy manual.<sup>74</sup> However, the referenced waiver policy only provides guidelines for criminal convictions and child abuse or neglect.<sup>75</sup> It has not been updated to address undocumented immigrants.

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<sup>70</sup> N.J. Dep’t of Children & Families Policy Manual, *supra* note 28, at 1-2.

<sup>71</sup> See The Rights of Immigrants in New Jersey, ACLU-NJ, 10 (October 2008), <https://www.aclu-nj.org/files/9513/1540/4576/121108immigrant.pdf>; see also Johanna Calle, *Newark, Largest Municipality in New Jersey Approves Resolution Supporting State Driver’s Licenses for Immigrants*, NJ Alliance for Immigrant Justice, (June 18, 2015), [http://www.njimmigrantjustice.org/newark\\_dl\\_resolution](http://www.njimmigrantjustice.org/newark_dl_resolution) (reporting nine cities in NJ have approved a resolution urging the state government to enact legislation to permit the Motor Vehicle Commission to issue driver licenses to individuals who cannot provide proof of lawful presence in the U.S.).

<sup>72</sup> N.J. Dep’t of Children & Families Policy Manual, *supra* note 28, at 1.

<sup>73</sup> *Id.* See also N.J. ADMIN. CODE 10:122C-5.3(a)(1)(ii). Many of DCF’s policies and regulations referencing immigration are outdated. For example, the home study regulation, last amended in 2009, refers to Immigration and Naturalization Services (INS), an agency that has been reorganized into three new entities (U.S. Citizen and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection) under the Department of Homeland Security since 2003. Homeland Security of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>74</sup> N.J. Dep’t of Children & Families Policy Manual, *supra* note 28, at 2 (referencing the Home Study and Licensing Waiver Policy (CP&P-IV-B-2-300)).

<sup>75</sup> N.J. Dep’t of Children & Families Policy Manual, *Waivers*, CP&P-IV-B-2-300 (effective April 1, 2013) [http://www.nj.gov/dcf/policy\\_manuals/CP&P-IV-B-2-300\\_issuance.shtml](http://www.nj.gov/dcf/policy_manuals/CP&P-IV-B-2-300_issuance.shtml).

DCF's policy allows undocumented immigrants to be paid a resource or adoption subsidy once they have obtained an individual taxpayer identification number ("ITIN").<sup>76</sup> However, the policy states that a child cannot be placed until the prospective caretaker receives an ITIN.<sup>77</sup> Thus, obtaining an ITIN from the Internal Revenue Service is an additional prerequisite for an undocumented immigrant caregiver. This seems contrary to the purpose of ensuring the best interests of the child and conflicts with the current waiver provisions that allow temporary placement with a relative in the process of becoming licensed.

The most troubling aspect of the current policy is the presumption against placement with undocumented immigrant caregivers.<sup>78</sup> "Compelling justification" is required to overcome this presumption to allow placement.<sup>79</sup> The policy instructs Division workers to be cautious when deciding to place children with undocumented immigrants.<sup>80</sup> It stereotypes undocumented immigrants as precarious and makes blanket assumptions alleging that they face uncertainty and instability in their housing and employment, and the risk of unanticipated deportation.<sup>81</sup> Moreover, the policy states that placement with an undocumented immigrant can *only* occur when such placement is *clearly* in the child's best interest.<sup>82</sup> DCF unjustifiably places a high burden on undocumented immigrants seeking to serve as foster or kinship caregivers.

DCF's current policy does not adequately address the bias against placing children with undocumented caregivers as it lacks specific procedures and contains inconsistencies with current regulations. This policy can be improved by eliminating the presumption against placement with undocumented immigrant caregivers. Doing so will also eliminate the unwarranted compelling justification requirement and the need for approval and

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<sup>76</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 2.

<sup>77</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 2.

<sup>78</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 1 (stating that "CP&P presumes that undocumented immigrant caregivers will have difficulty providing children in out-of-home placement with long or short term stability or permanency.").

<sup>79</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 1.

<sup>80</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 2.

<sup>81</sup> N.J. Dep't of Children & Families Policy Manual, *supra* note 28, at 2 ("Undocumented immigrants typically face uncertainty in their housing and employment . . . More importantly, such immigrants are at risk of unanticipated expulsion from the United States at any time"). See also discussion *infra* Part V.B.2.

<sup>82</sup> *Id.* at 1.

waiver procedures. The presumption against placing children with undocumented immigrants hurts rather than helps children. Without such improvements, undocumented relatives will continue to be overlooked as caregivers.

### III. PROPOSED BILL: HELP SEPARATED FAMILIES ACT OF 2013

Around the United States, even where undocumented persons are not categorically banned from being resource parents, such persons are often ineligible because their homes do not meet licensing requirements.<sup>83</sup> Many potential kinship caretakers have difficulties fulfilling the licensing requirements, such as income qualifications, background checks, and fingerprint clearances, without government-issued identification or proper documentation.<sup>84</sup> However, a proposed federal bill reconciles the issue of identification for background checks.

California Representative Lucille Roybal-Allard introduced the Help Separated Families Act in June 2013.<sup>85</sup> The bill seeks to amend Part E (Foster Care and Adoption Assistance) of Title IV of the Social Security Act, which provides “the State shall consider giving preference to an adult relative over a non-related caregiver when determining placement for a child, provided that the relative caregiver meets all relevant State child protection standards.”<sup>86</sup> This bill was proposed in response to policies and practices of the child welfare systems and family courts that thwarted placement of children in the care of appropriate relatives simply because of lack of legal immigration status.<sup>87</sup>

The proposed bill aims for state child protection standards to ensure that immigration status alone does not disqualify a parent, legal guardian, or relative from being a placement for a child.<sup>88</sup> Additionally, the bill provides that a foreign consulate identification

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<sup>83</sup> Yali Lincroft, *Undercounted, Underserved: Immigrants and Refugee Families in the Child Welfare System*, THE ANNIE E. CASEY FOUND. 5 (2006), <http://www.f2f.ca.gov/res/pdf/UndercountedUnderserved.pdf> [hereinafter *Undercounted, Underserved*].

<sup>84</sup> *Id.*

<sup>85</sup> *Bill Summary & Status 113th Congress (2013-2014)* H.R. 2604, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR02604:@@L&summ2=m&> (last visited Mar. 21, 2015).

<sup>86</sup> 42 U.S.C. § 671(a)(19).

<sup>87</sup> *Roybal-Allard Bill Would Help Families Stay Together*, WOMEN’S REFUGEE COMMISSION (June 28, 2013) <https://www.womensrefugeecommission.org/news/press-releases-and-statements/1667-roybal-allard-bill-would-help-families-stay-together>.

<sup>88</sup> H.R. 2604, 113<sup>th</sup> Cong. (2013).

card, foreign passport, or other foreign identification document is sufficient identification for purposes of initiating a criminal records check or a fingerprint-based check.<sup>89</sup>

If signed into law, the Help Separated Families Act of 2013 will also require states to notify relatives seeking placement of a child that their immigration status will not be questioned, except to the extent necessary in determining eligibility for relevant services or programs.<sup>90</sup> Furthermore, the bill directs the Secretary of Health and Human Services to develop and disseminate best practice guidance on specified activities that take into account the best interests of children, to state, county, and local child welfare agencies, including a preference for family unity whenever appropriate.<sup>91</sup>

Representative Roybal-Allard reintroduced the bill to the House Ways and Means on June 28, 2013.<sup>92</sup> The bill was referred to the House Subcommittee on Social Security on July 23, 2013.<sup>93</sup> Representative Roybal-Allard's goal is to "prevent the tragic placement of children with strangers in foster care" by taking "sensible steps to prevent U.S. children from being separated from their loved ones."<sup>94</sup> Representative Roybal-Allard argues that "as a nation, we claim to value children and families, but at least 5,000 American kids are in foster care today because of our deeply unjust immigration laws" and "separating these American kids from their families does not reflect our American values."<sup>95</sup>

The importance of this proposed legislation cannot be understated. Representative Roybal-Allard argues that all parents deserve the peace of mind that comes from knowing that their children are receiving the proper care.<sup>96</sup> Most parents who are unable to care for their children seek the help of relatives, as

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<sup>89</sup> *Id.*

<sup>90</sup> Help Separated Families Act of 2013, Bill Tracking H.R. 2604, 113<sup>th</sup> Cong. (2013).

<sup>91</sup> *Id.*

<sup>92</sup> *Bill Summary & Status 113th Congress (2013-2014)* H.R. 2604, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR02604:@@X> (last visited Mar. 21, 2015).

<sup>93</sup> *Id.*

<sup>94</sup> *The Help Separated Families Act*, 158 CONG. REC. E1249, Vol. 158, No. 105 (July 13, 2012) (statement of Rep. Roybal-Allard). *See also* Ed Walz, *Roybal-Allard Bill Would Help Families Stay Together*, FIRST FOCUS (June 28, 2013), <http://firstfocus.org/news/press-release/roybal-allard-bill-help-families-stay-together/>.

<sup>95</sup> Walz, *supra* note 94.

<sup>96</sup> Press Release, Elizabeth Murphy, *Rep. Roybal-Allard Introduces Separated Families Act to Keep Immigrant Families Together* (July 16, 2012), <http://roybal-allard.house.gov/news/documentsingle.aspx?documentid=303274>.

opposed to that of strangers.<sup>97</sup> Therefore, when possible, if relatives are able and willing to care for them, children should not become wards of the state.<sup>98</sup> The Help Separated Families Act of 2013 would be a step toward reducing the number of children who end up in foster care with strangers because a relative is undocumented.<sup>99</sup>

#### IV. LEGISLATION GOVERNING LICENSING OF RELATIVE CARETAKERS ACROSS HIGHLY CONCENTRATED IMMIGRANT STATES

While the federal bill has languished, several states, namely, California, New York, and Illinois, have proposed or enacted legislation targeting child welfare laws as an avenue for reforming the family justice system with respect to immigrant families and children.<sup>100</sup> Not surprisingly, those states have the highest foreign-born proportions of their total populations.<sup>101</sup>

##### A. California

In October 2012, California passed The Reuniting Immigrant Families Act, creating uniform, statewide policies and practices that eliminate family reunification barriers in the child welfare system for immigrant families.<sup>102</sup> Prior to this law, California child welfare practices exhibited systematic bias against placing children with undocumented parents or relatives.<sup>103</sup> Social workers and courts simply assumed that children could not be placed with

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<sup>97</sup> Hon. Leonard Edwards (ret.), *Examining the Benefits and Challenges of Placing Children with Relatives*, COURT APPOINTED SPECIAL ADVOCATES (Nov. 2011) [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.7792495/k.8FF1/JP\\_1\\_Edwards.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.7792495/k.8FF1/JP_1_Edwards.htm) (“When parents find themselves unable to care for their children, they naturally turn to relatives for assistance. Currently approximately 2,500,000 children live with relatives”) (internal citations omitted).

<sup>98</sup> Murphy, *supra* note 96.

<sup>99</sup> Felicity S. Northcott & Wendy Jefferies, *Forgotten Families: International Family Connections for Children in the American Public Child-Welfare System*, 47 FAM. L.Q. 273, 275 (2013).

<sup>100</sup> Sarah Rogerson, *Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 166 (2013).

<sup>101</sup> American Community Survey Reports, *The Foreign-Born Population in the United States: 2010* at 3 (May 2012) <http://www.census.gov/prod/2012pubs/acs-19.pdf>; see also Elizabeth Grieco et al., *The Foreign-Born Population in the United States: 2010*, U.S. CENSUS BUREAU, 4 (May 2012) <http://www.census.gov/prod/2012pubs/acs-19.pdf> (noting that in 2010, 22 percent of residents of New York were foreign born; 27 percent in California; and 14 percent in Illinois).

<sup>102</sup> *About SB 1064, Reuniting Immigrant Families*, <http://www.sb1064.org/about-sb1064> (last visited March 21, 2015); Legis. Bill Hist. CA S.B. 1064 (2011).

<sup>103</sup> Mike Feuer, ASSEMB. COMM. ON JUDICIARY, SB 1064 (2012) <https://drive.google.com/viewerng/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbncxzYjEwNjRmYW1pbGllc3xneDpjMTJhMTk0M2UzNmZjMmU>.

undocumented family members.<sup>104</sup> The Reuniting Immigrant Families Act seeks to keep children with their families and out of the public child welfare system by ensuring that children are placed with relatives, regardless of their immigration status.<sup>105</sup>

In California, family members are given preferential consideration as placements for children removed from parental custody, regardless of their immigration status.<sup>106</sup> Moreover, California's law explicitly provides that a social worker must immediately release a child in temporary custody to the child's guardian or responsible relative, regardless of that relative's immigration status.<sup>107</sup> A relative's immigration status alone does not disqualify her from receiving custody of a child in a family law proceeding.<sup>108</sup>

Another implication of the Reuniting Immigrant Families Act is the allowance of a relative to file for guardianship of a minor regardless of immigration status.<sup>109</sup> Undocumented immigration status of a relative does not constitute *per se* unsuitability.<sup>110</sup> The law also permits a relative's foreign identification card or foreign passport to be used to initiate the criminal records and fingerprint clearance checks for when a social worker is deciding whether to place a child in the relative's care.<sup>111</sup>

#### B. New York

It is estimated that more than 150,000 children in New York live with grandparents, relatives, and family friends because of parental abuse, neglect, or abandonment.<sup>112</sup> New York KinCare Coalition asserts that kinship care will continue to increase in importance during the next few years, moving from placement

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<sup>104</sup> *Id.*

<sup>105</sup> *About SB 1064, Reuniting Immigrant Families*, <http://www.sb1064.org/about-sb1064> (last visited March 21, 2015); Legis. Bill Hist. CA S.B. 1064 (2011).

<sup>106</sup> CAL. WELF. & INST. CODE § 361.3(a) (Deering 2016); Senate Rules Committee, *SB 1064*, (Aug. 24, 2012) <https://drive.google.com/viewerng/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbmVzYjEwNjRmYW1pbGllc3xneDo2ZDcyNWM1NmExZDJhYjQx>; *see also* CAL. WELF. & INST. CODE § 361.3 (Deering 2016).

<sup>107</sup> CAL. WELF. & INST. CODE § 309(a) (Deering 2016).

<sup>108</sup> CAL. WELF. & INST. CODE § 361.3(a); CAL. FAM. CODE § 3040(b) (Deering 2016).

<sup>109</sup> CAL. PROB. CODE § 1510(a) (Deering 2016).

<sup>110</sup> CAL. PROB. CODE § 1514(c) (Deering 2016).

<sup>111</sup> CAL. WELF. & INST. CODE §§309(d)(1), 361.4(b) (Deering 2016).

<sup>112</sup> Gerard Wallace, "Support of Kinship Care Vital," *TIMES UNION* (Sept. 25, 2014, 07:48 EST), <http://www.timesunion.com/local/article/Photos-Kinship-care-rally-4915909.php>.

preference to an invaluable resource.<sup>113</sup> New York recognizes that kinship care achieves better outcomes for children and that grandparents and other relatives are the greatest resources for children at risk.<sup>114</sup>

To facilitate placement with relatives, New York has separate foster parent application procedures specific to relatives and allows for their certification process to be expedited.<sup>115</sup> State agencies waive income level as a licensing criterion for kinship foster parents.<sup>116</sup> Licensing requirements appear to be less stringent in New York for kinship caregivers.

The New York State Reuniting Families Act (“NYRFA”) was introduced on March 13, 2013, was passed on June 9, 2014 in the State Assembly, and was subsequently sent to the Senate Committee on Children and Families.<sup>117</sup> This bill incorporates many of the components in the Help Separated Families Act of 2013 and California’s Reuniting Immigrant Families Act by addressing the needs of immigrants involved in the child welfare system.<sup>118</sup> NYRFA includes a subdivision which provides that “immigration status of a parent or other person responsible for care shall not disqualify such person from being granted custody . . . .”<sup>119</sup> Additionally, under NYRFA, “the child welfare agency shall accept a foreign consulate identification card, a foreign passport, or such other foreign identification document as may be allowed as sufficient

<sup>113</sup> *Kinship Care in New York: Keeping Families Together*, NY STATE KINCARE COALITION 5 (March 2011) available at [http://assets.aarp.org/www.aarp.org/\\_cs/elec/aarp\\_kincarekeepingfamilies6.pdf](http://assets.aarp.org/www.aarp.org/_cs/elec/aarp_kincarekeepingfamilies6.pdf).

<sup>114</sup> *Id.* See also “A Research Brief on Child Well-being: Kinship Children in New York State,” NYS COUNCIL ON CHILDREN & FAMILIES, available at <http://ccf.ny.gov/files/4213/8255/2329/KinshipChildrenNYS.pdf> (stating that “Kinship care is an extremely valuable alternative to traditional foster care in that it offers strong familial bonds that provide children a sense of positive identity, belonging and security. . .”).

<sup>115</sup> N.Y. FAM. CT. ACT § 1028-a (Consol. 2015); N.Y. FAM. CT. ACT § 1027(b)(i)(A) (Consol. 2015).

<sup>116</sup> 28 N.Y. Reg. 1 (July 10, 2002).

<sup>117</sup> A.B. 6377 236th Ann. Legis. Sess. (N.Y. 2013).

<sup>118</sup> Yali Lincroft, *The Reuniting Immigrant Families Act: A Case Study on California’s Senate Bill 1064* (May 2013) STATE POLICY ADVOCACY AND REFORM CENTER 5, <http://childwelfareparc.org/wp-content/uploads/2014/07/12-reuniting-immigrant-families-act-brief-final-updated.pdf> [hereinafter *Reuniting Immigrant*]; see also Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, 33 ABA CHILD LAW PRACTICE 49, 54 (April 2014) <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Keeping%20immigrant%20families%20together.pdf>.

<sup>119</sup> State of New York Assembly Bill A6377A, 2013-2014 Regular Sessions (March 26, 2013) available at <http://legislation.nysenate.gov/pdf/bills/2013/A6377A>.

identification for purposes of initiating a criminal records check or fingerprint based check."<sup>120</sup>

Lawmakers in New York recognize that the public child welfare system is costly and that separating families and unnecessarily placing children into this costly system is not a wise way to allocate the state's scarce financial resources.<sup>121</sup> There are immediate court costs as well as long-term costs of special education, juvenile justice, and mental health services for children in foster care.<sup>122</sup> New York, like many other states, is facing budget challenges, and counties across New York are struggling to preserve core services like education, fire protection, and park services.<sup>123</sup> Allowing undocumented persons to be caregivers advances states' goals of reducing costs associated with the child welfare system, while also advancing the best interests of children.

### C. Illinois

On May 16, 2008, the Illinois Department of Children and Family Services issued a policy guide for the licensing and placement of children with undocumented relatives.<sup>124</sup> Illinois policy is extensive on the issue, as it covers not only placement in the United States, but also placements with relatives in other countries.<sup>125</sup> The policy provides that if certain basic health and safety requirements are met, immigrant status of a relative caregiver should not hinder the placement of a child.<sup>126</sup> Additionally, the policy allows for an individual taxpayer identification number to be listed on the foster care licensing application in lieu of a Social Security number.<sup>127</sup> Illinois also has a related policy that requires developing an emergency care plan for children in the event that an

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<sup>120</sup> *Id.*

<sup>121</sup> S.B. 4185, 236th Ann. Legis. Sess. (N.Y. 2013); *see also* S-4185 & A-6377 *New York State Reuniting Families Act*, available at [http://s4185.com/?page\\_id=27](http://s4185.com/?page_id=27).

<sup>122</sup> S-4185 & A-6377 *New York State Reuniting Families Act*, available at [http://s4185.com/?page\\_id=27](http://s4185.com/?page_id=27).

<sup>123</sup> *Id.*

<sup>124</sup> Erwin McEwen, *Policy Guide 2008.01: Licensing, Payment and Placement of Children with Undocumented Relatives*, ILL. DEP'T OF CHILDREN & FAMILY SERV. 1 (May 16, 2008) available at <http://www.illinois.gov/dcf/search/pages/policyresults.aspx?k=2008.01>.

<sup>125</sup> Placement and Visitation Services Procedures 301, Section 301.80 Relative Home Placements, 14-16, (June 1, 2015) available at [http://www.illinois.gov/dcf/aboutus/notices/Pages/pr\\_policy\\_procedure.aspx](http://www.illinois.gov/dcf/aboutus/notices/Pages/pr_policy_procedure.aspx).

<sup>126</sup> *Id.* at 14.

<sup>127</sup> *Id.* at 14-15.

undocumented caregiver is detained due to immigration status.<sup>128</sup> The procedures include an attachment with a list of resources and advocates for immigrants in Illinois.<sup>129</sup>

On February 26, 2013, Illinois introduced HB 3050, a bill based on the California legislation, which provides that the immigration status of a parent, legal guardian, or relative does not disqualify her from receiving custody of a child or from acting as a guardian of a minor.<sup>130</sup> Subsequently, Illinois created a taskforce to evaluate whether the legislation was necessary.<sup>131</sup> The taskforce met with the Illinois Department of Children and Families and, with the help of immigration advocacy centers, identified issues with immigrant children and families in the child welfare system.<sup>132</sup> Additionally, the taskforce contacted attorneys representing children and parents to gather information about their experiences and also reached out to the Office of the Cook County Public Guardian for statistics.<sup>133</sup>

In late 2014, lawmakers in Illinois opted not to pursue the proposed legislation since the taskforce concluded that the Department of Children and Families is committed to enforcing the policies that are already in place for the benefit of immigrant children and parents.<sup>134</sup> The Illinois Department of Children and Families already has an unwritten policy of not inquiring about the immigration status of the child or parent.<sup>135</sup> This policy ensures that immigration status does not affect services that children receive or create more issues for children and parents.<sup>136</sup>

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<sup>128</sup> Guardianship Services Procedures 327, Appendix F, Attachment 2, Emergency Care Plan for Children with Undocumented Caregivers, ILL. DEP'T OF CHILDREN & FAMILY SERV., 1-2 (July 13, 2015) available at [http://www.illinois.gov/dcfs/aboutus/notices/Documents/procedures\\_327.pdf](http://www.illinois.gov/dcfs/aboutus/notices/Documents/procedures_327.pdf).

<sup>129</sup> *Id.* at 3-11.

<sup>130</sup> Ill. H.B. 3050, 98th Gen. Assemb. (Ill. 2013-2014).

<sup>131</sup> Park, *supra* note 118, at 57.

<sup>132</sup> Park, *supra* note 118, at 57.

<sup>133</sup> Park, *supra* note 118, at 57.

<sup>134</sup> Park, *supra* note 118, at 57.

<sup>135</sup> Park, *supra* note 118, at 57.

<sup>136</sup> Park, *supra* note 118, at 57.

## V. ANALYSIS

*A. While New Jersey Has Made Significant Progress in Child Welfare Reforms, the State Can Continue to Improve Strategic Recruitment and Licensing of Prospective Resource Parents*

In 1999, a class-action lawsuit was filed against the Governor of the state of New Jersey, the Commissioner of the Department of Human Services, and the Director of the Division of Youth and Family services on behalf of the more than 9,000 children in the custody of New Jersey's child welfare system and tens of thousands of additional children who were victims of abuse or neglect or at risk of maltreatment statewide.<sup>137</sup> As a result of settlement agreements, federal oversight and court-appointed monitoring, the child welfare system in New Jersey underwent sweeping changes.<sup>138</sup> The New Jersey Department of Children and Families' Sustainability and Exit Plan provides that it is guided by principles of the modified settlement agreement that include, "[c]hildren in out-of-home placement should be in the least restrictive, most family-like setting appropriate for their needs. . . settings that promote the continuity of critical relationships: together with their siblings; with capable relatives whenever possible; and in their own communities."<sup>139</sup> These principles support the proposition that undocumented relatives who are willing and able to care for children ought to be licensed as resource parents.

As previously discussed, New Jersey will first look to place children with relatives before seeking out-of-home placements.<sup>140</sup> The overwhelming majority of children in out-of-home placements in New Jersey are in resource family homes.<sup>141</sup> The state has made

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<sup>137</sup> Class Actions NJ – Charlie & Nadine H. v. Christie, CHILDREN'S RIGHTS, [http://www.childrensrights.org/class\\_action/new-jersey/#](http://www.childrensrights.org/class_action/new-jersey/#) (last visited Mar. 23, 2016).

<sup>138</sup> *Id.* The case was settled in 2003. However, due to inadequate progress, a contempt motion was filed against the state and a modified settlement agreement was reached in 2006.

<sup>139</sup> Sustainability and Exit Plan (Second Modified Settlement Agreement), Charlie and Nadine H., et al., v. Christie, et al. Civil Action Number 99-3678 (SRC), 2-3 (Nov. 4, 2015), available at <http://www.state.nj.us/dcf/about/welfare/Sustainability-and-Exit-Plan-110415.pdf>.

<sup>140</sup> See *infra* Part II.A.

<sup>141</sup> *Progress of New Jersey Department of Children and Families*, CTR. FOR THE STUDY OF SOC. POLICY, at 93 (Nov. 4, 2015) [http://www.cssp.org/publications/child-welfare/new-jersey-charlie-and-nadine-h-v-christie/document/Charlie\\_and\\_Nadine\\_](http://www.cssp.org/publications/child-welfare/new-jersey-charlie-and-nadine-h-v-christie/document/Charlie_and_Nadine_)

it a goal to recruit and license a sufficient number of family-based homes to place children and to explore and utilize kinship care whenever possible.<sup>142</sup> In 2014, 66 percent of the 1,424 newly licensed resource family homes were relatives of children in care.<sup>143</sup> As of December 31, 2015, there were 6,955 children in DCPD out-of-home placement – 39 percent were in homes of relatives as compared to 52 percent who were in the homes of a non-relative.<sup>144</sup> Almost half (45 percent) of the children in out-of-home care were five years old or younger.<sup>145</sup>

The growth of relatives serving as licensed resource family homes came in response to two developments: (1) a heightened interest in honoring familial and cultural ties and (2) an inadequate supply of licensable foster homes, particularly in inner-city neighborhoods.<sup>146</sup> Given this reality, it is important to ensure that New Jersey's resource family licensing process treats relatives fairly and is not overly burdensome on individuals who are undocumented. This will allow the state to continue to expand its network of resource families.

#### *B. Best Interests of the Child Policy Implications*

Federal laws were passed to promote the best interests of children in the welfare system waiting to be placed with a family, shorten the length of time that children waited for adoption, prohibit discrimination in placements, and encourage rather than prevent qualified prospective individuals from serving as foster or adoptive parents to children who need a home.<sup>147</sup> The Interethnic Adoption Provisions of 1996 prohibit state child protection agencies from delaying or denying "the placement of a child for adoption or into foster care on the basis of race, color, or national

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H.\_v.\_Christie\_Monitoring\_Report\_XVI\_11\_4\_15.pdf (showing a total of 91 percent of children in out-of-home care as of December 31, 2014 were in resource family homes (either kinship or non-kinship)).

<sup>142</sup> *Id.* at 96. (The term "family-based home" is meant to contrast placements in group and residential facilities and independent living facilities. *See id.* at 93.)

<sup>143</sup> *Id.* at 96.

<sup>144</sup> Child Protection & Permanency Quarterly Demographic Summary as of December 31, 2015, New Jersey Department of Children and Families (Feb. 19, 2016) available at [http://nj.gov/dcf/childdata/continuous/Demo.2015\\_Q4.pdf](http://nj.gov/dcf/childdata/continuous/Demo.2015_Q4.pdf).

<sup>145</sup> *Id.*

<sup>146</sup> *See generally*, Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, at 26, 61 (Winter 2015).

<sup>147</sup> Cynthia R. Mabry and Lisa Kelly, *ADOPTION LAW: THEORY, POLICY, AND PRACTICE*, 374 (2d ed. 2010).

origin of the adoptive or foster parent, or the child, involved.”<sup>148</sup> In an amendment to the Social Security Act, Congress recognized the importance of diversity in foster and adoptive recruitment efforts. Congress enacted legislation that directed states to establish and implement a plan “for the diligent recruitment of potential foster and adoptive families that reflect[s] the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed[.]”<sup>149</sup> Furthermore, the Department of Health and Human Services warned agencies and state representatives against implementing suitability standards that preclude groups of prospective parents because of age, education, income, family structure, or size, or lack of home ownership “where those standards are arbitrary, unnecessary, or where less exclusionary standards are available.”<sup>150</sup>

i. The Effect the Type of Placement has on Children’s Well-being in the Child Welfare System

Searching for relatives with whom a foster child may be placed generally furthers the child’s best interests.<sup>151</sup> In *Div. Youth & Family Servs. v. K.L.W.*, the court explained:

[W]hen the Division complies with its obligation to identify and assess relatives, it increases the likelihood of a decision that is in the best interests of the child. With information about relatives, the trial court can assess potential placements that provide permanency for the child without cutting the child off from all family ties . . . .<sup>152</sup>

Sociological studies have found that the well-being of children whose parents can no longer care for them is often greater in kinship foster care homes than in non-kinship homes.<sup>153</sup> Children who enter the child welfare system and are placed with family or friends are less likely to be moved around from foster home to foster home,

<sup>148</sup> The Interethnic Adoption Provisions, 42 U.S.C.A. § 1996b(1)(B) (repealing the Multiethnic Placement Act of 1994 provision that allowed consideration of a child’s cultural, ethnic and racial background and the prospective parent’s ability to meet that child’s need); *see also* 42 U.S.C. § 671(a)(18)(B) (2015).

<sup>149</sup> 42 U.S.C. § 622(b)(7).

<sup>150</sup> Department of Health and Human Services, Policy Guidance (Apr. 20, 1995), available at <http://archive.hhs.gov/ocr/acf.htm>. Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements, 60 Fed. Reg. 20,272, 20,275 (Apr. 25, 1995).

<sup>151</sup> *See* Fall & Romanowski, *supra* note 12, at 573 (citing to *DYFS v. K.L.W.*, 18 A.3d 193, 201 (N.J. Super. Ct. App. Div. 2011)).

<sup>152</sup> *D.Y.F.S. v. K.L.W.*, 18 A.3d 193, 201 (N.J. Super. Ct. App. Div. 2011).

<sup>153</sup> Safia Hussain, Note, *Safeguarding Liberty Interests in New York’s Kinship Foster Care System*, 59 RUTGERS L. REV. 637, 640 (2007).

thus minimizing disruption and ensuring stability.<sup>154</sup> Infants and young children develop an attachment, or trust and emotional connection, to their adult caregivers, and they turn to those caregivers for comfort, support, nurturance, and protection.<sup>155</sup> A secure attachment to a primary caregiver helps a child regulate emotions, develop self-confidence, and function autonomously and competently.<sup>156</sup> Additionally, kinship foster care provides positive familial role models and helps with emotional problems, such as stigma, that may arise from being in the foster system.<sup>157</sup> Furthermore, children who are placed with relatives are more closely connected with their cultural heritage and traditions.<sup>158</sup>

Rates of physical abuse, sexual abuse, and neglect are higher among foster families than among other families.<sup>159</sup> Youths who experience maltreatment in the child welfare system face challenges transitioning into adulthood and are vulnerable to early pregnancy, poverty, and disconnection from society.<sup>160</sup> Indeed, adults who have spent time in foster care experience higher rates of post-traumatic stress disorder, depression, panic syndrome, and anxiety disorders.<sup>161</sup>

There are disparities and disproportionalities in the child welfare system when it comes to the treatment of children of different racial and ethnic groups.<sup>162</sup> Latinos represent the fastest growing population in the child welfare system.<sup>163</sup> Latino children

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<sup>154</sup> Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, COLORLINES.COM, 52 (Nov. 2011), available at [http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC\\_Report\\_Shattered\\_Families\\_FULL\\_REPORT\\_Nov2011Release.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf).

<sup>155</sup> National Survey of Child and Adolescent Well-Being, No. 18: Instability and Early Life Changes Among Children in the Child Welfare System, U.S. DEPT. OF HEALTH & HUMAN SERVS., at 1 (Sept. 15, 2012) [http://www.acf.hhs.gov/sites/default/files/opre/early\\_life.pdf](http://www.acf.hhs.gov/sites/default/files/opre/early_life.pdf).

<sup>156</sup> *Id.*

<sup>157</sup> Hussain, *supra* note 153.

<sup>158</sup> Hussain, *supra* note 153.

<sup>159</sup> Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 661 (2006).

<sup>160</sup> National Survey of Child and Adolescent Well-Being, No. 21: Disconnected Youth Involved in Child Welfare, U.S. DEPT. OF HEALTH & HUMAN SERVS., at 1 (October 28, 2014), <http://www.acf.hhs.gov/sites/default/files/opre/briefdiscyouth508v2.pdf>.

<sup>161</sup> Huntington, *supra* note 159.

<sup>162</sup> Michelle Johnson-Motoyama et al., Parental Nativity and the Decision to Substantiate: Findings from a Study of Latino Children in the Second National Survey of Child and Adolescent Well-Being, CHILDREN AND YOUTH SERVS. REV., 2229 (2012), available at <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Parental%20nativity%20and%20the%20decision%20to%20substantiate.pdf>.

<sup>163</sup> Megan Finno-Velasquez, *The Relationship Between Parent Immigration Status and*

are perceived to be at an increased risk of maltreatment because they face unique stresses and pressures as a result of being raised in immigrant families.<sup>164</sup> Latino immigrants experience financial challenges, isolation, language difficulties, and loss of previously established support systems.<sup>165</sup> Restricted access to social services and hostile public attitude towards immigrants compound these challenges.<sup>166</sup>

In Texas, a child welfare study on placement and permanency planning for Latino children found that immigrant children and children of immigrants were significantly less likely to be placed with relatives than children of American-born parents.<sup>167</sup> The study uncovered that immigrant children were more likely to be placed in group homes than other children.<sup>168</sup> In addition, reunification and relative adoption for immigrant children were less likely compared to American-born children.<sup>169</sup> The study's findings indicate that the apparent bias against immigrant families seemed to be interfering with decisions about children's best interests.<sup>170</sup>

## ii. Permanency Arguments

Some critics argue that placing children with undocumented relatives is not in their best interest because these guardians could be deported at any time.<sup>171</sup> A judge in Michigan compared undocumented relatives to "individuals with outstanding criminal warrants" to illustrate the instability of their living situations.<sup>172</sup> It is contended that placing children with undocumented caregivers is contrary to the goal of permanency.<sup>173</sup> Conversely, placing a child

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*Concrete Support Service Use Among Latinos in Child Welfare: Findings Using the National Survey of Child and Adolescent Well-Being*, 35 CHILD. & YOUTH SERVS. REV. 2118, 2118-2127 (2013), available at <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/The%20relationship%20between%20parent%20immigration%20status.pdf>.

<sup>164</sup> Johnson-Motoyama, *supra* note 162, at 2230.

<sup>165</sup> Johnson-Motoyama, *supra* note 162, at 2230.

<sup>166</sup> Johnson-Motoyama, *supra* note 162, at 2230.

<sup>167</sup> Alan Dettlaff, *Immigrant Children and Families and the Public Child Welfare System: Considerations for Legal Systems*, 63 JUV. & FAM. CT. J. 19, 22-23 (2012), available at <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Considerations%20for%20Legal%20Systems.pdf>.

<sup>168</sup> *Id.* at 23.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Stanton, *supra* note 2.

<sup>172</sup> Stanton, *supra* note 2.

<sup>173</sup> Stanton, *supra* note 2. *See generally*, N.J. Div. of Youth & Family Servs. v. S.A., 908 A.2d 244 (N.J. Super. Ch. Div. 2005) (describing permanency as the notion that

with an undocumented relative can be no less stable than foster care, given that the nature of foster care is contractual and not intended to confer custodial rights on the foster parents.<sup>174</sup>

Lacking legal status does mean an immigrant is likely to face imminent deportation.<sup>175</sup> But the U.S. Supreme Court has stated, “a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed.”<sup>176</sup> Even if an undocumented immigrant found herself in removal proceedings, she would be entitled to due process protections that generally provide some time between the initiation of removal proceedings and the actual removal.<sup>177</sup> The courts have long recognized and grappled with the relative stability of the undocumented population.<sup>178</sup>

Immigration status should not have any impact on the goal of reunification nor should it affect the permanency plan for a child. The purpose of resource family placement is to provide “temporary palliative care” with the goal of reunification of the child with his or her family.<sup>179</sup> Adoption or kinship legal guardianship are viewed as alternatives only to be considered when family reunification is not feasible.<sup>180</sup> Kinship legal guardianship may be considered when children are placed with relatives, but only after adoption has been ruled out as an achievable plan. Unlike with adoption, parental

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children deserve stable and consistent care from caretakers who provide for their emotional and physical needs outside of the child welfare system).

<sup>174</sup> See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845-846 (1977).

<sup>175</sup> David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 *TEX. HISP. J.L. & POL’Y* 47, 69 (Fall 2005).

<sup>176</sup> *Plyler v. Doe*, 457 US 202, 226 (1982).

<sup>177</sup> Thronson, *supra* note 175, at 70.

<sup>178</sup> Thronson, *supra* note 175, at n.128 (citing to *Plyer v. Doe*, 457 U.S. 202, 218 (1982); noting “the creating of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”).

<sup>179</sup> See, e.g., *In re Adoption of Two Children by A.M. and L.M.*, 406 A.2d 468, 472 (N.J. Super. Ct. App. Div. 1979) (quoting *W.C. v. P.M.*, 383 A.2d 125, 130 (N.J. Super. Ct. App. Div. 1978)); *In re Guardianship of J.C.*, 608 A.2d 1312, 1325 (N.J. 1992) (Clifford, J., concurring) (noting that “[t]he entire statutory scheme implements a legislative determination that eventual reunification of the child with the natural parent is the objective of foster, i.e., temporary, placement.”).

<sup>180</sup> See N.J. STAT. ANN. § 30:4C-15.1a (2015). *N.J. Div. of Youth & Fam. Servs. v. A.W.*, 512 A.2d 438, 442 (N.J. 1986).

rights do not need to be terminated for a relative to obtain kinship legal guardianship.<sup>181</sup> Also contrary to adoption, parents may seek to regain legal guardianship of their children or change the terms of the kinship legal guardianship agreement regarding visitation.<sup>182</sup> Given the state's mandate to reunify children with parents whenever feasible, amending the state's policies regarding temporary placement to include any relative or interested person, regardless of immigration status, will promote the goal of permanency.

### iii. Reforming Social Welfare Policies to Consider the Best Interests of Children

There are as many as five million undocumented parents of American children in the United States.<sup>183</sup> The majority of children from immigrant families who enter the child welfare system are U.S. citizens.<sup>184</sup> It is difficult for undocumented caregivers to receive basic services needed to support children's safety and wellbeing.<sup>185</sup> Even when children are eligible for services, some undocumented guardians fear exposure to immigration authorities.<sup>186</sup> It is in children's best interests for their caregivers to have access to benefits so that the children have the opportunity to be raised in healthy, stable households.<sup>187</sup>

The recent executive actions on immigration, announced in November 2014, illustrate the recognition of the need for providing benefits to undocumented parents of U.S. citizens.<sup>188</sup> Deferred Action for Parents of Americans ("DAPA") would grant temporary reprieve from deportation to parents of U.S. citizens and lawful permanent children for a period of three years.<sup>189</sup> The implementation of DAPA would allow approximately 5.2 million individuals to work legally and live without fear of deportation, thereby permitting them to be more economically productive and

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<sup>181</sup> See, N.J. Div. of Youth & Fam. Servs. v. H.R., 67 A.3d 689, 699 (N.J. Super. Ct. App. Div. 2013) (providing that prospective kinship legal guardians "must be made aware the [kinship legal guardian] statute does not provide permanency and protection against future court proceedings in the same way as adoption.").

<sup>182</sup> *Id.*; see also, N.J. STAT. ANN. § 3B:12A-4(a)(4) (2015).

<sup>183</sup> Nora Caplan-Bricker, *Obama's Immigration Gurus*, THE NAT'L J. (January 23, 2015) <http://www.nationaljournal.com/magazine/obama-s-immigration-gurus-20150123>.

<sup>184</sup> Dettlaff, *supra* note 167, at 26.

<sup>185</sup> Finno-Velasquez, *supra* note 163, at 2125.

<sup>186</sup> Finno-Velasquez, *supra* note 163, at 2124.

<sup>187</sup> Finno-Velasquez, *supra* note 163, at 2125.

<sup>188</sup> *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2015).

<sup>189</sup> *Id.*

less vulnerable to wage theft and workplace exploitation.<sup>190</sup>

Additional immigration and child welfare policies should be implemented to assist vulnerable immigrant families who remain in the shadows and have difficulty understanding the intricacies of social services.<sup>191</sup> For example, the Department of Children and Family Services in Illinois has a Latino Advisory Council and a policy in place that requires diligent efforts to place a child whose family's preferred language is Spanish in a Spanish-speaking or bilingual foster home.<sup>192</sup> The lack of culturally or linguistically appropriate services limits the ability of immigrant children in foster care to receive services they require to address both their physical and mental needs.<sup>193</sup>

Moreover, current funding for services for immigrant children is limited because of restrictions within Title IV-E of the Social Security Act, which is the primary source of federal funds for the care of children in state custody.<sup>194</sup> Funds are restricted to children who

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<sup>190</sup> Silva Mathema, *Assessing the Economic Impacts of Granting Deferred Action Through DACA and DAPA*, CTR FOR AM. PROGRESS (Apr. 2, 2015) <https://www.americanprogress.org/issues/immigration/news/2015/04/02/110045/assessing-the-economic-impacts-of-granting-deferred-action-through-daca-and-dapa/> (arguing that the U.S. economy will be better off economically when the DAPA and DACA eligible population receives deferred action); see also Melissa Crow, *What's Next in the Supreme Court Case on Expanded DACA and DAPA?* AM. IMMIGR. COUNCIL (Jan. 20, 2016) <http://immigrationimpact.com/2016/01/20/supreme-court-case-on-expanded-daca-and-dapa/> (noting that the U.S. Supreme Court will hear arguments in the lawsuit to determine whether the President's deferred action initiatives constitute a lawful exercise of executive action and its decision could allow expanded DACA and DAPA to go forward as early as June 2016.); see generally Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents, Analysis of DAPA's Potential Effects on Families and Children*, URBAN INST., MIGRATION POLICY INST. (February 2016).

<sup>191</sup> Finno-Velasquez, *supra* note 163, at 2125; see also Lincroft, *Undercounted, Underserved* *supra* note 83, at 19 (noting that child welfare agencies should partner with experienced community-based agencies that have extensive experience in serving immigrant families to help family members understand and meet requirements for foster home licensing, placement, and benefits.).

<sup>192</sup> See Latino Advisory Council, ILL. DEP'T OF CHILDREN & FAMILY SERV, [http://www.illinois.gov/dcf/aboutus/policy/Pages/com\\_communications\\_LAC.aspx](http://www.illinois.gov/dcf/aboutus/policy/Pages/com_communications_LAC.aspx); Placement and Visitation Services Procedures 301, Section 301.60(a)(8), Children of Hispanic or Latino Origin 3-4 (July 30, 2014) available at [http://www.illinois.gov/dcf/aboutus/notices/Pages/pr\\_policy\\_procedure.aspx](http://www.illinois.gov/dcf/aboutus/notices/Pages/pr_policy_procedure.aspx).

<sup>193</sup> Alan Dettlaff & Jodi Berger Cardoso, *Mental Health Need and Service Use Among Latino Children of Immigrants in the Child Welfare System*, 32 CHILD. & YOUTH SERVS. REV. 1373, 1373-1379 (June 1, 2010) available at <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Mental%20health%20need%20and%20service%20use%20among%20Latino%20children%20of%20immigrants%20in%20the%20child%20welfare%20system.pdf>.

<sup>194</sup> *Id.* See also N.J. Dep't of Children & Families Policy Manual, *Placement of Children with Kinship Caretakers who are Undocumented Immigrants*, CP&P-IV-A-11-200,

meet certain eligibility requirements, including U.S. citizenship.<sup>195</sup> One argument against reforming child welfare policies claims that states will inevitably bear the burden of substitute care costs for immigrants.<sup>196</sup> With shrinking resources for public child welfare systems, this burden may limit states' abilities to adequately care for ineligible immigrant children.<sup>197</sup> However, it is noteworthy that federal guidance related to Title IV-E does not prohibit undocumented caregivers from receiving federal foster care payments on behalf of a U.S. citizen child.<sup>198</sup>

The child welfare system is expensive.<sup>199</sup> There are strong financial motivations for policymakers to keep children out of the foster care system and with their families. In California, legislators noted that The Reuniting Immigrant Families Act of 2013 will decrease upfront costs associated with the placement of children and the longer-term care costs by keeping children out of the foster care system.<sup>200</sup> Proponents of similar legislation in New York also noted that unnecessarily placing children into the costly public child welfare system is not wise for the state's already limited budget.<sup>201</sup>

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2 (effective July 21, 2014) [http://www.nj.gov/dcf/policy\\_manuals/ CPP-IV-A-11-200\\_issuance.shtml](http://www.nj.gov/dcf/policy_manuals/_CPP-IV-A-11-200_issuance.shtml) (requiring the reporting of undocumented immigrant children and non-citizen legal resident children who have resided in the U.S. less than five years, to comply with not claiming federal funds under Title IV-E of the Social Security for placement of such children.); Cf. E-mail from NJ DCF Open Pub. Records Act Custodian, to American Friends Serv. Comm. (June 16, 2015, 14:44 EST) (on file with author) (indicating no records in response to request for number of undocumented immigrant and non-citizen children under the Division's custody and no record of screening process to determine a child's immigrant legal status).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* See also, Lincroft, *Undercounted, Underserved supra* note 83, at 5 (noting that child welfare agencies are forced to depend on scarce local resources to fund "[s]ervices, such as interpretation, visiting the child's native country for evaluation of potential placement, or hiring immigration counsel.").

<sup>198</sup> See Park, *supra* note 118, at 54.

<sup>199</sup> See, e.g., Kerry Devooght & Hope Cooper, *Child Welfare Financing in the United States*, SPARC (February 2012) <https://childwelfaresparc.files.wordpress.com/2013/02/child-welfare-financing-in-the-united-states-final.pdf>.

<sup>200</sup> Lincroft, *Reuniting Immigrant, supra* note 118, at 6.

<sup>201</sup> S-4185 & A-6377 New York State Reuniting Families Act, available at [http://s4185.com/?page\\_id=27](http://s4185.com/?page_id=27).

*C. New Jersey is a Leader in Finding Family Members of Children in Foster Care Who Live Overseas But Lacks a Comprehensive Policy for the Placement of Children with Undocumented Relatives in the United States*

In response to the Fostering Connections to Success and Increasing Adoptions Act of 2008, which requires agencies to engage in intensive efforts to locate grandparents and other adult relatives when a child enters foster care, the Children's Bureau Family Connection issued a grant to DCF.<sup>202</sup> New Jersey is the only state that has a comprehensive policy, a case management protocol, and supplemental training to manage cases for children who have family connections out of state or in foreign countries.<sup>203</sup> The proposed Help Separated Families Act and California's Reuniting Immigrant Families Act of 2013 includes similar reunification provisions.<sup>204</sup>

Rutgers University conducted a three-year demonstration project from 2009 to 2012, in which it gathered data on the number of children in the care of DCPD who have family connections outside of the United States.<sup>205</sup> The project developed a written policy, trained hundreds of social workers, developed a single point of contact for all cases, and created an outreach strategy to keep workers informed.<sup>206</sup> The project also piloted training for judges and legal professionals involved in family courts and initiated a larger judicial training project.<sup>207</sup> The training was in response to a study's finding that caseworkers were sometimes reluctant to refer cases to International Social Services or were not sure how international family finding worked.<sup>208</sup> New Jersey has served as a

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<sup>202</sup> Felicity Northcott, *Pathways to Permanency: Supporting Cross-Border Family Finding and Engagement for Children in Foster Care*, 22 *TRANSNAT'L L. & CONTEMP. PROBS.* 623, 628 (2013).

<sup>203</sup> *Id.*

<sup>204</sup> *Bill Summary & Status 113th Congress (2013-2014) H.R. 2604*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR02604:@@X> (last visited Mar. 21, 2015); *see also* Legis. Bill Hist. CA S.B. 1064 (2011).

<sup>205</sup> Northcott, *supra* note 202, at 624.

<sup>206</sup> Northcott, *supra* note 202, at 624.

<sup>207</sup> Northcott, *supra* note 202, at 625.

<sup>208</sup> *International Family Finding*, 12 *CHILDREN'S BUREAU EXPRESS* 4 (May 2011), available at <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=126&articleid=3166> (defining international family finding as conducting searches in other countries for relatives of children in foster care).

role model in this area for other states. New Jersey should continue to be progressive when it comes to ensuring the best interests of all children by improving its policies so that children can be placed with their desired caregivers in the U.S. regardless of their immigration status. This will require implementing a comprehensive policy, case management protocols, and supplemental trainings, comparable to those in place for international family finding.

The immigration status of a child or family plays a significant role in placement proceedings. To create stable, long-term improvements in the treatment of immigrant children and families, there needs to be an initiative for a similar training project to facilitate the placement of children with undocumented relatives and friends residing in New Jersey, especially given the fact that DCF's policy on this topic was recently issued.<sup>209</sup> A number of professional actors in the child welfare system need to be kept informed about emerging policy changes so that children are receiving the best possible outcomes. Immigration law advocates should host trainings on immigration law and enforcement polices, and their impact on child welfare cases, for all Division caseworkers, attorneys, and family court judges.<sup>210</sup> Family court actions that are not informed by immigration considerations can have an adverse effect on children and families.<sup>211</sup>

## VI. CONCLUSION

In New Jersey, the child welfare system and family court are responsible for determining what is in the best interests of children, including those from immigrant families who become involved in the foster system. Otherwise qualified caregivers are currently being rejected based on their immigration status. There are strong public policy reasons for allowing persons without legal immigration status to serve as resource family parents. It is considered a child welfare best practice to place children separated from their parents with family members or other interested persons. Placements with relatives preserve cultural and familial ties and reduce trauma. Keeping children out of the foster care system will also reduce the state's financial burden.

New Jersey's child welfare system needs to be reformed to keep

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<sup>209</sup> See discussion *infra* Part II.B.4.

<sup>210</sup> See Park, *supra* note 118. The ABA Center on Children and the Law has developed and participated in such trainings in several states. *Id.*

<sup>211</sup> See Lincroft, *Undercounted, Underserved*, *supra* note 83, at 21.

families together, as well as to guard against bias and misinformation when providing services to children in immigrant families. Children should be placed in the best homes possible, homes with loving and caring caretakers, regardless of their immigration status. Current New Jersey resource family licensing requirements and procedures should be amended to unequivocally provide that undocumented persons are eligible to serve as licensed resource family parents.

Similar to California and New York, New Jersey should model its policies after the proposed federal bill. Additionally, it is essential that the state implement case management protocols, ongoing trainings, and systemic changes, including monitoring the enforcement of improved comprehensive policies to help minimize the prejudice against undocumented caretakers.