COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: December 5, 2022

SUBJECT: Report on Bill 24-989, "Educator Background Check Streamlining Amendment Act of 2022"

The Committee of the Whole, to which Bill 24-989, the "Educator Background Check Streamlining Amendment Act of 2022" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

On September 16, 2022, Bill 24-989, the "Educator Background Check Streamlining Amendment Act of 2022" was introduced by Chairman Mendelson and Councilmembers Henderson, Bonds, Nadeau, and Robert White. This bill amends the School Safety Omnibus Amendment Act of 2018 (School Safety Act) to revise the process by which local education agencies screen volunteers and applicants for employment including requiring that local education agencies review the National Sex Offender Registry. The bill also further amends the School Safety Act to reduce the review of past employment from 20 years to 7 years or each of the employee's previous 3 employers, whichever period is longer, and repeals the requirement to check Child Protection Registers. Further, Bill 24-989 amends the Prevention of Child Abuse and Neglect Act of 1977 to remove a notarization requirement, to expunge inconclusive reports of abuse and neglect from the Child Protection Registry, and to revise the requirements for expungement of substantiated reports from the Child Protection Registry.

The key steps of the background check process are generally the same regardless of local education agency, with variations based on the class of worker or volunteer. The steps required under current law for prospective employees and contractors and the timeline for each step are included below for reference. Steps of the process can run concurrently.

Current Background Check Process

	Step	Avg. Processing Time
1	Criminal History (FBI)	2 days (no criminal record) to 60 days (criminal record)
2	Criminal History (MPD)	2 days (no criminal record) to 60 days (criminal record)
3	National Sex Offender Registry or SOR	2 days to 5 days
4	DC Child Protection Register or CPR (CFSA)	14 days (initial check) or 45 days (renewal check) for the D.C. Register
5	TB Screening	variable, dependent upon candidate self-reported results
6	Mandatory Drug and Alcohol Testing*	5 days (negative specimen) to 14 days (positive specimen

*Not applicable to volunteers.

Currently, staff, contractors, and volunteers working at a DCPS school go through the DCPS clearance process while many charter schools use their own processing entities, and many go through DCHR through a program that the DC Public Charter School Board developed to support charter schools. OST/Learn 24 providers often go through DCHR, with support from Learn 24, and those partnering with DCPS go through DCPS' process, as described above.[1]

The District requires applicants to positions that involve supervising students in an educational setting to submit to a suitability screening prior to hiring. Before 2018, that screening included the FBI Criminal History Record and a criminal background check from the Metropolitan Police Department (MPD). Following an incident in which an employee at an after-school program allegedly engaged in an abuse of power with a minor student, the DC Council adopted the School Safety Omnibus Amendment Act of 2018, which added a search of child abuse and neglect registries to the background check process. The majority of states maintain a statewide central registry (in DC called the "Child Protection Registry", the (CPR)), which is a centralized database of child abuse and neglect investigation records.

While a typical background check should take around 21 days, groups are reporting a turnaround time of upwards to 3 months or more. This has adversely affected the ability of schools and programs' ability to recruit and hire critical staff needs like substitute teachers, tutors, and volunteers.

The central registry reports are typically used to aid social services agencies in the investigation, treatment, and prevention of child abuse cases and to maintain statistical information for staffing and funding purposes. Central child abuse and neglect registry records also are used to screen persons who will be entrusted with the care of children, such as foster parents. The registries are records of the outcomes of child abuse and neglect investigations and in the District. The Children and Family

[1] Testimony of the Deputy Mayor for Education, Paul Kihn, at the Council's public hearing on Bill 24-989. November 2, 2022.

Services Agency (CFSA) investigates reports when the alleged complainant is a parent, guardian, kindship caregiver, day to day caregiver, relative or godparent caregiver, or custodian. Genreally, CFSA does not investigate reports of abuse or neglect when the complainant is a stranger or non-family member who does not have custody of the child – those claims would be investigated by MPD.

The Executive and education agencies have expressed support for the removal of the CPR check in the hiring process, citing its irrelevancy to the educator onboarding process. During school year, 2021-22, the Council began hearing from school leaders, frustrated volunteers, and Out of School Time (OST) program providers about the significant delays in hiring and onboarding of employees and volunteers into DCPS. It was found that the delays were being caused in large part by the extensive amount of time that a full and comprehensive review of the Districts' Child Protection Registry (CPR) review takes to conduct.

The CFSA CPR check was not intended to be used for employment suitability for school staff or contractors. In order to do a full check of whether an individual has been involved in cases of child abuse or neglect, the CFSA must undertake a manual search of the CPR to look for a match of an applicant with someone listed in the Register. There is no public or national database accessible for CPR checks as there is for criminal checks. This can be a time-consuming process, in particular when the applicant has a common name. Moreover, so data from other states requires individual outreach to each jurisdiction, this is even more challenging to obtain, as CFSA does not have the authority to conduct CPR checks in other jurisdictions for school employees, few jurisdictions have online, searchable databases, and states may elect not share information with CFSA.

Removing the CPR requirement leaves the CPR for its intended use, around custodial relationships. This change will also have the benefit of expediting the background check process and reducing backlogs and delays. This change will not create safety risks for students or interfere with the intent of 2018 School Safety Act, as the criminal background check conducted for any staff member, contractor, or volunteer will capture any criminal complaint related to abuse or neglect through arrest records and/or convictions. Bill 24-989 is adding a requirement to check the National Sex Offender Registry and the background check process will continue to include a self-disclosure requirement. These provisions will capture any candidate who has been the subject of a child welfare investigation.

Even though this legislation is about background checks and protecting children from known criminal offenders, especially sexual predators, it is important to recognize that criminal history by itself, should not be an automatic bar to employment in all cases. For instance, it is commonly accepted that the best violence interrupters may be individuals who have a criminal record from their past. Indeed, DCPS testified (attached) that the agency considers seven factors to determine whether an individual poses a present danger to children or youth and therefore will be rejected. Those factors include the duties of the job, the nature of the past offense, how much time has elapsed since the offence, and information about the individual's conduct since the offence. To be clear, DCPS does not make exceptions for cases of sexual offenses involving a minor and all sexual felony offenses.

Students are best served in nurturing environments that are adequately staffed by caring and qualified educators and volunteers. Four years after the Council passed the School Safety Omnibus Amendment Act, it is clear that the Council overcorrected the District's suitability screening criteria. Good government principles require us to take a clear-eyed view of our laws' effectiveness, and to make refinements as needed. The Committee is committed to providing safe learning environments for students and to ensuring that our classrooms and after-school programs are fully staffed. This bill will

help LEAs realize those goals by targeting background check requirements to the registries and lookback periods that provide the most relevant and useful information about an applicant's suitability to supervise and care for students.

The Committee recommends Council adoption of the Committee print for Bill 24-989.

II. LEGISLATIVE CHRONOLOGY

September 16, 2022	Bill 24-989, the "Educator Background Check Streamlining Amendment Act of 2022" is introduced by Councilmembers Henderson, R. White, Bonds, Nadeau, and Chairman Mendelson in the Office of the Secretary.
September 20, 2022	Bill 24-989 is "read" at the regular meeting of the Council and the referral to the Committee of the Whole is official.
September 21, 2022	Notice of Intent to Act on Bill 24-989 is published in the *D.C. Register*.
October 7, 2022	Notice of Public Hearing on Bill 24-989 is published in the *D.C. Register*.
November 2, 2022	The Committee of the Whole holds a Public Hearing on Bill 24-989.
December 6, 2022	The Committee of the Whole marks up Bill 24-989.

III. POSITION OF THE EXECUTIVE

Robert L. Matthews, Director, Children and Family Services Agency, testified on behalf of the Executive in support of Bill 24-989, and notes that the bill will make some important improvements to the 2018 School Safety Act, while ensuring an appropriate screening process for individuals who have direct access to children. The agency also supports an amendment to the Prevention of Child Abuse and Neglect Act of 1977 included in the bill to remove the notary requirement for CPR check applications. CFSA requests the Council remove the CPR from the background check process altogether.

Sharon Gaskins, Resource Strategy Officer, District of Columbia Public Schools testified on behalf of the Executive in support of Bill 24-989 and believes the bill will greatly enhance DCPS' efforts to hire talented staff across the system while continuing to implement important safeguards that keep our students safe. The agency suggested further refinement of the bill to address implementation challenges related to the addition of the CPR check in the School Safety Act.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The committee received no comments from Advisory Neighborhood Commissions on Bill 24-989.

V. SUMMARY OF TESTIMONY

The Committee of the Whole held a public hearing on Bill 24-989 on November 2, 2022. The testimony summarized below is reflective of the testimonies received at the hearing. Written statements received by the Committee of the Whole are attached.

Ryllie Danylko, Public Witness, testified in support of Bill 24-989. Ms. Danylko described the issues that volunteers and aftercare program providers have experienced due to delays in the suitability clearance process. She also testified in support of removing the CPR requirement altogether in the background check process.

Sarah Warren, Public Witness, testified about how the delays in the background check process have impacted her child's school in hiring an occupational therapist for her child, whose Individualized Education Program requires this staffing.

Erin Pitts, Managing Director of Employee Policy, KIPP DC, testified in support of Bill 24-989. KIPP DC supports amending the School Safety Omnibus Amendment Act in ways that ease hiring for critical positions in schools. She expressed concerns about repealing the looking back at any employer about abuse and neglect, and presented several recommendations for changes to the bill

Tami Weerasingha-Cote, Supervising Policy Attorney, DC Children's Law Center, testified on Bill 24-989. Ms. Weerasingha-Cote expressed concerns that the act has implications for child safety and the District's Child Protection Registry. The DC Children's Law Center is supportive of a tiered expungement structure for the CPR.

Carlene Reid, Ward 8 Representative, DC State Board of Education testified on Bill 24-989 and the desire to have violence interrupters in schools in Ward 8. Ms. Reid noted that the current background check process and requirements can be a barrier to this, and the expungement language will be helpful.

Marie Cohen, Author, Child Welfare Monitor Blog, testified on Bill 24-989 and believes that a review of the Child Protective Registry requires more input from parents and a more thorough review of other states' policies around this issue. Ms. Cohen noted that the changes currently in Bill 24-989 put the District well beyond the mainstream of states in terms of the ease and speed of expunging registry entries.

JoEllen Ambrose, Policy Advocacy Intern, Jubilee Housing, Inc., testified in support of the Council's efforts to propose amendments to the background check process and shared the experiences of OST Coalition members who have had withdraw from applying to DCPS schools because of the too lengthy process.

Caylyn Keller, Staff Attorney, DC KinCare Alliance, express concerns around some aspects of Bill 24-989. Those concerns include the time frames for expungement of substantiated reports being well outside the mainstream of other jurisdictions without any evidence to show that this will properly balance child safety against reasonable expungement provisions and basing timeframes for expungement on whether or not a child was removed from their home does not ensure that only severe abuse is considered for background check purpose.

Sharon Gaskins, Resource Strategy Officer, District of Columbia Public Schools, testified on behalf of the Executive in support of the intent of Bill 24-989. Her testimony is summarized in Section III.

Robert L. Matthews, Director, Children and Family Services Agency, testified on behalf of the Executive in support of Bill 24-989. His testimony is summarized in Section III.

VI. IMPACT ON EXISTING LAW

Bill 24-989 amends the School Safety Omnibus Amendment Act of 2018, effective April 11, 2019 (D.C. Law 22-294; D.C. Official Code § 38–951.03) to remove the review of the Child Protection Register as a required step in the educator background check process and to require that local education agencies review the National Sex Offender Registry in reviewing applicants for employment to education positions. The bill also amends the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977 (D.C. Law 2-22; D.C. Official Code § 4-13021.02 et seq.) to remove the prior notarization requirement and revise the process for expungement of reports from the Child Protection Registry.

VII. FISCAL IMPACT

Bill 24-989 is

VIII. RACIAL EQUITY IMPACT ASSESSMENT

The Month, Day 2022 Racial Equity Impact Assessment (REIA) from the Council Office of Racial Equity concluded that Bill 24-989's impact on Black, Indigenous, and other students of color was

IX. SECTION-BY-SECTION ANALYSIS

Section 1 — States the short title of Bill 24-989.

Section 2 — (a) Amends Section 103 of the School Safety Omnibus Amendment Act of 2018 to reduce the employer review from 20 years to 7 years or each of the employee's previous 3 employers, whichever period is longer, adds a check of the National Sex Offender Public Registry as a required step in the employment process, and repeals the requirement for a check of the Child Protection Register prior to employment.

(b) Specifies a penalty for an applicant providing false information.

(c) Clarifies language requiring sharing misconduct information with other school districts.

Section 3 — Amends Title II of the Prevention of Child Abuse and Neglect Act of 1977 to remove the notarization requirement, to expunge inconclusive reports of abuse and neglect from the Child Protection Registry, and to revise the notice requirements for expungement of inconclusive reports from the Child Protection Registry. Our intent is to implement the recommendations of the District of Columbia Children's Justice Act Taskforce regarding how long records must remaining on the CPR and which reports cannot be removed.

Section 4 — Fiscal Impact Statement

Section5 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

X. ATTACHMENTS

1. Bill 24-989 as introduced
2. Written Testimony and Letters
3. Racial Equity Impact Assessment
4. Fiscal Impact Statement for Bill 24-989
5. Legal Sufficiency Determination for Bill 24-989
6. Committee Print for Bill 24-989

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, September 19, 2022

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Friday, September 16, 2022. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Educator Background Check Streamlining Amendment Act of 2022", B24-0989

INTRODUCED BY: Councilmembers Henderson, Nadeau, Bonds, R. White, and Chairman Mendelson

The Chairman is referring this legislation to Committee of the Whole with comments from the Committee on Human Services.

Attachment
cc: General Counsel
Budget Director
Legislative Services

COUNCIL OF THE DISTRICT OF COLUMBIA
THE JOHN A. WILSON BUILDING
1350 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20004

CHRISTINA HENDERSON
Councilmember, At-Large

Committee Member
Government Operations and Facilities
Health
Labor and Workforce Development
Transportation and the Environment

Statement of Introduction for the
Educator Background Check Streamlining Amendment Act of 2022
September 16, 2022

Today, I am introducing the Educator Background Check Streamlining Amendment Act of 2022, along with Chairman Phil Mendelson and Councilmembers Anita Bonds, Brianne Nadeau, and Robert C. White, Jr.

This legislation will revise the suitability screening process for individuals applying to work as a teacher or volunteer in schools and for educational programs in the District of Columbia. Over the past year, the Council has heard from teachers, prospective volunteers, community based organizations, parents, and school leaders about the detrimental impacts arising from backlogs in the District's processing of prospective teachers' and volunteers' applications. While a typical background check should take around 21 days, groups are reporting a turnaround time of upwards to 3 months or more. This has impacted schools and programs ability to recruit and hire critical staff needs like substitute teachers and tutors. Working with my Council colleagues, the District of Columbia Public Schools ("DCPS"), the Deputy Mayor for Education, the Child and Family Services Agency ("CFSA"), and the education community, I am pleased to take steps to rectify these issues.

First, some background. The District requires applicants to positions which involve supervising students in an educational setting to submit to suitability screening prior during the hiring process. Prior to 2018, the screening included the FBI Criminal History Record, a criminal history record from the Metropolitan Police Department ("MPD"), and a National Sex Offender Registry check. DCPS requires all employees to update their background checks every two years. Following an incident in which an employee at an after-school program allegedly engaged in an abuse of power with a minor student, DCPS conducted an internal review and found that more than 30% of its employees had not maintained their background check status. Following these events, the Council passed the School Safety Omnibus Amendment Act of 2018, which, among other things, added a search of child abuse and neglect registries to the background check process.[1] The District's child abuse and neglect registry is called the Child Protection Register ("Register"), but it goes by other names in other states.

Child abuse and neglect registries are records of the *outcomes* of child abuse and neglect investigations. In the District, allegations against a caretaker of a child for abuse or neglect are reported to CFSA. Specifically, CFSA investigates reports when the alleged complainant is a parent, guardian, kinship caregiver, day-to-day caregiver, relative or godparent caregiver, or custodian. CFSA

[1] D.C. Code § 38–951.03.

does not investigate reports of abuse or neglect when the complainant is a stranger or non-family member who is not in a custodial role with the child; MPD would investigate such claims. CFSA then determines if the allegations are unsubstantiated, substantiated, or inconclusive. Unsubstantiated findings indicate that investigators found insufficient evidence to conclude that the child was maltreated. Substantiated findings are issued when a determination is made that abuse or neglect likely did occur, and inconclusive findings indicate that the investigators were unable to confirm the occurrence of abuse or neglect. Substantiated and inconclusive findings are entered into the Register, and the name of the maltreater is searched in the Register, the Register will show a "hit" for that person. Parents and guardians may petition for their records to be expunged from the Register.[2] Substantiated findings remain in the Register forever, and inconclusive findings are expunged either 5 years after the termination of social services offered to the family following the investigation or when the child in the matter turns 18, whichever is sooner.[3] The District's processes and standards are not identical to those of other states.

A review of what is contained in the Register demonstrates its limitations as a tool. First, CFSA cannot investigate school personnel alleged to have abused a student; MPD would investigate such claims. The Register would not contain records for teachers who have abused students. That type of record would appear in a criminal background check. Second, a "hit" in the Child Protection Register will not specify the findings of CFSA's investigation, nor will it show whether the findings were substantiated or if they are inconclusive. A "hit" in the Register that is not accompanied by a "hit" in any of the other registries does not indicate that an adult is a danger to children. Finally, most substantiated allegations in the Child Protection Register will overlap with the findings of one or all of the FBI Criminal History Record, the MPD criminal history record, and the National Sex Offender Registry. The only types of findings that appear in the Register that do not appear in the other registries are inconclusive findings, findings of neglect, and findings of abuse of one's own child which do not rise to the level of a criminal charge. Within those categories, findings of neglect often have more to do with circumstances associated with a caretaker's income and less to do with the caretaker's suitability to supervise children in a professional capacity. [4]

This bill makes several adjustments that will shorten hiring timelines and bring more equity to LEAs' hiring processes. First, the bill will appropriately scale the reach of the child abuse and neglect check to states in which the applicant has lived or worked. Currently, the law is overly broad and poorly tailored, as it requires that a local education agency review child abuse and neglect registries in every state in the United States for each applicant. This process is administratively burdensome and incredibly time-consuming, contributing most to the delays in processing prospective educators' and volunteers' background checks. This provision is also duplicative, as the statute requires LEAs to examine the child abuse and neglect registries in states in which the applicant is known to have lived or worked, in addition to the self-disclosure provision.

This legislation also removes the requirement that LEAs determine if an applicant is the subject of an inconclusive report of child abuse in states in which they lived or worked. Inconclusive reports

[2] D.C. Code § 4–1302.07
[3] D.C. Code § 4–1302.07
[4] Dorothy Roberts, *Torn Apart*, 2022.

are not substantiated, and asking LEAs to consider records of inconclusive findings runs counter to principals of fairness. The District should not refuse to employ eligible applicants due to unproven allegations.

This bill also revises the Child Protection Register expungement statute by tiering offenses based on the outcome of a report and any subsequent findings were entered into the Register. Records will be expunged either 1, 3, or 5 years after bring entered into the register, depending on the findings and subsequent reports. By revising the expungement statute in this way, the District can be sure that those individuals who do have "hits" in the Register are those with either serious substantiated findings or those who were recently the subject of an investigation. This will align penalties such that caretakers who made less harmful mistakes are not permanently disadvantaged in the same manner as those who committed serious offenses.

This bill would also institute the requirement that the National Sex Offender Registry be reviewed during the candidate suitability screening process. While DCPS does review this register as a matter of practice, it is important to clarify that this register must be cleared to ensure student safety at all LEAs.

Finally, this legislation will amend the existing requirement that applicants provide the contact information for the employers in the past 20 years. This bill would instead require applicants to provide the contact information of their current employer and for the longer of either the past seven years or the past three employers for positions the applicant held which involved direct supervision of children. This bill's lookback period is targeted and reasonable, and increases the likelihood that the past employers recall the applicants' performance as an employee in positions that are directly related to the roles for which they are applying.

Students are best served in nurturing environments that are adequately staffed by caring and qualified educators and volunteers. Four years after the Council passed the School Safety Omnibus Amendment Act, it is clear that the Council overcorrected the District's suitability screening criteria. Good government principles require us to take a clear-eyed view of our laws' effectiveness, and to make corrections as needed. The Council is committed to providing safe learning environments for students and to ensuring that our classrooms and after-school programs are fully staffed. This bill will help our LEAs realize those goals by targeting background check requirements to the registries and lookback periods that provide the most relevant and useful information about an applicant's suitability to supervise and care for students.

Chairman Phil Mendelson

Councilmember Christina Henderson

Councilmember Anita Bonds

Councilmember Brianne K. Nadeau

Councilmember Robert C. White, Jr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the School Safety Omnibus Amendment Act of 2018 to revise the process by which local education agencies screen applicants; to require that local education agencies review the National Sex Offender Registry in reviewing applicants for employment to education positions; to amend the Prevention of Child Abuse and Neglect Act of 1977 to remove a notarization requirement; and to revise the criteria by which findings in the Child Protection Register are reviewed for expungement.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Educator Background Check Streamlining Amendment Act of 2022".

Sec. 2. Section 103 of the School Safety Omnibus Amendment Act of 2018, effective April 11, 2019 (D.C. Law 22-294; D.C. Official Code § 38–951.03), is amended as follows:

(a) Subsection (a) is amended as follows:

(1) Paragraph (1) is amended as follows:

(A) Sub-paragraph (A) is amended to read as follows:

"(A)(i) The name, address, telephone number, and other relevant contact information for the applicant's current employer, and previous employers for the preceding 7

years or previous 3 employers, whichever period of time is longer, for whom the applicant's scope of employment involved direct interaction with children; and

"(ii) Contact information for at least one character reference."

(2) Paragraph (3) is repealed.

(3) Paragraph (5) is amended by striking the phrase "or inconclusive report of child abuse; and" and inserting the phrase "report of child abuse; and" in its place.

(4) Paragraph (6) is amended by striking the period and inserting the phrase "; and" in its place.

(5) A new paragraph (7) is added to read as follows:

"(7) Reviews the Dru Sjodin National Sex Offender Public Website, also known as the National Sex Offender Public Registry, to determine if the person has been convicted of sex offenses or offenses against children."."

(b) A new subsection (a-1) is added to read as follows:

"(1A) An applicant who intentionally provides false information on an application submitted to a local education agency under subsection (a)(1) of this section shall be subject to prosecution under section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code§ 22-2405).".

(c) Subsection (b) is amended by striking the phrase "subsection (a)(3)" and inserting the phrase "subsection (a)(7)" in its place.

Sec. 3. The Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977 (D.C. Law 2-22; D.C. Official Code § 4-1301.02 *et seq.*), is amended as follows:

(a) Section 203(a-1)(1)(B) (D.C. Official Code § 4–1302.03(a-1)(1)(B)) is amended to read as follows:

"(B) The request is accompanied by:

"(i) A consent for release of information from the Child Protection Register signed by the employee or volunteer or prospective employee or volunteer; and

"(ii) Government issued identification documentation that allows the staff of the Child Protection Register to verify the identity of the employee or volunteer or prospective employee or volunteer.".

(b) Sec. 207 (D.C. Official Code § 4-1302.07) is amended to read as follows:

"(a) The staff which maintains the Child Protection Register shall expunge an inconclusive report from the Child Protection Register one year after the date the report was entered in the Child Protection Register if no subsequent substantiated or inconclusive reports involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register during the one year period.

"(b) The staff which maintains the Child Protection Register shall expunge a substantiated report from the Child Protection Register:

"(1) Three years after the date the report was entered in the Child Protection Register if the child was not removed pursuant to § 4-1303.04 and no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register during the 3 year period; or

"(2) Three years from the date the that the child, if removed pursuant to § 4-1303.04 and a court did not make a finding that the child was abused or neglected, was reunified with the person identified as responsible for the abuse or neglect, or 5 years from the date that the substantiated report was entered in the Child Protection Register, whichever occurs first

provided that no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register.

"(c) If during the time a prior substantiated or inconclusive report is on the Child Protection Register, a subsequent substantiated or inconclusive report is entered in the Child Protection Register that identifies the same individual as responsible for the abuse or neglect, the prior report shall not be expunged until the subsequent report is expunged from the Child Protection Register.

"(d) The staff which maintains the Child Protection Register shall expunge from the Child Protection Register:

"(1) Any unfounded report immediately upon such classification by the Agency; and

"(2) Any material successfully challenged as incorrect pursuant to the rules adopted under § 4-1302.06.

"(e) Notwithstanding any other provision of law, substantiated reports involving a child fatality, sexual abuse, and serious physical injury shall not be expunged from the Child Protection Register.

"(f) For purposes of this section, serious physical injury is a physical injury which creates a substantial risk of death, or which causes serious and protracted impairment of health or protracted loss or impairment of the function of any bodily organ.".

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved 1 December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1), and publication in the District of Columbia Register.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
NOTICE OF PUBLIC OVERSIGHT HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRMAN PHIL MENDELSON
COMMITTEE OF THE WHOLE
ANNOUNCES A PUBLIC HEARING

on

Bill 24-989, "Educator Background Check Streamlining Amendment Act of 2022"

on

November 2, 2022 at 12:00 p.m.

Chairman's Website (www.ChairmanMendelson.com/live)
DC Council Website (www.dccouncil.us)

Council Chairman Phil Mendelson announces a public hearing by the Committee of the Whole on **Bill 24-989*, Educator Background Check Streamlining Amendment Act of 2022***. The hearing will be on **Wednesday, November 2, 2022, at 12:00 p.m.** via Zoom video conference.

The purpose of this hearing is to receive testimony from the government and public witnesses regarding the background check process for educators and volunteers in District of Columbia educational programs and schools. Bill 24-989, the "Educator Background Check Streamlining Amendment Act of 2022" would revise the suitability screening process for individuals applying to work as a teacher or volunteer in schools and educational programs in the District of Columbia. While a typical background check should take around 21 days, teachers, prospective volunteers, community-based organizations, parents, and school leaders are reporting a turnaround time of upwards to 3 months or more. This has impacted schools and programs' ability to recruit and hire critical staff needs like substitute teachers and tutors. Bill 24-989 seeks to address this.

Those who wish to testify must register at http://www.ChairmanMendelson.com/testify by the close of business on Monday, October 31, 2022. **Testimony is limited to four minutes**; less time will be allowed if there are a large number of witnesses. Witnesses who anticipate needing spoken language interpretation, or require sign language interpretation, are requested to inform the Committee office of the need as soon as possible but no later than five business days before the proceeding. We will make every effort to fulfill timely requests, although alternatives may be offered. Requests received in less than five business days may not be fulfilled. If you have additional questions, please email cow@dccouncil.us or contact LeKisha Jordan, Senior Policy Advisor, at (202) 724-8137.

The hearing will be conducted virtually on the Internet utilizing Zoom video conference technology. Testimony should be submitted in writing to cow@dccouncil.us in advance of the hearing. Written testimony will be posted publicly to http://www.chairmanmendelson.com/testimony. If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Statements for the record should be submitted to cow@dccouncil.us or left by voicemail by calling (202) 430-6948 (up to 3 minutes which will be transcribed). The record will close at 5:00pm on Wednesday, November 16, 2022.

DC ACTION
One voice. One future.

Testimony of Ryllie Danylko
Policy Analyst, DC Action
Committee of the Whole
Hearing on B24-989, Educator Background Check Streamlining Amendment Act
Council of the District of Columbia

November 2, 2022

Good morning, Chairman Mendelson and members of the Committee of the Whole. Thank you for the opportunity to address the DC Council today. My name is Ryllie Danylko. I am a policy analyst at DC Action, home of the DC Out-of-School Time Coalition and I am testifying in support of the Educator Background Check Streamlining Amendment Act and to share additional recommendations for improving the background check process.

I'd like to thank Councilmember Henderson for introducing the Educator Background Check Streamlining Amendment Act, along with Chairman Mendelson and Councilmembers Bonds, Nadeau, and Robert White for co-introducing it. For more than two years, the background check process as sanctioned by the School Safety Omnibus Amendment Act of 2018 (SSOAA) has been the source of significant OST program delays, hiring challenges, and most importantly, a barrier for afterschool and summer programs' ability to meet the needs of the young people they serve, particularly for those who partner with DCPS to provide programming. While we understand and appreciate the Council's intentions in strengthening protections for students in school and OST settings, we believe the implementation of the SSOAA has been flawed and requires immediate improvements, including those proposed in this legislation.
In a survey, OST coalition members have shared the following experiences as direct results of the challenges with the clearance process, demonstrating the need for this legislation, in addition to more significant improvements to the process.

Programs had to delay programs or pull out of DCPS: Some organizations that planned to provide programming at DCPS schools this year were unable to do so at some or all of the schools. One program estimates that 100 students missed out on their OST program as a direct result of these delays; another estimates that 50 students missed out; and yet another puts the estimate around 85 students. While we may never know exactly how many students in total missed out on OST because of this issue, these examples demonstrate the dire impact on OST access and participation.

Staffing became increasingly difficult: The delayed clearance process also contributed to staff turnover, impacting continuity and quality of programming for youth, who deserve reliable

and high-quality OST. In many cases, volunteers or staff were hired for a role in an afterschool program but never got the opportunity to work in the program because their clearance application took 6 or more months to be approved. At one program, 5 staff members who were hired for a program found other employment options while they were waiting for their clearance approval. Another program says more than 20 volunteers who were accepted by the organization ultimately found other options because of the unreasonable waiting period. One respondent said that they went through DCPS to get the clearances in September 2021, and as of July 2022, had yet to receive their clearance. The same staff member went through the DC Department of Human Resources clearance process this past summer and reported a much quicker experience.

Feedback on the proposed legislation and recommendations for further action

I also want to encourage the DC Council to remove the CPR requirement in the SSOAA for clearing school staff and contractors by striking paragraph (5) of subsection (a) in section 103 of D.C. Law 22-294 (D.C. Official Code § 38–951.03). As Councilmembers wrote in the statement of introduction for this bill, the CPR check is not a useful tool for judging a person's ability to work with youth, and other elements of the clearance process adequately capture information about applicants' suitability. Most substantiated allegations in the Child Protection Register will overlap with the findings of one or all of the FBI Criminal History Record, the MPD criminal history record, and the National Sex Offender Registry. Therefore, the CPR check is at best, redundant and therefore not a good use of time and resources, and at worst, could lead to discrimination against low-income applicants. In addition, the CPR check is one of the steps most frequently cited as the source of the delays. Removing it would further achieve the Council's goal of streamlining the clearance process.

We also urge the Council to call on the leaders of education agencies to take additional steps to improve the clearance processing time. While the legislation at hand might speed up some of the individual pieces of the process, it does not address the fundamental flaw of the clearance process, which is that it is decentralized, outdated, and disorganized. Not only is the application itself administratively burdensome, but it is not clear that DCPS in particular has any way of tracking the progress of individual applicants. It is next to impossible for candidates to get an update on the status of their application because the various pieces of the application are handled by a combination of different agencies and external vendors, with apparently no central system to track these various pieces. This puts the onus on applicants or the nonprofit that hired them to spend time tracking down someone who can give them a status update on each individual component, which is administratively burdensome, especially for community-based organizations with limited resources.
In addition, we know that in 2022, technology exists to give real-time feedback about missing required information on an online application. This must be implemented into the background clearance process so that human errors can be flagged and corrected within seconds, rather than an applicant having to wait weeks or months to be notified that they missed a section on a form. Neighboring jurisdictions in Maryland and Virginia have much more efficient clearance

processes. Many organizations that work in school districts around the region have said that other jurisdictions have much faster turnaround times for staff and volunteers. DC should look to them as models, or risk losing high-quality programming from organizations who might consider directing their resources toward a city, county, or school district where they know they can reach other young people in need of OST.

Thank you for your time and consideration. If you have any questions I can be reached at the contact information below.

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Chairman Mendleson and members of the Council,

Thank you for the opportunity to share my experience with the background check process. I will admit that I am not sure if the specific changes you are considering are the right path forward. But what I do know is the background check system for DCPS must be fixed as quickly as possible.

I have two children in DC public schools, an 8-year old in 3rd grade and a 5-year old in kindergarten. My youngest son has autism and an associated IEP. At this time his school has hired an occupational therapist but this person has been languishing in the background check process since before the school year started. We are approximately 8 weeks into the school year and this person's background check has yet to be completed. This means my son is not receiving services as required by his IEP.

The consequences of these delays have significant impacts. First, he is not getting access to services he needs (and is required to receive under IDEA) to address his neurodiversity. At this time the major autism programs in the area, such as Children's National, have wait lists of 18 months and while our son is on these wait lists he still has a significant period of time before he will be admitted to a program. In other words, as unfair as this might be, DCPS is the only service provider he has to address his needs. Second, once this person is approved we will have to develop a compensatory services plan which creates a lot of work for myself and his IEP team.

And the delays are compounded by the fact that DCPS is extremely slow to provide the information necessary to develop the compensatory services plan. My son had an interruption of services during last school year of 5 weeks. Seven months later, DCPS finally supplied the information necessary to his school to establish the compensatory services plan. So the background check delays compound other existing delays in DCPS processes.

I am also concerned that delays in processing background checks will force potential employees to rescind their offers and seek employment elsewhere further compounding the staffing shortages DCPS is facing. For example, the OT at my son's school was offered the position in August. This person has not been paid by DCPS while waiting for their background check. At some point this person is going to need to be employed and may determine they can no longer wait for their background check to be completed and accept a different position. That would force the school to start the hiring process all over again further delaying access to these services for my son.

In speaking with administrators at my sons' schools, the delays associated with the background check process appears to be fairly common and is not isolated to a few schools. I am also hearing that background checks for substitutes is a huge problem taking administrators way from their duties to cover classes when teachers are out sick or at appointments and preventing teachers from getting a lunch break because they need to watch students. It is unreasonable to expect teachers and administrators to continue to take on these extra obligations when streamlining the hiring process for substitutes is within our reach.

In speaking with former DCPS employees, I have heard the HR department for DCPS is extremely small- with possibly as few as 2 employees. If this is true, it is no wonder the background check process is taking so long. I think this speaks to a larger problem that will require a comprehensive approach to ensure there is enough staff to process applications and hiring, fixing delays in the background check process, and ensuring DCPS supplies the information necessary, such as compensatory services plan information, to schools in a timely fashion to ensure students are successful.

I appreciate that the Council is considering this issue and I hope it will consider a comprehensive set of changes to ensure DCPS has the resources it needs to effectively serve the city's students. Changes to the background check process is a critical element, but not the only element, necessary to ensure DCPS is seen as the best choice for DC families when considering their educational needs.

Thank you.

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TO: Chairman Mendelson and Members of the Council

FROM: Erin Pitts, Managing Director of Employee Policy, KIPP DC

RE: Educator Background Check Streamlining Amendment Act

DATE: November 2, 2022

Good afternoon Chairman Mendelson and Members of the Council:

My name is Erin Pitts and I am the Managing Director of Employee Policy at KIPP DC. In this role, I help to interpret and implement employment laws, including the School Safety Omnibus Amendment Act of 2018 (SSOAA).

At KIPP DC, we understand that our most important responsibility is to keep our 7,000 students safe. So, we understood the renewed attention on pre-employment screening that came with the passage of SSOAA. Today, as schools cope with a nationwide teacher shortage, however, we are pleased the Council is revisiting SSOAA. **We support amending SSOAA in a way that strikes an appropriate balance between being thorough and being expedient when performing suitability screening.**

Even as we look at how SSOAA could be improved, we want to highlight two positive changes that SSOAA brought to DC schools:

- First, **SSOAA mandated that LEAs develop policies to prevent and address staff-on-student abuse and student-on-student abuse.** Importantly, the Council supported LEAs in executing upon these mandates by requiring that OSSE prepare well-researched model policies that LEAs could adopt.

- Second, **SSOAA required that LEAs offer not only staff training on abuse prevention, but also training and information to caregivers and age-appropriate instruction for students**. This has allowed us to provide caregivers and students with tools to better identify and respond to red-flag behaviors. Again, in setting these mandates, the Council enlisted support from OSSE, requiring that OSSE provide LEAs with a list of curricula that could be used to satisfy the new instructional requirements. We have adopted a curriculum from OSSE's approved list with considerable success.

We thank the Council for enlisting OSSE's support and OSSE for their strong partnership with these aspects of SSOAA.

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In proposing the Educator Background Check Streamlining Act, we are pleased the Council is taking a close look at the areas of SSOAA that have not worked as well. Specifically, we appreciate the Council's interest in expediting the process by which candidates and volunteers are screened for work in schools. We understand that delays in filling staff vacancies have very real, negative consequences for staff satisfaction, retention, and student supervision. In these respects, staff vacancies present their own safety risks. Accordingly, we share your interest in achieving a better balance between conducting thorough pre-employment screens and reducing delays in hiring. For that reason, we support the Council's proposal to narrow the lookback period used when conducting employment history checks and simultaneously expand suitability screening to include a check of the National Sex Offender Registry–a review which takes just moments to complete.

That said, **we are worried about the potential removal of the requirement that LEAs contact any of a candidate's former employers to inquire about possible child abuse or sexual misconduct.** If that provision is repealed, we fear that LEAs will miss important risks that can only be detected by consulting prior employers. This might include a candidate resigning in lieu of facing termination for child maltreatment. We would ask that this aspect of the proposed legislation be given additional consideration.

Further, we encourage the Council to consider the following amendments that we think will ease the burden on LEAs of performing suitability screening without compromising student safety:

- **Allow LEAs to hire staff after they have completed the most critical screening checks.**
    - The Council could allow schools to hire staff after they clear the criminal history background check and National Sex Offender Register checks, with continued employment conditioned on successful completion of the remaining aspects of the screening process.
    - If an LEA receives adverse information while performing the remaining checks, they could take appropriate employment action.

- **Expand the number of DCHR staff who provide suitability screening services to LEAs**.
    - DCHR provides suitability screening services for KIPP DC and twenty other LEAs.
    - Since beginning this relationship with DCHR, we have seen a dramatic decrease in the time it takes to receive criminal background check results.
    - At this time, DCHR has just four employees involved (on a part-time basis) in suitability reviews for schools. Allocating more resources to DCHR could shorten their review process and allow additional schools to access their expert services. Placing this important responsibility in DCHR's hands could be expected to have the additional benefit of ensuring a more consistent review process for candidates.

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- **Provide LEAs with free access to DCHR's suitability screening services.**
    - DCHR currently charges LEAs approximately $100 per candidate to complete all of the suitability screening steps mandated under SSOAA. Given high teacher turnover and the need to renew background checks at least every two years, the cost of screening candidates and volunteers can become significant for LEAs.
    - No LEA should have to choose between having the budget to hire a teacher and having the budget to background check that teacher.

- **<u>If</u> it is not possible for DCHR to perform suitability checks for all schools, offer alternatives.**
    - The Council could require DC agencies to support compliance with suitability screening, just as the Council tasked OSSE with assisting LEAs with other aspects of SSOAA. Among other things, LEAs might benefit from support in:
        - Identifying technical solutions to automate employment history checks.
        - Identifying a list of vendors capable of conducting suitability screening.

- **Clarify to whom the background check requirements apply.**
    - SSOAA currently requires LEAs to conduct background checks on all employees and contractors if they occupy **"a position that involves direct interaction with students."**
    - We have grappled with what that means, particularly where contractors are concerned. For instance, does this apply to individuals who perform HVAC repairs in the vicinity of students? Individuals who briefly enter school buildings to deliver goods?
    - This has led to tension with some school vendors who insist they should not be subject to SSOAA and cannot comply with its burdens.
    - Council could assist by revising SSOAA to clarify that only <u>unsupervised</u> contractors (like unsupervised volunteers) in buildings and/or individuals who spend a certain <u>minimum</u> amount of time in schools need to be subject to the suitability screening requirements.

Passing the Educator Background Streamlining Act, with the aforementioned changes, will better ensure schools can screen staff in a thorough, expedient, and minimally burdensome manner. We look forward to working with the Council and Administration to continue moving towards the most efficient and effective hiring process that centers the need for every student to be safe in every school building. Thank you for the opportunity to speak with you. I am happy to answer your questions.

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Testimony Before the District of Columbia Council
Committee of the Whole
November 2, 2022

Public Hearing:
B24-0989, Educator Background Check Streamlining Amendment Act of 2022

Tami Weerasingha-Cote
Supervising Policy Attorney
Children's Law Center

Introduction

Good afternoon, Chairman Mendelson, and members of the Committee of the Whole. My name is Tami Weerasingha-Cote. I am the Supervising Policy Attorney at Children's Law Center[1] and a resident of the District with two children who attend DC public school. I am testifying today on behalf of Children's Law Center, which fights so every DC child can grow up with a stable family, good health, and a quality education. With nearly 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year.

Thank you for the opportunity to testify today regarding B24-0989, the Educator Background Check Streamlining Amendment Act of 2022 (the "Act"). Children's Law Center serves DC's children and their families in many different capacities across a variety of systems – in the foster care system, in schools, and in healthcare and housing.[2] Advocating for the safety and well-being of DC's children is our top priority.

Although this draft legislation is largely focused on streamlining the suitability screening process for individuals applying to work as a teacher or volunteer in DC schools and educational programs, this Act also has important implications for child safety and the District's Child Protection Register.

Children's Law Center supports all schools having the staffing resources they need to fully meet the needs of the children they serve. We also feel strongly that any

person entrusted with the responsibility and care of children in our schools should be screened for their child abuse history in the District, and in any place where they have lived or worked. To this end, although we support the proposed legislation's goal of limiting the reach of the child abuse and neglect check to states in which the applicant has lived or worked – we believe that these remaining checks are critical to maintaining child safety, because these registries often contain information about serious instances of child abuse that will not show up in other parts of the background check.[3] Further, we are concerned that the Act proposes repealing all of DC Code § 38–951.03(a)(3).[4] This subsection requires hiring local education agencies to review an applicant's employment history and contact former employers to ask whether the applicant has a history of abusing children or sexual misconduct.[5] We do not believe the intent of the Act is to eliminate any requirement to contact former employers, and therefore urge that DC Code § 38–951.03(a)(3) remain as it is to ensure this important step is taken.

Children's Law Center is strongly supportive of the proposed legislation's efforts to reform the Child Protection Register statute by creating a pathway for expungement.[6] Currently, placement on the Child Protection Register is largely permanent, resulting in lifetime barriers to employment and family stability – both of which directly impact the well-being of children and families in the District. We share the Committee's goal of creating a tiered structure that allows for expungement in some cases. This interest, however, must be balanced with adequate protections for child

safety. To this end, we urge the Committee to make two changes to the proposed legislation to strengthen it and ensure it conforms with the recommendation of the Children's Justice Act Task Force:[7] (1) broaden the definition of "serious physical injury" for Tier 3 offenses to include the full scope of injuries included in the Task Force's recommendations; and (2) ensure the legislation requires a petition-based process for expungement, rather than an automatic date-triggered process.

The Current Child Protection Registry Statute Imposes Lifelong Consequences that Harm Families

Under the current Child Protection Registry statute, "substantiated reports shall not be expunged from the Child Protection Register."[8] Substantiated reports include a wide variety of circumstances, including reports stemming from issues of neglect – such as a child missing too many days of school, inadequate supervision, poor housing conditions, and other situations that do not involve violence against children. Such reports are not necessarily helpful in determining whether a person is capable of safely caring for children – especially when they are decades old. Under our current statute, however, such reports continue to impose lifelong consequences – long after the underlying situation has been resolved, rehabilitation completed, children reunified, and cases closed.

Being placed on the Child Protection Register most significantly impacts families in two critical areas: employment and family stability. Placement on the Child Protection Register prevents individuals from obtaining jobs involving close contact

with children. This includes schools, daycares, aftercare/out-of-school time programs, and all manner of child-serving programs (tutoring, sports clubs, extracurricular programs, etc.). In addition to being sectors where the District is suffering serious workforce shortages,[9] these are also critical jobs and incomes that many families need access to in order to meet their children's basic needs.

Placement on the Child Protection Register also impacts family stability by preventing individuals from being able to serve as caregivers or kin foster parents for members of their own family. We have seen cases where grandparents or other extended family members of children who have been removed from their parents are unable to get licensed because of decades-old reports placing them on the Child Protection Register. As a result, children in these families are faced with the much more traumatic experience of entering the foster care system instead of staying with family members they know and love. This needlessly harms children and does not serve the interest of child safety.

The Proposed Legislation Should be Revised to Conform with Children's Justice Act Task Force Recommendations

In 2010, the District of Columbia Children's Justice Act (CJA) Task Force was established to improve the government systems and processes that protect the interests of child victims of abuse and neglect. The CJA Task Force includes professionals from across the District with expertise in the fields of criminal justice, child physical abuse, child neglect, child sexual abuse and exploitation, and child maltreatment-related

fatalities.[10] In 2017, the CJA Task Force took up the issue of reforming the expungement provision of the District's Child Protection Register statute, largely for the same reasons discussed above. The CJA Task Force engaged in a several-year long process of research and consultation with government and community stakeholders from across the city – resulting in a set of recommendations in 2020.

It is our understanding that the proposed legislation before the Committee today is intended to be the legislative equivalent of the CJA Task Force recommendations. The draft language in the Act, however, differs from the CJA Task Force recommendations in two key areas: (1) the definition of "serious physical injury," and (2) the process by which substantiated reports will be expunged from the Child Protection Register.

The Definition of "Serious Physical Injury" Should Include All Injuries Indicative of Intentional Extreme Violence Against Children

The proposed legislation creates a tiered structure that allows for different types of reports to be expunged from the Child Protection Register after one, three, or five years depending on the report type and other circumstances.[11] The Act states, however, that "substantiated reports involving a child fatality, sexual abuse, and serious physical injury shall not be expunged from the Child Protection Register" and defines "serious physical injury" as "a physical injury which creates a substantial risk of death, or which causes serious and protracted impairment of health or protracted loss or impairment of the function of any bodily organ."[12] Although the report categories identified as not

being eligible for expungement are identical to the CJA Task Force recommendation – the definition of "serious physical injury" in the proposed legislation is much narrower than the definition provided by the CJA Task Force recommendation. The CJA Task Force recommendation definition includes specific types of injuries that – while not necessarily life-threatening – demonstrate intentional extreme violence against children, including suspicious burns, broken bones or fractures, suspicious head injuries, injuries with an implausible explanation, injuries of different ages which are indicative of a pattern of abuse, medical abuse, adult-sized human bites, cases involving children who have been tortured, tied or confined, and other serious injuries that involve hospitalization or surgical procedures.

We believe the definition of "serious physical injury" in the current version of the Act is far too narrow, and the CJA Task Force recommendation provides the right level of detail to ensure individuals who have committed intentional acts of extreme violence against children remain flagged in the Child Protection Register. We therefore strongly urge the Committee to revise the language in the proposed legislation to conform with the CJA Task Force recommendation definition of "serious physical injury."

<u>Substantiated Reports Should Be Expunged Through a Petition-Based Process and Not Through an Automated Process</u>

The proposed legislation appears to contemplate an automated, date-triggered process for expunging reports from the Child Protection Register. Each subsection that

requires expungement simply starts with the statement "The staff which maintains the Child Protection Register shall expunge…" and describes the conditions and time period by which expungement shall occur.[13]

The CJA Task Force recommendations, however, contemplate a more intentional petition-based process for determining whether and when expungement should take place. Specifically, the CJA Task Force recommendations note that individuals with substantiated reports can have their names expunged from the Child Protection Register "by way of a Program Administrator's Review (PAR) or an appeal through the fair hearing process with or without a Court hearing."[14]

We believe the determination of whether and when expungement is appropriate should be done through a petition-based process that places responsibility on one or more persons to make an intentional and informed expungement decision that considers all available information. The exercise of careful judgment will be particularly important when determining whether a substantiated report falls under the category of "serious physical injury" – and is therefore not eligible for expungement – versus non-serious physical injury that can be expunged with three to five years. Utilizing a petition-based process is not only critical to ensuring good decision-making, it is also important to allow for due process, so that individual have the ability to challenge decisions to not allow expungement. To these ends, we urge the Committee

to ensure the proposed legislation includes a petition-based process for making expungement decisions.

Conclusion

Thank you for the opportunity to testify today. I welcome any questions the Committee may have.

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[1] Children's Law Center fights so every child in DC can grow up with a stable family, good health, and a quality education. Judges, pediatricians, and families turn to us to advocate for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With more than 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And we multiply this impact by advocating for city-wide solutions that benefit all children.

[2] DC's Children's Law Center, *Our Impact, available at*: https://childrenslawcenter.org/our-impact/.

[3] Although not the main focus of our testimony or this legislation, we must challenge several points made in the Statement of Introduction accompanying this proposed legislation. First, the Statement asserts that "CFSA cannot investigate school personnel alleged to have abused a student." This is incorrect – CFSA is able to investigate such incidents and include the findings of these investigations on the Register but exercises its discretion to limit its enforcement actions to families. Second, such abuses by school and childcare personnel often will not appear in a criminal background check. Prosecutions of such incidents are rare for many reasons – and convictions even more so. More often, such incidents result in employment termination but no other consequences. It is simply incorrect that "most substantiated allegations in the Child Protection Register will overlap with the findings of one or all of the FBI Criminal History Record, the MPD criminal history record, and the National Sex Offender Registry." In fact, we have seen abusive personnel simply move from school to school in the District, with our clients suffering as victims, because of this gap. For these reasons, Children's Law Center has long taken the position that CFSA should exercise its jurisdiction to investigate abuses by school and childcare personnel and any substantiated claims of child abuse should be included in the Child Protection Register.

[4] B24-0989, *Educator Background Check Streamlining Amendment Act of 2022*, Sec. 2. Section 103(a)(2), line 40.

[5] *See* DC Code § 38–951.03(a)(3), "(3) Conducts a review of the employment history of the applicant by contacting any former employers identified pursuant to subparagraph (1)(A) of this subsection to determine whether the applicant: (A) Has been the subject of any child abuse or sexual misconduct investigation by any such employer, state licensing agency, law enforcement agency, or the Child and Family Services Agency or another state's equivalent, unless the investigation resulted in a finding that the allegations were false, or the alleged incident of child abuse or sexual misconduct was determined unsubstantiated; (B) Has ever been disciplined, discharged, nonrenewed, asked to resign from employment, or has resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or (C) Has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct."

[6] B24-0989, *Educator Background Check Streamlining Amendment Act of 2022*, Sec. 3, Sec. 207(a)-(e), lines 66-97.

[7] The District of Columbia Children's Justice Act (CJA) Task Force was established in 2010 to enhance investigative, administrative, prosecutorial, and judicial processes that protect the interests of child victims of abuse and neglect. The Task Force includes professionals from across the District with expertise in the fields of criminal justice, child physical abuse, child neglect, child sexual abuse and exploitation, and child maltreatment-related fatalities. A staff member from the Child and Family Services Agency (CFSA) satisfies the requirement for representation from a Child

Protective Service's Agency. *See* Child Welfare Information Gateway, *State Children's Justice Act Grantees, available at*: https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=Custom&RS_ID=140. *See also* Capacity Building Center for States, CJA 101: Quick Facts About the Children's Justice Act Grant, *available at*: https://capacity.childwelfare.gov/sites/default/files/media_pdf/cja-101-factsheet-cp-00048.pdf. *See also* Child and Family Services Agency (CFSA), *Annual Report FY2014, available at*: https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/FY2014%20APR%20%28FINAL%29_0.pdf; Child and Family Services Agency (CFSA), *Annual Report FY2015, available at*: https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/page_content/attachments/Annual%20Public%20Report%20FY15.pdf; Child and Family Services Agency (CFSA), *Annual Report FY2016, available at*: https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/FY2016-CFSA-APR.pdf.

[8] DC Code § 4–1302.07(a). For inconclusive reports, personally identifying information is expunged when the subject child turns 18 (provided there is no reasonable suspicion or evidence that another child living in the same household or under the care of the same parent, guardian, or custodian has been abused or neglected) or after the 5th year after the termination of the social rehabilitation services directed toward the abuse and neglect. *See* DC Code § 4–1302.07(b).

[9] James Wright Jr., *D.C. Schools Face Major Substitute Teacher Shortage: Analysis,* The Washington Informer, August 3, 2022, *available at*: https://www.washingtoninformer.com/d-c-schools-face-major-substitute-teacher-shortage-analysis/; James Treuthardt, *Chart of the week: School districts are struggling to retain and recruit teachers,* D.C. Policy Center, September 9, 2022, *available at*: https://www.dcpolicycenter.org/publications/school-districts-struggle-retain-recruit-teachers/; Lauren Lumpkin, *Survey shows low morale, frustration among D.C. teachers,* the Washington Post, October 25, 2022, *available at*: https://www.washingtonpost.com/education/2022/10/24/dc-teachers-survey-retention/; Jaclyn Diaz, *Bonus checks! One year free! How states are trying to fix a broken child care system,* NPR News, *available at*: https://www.ktoo.org/2022/07/13/from-pay-care-states-pandemic-aid-childcare/; Secretary Cardona Lays Out Vision to Support and Elevate the Teaching Profession, U.S. Department of Education, June 9, 2022, *available at*: https://www.ed.gov/news/press-releases/secretary-cardona-lays-out-vision-support-and-elevate-teaching-profession; Early Care & Education Consortium, *The Child Care Workforce Shortage: Solutions from Around the Country,* June 2022, *available at*: https://www.ececonsortium.org/wp-content/uploads/2022/06/ECEC_Workforce-Report_6.2.22.pdf; and Lauraine Langreo, *After-School Programs Face Perfect Storm of Staffing and Funding Problems, Survey Finds,* Education Week, *available at*: https://www.edweek.org/leadership/after-school-programs-face-perfect-storm-of-staffing-and-funding-problems-survey-finds/2022/07.

[10] Child Welfare Information Gateway, *State Children's Justice Act Grantees, available at*: https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=Custom&RS_ID=140; Capacity Building Center for States, CJA 101: Quick Facts About the Children's Justice Act Grant, *available at*: https://capacity.childwelfare.gov/sites/default/files/media_pdf/cja-101-factsheet-cp-00048.pdf.

[11] B24-0989, *Educator Background Check Streamlining Amendment Act of 2022*, Sec. 3, Sec. 207(a)-(f), lines 66 -100.

[12] *Id*. at Sec. 3, Sec. 207(f), lines 98-100.

[13] B24-0989, *Educator Background Check Streamlining Amendment Act of 2022*, Sec. 3, Sec. 207(a)-(f), lines 66 -83, "(a) The staff which maintains the Child Protection Register shall expunge an inconclusive report from the Child Protection Register one year after the date the report was entered in the Child Protection Register if no subsequent substantiated or inconclusive reports involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register during the one-year period. (b) The staff which maintains the Child Protection Register shall expunge a substantiated report from the Child Protection Register: (1) Three years after the date the report was entered in the Child Protection Register if the child was not removed pursuant to § 4-1303.04 and no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register during the 3 year period; or (2) Three years from the date the that the child, if removed pursuant to § 4- 1303.04 and a court did not make a finding that the child was abused or neglected, was reunified with the person identified as responsible for the abuse or neglect, or 5 years from the date that the substantiated report was entered in the Child Protection Register, whichever occurs first provided that no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register."

[14] Children's Justice Act Task Force Recommendations, on file with the CJA Task Force (not publicly available).

Carlene Reid
Ward 8 Representative

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November 2, 2022

Greetings Chairman Mendelson and members of the Committee of the Whole:
I am Dr. Carlene Reid, Ward 8 Member of the D.C. State Board of Education. This testimony is related to the Educator Background Check Streamlining Amendment Act. I am testifying as the Ward 8 member and my summary should not be considered a reflection of the board's views.

The D.C. State Board of Education has participated in some activities related to a few topics mentioned in the proposed bill and I want to highlight some of my takeaways from these engagements.

1) The D.C. State Board of Education hosted a panel on violence in school communities on 11/19/2022. A couple participants on that panel were members of an organization that provides violence interruption services in schools. They mentioned that the backlog in background checks creates a barrier to their recruiting and being able to deploy workers to sites which causes understaffing. I encourage the Committee of the Whole to consider how this bill can reduce the barriers for violence interrupters to get background checks completed for them to do their work in school settings. Many (not all) of the individuals who do the work have previous histories with the justice system, which gives them the unique skillset to relate to youth and do their work in a way that many students can learn from. I ask the council to consider our background checks waiving any previous charges that were not directly connected to the well-being and safety of children.

2) The D.C. State Board of Education also hosted a panel on sexual assault in schools on 9/23/2022. Based on feedback from panelists, I concur with the bill's proposal to include the National Sex Offender Registry data in D.C.'s background check requirements. During that panel a presenter mentioned there are occasions where an individual may have been substantially accused and is able to move between LEAs for employment or be hired in D.C. with a history in another state. I have included the link to the recording of that panel for your convenience (SBOE Roundtable on Sexual Assault in Schools - September 23, 2022 - YouTube).

I appreciate the committee's time and consideration of this topic.

Respectfully,

Dr. Carlene Reid
Ward 8 Member
D.C. State Board of Education

Testimony before the District of Columbia Council
Committee of the Whole
November 3, 2022

Educator Background Check Streamlining Amendment Act of 2022

Marie Cohen
Child Welfare Monitor
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Good afternoon! My name is Marie Cohen, I am a resident of Ward 6 and I write the blog, Child Welfare Monitor, a national child welfare policy blog that attempts to cut through ideology and misinformation and provide a clear-eyed discussion of issues. I also serve on the District of Columbia's Child Fatality Review Committee and previously served on the Citizen's Review Panel on Child Abuse and Neglect. I am a former foster care social worker in the District of Columbia and before that I was a policy analyst and researcher working on issues related to poverty.

I am here to testify on the Educator Background Check Streamlining Amendment Act of 2022 and specifically on the provisions related to the Child Protection Register (CPR). To summarize my testimony, some people with substantiated reports of abuse or neglect should be able to have their names expunged from the registry earlier than current law allows. But the changes embodied in this bill put the District well beyond the mainstream of states in terms of the ease and speed of expunging registry entries. Several misleading assertions in the Statement of Introduction, which tend to minimize the severity of many registry reports, suggest that the framers of the bill were biased or misinformed and cast further doubt upon the bill. Aside from any concerns about the merits of the bill, such major changes should not be made without extensive research including public input, adequate notice to parents and advocates, and hearings by the Human Services Committee.

Creating several tiers of child maltreatment findings with different requirements for expungement makes sense. Not all child maltreatment offenses are equally severe, and people can mature and change over time. Being listed on the Registry most likely disqualifies some people who are not a danger to children from getting jobs that would benefit them and the community. However, The assertion in the Statement of Introduction that "the District's processes and standards are not identical to other states" is correct but meaningless. It is rare to find any aspect of government in which one state's processes and standards are identical to another. States' expungement policies vary greatly. But the District is in the majority along with 27 states that have no provision for automatic expungement of *substantiated* reports after a period of time.[1] Another 20 states provide for

expungement of substantiated allegations after a certain amount of time has elapsed and there have been no further reports.[2] While no two states have identical processes and standards, the District's processes and standards are squarely in the mainstream of other states today.

Moreover, the radical changes being proposed in this bill would put the District well outside the mainstream in terms of expungement from the registry. They provide for the expungement of an inconclusive report after one year if no further substantiated or inconclusive reports were entered in the Registry, and of substantiated reports after three or five years depending on some rather convoluted language that should be rewritten. Only six states allow expungement of *any* substantiated reports in as little as five years, and usually only for certain cases, with others taking longer to expunge.[3]

The sponsors of the bill assert, without evidence, that that most substantiated allegations in the Child Protection Register will also appear in another registry like that of MPD, the FBI or the Sex Offender Registry. They go on to state that "the only types of findings that appear in the Register that do not appear in the other registries are inconclusive findings, findings of neglect, and findings of abuse of one's child that do not rise to the level of a criminal charge." The signers appear to be implying that these three types of findings are so trivial that the perpetrator will not pose a danger to children. But findings of neglect and findings of abuse that "do not rise to the level of a criminal charge" can be very serious indeed, as I explain below.

Findings of neglect: The authors minimize the importance of neglect findings, claiming that "findings of neglect often have more to do with circumstances associated with a caretaker's income and less to do with the caretaker's suitability to supervise children in a professional capacity." This statement is supported with a footnote to a book by Dorothy Roberts, which provides no factual evidence for this assertion.[4] And the common trope that neglect reflects nothing but poverty is actually not supported by the facts. Rather than "only" poverty, substantiated findings of neglect often involve parents who leave their children alone for extended periods of time, drop them off with

unsuitable caregivers. fail to get them to school regularly, or let their home become unlivable. I have recently read about a case of two parents substantiated for neglect but not abuse when an infant was killed because there was no proof of who actually killed the baby—a parent or unknown caregiver with whom the parents left the child. Whatever the case, the parent was ultimately responsible for the baby's death. Serious substance abuse is often a contributing factor in such cases. According to CFSA's most recent oversight responses,[5] out of 1,035 investigations that resulted in substantiated allegations in FY 2021, 24 percent included substance abuse as one of the substantiated allegations, 22 percent included inadequate supervision, 17 percent involved educational neglect and seven percent involved medical neglect.[6] Six percent of substantiations involved inadequate housing, for which lack of income can certainly be a contributing factor. But all families have access to shelter in the District so they should not be sleeping in a place that is unsafe. Many of these substantiated allegations likely concerned parents who let their homes become uninhabitable. In short, it is an error to belittle the severity of neglect.

Findings of abuse that "do not rise to the level of a criminal charge": It is patently wrong to suggest that findings of abuse that do not rise to the level of a criminal charge are by definition minor. Criminal courts have a much stricter standard of proof than does CFSA, and there are many cases of death or injury that are substantiated as maltreatment by CFSA but do not even result in charges by the police, as I know from serving on the citywide child fatality review team. Thankfully, the bill does not allow substantiated reports involving a child fatality, sexual abuse, or serious physical injury to be expunged. But the definition of serious injury in the bill is quite narrow and requires a threat of death or prolonged impairment. That means that perpetrators of some very serious abuse, such as whipping a child bloody or knocking them down with a punch, may not show up on a criminal registry.

Since I never heard about this bill until last Wednesday, I have not had a chance to review thoroughly and consider other options for allowing expungements from the Child Abuse Registry.

But the attempts in the Statement of Introduction to minimize the nature of the offenses that land people in the registry suggest that the framers were either biased or misinformed when writing this bill. If they had been better informed or less biased, they might have chosen longer timeframes or different definitions of the groups eligible for expunction. Or maybe even instead of automatic expungements, they could have provided for expungement to depend on review of the case. In Vermont, for example, a person can petition after seven years for a review for the purpose of having a record expunged but the burden of proof is on the individual to show that he or she no longer poses a danger to children.

Whether or not this bill would be the best way to reform the registry, these changes should not be made in a bill about the hiring of educators because it is not only educators who require a registry check. Moreover, changes to the registry should be the outcome of a process including surveys of policies in other states and provisions for community input. The result should be a bill dealing with the registry alone—a bill that is introduced with enough advance notice to parents and child advocates and receives a hearing at the Human Services Committee. The framers should explain why they chose to define the three tiers as they did and why they chose such short timeframes. They should inform the public about whether they thought of having expungement be at the discretion of the agency rather than automatic, and why they discarded that option if they considered it.

It is clear that the framers were trying to achieve the reforms quickly in the interests of hiring educators fast. But rushing this reform to passage as part of an education bill shortchanges the District, its children, and the parents who entrust their children to the professionals hired to care for them. Let us not forget why we have a child abuse registry. It is for vetting not only teachers but also child care providers, foster parents (including relatives), and volunteers who work with children as mentors, tutors, or in other capacities. This bill is written to help hire educators, but it will affect many more systems to which we entrust our children. Reforming the child abuse registry is a worthy

objective but a weighty one, necessitating thorough investigation, honest advocacy, and clear-eyed consideration.

Notes

[1] Child Welfare Information Gateway (2018). Author's analysis of data from *Review and Expunction of Central Registries and Reporting Records*. Washington, DC: US Department of Health and Human Services, Children's Bureau. Available from https://www.childwelfare.gov/pubPDFs/registry.pdf. Some of these states allow reports that are not substantiated to be expunged after a certain time period.
[2] Regarding inconclusive reports, it is harder to compare our provisions to those of the states given the different terms and definitions used.
[3] Child Welfare Information Gateway (2018).
[4] See Marie Cohen, "Torn Apart: A Skewed Portrait of Child Welfare in America." *Child Welfare Monitor*, April 27 2022, http://childwelfaremonitor.org/2022/04/27/torn-apart-a-skewed-portrait-of-child-welfare-in-america/.
[5] CFSA, FY 21-22 Performance Hearing Oversight Responses, February 3, 2022, https://dccouncil.gov/wp-content/uploads/2022/02/FY21-22-CFSA-Performance-Oversight-Prehearing-Questions-Responses-Final.pdf, p. 21.
[6] The categories do not add up to 100 because some parents are substantiated for more than one maltreatment type.

Testimony of JoEllen Ambrose
Policy Advocacy Intern, Jubilee Housing, Inc.
Before
CHAIRMAN MENDELSON
COMMITTEE OF THE WHOLE
Bill 24-989: Educator Background Check Streamlining Amendment Act of 2022
November 2, 2022

Good afternoon, Chairman Mendelson and Members of the Committee. My name is JoEllen Ambrose, and I am the Policy Advocacy Intern at Jubilee Housing. Thank you for the opportunity to provide testimony on the Educator Background Check Streamlining Amendment Act of 2022.

Jubilee Housing, founded in 1973, works to build diverse, compassionate communities that create opportunities for everyone to thrive. As Jubilee approaches its 50th anniversary, we remain committed to the residents of our city who deserve to live in quality housing that they can afford and receive the type of services that allow them to succeed. Jubilee has come to understand its work as *Justice Housing* — deeply affordable housing, in thriving neighborhoods, with supportive services onsite and within walking distance that bridge the gap in access to resources between lower- and higher-income District residents.

I would like to begin by recognizing the positive steps the Council are taking by proposing amendments to the background check processes that educators, partner staff, and volunteers are required to complete to work with youth. However, over the past year and a half, dozens of OST programs that partner with DCPS have continued to report delays in getting their staff and volunteers cleared through a process which, according to DCPS should take 15 days, but is averaging several weeks and even months. In a survey, OST coalition members have shared the following experiences related to this issue:

> **Programs had to pull out of DCPS:** Some organizations that planned to provide programming at DCPS schools this year were unable to do so at some or all of the schools. Several programs estimate that 50-100 students have missed out on their OST program as a direct result of these delays. While we may never know exactly how many students total missed out on OST because of this issue, these examples demonstrate the dire impact on OST access and participation.
>
> **Staffing became increasingly difficult:** The delayed clearance process also contributed to staff turnover, impacting continuity and quality of programming for youth, who deserve reliable and high-quality OST. In many cases, volunteers or staff were hired for a role in an afterschool program but never got the opportunity to work in the program because their clearance application took 6 or more months to be approved and they had to find other employment options.
>
> **Neighboring jurisdictions in Maryland and Virginia have much more efficient clearance processes:** Many organizations that work in school districts around the region have said that other jurisdictions have much faster turnaround times for staff and volunteers. DC should look to them as models, or risk losing high-quality programming from organizations who might consider directing

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Testimony Before the Council of the District of Columbia

Committee of the Whole

Public Hearing
Bill 24-989: Educator Background Check Streamlining Amendment Act of 2022
November 2, 2022

Caylyn Keller, Staff Attorney

DC KinCare Alliance

Good afternoon, Chairman Mendelson and Members of the DC Council. My name is Caylyn Keller and I am a staff attorney with DC KinCare Alliance. Our mission is to support the legal, financial, and related service needs of relative caregivers who step up to raise DC children in their extended families in times of crisis when the children's parents are not able to care for them due to mental health and substance use disorders, incarceration, death, abuse and neglect, and/or deportation. Many of these children come into the care of relatives after the children have been abused by their parents. Our relative caregiver clients have reported concerns that both MPD and CFSA have failed to take steps to protect abused DC children, even in particularly serious cases.

We are testifying today to express our concerns with some aspects of this legislation. First, child welfare stakeholders were not made aware of its provisions and as a result were not involved in its development. Second, the time frames for expungement of substantiated reports are well outside the mainstream of other jurisdictions without any evidence to show that this will properly balance child safety against reasonable expungement provisions. Finally, basing timeframes for expungement on whether or not a child was removed from their home does not ensure that only severe abuse is considered for background check purposes.

First, the typical process for legislation that impacts child welfare would be for stakeholders in the child advocacy community to be invited to comment on the proposed legislation and for the Committee on Human Services to hold a hearing so that stakeholders and the members of the public would have the opportunity to testify. The involvement of stakeholders is important to legislation such as this because it is addressing much more than background checks for teachers. These background checks are relied on to ensure the safety of children when licensing social workers, residential treatment staff, nurses, medical and

mental health providers, day care workers, and foster parents. By only including government agency representatives in the drafting process and including drastic changes to child welfare laws in an education bill, the Council is missing critical input and giving the appearance of not being transparent about the process.

Second, according to the U.S. Children's Bureau's "Review and Expunction of Central Registries and Reporting Records," DC's current law, which does not provide for expungement of substantiated reports, is consistent with the majority of other states (30 states). Moreover, only 5 states (Arkansas, Illinois, Iowa, North Dakota, and Utah) provide for expungement of substantiated reports after 5 or fewer years.[1] Of the remaining 15 states, 7 provide for expungement only after the child becomes an adult, 5 provide for expungement 10 years from entry on the register, and 3 provide for expungement after 7 years.[2]

Third, our work with relative caregivers, children, and families touched by the DC child welfare system has identified various practices CFSA utilizes when a child has been abused or neglected. One of these practices is known as kinship diversion or hidden foster care. It occurs when CFSA substantiates abuse or neglect and determines it is not safe for a child to remain in their parental home and, rather than remove them to foster care, CFSA will ask a relative or godparent to step in a take the child. This most often occurs under threat of removal to foster care, so the parents and relatives feel coerced into agreeing to the arrangement. This practice has been studied by various organizations, including the Annie E. Casey Foundation and Child Trends, which have found that hidden foster care is so common that it occurs roughly as frequently as formal foster care, and the decision to remove a child

[1] While the Children's Bureau document indicates that Pennsylvania has a 5 year expungement provision, a 2018 amendment increased the time period to 10 years.
[2] U.S. Department of Health and Human Services, Children's Bureau Child Welfare Information Gateway. (2018, May). *Review and Expunction of Central Registries and Reporting Records.* https://www.childwelfare.gov/pubPDFs/registry.pdf.

rather than divert "is typically made because of a lack of appropriate family members, not due to case specific concerns (e.g., the severity of the abuse or neglect). . . ."[3] This is consistent with what we see here in DC. CFSA will look to divert a child first before ever considering removal and will do so as long as there is a willing relative, regardless of the type or severity of maltreatment, age of the child, ability of the relative to care for the child, or other relevant factors.

In light of the prevalence of kinship diversion, we cannot assume that just because a child was not removed from their home to foster care, the abuse was not severe. If we base the amount of time for expungement on whether a child was removed to foster care, we will ensure that perpetrators of similar levels of abuse will be treated dissimilarly based solely on whether the child was diverted to hidden foster care or formally removed to foster care, not the severity of abuse. Finally, we note that the types of abuse that are excluded from expungement under this legislation are too narrow and should also include sex trafficking, burns, broken bones, torture, medical abuse, and evidence of repeated physical abuse.

* * *

Thank you for providing me the opportunity to testify. I am pleased to answer any questions.

[3] Malm, K. and Allen, T. (2016, July). *A Qualitative Research Study of Kinship Diversion Practices*. https://www.childtrends.org/wp-content/uploads/2016/07/2016-24KinshipBrief.pdf. *See also,* Annie E Casey Foundation. (2013). *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies*. https://assets.aecf.org/m/resourcedoc/KinshipDiversionDebate.pdf; Gupta-Kagan, J. (2020, April) America's Hidden Foster Care System. *Stanford Law Review*, 72 (4), 841. https://www.stanfordlawreview.org/print/article/americas-hidden-foster-care-system/.

Research Brief

July 2016 Publication #2016-24

A Qualitative Research Study of Kinship Diversion Practices

Karin Malm
Tiffany Allen

OVERVIEW

This brief explores the practice of "kinship diversion," in which children are placed with relatives as an alternative to foster care. Also referred to as informal or voluntary kinship care or safety plans, its use varies across the country. In this brief we present findings from an in-depth review of kinship diversion in one state. Interviews and focus groups revealed common themes among agency caseworkers, kinship caregivers, and court personnel around the reasons for using kinship diversion, the continued support needed for kinship caregivers, and the varied factors that influence kinship diversion practices.

BACKGROUND

Relatives and "fictive kin" (who lack a blood relation but maintain an intimate, family-like relationship) can play a significant role in supporting children and families, particularly children who have experienced abuse or neglect. Kinship diversion occurs when a child welfare agency facilitates the placement of a child with relatives or fictive kin when that child cannot remain safely at home with his or her parents. In such cases, without the presence of an appropriate relative to care for the child, the child would be brought into the agency's custody. Considerable anecdotal evidence suggests many states facilitate kinship diversion arrangements to prevent children from entering foster care, but it is unclear how often this occurs, or what the practice involves.

Over the past two decades there has been an increase in federal and state emphasis on kinship care and family involvement in child welfare agency policies and practices.[1] This seems to naturally lead to an increase in reliance on kinship caregivers to care for children in agency custody, as well as outside-of-agency custody with informal arrangements. While there are federal policy guidelines that govern practice for kinship caregivers of children in agency custody, federal guidance is noticeably lacking in regards to kinship diversion practices. In particular, there are no guidelines on when kinship diversion is appropriate, how

1 The provisions for kin caregivers in the Adoption and Safe Families Act (ASFA) of 1997 focus primarily on kin who care for children in state custody. For states to receive Title IV-E federal reimbursement for eligible children, ASFA requires that kin must meet the same licensing requirements as non-kin foster parents. However, states have the ability to waive licensing requirements for kinship caregivers on a case-by-case basis for non-safety issues (Allen et al., 2008).The Fostering Connections to Success and Increasing Adoptions Act of 2008 requires states to notify grandparents and other adult relatives within 30 days of a child's removal from his/her parent and inform relatives of their rights to participate in the child's care and placement. States must also explain foster parent requirements to the relatives and describe the services provided to licensed providers. However, most of the Act's provisions for kinship caregivers do not pertain to diversion, and instead affect only licensed caregivers. For example, they allow for federal reimbursement for guardianship assistance payments and codification of foster care licensing standards and waivers (Geen, 2009).

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to assess whether a particular caregiver is appropriate, or what services should be available in kinship diversion arrangements. Additionally, there is a robust debate among national experts about whether and when kinship diversion is an appropriate method for keeping children out of formal foster care (Annie E. Casey Foundation, 2013).[2]

DATA SOURCES

To better understand kinship diversion practices in one mid-Atlantic state, we conducted semi-structured interviews and focus groups with caseworkers, supervisors, kinship caregivers, and court representatives.[3] We structured our research to address three overarching questions:

1. Under what circumstances are child welfare agencies using kin as a way to divert children from foster care?
2. How is the family triad (children, birth parents, and kinship caregivers) faring when they are diverted from the foster care system?
3. What is the child welfare agency and locality's philosophy regarding the use of kin to care for children who come to the attention of the child welfare agency?

Prior to beginning field work, telephone interviews with experts[4] were conducted to understand current practices and arguments for and against kinship diversion in the United States. These interviews provided important context and informed the development of site visit protocols.

In total, 154 individuals across six jurisdictions participated in semi-structured interviews or focus groups. Sites were selected to reflect diversity across a variety of factors that may play a role in the use of kinship diversion practices, including urban versus rural settings, the percentage of out-of-home placements with relatives, and the numbers of Temporary Assistance for Needy Families (TANF) child-only cases. The interview guides included the following topics:

- Caseworker practices in kin diversion situations
- Information provided to kin caregivers in the decision-making process for kin diversion
- Support for birth parents
- Services provided to kin caregivers
- Data tracking of diverted placements
- Opinions about kin diversion practice

2 The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies, 2013.

3 In 2011, we completed focus groups with 96 caseworkers (including 53 investigative/child protective services caseworkers, 37 ongoing or foster care caseworkers, and 6 prevention or family preservation caseworkers), 23 supervisors, and 21 kinship caregivers across six jurisdictions. We also completed interviews with 14 court representatives, which included judges, attorneys, and Court Appointed Special Advocates (CASA).

4 In 2010, 41 experts with a variety of viewpoints and duties, including public child welfare administrators, practitioners, researchers, court personnel, policymakers, and advocates were interviewed. These interviews were not conducted as part of the research study; they were conducted for a broad range of purposes for a funder organization. A set of questions was developed but not used consistently across interviews.

KEY FINDINGS:

Analysis of information obtained during interviews and focus groups identified the following themes:

Agencies use kinship diversion for a variety of reasons.

> **"I think that the role of government is to be involved with the lives of families to the smallest extent possible. We are a statutory and intrusive agency."** – Public Agency Staff

Kinship diversion allows families to remain the primary decision makers, avoiding court involvement. Both staff and kinship caregivers reported that being involved with the child protective services agency meant adhering to many rules and regulations, which both types of participants considered intrusive and not family-friendly. According to participants, kinship diversion practice provides families with autonomy over their lives. Some participants noted that families can avoid the mandatory timelines for reunification that would occur if the child were in the state's custody. Study participants also noted that kinship diversion avoids what caseworkers often viewed as unnecessary court involvement. Even court personnel noted that court involvement was intrusive and did not always help families.

Kinship diversion keeps children out of foster care. Caseworkers described foster care as a last resort for children, and kinship diversion is one method for keeping children out of foster care. Some caseworkers share the perception that foster care should be a temporary solution and that children fare worse in foster care settings. Perceptions about the negative effects of foster care also appear to make caseworkers less likely to offer kin the option of becoming a licensed foster parent.

> **"Our first goal before diversion is to provide services to the family to keep the child in the home. We would try to divert from foster care but before we look at placing with other relatives, we look at providing services to the parent to resolve any issues."** - Public Agency Staff

Kinship diversion is not used to avoid providing services to families. Caseworkers stressed that they do not pursue kinship diversion as a way to avoid providing in-home or other preventive services to the birth parents. Caseworkers also report working with relatives to help link them with services such as child care or TANF. Interestingly, despite participants' assertions that foster care negatively affects children and that relative caregivers are, for the most part, not licensed as foster parents, most participants supported the idea of licensing relative caregivers as foster parents. The positive reaction to licensing relative caregivers may be due to participants' belief that the agency needs to provide support to kinship families. As licensed foster parents, the relatives would be eligible for financial and other supports not available to unlicensed caregivers. Participants reported that the agency needs to (and in many cases does) provide some support when relatives step up to care for children, even in diversion situations.

There is some variation in programmatic specifics across jurisdictions and among cases.

Decision-making. Concerning the decision to divert or not, participants reported two major decision-makers in facilitating kinship diversion: the child's parent and the agency representative. Typically, the parents' wishes drive kinship diversion in situations that do not involve abuse and/or neglect (e.g., parent incarceration, hospitalization). In other situations, the agency is the primary influence in suggesting diversion. Some participants noted that the decision to divert is made collaboratively with the parent and the agency. This collaboration often occurs in conjunction with family meetings that are facilitated before a child is removed from a home. Regardless of who participants view as the primary decision maker, the parent must agree with the arrangement before the diversion occurs. In most cases, the parent identifies kin as potential placements, and the parent negotiates with the agency to ensure that the child is moved to a safer environment.

The decision not to divert is typically made because of a lack of appropriate family members, not due to case-specific concerns (e.g., the severity of the abuse or neglect) about the appropriateness of diverting from agency custody. Kinship diversion would not be pursued if no family member is immediately available to care for the child, or if those who are available have histories of abuse or neglect, substance abuse, financial instability, or an inability to keep the child safe and meet his or her needs. Very few local jurisdictions choose to bring a child into agency custody when an appropriate relative is available.

When appropriate and available relatives are out of state, the child enters agency custody and diversion could not occur. The agency would then request a home study of the family member in the other state and begin the process to place the child out of state.

Timing. Study participants reported that kinship diversion occurs at all stages of a child welfare case, and all types of caseworkers facilitate diversion arrangements, with the exception of adoption workers.[5] Investigative workers initiate or participate in discussions with parents about a potential kinship diversion if the removal of a child from the home is being considered. There was also mention of ongoing or prevention workers, who provide services in the home to the birth parent and the child. These workers sometimes determine that the child can no longer remain there safely, and facilitate a diversion as a result. In foster care units, often called ongoing units, workers may arrange the placement of a child with kin soon after the agency takes custody, but before the preliminary court hearing.

Relative assessments. According to respondents, the policies and instruction around relative/home assessments are inconsistent. None of the local jurisdictions have formal assessment guidelines for caseworkers to follow, and practices are not standardized across units within an agency. Assessments range from home safety checks, financial assessments, and drug screens to local, state, federal background checks, and child abuse and neglect registry checks. The timing of the assessments also varies. Some workers conduct assessments before the child is moved to the relative's home and some workers assess the relative following the move. For example, in rural jurisdictions where families are known to the agency, background checks are not frequently conducted prior to the child's move. Other factors may impact assessment procedures, including the anticipated length of time in the kinship caregiver's home or the reason for child's removal. In addition, the worker may assess the child's medical, educational, and socio-emotional needs to determine if the caregiver is equipped to handle those specific needs.

Information provided to families. Participants reported that the information provided to potential kinship caregivers often depends on the judgment of the caseworker. Discussions often occur simultaneously with assessment procedures, and information can be presented through individual discussions with family members or during a meeting with the family, parents, and the child (depending on the child's age). Participants reported that many different topics are discussed with birth parents and kinship caregivers; however, there are no reports of a checklist or other standardized mechanism to ensure that specific topics are discussed prior to decision-making.

Based on an assessment of the child's needs, the agency may discuss available services with the family (including the child, birth parent, and kinship caregiver), including those that come through the agency or the community. They also have discussions about how kinship caregivers should maintain healthy boundaries with the parent and the child. In addition, the worker may discuss agency- or caregiver-facilitated visitation between the child and the parent and/or siblings.

Participants reported that the initial discussions with kin can result in a written safety plan outlining terms to which all parties agree, encompassing services, visitation, etc. While participants noted that the plans are not legally enforceable, they admitted that families may mistakenly view these agreements as legally binding.

5 We did not interview adoption workers in any of the jurisdictions we visited, however, there was later indication that adoption workers may be diverting to avoid adoption dissolutions. This was not mentioned during our site visits.

Study participants also said that they discuss the caregiver's personal economic resources and possible financial assistance, though foster care subsidy payments were infrequently mentioned. Caseworkers rarely discuss the possibility of pursuing foster care licensure with kin caregivers, and they noted that the caregiver usually has to request this option. Workers also reported discussing the kinship caregiver's legal custody options and the court process required to obtain legal custody.

Several factors influence the use of kinship diversion.

Study participants reported a number of changing practices and directives from agency leadership that appeared to influence the use of kinship diversion. First, all the local agencies in the study are moving to a more prevention-focused practice, with some agencies creating new prevention units and specialized staff positions. Study participants also reported a move to more family-based practice with caseworkers increasingly receptive to family engagement. The local jurisdictions that do license kin as foster parents have seen increases in these placements in recent years. Additionally, several of the jurisdictions were engaging in family-finding techniques, which can be used early in the case process to identify and engage kin.

According to participants, state leadership has promoted a reduction in the numbers of children in foster care. This appeared to affect the use of kinship diversion as a means of keeping children from entering the state's custody, thereby reducing the numbers of children in foster care. At the time of the research, the state had recently approved a subsidized guardianship program allowing for financial support for kinship caregivers, but, due to its newness, study participants were not yet aware of the program and its implications. In addition, the state had recently implemented family meetings, which can influence kinship diversion by bringing together family members early in the case to discuss the well-being of the child. These meetings can also encourage ongoing collaboration between the agency and extended family in making decisions concerning the child. The meetings occur when the determination to remove the child from the home is made, and study respondents reported that the diversion option is discussed as part of these meetings.

IMPLICATIONS AND CONCLUSIONS

Study participants—agency caseworkers, court personnel, and kinship caregivers—generally viewed child welfare agencies as intrusive in families' lives. However, they also felt that they and the agency had a responsibility to provide resources and support to the kin who step in to care for children. The availability and accessibility of such services varies greatly across the local jurisdictions in the study. All of the jurisdictions struggle to determine which cases needed ongoing monitoring and services, or to determine the appropriate amount of time to support the families.

"I wouldn't be a foster parent again, I'd ask for no money and I'd take them into my home and care for them. And I'd never give them back." - Relative

For agencies implementing kinship diversion practice, it will be important to balance support for family autonomy with the agency's mission to protect children. Our research found that not every diverted family receives ongoing services, and some families are given the option to decline suggested services. If the diversion had not occurred and the child had entered foster care, ongoing monitoring and services would have been required. Study participants acknowledged this situation, reporting that once the child moves to the kinship caregiver's home, the safety risk that brought the child to the agency's attention is removed, and, without the safety risk to address, intervention from the child welfare agency is no longer imperative. Yet respondents did acknowledge that some diverted families would benefit from ongoing assistance in order to adequately care for the children, and in some instances, ongoing services are provided.

"It's a full time job with the extra kids…having an extra hand, they [private agency] do all the visits [with the parents]. That is so helpful." - Relative foster parent

With no standardized policies and procedures for kinship diversion practice, and no data gathered to track children who have been diverted, agencies do not know exactly how practice is carried out and how diverted families are being served. This lack of clarity also leaves the burden of deciding whether diversion is appropriate on the individual decision-maker, typically the caseworker. This may leave the agency open to claims of bias or unethical practice and may also result in inadequate services for children and families. When practice varies from caseworker to caseworker, families do not obtain consistent and comprehensive information about the service and custody options available during a family crisis. Implementation of a more consistent, intentional approach with each family would provide a level playing field for families and agencies to make better decisions.

Research suggests that agencies are increasing their use of kinship diversion (Allen et al., 2008). In 2011, informal kinship placements were the most common out-of-home placement for children who had a maltreatment report (Walsh, 2013). This may signal a shift in child welfare agencies, broadening from responding to child abuse and neglect to addressing the underlying causes of abuse and neglect. With the increased use of family engagement techniques, agencies are focusing on supporting families in ways that may prevent the need for child welfare intervention. Though agencies recognize and acknowledge this shift, the structure of child welfare funding is not aligned with this modification in mission. This change in practice also requires a culture shift at the front line from protecting the child from his/her immediate family to empowering and supporting the child's extended family to ensure the safety and well-being of the child.

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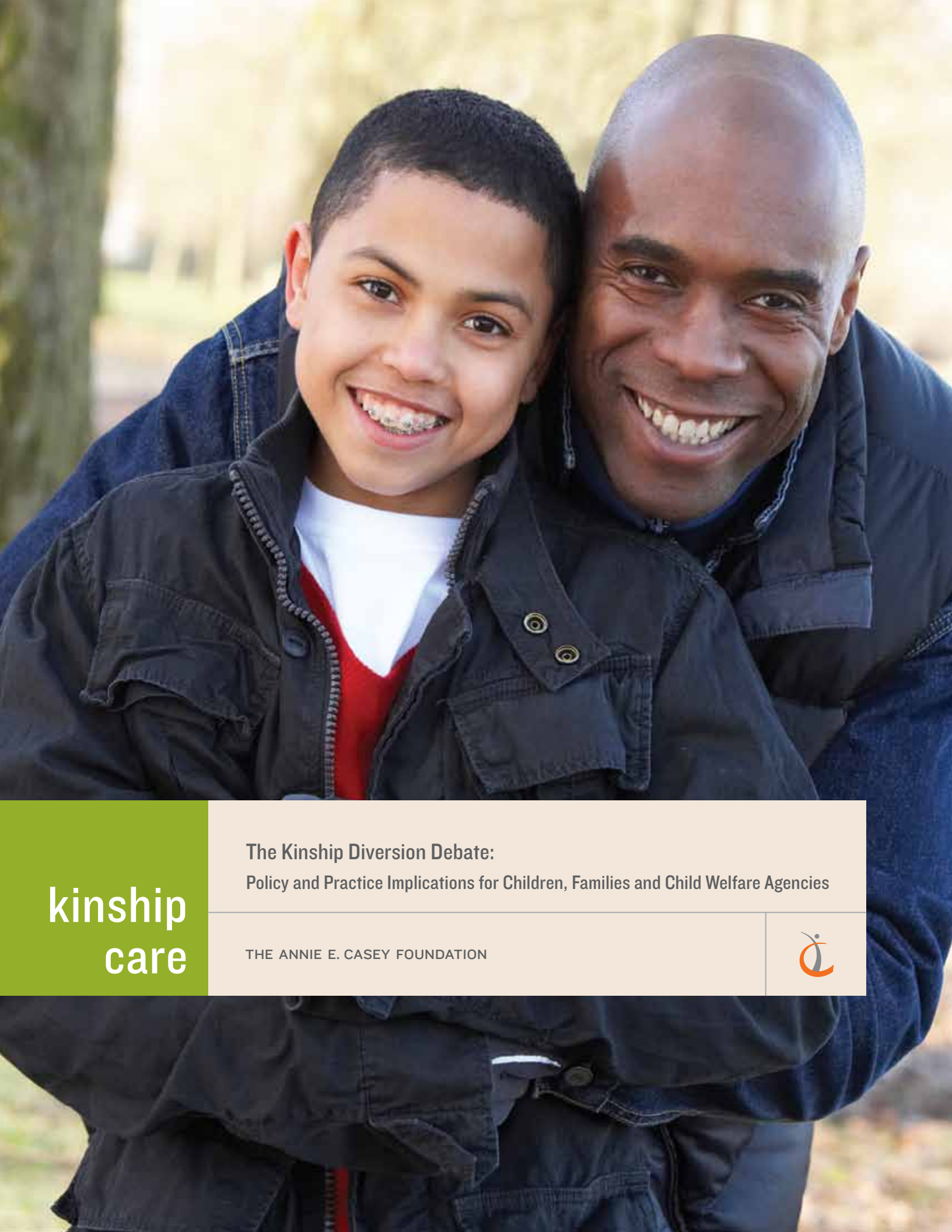

kinship care

The Kinship Diversion Debate:

Policy and Practice Implications for Children, Families and Child Welfare Agencies

THE ANNIE E. CASEY FOUNDATION

about the annie e. casey foundation

The Annie E. Casey Foundation is a private philanthropy that creates a brighter future for the nation's children by developing solutions to strengthen families, build paths to economic opportunity and transform struggling communities into safer and healthier places to live, work and grow.

Within the Foundation, the Child Welfare Strategy Group (CWSG) works with results-focused leaders throughout the United States to strengthen agency management, operations, policy and frontline practice. CWSG offers its services at no cost to agencies seeking to achieve the following goals:

- Engage families in caring for their children when and where they need support.
- Deliver on the promise of safety, well-being and permanent families for children and youth.
- Adopt and sustain cost-effective and proven strategies that prepare children and youth to reach their fullest potential.

CWSG also works to develop the capacity of child welfare leaders to become champions for improving outcomes for children in care. Additional kinship care resources and copies of this report can be found at www.aecf.org.

contents

the kinship diversion debate

POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES

A Kinship Care Experience

Roberta Thompson[1] was leaving work when she picked up a panicked text from her daughter, Mia: Come now 4 nathan!! Even before her son was born, Roberta's daughter had struggled, first in a violent relationship and now with a growing addiction to prescription drugs. Roberta rushed across town to Mia's apartment to find a strange calm: her grandson asleep and Mia at her kitchen table talking softly to a county social worker. "Mia told me she'd only left Nathan sleeping for a few minutes," remembers the 48-year-old grandmother. "A neighbor called 911 when she heard the baby screaming." The police had arrived to find Nathan, alone and crying, in his crib. Child protective services (CPS) had waited for more than an hour for his mother to return. "Mia looked absolutely exhausted, but all I could think about was how I was going to walk out of there with my grandson."

Across the country, child welfare agencies rely on grandparents and other relatives to care for children who cannot remain safely with their parents. While some family members may offer a safe, less intrusive alternative to the bureaucratic complexities of state-supervised foster care, some child welfare experts worry that too many abused or neglected children are being inappropriately "diverted" to live with relatives without the necessary safeguards and supportive services for children, caregivers and birth parents. Critics also argue that some child welfare agencies are prematurely directing children to live with willing relatives instead of providing struggling parents intensive services needed to keep children safely at home. Some experts express growing concern that relatives may feel unfairly pressured into taking responsibility for children who cannot remain safely with their parents without being given a clear explanation of all the available placement options and supports, including licensed kinship foster care. "We say we want a child welfare system that values family decisions," explains one child protective service worker, "but once the government gets involved, relatives and parents don't always have real choices. Sometimes it's auntie or else."

On the other side of the debate are child welfare agencies and advocates that allow or encourage children to be diverted to kinship care as an alternative to bringing a child into state custody. Administrators in these jurisdictions argue that, in certain situations, kinship diversion is a preferable option for children and families. Diversion supporters maintain that families are often better able to care for children without the complications and uncertainty of government involvement as long as the

"We say we want a child welfare system that values family decisions, but once the government gets involved, relatives and parents don't always have real choices."

[1] This fictional story combines elements of child welfare cases to illustrate common kinship care situations.

WHAT IS KINSHIP DIVERSION?"

While there is no uniform definition of kinship diversion, this article uses the term to describe situations in which a child welfare agency investigates a report of child abuse or neglect, determines that a child cannot remain safely with parents/guardians, and helps to facilitate that child's care by a relative instead of bringing the child into state custody. For jurisdictions that use kinship diversion, policy and practice vary considerably. These state and county child welfare agencies have different approaches to safety assessments of the relative's home, post-diversion agency supervision and case management; the types and duration of services provided to the family; the transfer of legal custody/guardianship; and other requirements.

agency has considered in-home services, made an appropriate assessment to assure the child's safety and provided the family with appropriate services. These advocates assert that there are situations in which children are better off "outside of the system," while also acknowledging that some cases may require intensive in-home services or the removal and ongoing supervision and protection of children through state custody and licensed foster care. Just as children in state custody require different types of foster care to meet a range of individual needs (e.g., family foster homes, therapeutic foster care), supporters of diversion believe that kinship arrangements should vary to reflect the child's need, risk and family preference.

"In the real world, government is a poor surrogate for family decision making," explains one county child welfare administrator. "If the child is safe and the family agrees, why does a child need to go into state custody?" Another veteran child welfare director offers a more personal explanation: "If your cousin was struggling with her kid, are you going to tell your aunt to call child protective services? Loss of control is a high price to pay even when families could use help." While most child welfare advocates agree that kinship diversion without proper attention to safety and support hurts children and families — one advocate sardonically referred to it as "drive-by diversion" — they also assert that kinship diversion grounded in strong policy and good casework can be a critical option for some families.

Despite assertions on both sides, initial research revealed little information about the use and extent of diversion practice or existing analytical tools to support further analysis. "From our work in the states, we know that diversion is common in many jurisdictions. We also know that it's not always done well," explains Tracey Feild, director of the Annie E. Casey Foundation Child Welfare Strategy Group (CWSG). "We really felt that, with the right questions and support, child welfare agencies could take a much closer look at what's working and what's not before deciding what role, if any, diversion should play in their overall kinship care practice."

Understanding the Diversion Debate

To sort through the many different approaches to kinship diversion, including some jurisdictions' strong opposition to the practice, the Annie E. Casey

Foundation (Casey Foundation) engaged experts on both sides of the debate to learn more about the complex arguments for and against kinship diversion and the philosophies and experiences that shape them. This analysis is based on more than 50 interviews conducted with public agency administrators and supervisors; prevention, child protective service and foster care caseworkers; and clinicians, researchers, policy advocates and judicial personnel from across the country.

For the agencies that oppose kinship diversion, the Casey Foundation wanted to explore both the rationale behind their views and how these jurisdictions were meeting family needs through licensed kinship foster care and other alternatives. For the agencies that rely on some form of kinship diversion, the Casey Foundation wanted to find out if and how these jurisdictions manage the following roles:

- ensure safety, stability and permanence for diverted children and their families;
- offer services and financial support to children, birth parents and relative caregivers;
- protect birth parent rights and safely facilitate reunification whenever possible; and,
- provide families with comprehensive information about available state-supported options to support children's care.

In addition to learning more about the theoretical and practical arguments for and against kinship diversion, the Casey Foundation also asked national experts about the possibility of an acceptable "middle ground" in the diversion debate. More specifically, interviewers asked whether experts might consider sanctioning a "supported kinship diversion model." This theoretical practice approach would be limited to certain types of cases and would provide an alternative to state custody while still ensuring child safety and the needed services to get families back on track.

Despite deeply disparate viewpoints on kinship diversion, most experts interviewed agreed that no single path will meet the needs of every family or every jurisdiction. By raising a series of critical questions, the Casey Foundation hopes that it can provide child welfare agencies with the opportunity to more comprehensively examine whether diversion is ever appropriate in the context of their communities; if and how agencies currently use kinship diversion;

DIVERSION AND THE "CASES IN BETWEEN"

Even its strongest supporters argue that diversion should only be considered for what one advocate calls the "cases in between" — the narrow band of situations between cases in which intensive in-home services could be successfully provided to prevent removal and cases that are sufficiently serious to require the protection of a formal removal and the ongoing supervision of state custody. Critics argue that diversion practice is too often used as a default, even when in-home services or formal agency custody is the more appropriate option. "Kinship diversion should never be used as a path of least resistance when other options are either legally required or will achieve better outcomes for children and families," says Rob Geen, director of policy reform and advocacy at the Casey Foundation. "In that sense, the universe of cases in which diversion should be debated is a relatively small one."

diversion's long-term impact on child safety and family stability; and effective strategies for improving current policy and practice to better support children and families.

State Custody and Foster Care: First Line of Defense or Last Resort?

When it comes to balancing child safety, government responsibility and family autonomy, the child welfare field is deeply conflicted about when foster care is the best option for children who can no longer remain safely in their homes. This conflict is especially relevant when a relative with an established relationship to the child offers a safe and stable alternative to state custody. Some agency leaders and families believe strongly that, when relatives are willing and able to care for children safely, children do better without the uncertainty and potential disruption of ongoing system involvement.

Diversion critics maintain that families are best served when children are brought into state custody and their relative caregivers are licensed as foster parents.

Diversion critics also agree that children belong with families whenever possible. In order to ensure the requisite level of protection, court oversight and appropriate resources, however, they maintain that families are best served when children are brought into state custody and their relative caregivers are licensed as foster parents. A state-supervised approach, they argue, honors family connections while at the same time providing families with the guaranteed supports and protections of state custody and foster care. While this anti-diversion approach has strong theoretical support, other veteran child welfare leaders maintain that families' inconsistent, often negative, experiences with government-supervised care often outweigh the system's financial and other benefits. "Someday the foster care system may do what it's supposed to do for every family," explains a foster care supervisor, "but until that happens, we have hard decisions about what's best for kids." Diversion proponents also point to the inherent power imbalance of "system involvement" and its negative impact on some families. "When the system has the power to take away a child, a lot of families are going to choose to 'opt out'," explains one caseworker. "We focus so much on what kind of services and money that foster care provides," explains another foster care worker, "we forget that a lot of this is about who the child belongs to. Foster care means the state calls the shots."

Agency caseworkers are not the only ones with concerns about the potential downsides of state custody. Some relative caregivers also believe that diversion is preferable to "losing" a child to a government system they cannot predict or control, even if it means less access to services and financial support. "At the end of the day, that social worker could still come in and take my grandchild away," says one grandparent caregiver who went to court to get legal custody of her grandson. "I just couldn't deal with that pressure." Even in cases where state custody and licensed kinship foster care are the better choices for children and families, some frontline caseworkers argue that diverting children to live with kin may sometimes be the only practical alternative to keep children with caring relatives, especially in those cases where overly prescriptive regulations prevent an otherwise responsible family member from becoming a licensed foster parent. "What if grandma is great, but her apartment is too small? What if she's got a 25-year-old shoplifting charge?" asks one agency worker. "The child's still better off going to grandma than going into foster care with strangers." While a growing number of child

welfare advocates agree that current non-safety-related regulations should be more commonly waived — or the entire licensing system overhauled — if they prevent safe and appropriate placements, some frontline workers and foster care supervisors maintain that regulatory changes still lag behind the immediate placement needs of children and families.

In addition to supporting diversion as an option for able caregivers who cannot currently be approved as licensed foster parents, a number of jurisdictions and caseworkers are philosophically opposed to licensing kinship foster care because they believe it creates a system that "pays relatives to care for their own family members," a responsibility

WHY FOCUS ATTENTION ON KINSHIP DIVERSION?

With so many competing priorities facing child welfare agencies, why is it important to dedicate time and resources to assess the safety and impact of kinship diversion?

- **Kinship diversion policy and practice affect a significant number of children and families who come to the attention of the child welfare system.** The most recent data available found that, at a single point in time, approximately 400,000 children who came to the attention of the child welfare system were diverted from state custody to live with kin. [2]

- **Few jurisdictions systematically track and analyze the impact of diversion on children's safety, permanence and well-being.** Without an intentional approach to diversion policies and practices and appropriate data to measure their impact, child welfare agencies cannot adequately determine whether they are meeting their fundamental goals of safety, permanence and well-being for many children who come to their attention.

- **Diverting children to kin without adequate attention to their safety, stability and permanence makes child welfare agencies more vulnerable to legal challenges.** Unintended outcomes for diverted children may increase a child welfare agency's exposure to legal claims by individuals or class action lawsuits (see The Legal Implications of Kinship Diversion, pg. 8).

- **A careful assessment of kinship diversion policy and practice will help states and localities clearly define parameters for kinship diversion.** Kinship diversion advocates agree that diversion is not always appropriate when targeted in-home services can be provided to help parents keep children safely at home. At the same time, the safety considerations, economic challenges, and/or the need for intensive ongoing supervision in some cases demand the heightened protections of state custody and licensed foster care. To ensure children's safety and well-being, child welfare agencies must develop a clear point of view on those "cases in between" that may or may not be appropriate for kinship diversion (see Diversion and the Cases In Between, pg. 5).

- **States and localities must ensure that all kinship care practices appropriately protect birth parent rights and maximize the chance for successful reunification.** State custody is intended not only to ensure child safety, but also to provide certain protections for the child's family, including reasonable efforts to help birth parents reunify with their children. Child welfare agencies must pay attention to their diversion policies and practices to ensure that birth parents have a meaningful and legally protected "way back home" to resume the care of their children when it is safe to do so.

- **Understanding kinship diversion is critical in helping agencies to understand the full continuum of needed interventions and supports for kinship care families.** The question of how best to support kinship families — informal, diverted, unlicensed and licensed care — is complex. Without understanding the role kinship diversion plays in their overall approach to kinship care, child welfare agencies cannot determine whether the needs of individual children and families are appropriately met.

[2] Ehrle, J., Geen, R., & Main, R. (2003) Kinship foster care: Custody, hardships, and services. *Snapshots of America's Families III, (14)*. Washington, DC: The Urban Institute.

they believe caregivers should undertake without compensation. "Where I come from, family takes care of family," says one social worker. "Why should the government give people money to do the right thing?" While proponents of licensed kinship placements are quick to point out that the financial and other benefits that foster care provides are meant to support the child and not "pay" relatives for their caregiving, the belief in the family's fundamental moral and financial responsibility to care for children continues to play a significant role in the development and implementation of kinship diversion policies and practice.

What Responsibility Does Government Have to Kinship Families?

Despite the prevalence of kinship diversion, many experts worry about whether this widely varied and poorly regulated practice is really a good option for children and families if it comes at the price of the legal and financial protections of state-supervised foster care. More specifically, some experts argue that agencies cannot adequately ensure a child's safety, protect parental rights or provide appropriate interventions to stabilize children and families without the ongoing supervision of state custody and the financial and other supports provided by licensed foster care. While few states actually track the number, ethnicity and outcomes of children who have been diverted to live with kin, some child welfare administrators maintain that diversion disproportionately affects and disadvantages families of color, effectively denying them an opportunity to receive the higher stipends and more intensive services offered through licensed kinship foster care. Says one social worker, "Communities of color have a long

THE LEGAL IMPLICATIONS OF DIVERSION

Some critics are concerned that the use of kinship diversion unnecessarily exposes child welfare agencies to potential legal challenges. First, families who have been negatively impacted by diversion may file a class action lawsuit, similar to a recent Georgia case that alleged that the child welfare agency had been "misusing diversion, safety resources and temporary guardianships to inappropriately limit the number of children entering foster care."

While they are more difficult cases to prove, child welfare agencies are also concerned about class action suits based on "failure to protect" claims — assertions that the government has failed to adequately protect children who are diverted to kin by failing to take them into state custody and provide them with an appropriate level of supervision and care.

Finally, some legal experts have expressed concern about potential claims of individual harm based on a "state-created danger theory." These cases are based on the state's legal duty to protect a child and avoid creating a dangerous situation that could lead to a specific injury, such as inappropriately diverting a child to kin that results in direct harm to the child.

Although it is difficult to predict the future success of cases based on these three types of legal challenges, the media fallout from well-publicized lawsuits can create as much concern as the ultimate disposition of the case. Explains Anne Holton, a former dependency court judge and advisor to the Casey Foundation, "Child welfare agencies are rightly sensitive to the inherent risks of any legal exposure, especially if the child has previously come to the system's attention in some way." On a positive note, says Holton, "Recognition of these potential legal risks can motivate child welfare leaders to craft a much more deliberate and comprehensive approach to diversion when they believe the practice is appropriate for children and families."

history of family taking care of family, and sometimes we take advantage of that by not telling them what they might be missing to help support the kids they are raising."

In addition to the promise of appropriate help and safeguards, diversion critics strongly argue that government intervention in the name of child protection mandates a heightened set of legal and moral responsibilities to both the children and their families, including birth parents who deserve the opportunity to be reunited safely and successfully with their children. "We have a responsibility to do everything we can to keep children and families together safely without taking a child into custody, " says Marc Cherna, director of the Allegheny County Department of Human Services, a jurisdiction that has partnered with A Second Chance, Inc., to create a nationally-renowned support model for kinship families. "When removal is necessary, we believe that children are generally best off with kin supported by the full range of protections and family supports accessible through agency custody."

Diversion advocates argue that, in the real world, state custody is no magic bullet. Not only does foster care often fail to deliver the services and supports families need, they argue, but ongoing system involvement can leave children and families worse off than when they first came to the attention of the system. Even in jurisdictions with the most promising foster care practices, not every child placed with kin in state custody enjoys the full advantages of licensed foster care. In fact, an increasing number of children are brought into state custody and are placed with kin in unlicensed homes.

Policy and practice vary by state and locality, but many children in unlicensed care receive fewer financial and other supports than their counterparts in licensed kinship foster care. "Sometimes the only difference between diversion and unlicensed care is that the state retains legal custody," notes a CPS supervisor. "Grandma doesn't get the benefits or the control." While most diversion opponents also advocate strongly for the elimination of unlicensed foster care, many jurisdictions still routinely rely on these placements for children living with kin under state supervision.

Diversion critics are even more concerned that decisions to divert children to kin are motivated more by budget deficits and the desire to keep foster care numbers low than a desire to honor family strengths. "If an agency can keep a child safe without the high costs of court oversight and foster care, there's a pretty strong incentive to do it," says one county child welfare administrator. "I'm not saying that's the only driver, but money is definitely a factor." Says another child welfare administrator, "We are under tremendous pressure to safely keep foster care numbers down for a whole bunch of reasons. If it's done right, diverting kids to kin is one way to protect children, keep them with relatives and effectively use limited resources to support families with even greater service needs."

Is There a Role for Community-Based Services?

While diversion proponents acknowledge that federal, state and local foster care funding provides an important source of support for critical child and family services, others argue that state custody

"Diversion supporters argue that if it's done right, diverting kids is one way to protect children, keep them with relatives and effectively use limited resources to support families with even greater service needs."

and the strictures of licensed foster care should not be the only gateway to targeted support for kinship care families. Community-based services, including grandparent support groups, family therapy, legal aid and other resources, should be available to all kinship families based on their level of need rather than their level of involvement with the child welfare system. Supporters of this community-based model argue that building a more consistent network of supports outside the child welfare system and better coordinating existing government supports, such as income supports, health care and nutritional assistance, will allow families to access the services they need on their own terms without government-mandated interventions. "Families should have the option to come into the system if it's needed, but we should work hard to build more organic and tailored support services outside the system as well," explains one kinship care advocate.

Are Parents Missing Out on Appropriate In-Home Services?

Among the serious challenges to child welfare agencies' use of kinship diversion are its potential implications for birth parents. More specifically, birth parent and child welfare advocates assert that when a state child welfare agency makes the decision to remove a child from his or her home, state custody is the only way to guarantee and fund the appropriate legal protections and representation and reunification services for birth parents. Even in situations where kinship diversion might provide a less complicated and more desirable option for relative caregivers, these critics argue, it rarely offers "a way back" for birth parents to safely resume the care of their children. "The child goes to live with grandma and then what?" asks one dependency court judge. "How does mom get the help she needs? How does she get her child back?"

DIVERSION AND VOLUNTARY PLACEMENT AGREEMENTS

Some experts interviewed argue that child welfare agencies should use voluntary placement agreements (VPAs) more widely in kinship diversion cases; they say that such agreements ensure that birth parents, relative caregivers and the child welfare agency have a common understanding of the plan for the child, the types of services that will be provided and the point at which the court will become involved. By entering into this type of written agreement, the parent can consent to allow the child to live temporarily with a relative under the immediate supervision of the child welfare agency without relinquishing legal custody. The situation is then revisited by the agency, the family and the court within a specified period of time.

Proponents argue that VPAs provide an incentive for child welfare agencies to get parents the help they need to sort things out in a relatively short period of time while still providing the parent with the power to revoke the agreement. The state still has the power to petition for custody if they feel the child is in danger. While some advocates argue that VPAs may increase agency accountability in providing services in a diversion scenario, others fear that, as long as parents are dealing with an agency that has the power to take away their child, VPAs and kinship diversion practice cannot ever be characterized as truly voluntary.

Critics argue that diversion is an end-run around the legal protections and benefits of foster care that child welfare agencies may use as a default when they should be providing in-home services to keep parents and children safely together. These opponents point out that it might require less effort and paperwork for a social worker to ask a relative to care for the child while the parent "works on getting themselves together" than to provide the comprehensive services and supervision the parent needs to continue to care for the child at home. In addition to more intensive staff involvement, an in-home service plan may involve greater risk if services do not sufficiently prevent further harm to the child. "On the one hand, you've got a mom who is really struggling. On the other, you've got the aunt with her act together who's ready to step in. Sometimes diversion can be used as the default," observes one caseworker, "but the easier option isn't always the better option."

Diversion proponents, however, are quick to point out that jurisdictions with strong policy and practice do not use diversion as an easy out. "Diversion is only considered as an option when removal is imminent," explains one county CPS caseworker, "and we would only consider removal when in-home services are not a potential option for the parent and the child."

Birth parent advocates also argue that once the government intervenes in the lives of families, a child's parents lose any meaningful choice regarding the child's placement. "The 'decision' parents are asked to make is not a decision at all," explains one county child welfare leader. "Parents have been told their child can't stay with them. If there isn't a relative in the picture, they know the child is headed to foster care. Do they 'choose' the relative they know or a foster home they don't?" Explains another foster care caseworker, "When the state has the power to take your child, there's always coercion. You should still ask the parents what they think is best for the child, but I think we need to be honest with families that the decision ultimately belongs to the agency."

For some critics, the characterization of diversion as a "choice" for relative caregivers is equally misleading. While the federal Fostering Connections to Success and Increasing Adoptions Act requires that child welfare agencies notify and explain all placement possibilities to all adult relatives within 30 days of a child's removal, caregivers are not always given full disclosure of their options, which includes licensed foster care. Even when they do understand what types of placements are available, many potential caregivers understand they do not always have a choice about whether or not the child welfare agency brings the child into state custody.

Kinship Diversion and Permanence

In child welfare, there are many different perspectives on whether permanence is a legal condition, an emotional one, or a combination of both. A number of experts define permanence as a "forever family" while others believe connecting youth to family members before they age out of care is sufficient. Even without a uniform definition, however, critics argue that kinship diversion without ongoing oversight, reunification services for the parents, or a concrete plan for the child does not provide the long-term permanence that children and families need to thrive.

"Families should have the option to come into the system if it's needed, but we should work hard to build more organic and tailored support services outside the system as well."

USING TEAM DECISION MAKING TO SUPPORT KINSHIP FAMILIES

Team Decision Making (TDM), like other models of family teaming, plays a critical role in improving outcomes for children and families. This approach engages families and key stakeholders in making quality decisions regarding safety, placement and accountability for achieving permanence for children in care. The effectiveness of this approach depends heavily on relationships of trust and respect, clear communication and appropriate support to family and child.

More specifically, TDM meetings emphasize the engagement of family and community members in safety and placement-related decision making. These facilitated meetings are designed to develop specific, individualized interventions for children and families regarding removal, placement changes and reunification. In particular, TDM plays a key role in bringing family to the table when an agency is initially considering removal of a child from the home. The meetings focus on whether removal is warranted and, if so, where the child will go. The process uses families' natural networks as resources for safety planning and, when necessary, placement. In this way, TDM recognizes the importance of family continuity and the key role family caregiving relationships play in mitigating the traumatic impact on children who are removed from their parents' care.

Several jurisdictions that rely on kinship diversion as an alternative to state custody believe Team Decision Making is the only way to incorporate all of the components of a supported diversion model and assure quality kinship care. In TDM, the agency, together with the family, make determinations on major aspects of case planning including: whether kinship diversion is appropriate or the caregiver will pursue legal custody of the child; what kind of in-home or out-of-home services are needed to support children, birth parents and caregivers; and how to set up a meaningful parent-child visitation schedule. The meetings provide a venue for the family to be educated on the full range of child welfare options available to them, including the possibility of becoming a licensed foster care placement with court oversight. Family members are encouraged to anticipate and consider the child's current and future needs and make informed decisions based on understanding the legal and child welfare options available to them.

"We keep talking about how safety and permanence are fundamental for kids, yet diversion only addresses safety and that's a best case scenario," argues one national child welfare advocate. "It's pretty much up to the family to decide what happens to the child next," says another caseworker, "and that situation could change again and again for the child down the road."

Diversion supporters argue that allowing families to make decisions for their children's care is precisely what makes it a powerful option. "Every day, families make difficult decisions in really bad situations," says a social worker at a community-based kinship care agency. "Those decisions aren't always perfect, but that doesn't mean the government should make the choices for them." In fact, diversion advocates argue, families often make good but impermanent decisions because they are truly best for the child. Others argue that diversion already honors family decision making under a more universal definition of permanence.

"Whether it's mom or aunt or grandma, it's family that's permanent," explains one dependency court lawyer. "I am not sure why people think kinship diversion doesn't support that."

Supported Diversion: A Middle Ground

Despite compelling arguments on all sides of the diversion debate, the majority of child welfare advocates

agree that poor kinship diversion practice hurts children and families. While some jurisdictions offer diverted families targeted services and financial resources to get back on track through prevention, in-home services and interventions by community-based organizations, other jurisdictions fail to provide even minimal supports to diverted families. "I've seen cases where the agency essentially hands the child over to grandma and gives her the phone number for the local welfare office," says a legal aid lawyer who represents birth parents. "We call it 'dumping.' No real help. No follow-up and not a lot of assurance that the child isn't going to come right back in the system."

While most child welfare advocates agree on the risks of "bad" diversion practice, there is little consensus about whether responsible or "good" diversion is even possible. To explore this controversial question, the Casey Foundation specifically asked child welfare experts whether there might be an acceptable middle ground — an approach to diversion that allows families in certain situations to avoid further child welfare system involvement while still providing appropriate help for the kinship triad. If supported diversion should be an option for children, when should it be used and what supports should be in place? As with so many aspects of the diversion debate, this question has no clear answer, and no evidence-based diversion model exists to provide a baseline for comparison.

"While several jurisdictions seem to offer promising approaches to help families navigate kinship diversion, we have not yet found a supported diversion model that's comprehensive enough to test and evaluate across multiple jurisdictions," explains Karen Angelici, the team leader for the Casey Foundation's kinship diversion inquiry. "What we have found is a growing understanding of the building blocks that all kinship families need, and how those might be used in a diversion scenario."

While interview participants also agreed that there is no evidence-based model for supported diversion, they did identify critical components for states to consider in determining whether kinship care families are getting the supports they need:

- Appropriate risk assessment. *How is the agency ensuring the safety of children who are diverted to live with kin?* As with all decisions regarding children who come to the attention of a child welfare agency, advocates agree that kinship diversion should not be an option unless the child will be safe. With any supported diversion model, states must have and enforce a clear policy outlining how to make a safety determination.

- Facilitated Team Decision Making and full disclosure of options. *Do family members have meaningful input into the diversion decision and understand the full range of placement options for the child?* While many jurisdictions use family team meetings and other opportunities to allow birth parents, relative caregivers and youth a chance to weigh in on the possibility of diversion, some families have little say in the options available to them. The use of facilitated and collaborative decision-making strategies helps agencies to ensure that families are not unduly pressured into diversion. Similarly, relatives should clearly understand the child's full range

"While several jurisdictions seem to offer promising approaches to help families navigate kinship diversion, we have not yet found a supported diversion model that's comprehensive enough to test and evaluate."

of placement options, including the possibility of licensed kinship foster care (see Using Team Decision Making to Support Kinship Families, pg. 2).

- Appropriate needs assessment and services for the kinship care triad. *Is the child welfare agency providing all members of the kinship triad with adequate needs assessments and the right services to address identified needs?* If a family crisis is serious enough that a child can no longer remain safely with his or her parents, even temporarily, many experts interviewed argue that the agency has a responsibility to assess carefully the needs of the birthparent, relative caregiver and child and to provide or connect them with appropriate services and supports. Supports may include financial benefits and health insurance, mental health and substance abuse treatment, family counseling and parenting classes, among others.

- A "way home" for birth parents. *How does the child welfare agency ensure that the birth parents get the support they need to resume safely caring for their child?* If a family situation justifies diversion as a temporary situation for a child, birth parents still need what one social worker describes as a "way back home" or, more specifically, the necessary help and services to resume the care of their own children. Without attention to these supports, kinship diversion could effectively deny all three members of the triad the opportunity for and benefits of reunification.

- Caregiver legal status and permanency considerations. *How will the child welfare agency assure that the caregiver has the requisite legal authority to make key decisions for the child?* Without attention to the appropriate transfer of legal authority, kinship diversion can result in "legal limbo" for a child. Without legal custody or guardianship, relative caregivers are often unable to access basic medical care, facilitate school enrollment or make daily decisions on a child's behalf. They are also unable to legally control children's access to their parents, some of whom are still struggling with the issues that precipitated their system involvement. Many supported diversion advocates argue that ensuring the appropriate transfer of a child's custody or guardianship is the only way for the diverting agency to ensure that the caregiver can adequately care for the child and lay the groundwork for future legal permanence.

- Appropriate tracking of diverted children and families. *How do child welfare agencies know if diversion has a positive impact on children and families?* Very few jurisdictions are currently tracking the numbers and outcomes of children once they are diverted from state custody. To understand if diversion is truly an appropriate option for families, child welfare agencies need to understand how many children are diverted, how they are faring and whether they are coming back into care. Without this critical data, child welfare agencies cannot determine whether "supported diversion" actually benefits children and families.

To understand if diversion is truly an appropriate option for families, child welfare agencies need to understand how many children are diverted, how they are faring and whether they are coming back into care.

In considering these key components, diversion critics argue that there is little substantive difference between "supported diversion" and foster care, especially unlicensed kinship foster care. "If child welfare agencies should be providing all these services to "diverted" kinship families to ensure safety and stability, why not just bring the child

into state custody?" asks one national child welfare advocate. "We have to ask ourselves if the families have similar needs, why shouldn't they receive the same amount of money as licensed foster parents to meet those child's needs?" Critics further argue that diversion only creates another separate, unequal and unnecessary "system" for at-risk families. While they agree that the current foster care system is far from perfect, they also maintain that reform efforts should focus on improving the existing framework for licensed care, not creating and supporting a watered-down version of foster care with fewer supports for kinship care families. "Diversion without support isn't good for families,

RESEARCH ON KINSHIP DIVERSION: THE MISSING PIECES

Despite its prevalence, few jurisdictions collect data on the use of kinship diversion and its impact on children and families. Given these significant gaps, the following data and research are needed to answer certain fundamental questions:

Prevalence and types of diversion

- How many jurisdictions currently allow, encourage or require kinship diversion? For which children and under what circumstances?
- How do these jurisdictions define "kinship diversion"?
- How many jurisdictions have written policies and practices regarding kinship diversion?
- How many jurisdictions require a safety assessment of the caregiver and the caregiver's home prior to diversion?
- How many jurisdictions clearly define those cases in which kinship diversion is not appropriate?

How children and families fare in kinship diversion

- How do children in kinship diversion fare in terms of safety, permanence and well-being?
- How do diverted children fare in comparison to children in licensed kinship foster care? In licensed foster care with non-relatives? In comparison to children who remain with their parents with in-home services?

Supports and services for the kinship triad

- How do jurisdictions decide what level of services and financial support to provide to diverted children, their kin and birth parents?
- How do jurisdictions ensure that birth parent rights are protected and reunification is achieved?
- What kind of services do jurisdictions provide to ensure that children achieve permanency post-diversion?

Diversion versus foster care

- What is the child's legal status once kinship diversion occurs?
- How often do children return to live with their birth parents following diversion?
- What kind of ongoing supervision do jurisdictions provide once the child is diverted?
- Who decides whether kinship diversion is appropriate?
- How many jurisdictions provide kinship families with the full range of placement choices available to them, including licensed foster care?
- How do they ensure that families understand their options?

Fiscal implications

- How can child welfare agencies accurately measure the cost of kinship diversion?
- Is kinship care diversion more or less expensive than licensed kinship foster care?

Diversion trends

- How many jurisdictions track and report the number of children who come into state custody after they are diverted?
- Are some racial/ethnic groups diverted more often than others? If so, what factors drive these racial/ethnic disparities?

and supported diversion is essentially "junior varsity" foster care — fewer supports, less oversight and less money," explains another kinship care advocate. "The state doesn't have custody, but you are still asking the state to do all these assessments and provide all these services. You're talking about a pretty high level of ongoing intervention so why not license the family and make sure they have equal access to services?"

Kinship Diversion: Implications For Future Policy and Practice

In considering the complex arguments on all sides of this contentious debate, one thing is clear: The diversion question is difficult and the stakes are high for children and families and for the agencies that serve them. Jurisdictions that believe it is never appropriate to divert a child from state custody to live with relatives struggle to translate their philosophical preference for unlicensed and licensed foster care into a strong and responsive system of family-centered frontline practice. Child welfare agencies that rely on diversion must be equally vigilant in keeping children safe and supporting families without the formal protections, ongoing supervision and more generous funding streams associated with state custody.

Even advocates who promote a more middle-of-the-road or "supported diversion" model must answer difficult questions about which cases are truly appropriate for diversion, what qualifies as a minimum level of services and how diverted children are really faring in the long term.

"For most child welfare agencies, the real challenge is what happens after they figure out the child needs to stay with a relative for a while," says Rob Geen, director of policy reform and advocacy at the Casey Foundation. "Safety is the threshold question, but what then? How does the agency ensure that parents get the help they need? And can the relatives set appropriate boundaries with the parents? Families may want out of 'the system,' but has anyone told them what they are giving up and who makes that decision? These are the hard questions."

Child welfare advocates point out that the theoretical battle lines of the kinship diversion debate are much harder to define when they are put into everyday practice. Indeed, many child welfare advocates acknowledge that, even in effective jurisdictions, there are critical gaps in aligning philosophy, agency policy and the implementation of frontline practice. "There are so many things that affect how well families do in the long term," explains one long-time child welfare administrator. "In some cases, families who are diverted with absolutely minimal services will find the support and resilience to rebound. Other kinship families don't make it even with intensive services and supervision."

Given the complex dynamics of families that are at risk and the unpredictable trajectories of even the most deliberate policies, child welfare administrators may be left wondering where the ideal balance lies when it comes to creating appropriate options for kinship care families. Thoughtful analysis of current policies and practices and the philosophies that guide them is a critical first step in improving outcomes for all children and kinship families involved with the child welfare system. With the right questions and tools, jurisdictions can maximize their opportunities to understand where they stand and explore new and more effective ways to improve their work with children and families.

Thoughtful analysis of current diversion policies and practices and the philosophies that guide them is a critical first step in improving outcomes for all children and kinship families involved with the child welfare system.

appendix

THE PROS AND CONS OF KINSHIP DIVERSION

Concerns Raised by Some Kinship Diversion Programs

John B. Mattingly, *Senior Fellow, Annie E. Casey Foundation and former Commissioner, New York City Administration for Children's Services*

When a child must be removed from her family because of abuse or neglect, there is general agreement in the child welfare field that the placement of choice is often a caring relative known to the child. There is evidence that relative placements generally produce better outcomes for foster children and help keep children in touch with their families. While concerns remain about the length of stay in temporary care of children placed with relatives, many jurisdictions have worked to increase the percentage of foster children placed in relative care, and most of us think this is a good thing.

In these cases, the child is taken into foster care with court supervision, a case plan — typically for reunification — is put in place, visits are arranged, the help needed by the child's parents to provide a safe home in the future is provided, and the family court retains oversight of the case. The relative caregiver is treated by the system as a foster family, with many jurisdictions requiring a form of licensing and foster care payments.

Kinship diversion typically involves the voluntary placement of a maltreated child with a relative, without court oversight and often without reimbursement beyond TANF child-only payments. The relative is encouraged or assisted to approach the court for temporary custody of the child. Frequently, these cases do not involve further court involvement or ongoing agency supports to the relative caregiver. Nor are the relatives licensed or provided with foster care payments. Often these practices are said to be extensions of family preservation. These latter arrangements have raised several concerns among some child welfare advocates, judges and child welfare leaders.

First, if the public agency has made a determination that a child is no longer safe with her parents, should it make a difference from the agency's perspective whether or not the caregiver is related to the child? Should the court not always be involved in a removal decision? Should not the family have the same rights (e.g., for reunification planning, visits, etc.) as they would if their child were placed with an unrelated foster family? Doesn't the child have the same rights to counsel, to timely permanence and to a certified caregiver as does a child in unrelated foster care?

Some relative diversion cases also involve safety concerns. Some jurisdictions close cases very soon after placement, thus leaving children at risk of being returned to abusive parents or moved from relative to relative depending on caregivers' circumstances. Since these cases involve little or no ongoing oversight, outcomes will remain unknown and the children's well-being may be put at ongoing risk.

Relative diversion also raises questions of equity. Isn't a relative caregiver deserving of the same financial and program support (e.g., child care) as a regular foster parent? Many relative caregivers are poor themselves and in particular need of these supports. Shouldn't the public agency provide support to them as well?

In addition, in times of great fiscal and personnel stress on public agencies, will there not be a tendency to use relative diversion as a way to keep caseloads and costs down? Such practices need not reflect formal agency policy but become a preferred option by frontline managers to keep caseloads at more reasonable levels.

In sum, relative diversion carries real risks. Perhaps particular jurisdictions have found ways to minimize the impact of these risks. But given the pressures that the country's child welfare systems are already under, one must worry that diversion may be a tempting option for particular jurisdictions under great stress. While lowering the numbers of children in foster care is a laudable goal, it may leave many children to struggle alone with the consequences of abuse or neglect.

Kinship Diversion: More Myth than Reality

Dean M. Sparks, *Executive Director, Lucas County Children Services, Toledo, Ohio*

Most child welfare professionals agree that placing children with appropriate kin is the best living situation for children whose parents aren't able to care for them safely at home. Throughout history, families have cared for relative children during times of illness, poverty, incarceration, death, violence or other family crises. Many cultures continue this practice to this day, often outside of the social service or court systems.

Many professionals have turned up their noses at kinship care, wrongly believing that kin lack the resources to provide adequate care and that the "system" can do a better job of caring for kids. That's simply untrue. There are many reasons to embrace kinship care. These placements are more stable than foster care placements, except in cases of "crossover" children, who are considered both dependent and delinquent. We also know that reunification may be more likely from a kinship placement rather than from a foster placement.

Apparently, some agencies are using kinship to divert families from the formal child welfare system. Kinship should not be a diversion, but one of many tools available to keep children safe from abuse and neglect. Agencies and kin can — and should — work together to protect children while the agency makes its best efforts to work toward reunification with their parents.

There are a couple of decision points in this relationship. First, agency professionals should never take a position that advocates "kin placement at all costs." The agency has a responsibility to find out whether the potential kin provider is appropriate to care for the child. If the kin is not suitable based on the agency's standards, the child should not be placed in that home. And, while we don't believe in the "apple doesn't fall far from the tree" philosophy, we would be foolish to ignore the possibility that relatives may share similar lifestyles that involve intergenerational abuse and neglect.

A second decision point involves figuring out who is best suited to have custody and make decisions on behalf of the child. Should parents' custody be interrupted? If so, who should hold custody — the agency or the kin? If a kinship caregiver is appropriate to care for the child, he or she should be empowered to make decisions on the child's behalf. It is very frustrating, for example, for a caregiver to have to track down a caseworker to get permission to take a child on vacation or to the doctor, or to let him or her go on school field trips.

Agencies often retain custody of a child in a kin placement simply to maintain control of the child and the situation. If child welfare agencies believe that holding custody gives us one little bit of control in a kin home, we are fooling ourselves. Kin are going to do what they need to do to take care of their family. It is our responsibility to figure out how to support them and work with them to do the right thing within the context of their family situation. Some kin do not want custody because of their relationship with the children's parents. Agencies should respect this position and not force them to take custody. In turn, custody should not determine

the level of support that a caregiver needs. Others believe diversion allows an agency to hand a child over to a caregiver, maybe hand them a voucher and walk away. Nothing could be further from the truth. Kinship care is a conscious decision to actively include people that know and care about the child in making decisions about the child's well-being.

Money is rarely the reason kin step up to care for kids. The majority of children in kinship care are eligible for a child-only TANF grant, which is not nearly as much as the stipend most foster parents receive. Many kin would prefer less financial support and less intrusion from the child welfare system. Agencies would do well to provide as much support as they can while understanding that kin may not want to attend the pre-placement training required of foster parents. They might want to let the child stay in a bedroom in a finished basement. They may not want a caseworker to visit and inspect their house every month. But if the child is safe and the family can get by, they should have the chance to jointly make those decisions with agency staff.

Of course, parents who have lost the right to care for their child also have the right to services to help them correct the conditions that caused their children to come into care. The child's placement setting and custody status have little bearing on the services agencies offer to parents. In some cases, it may be easier to engage parents in services because of the support their family members provide. However, a number of parents will not engage in services regardless of their children's placement, and the kin will be the ones who ensure that the child has a permanent home.

I believe that, in most cases, kin placements are more stable than other foster placements. The chances of family reunification are better when kin are involved, and there is no evidence that kin placements are less safe than other placements. Parents can get the services that they need regardless of the type of placement setting for their children.

This issue seems to rest on our preferences as professionals for formal or informal involvement with families that are at risk of abuse or neglect. Both sides make important points. In either case, it does not matter where the child is placed, who holds custody and how much of a stipend the caregiver gets. Simply ignoring family problems and risks will not make them go away. Active and speedy involvement in the family system wherever and however we best see fit offers the greatest potential for resolving these problems.

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ARTICLE

America's Hidden Foster Care System

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Abstract. In most states, child protection agencies induce parents to transfer physical custody of their children to kinship caregivers by threatening to place the children in foster care and bring them to family court. Both the frequency of these actions (this Article establishes that they occur tens or even hundreds of thousands of times annually) and their impact (they separate parents and children, sometimes permanently) resemble the formal foster care system. But they are hidden from courts, because agencies file no petition alleging abuse or neglect, and hidden from policymakers, because agencies do not generally report these cases.

While informal custody changes can sometimes serve children's and families' interests by preventing the need for state legal custody, this hidden foster care system raises multiple concerns, presciently raised in Supreme Court dicta in 1979 in *Miller v. Youakim*. State agencies infringe on parents' and children's fundamental right to family integrity with few meaningful due process checks. Agencies avoid legal requirements to make reasonable efforts to reunify parents and children, licensing requirements intended to ensure that kinship placements are safe, and requirements to provide foster care maintenance payments to kinship caregivers.

This Article explains how the present child protection funding system and recent federal financing reforms further incentivize hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much regulation. In contrast to this trend, this Article argues for regulation: the opportunity for a parent to challenge the need for the custody change in court, limits on the length of time such custody changes can remain in effect without more formal action, the provision of counsel to parents (using money made available by a separate recent change in federal child protection funding), and requirements for states to report cases in which their actions lead to parent-child separations.

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Introduction

The state child protective services (CPS) agency receives a call alleging that a parent has abused or neglected a child. The CPS agency[1] investigates and concludes that the parent has, in fact, abused or neglected the child, and further determines that the child is in such danger in the parent's custody that the child needs to live elsewhere immediately. Accordingly, the agency identifies kin who can take care of the child—the child's grandparent, aunt or uncle, or godparent—and acts to ensure the child lives with that person, at least temporarily.

At this point, one might expect the CPS agency to involve a state family court. The state is limiting one of the most precious substantive liberty rights recognized by the Constitution—that of parents to the care, custody, and control of their children—and the reciprocal right of children to live with their parents. Balancing that fundamental right to family integrity with the state's *parens patriae* power to protect children from abuse and neglect is the subject of a complex body of federal and state constitutional and statutory law requiring court hearings focused on parental fitness and child safety.[2]

Yet in states across the country, this process happens without court involvement or oversight.[3] Instead, the agency threatens to remove children and take parents to court, a process that could lead to an indefinite placement of children in foster care, and even termination of parental rights, unless the parents agree to change their children's physical custody to the identified kinship caregiver. The state thus effectuates the children's loss of their parents' care and the parents' loss of physical custody of their children without any other branch of government checking or balancing the agency's actions and without anyone getting a lawyer. It is as if a police department investigated a crime, concluded an individual was guilty, did not file charges or provide him with an attorney, and told him he had to agree to go to jail for several weeks or months, or else it would bring him to court and things could get even worse.

Available data shows the practice occurs with great frequency.[4] States do not track the number of these cases precisely (a problem on its own), but this Article combines a variety of empirical studies and state-specific documentation to demonstrate that these cases likely separate tens or hundreds of thousands of children from their parents annually,[5] often for significant periods of time and

1. These agencies have different names in different jurisdictions—for instance, departments of social services, children's services, child and family services, etc. For simplicity, I refer to "CPS agencies" throughout this Article.

2. *See infra* notes 103-07 and accompanying text.

3. *See infra* Part I.A.

4. *See infra* Part I.B.

5. *See infra* Part I.B.

sometimes permanently.[6] It is thus a practice on par with formal foster care—in both the number of families affected and the impact on those families.

This is America's hidden foster care system.[7] It is a legally undomesticated[8] process through which state agencies effectuate a change of custody for thousands of children with little, if any, meaningful due process. State agencies thus coerce a surrender of fundamental constitutional rights with no lawyers or legal checks. This action, and what happens to the children and families subsequent to this action, is hidden from courts because agencies file no petition alleging abuse or neglect. It is hidden from the public, the federal government, and policymakers because federal funding statutes do not require states to count or report cases in which they arrange for hidden foster care.

Hidden foster care raises multiple concerns. The first and most obvious is whether threatening to remove children if parents do not place them with kinship caregivers renders such placements involuntary, thus violating due process. Substantively, this lack of oversight of agency determinations that children must be separated from their parents risks unnecessary and harmful separations. Given CPS agencies' wide discretion, the limited information often available at the beginning of a case, and the need to make quick decisions, it is easy to imagine many errors occurring, especially without court oversight.

Second, the hidden foster care system undermines important legal protections for children, parents, and kinship caregivers. By avoiding formal foster care, agencies avoid court oversight of their actions and legal requirements to develop case plans and make reasonable efforts to reunify parents and children.[9] They avoid foster care's licensing requirements, which are intended to ensure kinship placements are safe, thus potentially leaving some children in dangerous situations.[10] They avoid requirements to provide foster care maintenance payments to kinship caregivers, thus leaving caregivers without the financial support available to formal foster parents and jeopardizing their ability to take care of children.[11]

6. *See infra* Part I.A.3.

7. Others have used similar phrases. *See, e.g.*, DIANE L. REDLEAF, THEY TOOK THE KIDS LAST NIGHT: HOW THE CHILD PROTECTION SYSTEM PUTS FAMILIES AT RISK 191 (2018) ("shadow foster care"); Andrew Brown, *Shadow Removals: How Safety Plans Allow CPS to Avoid Judicial Oversight*, HILL (May 31, 2019, 9:30 AM EDT), https://perma.cc/TV5F-UDHV ("shadow removals").

8. This phrase is taken from the pathbreaking Supreme Court case *In re Gault*, 387 U.S. 1, 22 (1967), which favored the "constitutional domestication" of delinquency cases. In *Gault*, "domestication" meant the imposition of basic procedural rights for defendants, including the provision of counsel, in delinquency cases. *See id.* at 27-29.

9. *See infra* Parts III.B.1-.2.

10. *See infra* Part III.B.4.

11. *See infra* Part III.B.3.

The Supreme Court brought together these sets of concerns in its 1979 opinion in *Miller v. Youakim*, which presciently worried that permitting states to provide kinship foster parents less financial support would allow states to remove children from their parents without triggering the judicial checks that formal foster care and its financial payments require.[12] Hidden foster care shows how the Court's concerns have been borne out.

Despite these concerns, informal changes in children's physical custody can sometimes be useful—allowing children to live at home with kin and limiting state control over their families.[13] Parents may sometimes benefit from avoiding the court process, which introduces a judge who might believe a more invasive intervention is required. Hidden foster care leaves children in parents' legal custody, while court cases could lead a judge to shift legal custody to the CPS agency. Even if a brief separation from parents is necessary, it may be in children's interest to avoid family court intervention that could cause a separation from all family members, even the kinship caregiver. Kinship caregivers may prefer informal physical custody of children to a process that may require CPS agencies to decide whether to grant them a foster care license and that subjects the kinship caregiver to agency oversight.

This Article's concern is that absent legal regulation, the status quo gives CPS agencies tremendous power to determine the unusual case in which hidden foster care is appropriate. Given the weighty stakes involved and the state power exercised, more procedural protections should be required.

The hidden foster care phenomenon, and critiques of it, are not new. Indeed, it has been criticized from multiple ends of the child protection law spectrum, both by those who want to limit state intervention in families (who worry about the state effectively changing custody without due process)[14] and by those who want the state to intervene in more families (who worry that hidden foster care leaves children in unsafe conditions).[15]

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12. *See* Miller v. Youakim, 440 U.S. 125, 139-40 (1979); *see also infra* text accompanying notes 271-72. The Court prevented states from paying formal kinship foster caregivers less than other foster parents—the correct result, which nonetheless strengthened financial incentives for states to use hidden foster care. *See infra* Part IV.B.

13. *See* ANNIE E. CASEY FOUND., THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES 1-2 (2013), https://perma.cc/5GBW-WLEA (summarizing arguments for and against hidden foster care).

14. *See, e.g.*, Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 836-37 (1998) (arguing that safety plans are unconstitutionally coercive); Ryan C.F. Shellady, Note, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 IOWA L. REV. 1613, 1616-17 (2019) (same).

15. *See, e.g.*, Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV.

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Hidden foster care requires renewed attention because, as this Article establishes, a growing set of recent federal and state statutes and policies institutionalize and incentivize the practice without imposing meaningful regulations. This Article is the first to explain how the present child protection funding system creates incentives for states to avoid formal foster care and, just as importantly, how recent (and otherwise positive) federal financing reforms risk further institutionalization of hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much regulation. Rather than add essential substantive limits and procedural protections to ensure safety plans that respect the rights of affected parents, children, and kinship caregivers, state policies formalize hidden foster care without addressing its core problems.

This Article argues for the legal domestication of what is now hidden foster care. First, using state power to change child custody should trigger strong legal protections for family integrity—including the opportunity for a parent to challenge the need for the custody change in court and limits on the length of time such custody changes can remain in effect without more formal action. Second, any change in physical custody requested by the state should trigger a right for parents to obtain legal counsel (appointed if necessary) to advise them on their rights and negotiate appropriate plans with CPS agencies. New federal financing guidance makes federal funding available to states to provide attorneys to parents in precisely these cases. These steps recognize that hidden foster care is sometimes appropriate and therefore would not require CPS agencies to bring families to court whenever they use hidden foster care. But they would ensure that parents have a means to protect both their own and their children's right to family integrity.

Third, the federal government should take this parallel system of foster care out of hiding by requiring states to track the number of cases in which their actions lead to parent-child separations without formal foster care and what happens to affected children and their families. Presently, the absence of clear data on the frequency of hidden foster care's use, duration, effects on the safety of children, and other impacts on children and families limits policy discussions regarding the practice. Given the prominence of hidden foster care and the severity of its infringement on family integrity, gathering basic data regarding hidden foster care is essential to the future development and evaluation of policies governing this practice.

Part I of this Article defines the practice of hidden foster care and provides descriptive evidence of its incredibly wide scope, analogous to that of the formal foster care system. Part II addresses the due process concerns with the

1323, 1366-67 (2012) (expressing concern that safety plans left children with unsafe caregivers).

practice, including a discussion of competing U.S. Circuit Court of Appeals cases regarding the voluntariness of hidden foster care. Part III explains the policy concerns and policy benefits of the practice. Part IV describes the perverse incentives to use hidden foster care created by federal child protection funding laws. Part V describes how recent federal and state statutes and state agency policies institutionalize the practice of hidden foster care without adequately regulating the practice. And Part VI offers a range of individual case and systemic administrative oversight steps that would provide long-overdue legal regulation to this practice.

I. Hidden Foster Care: Similar in Function and Scope to Formal Foster Care

Every year, CPS agencies nationally separate more than 250,000 children from their parents and place them in formal foster care in the state's legal custody under the oversight of a family court judge.[16] Some are placed with strangers, and a growing proportion of foster children—now about one-third—is placed with kinship caregivers.[17] Some of these children leave foster care within weeks or months, largely to reunify with their parents, but others have their custody permanently changed. The hidden foster care system separates a roughly similar number of children, many of whom reunify with and some of whom are separated permanently from their parents.[18] A key difference is that in formal foster care, CPS agencies take legal custody of children, while in hidden foster care they induce parents to transfer physical custody to kinship caregivers through threats of the state taking legal and physical custody. This supposed voluntariness exempts hidden foster care from both court oversight and federal data-tracking requirements (which means a precise count of the number of hidden foster care cases is impossible).

This Part describes generally what hidden foster care is, how it operates, its impact on children, and its context in relation to kinship foster care.[19] This Part also uses available data to show the wide scope of the hidden foster care

16. This is the number of children counted as having "entered foster care" in a given year. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018—NO. 25, at 1 (2018), https://perma.cc/5HNA-6JMM.

17. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2017, at 4 (2019), https://perma.cc/J4QR-839P.

18. *See infra* Parts I.A.2-.3, .B.

19. The practice varies in some details from state to state, though a complete breakdown of such differences is beyond this Article's scope.

system, which affects at least tens or even hundreds of thousands of children each year, placing it on par with the formal foster care system.[20]

A. Hidden Foster Care

Hidden foster care occurs when CPS agencies cause a change in a child's physical custody without any family court action, without placing the child in the agency's own custody, and without reporting the child's removal to the federal government. It follows the same sort of concerns about child safety that trigger formal foster care—such as concerns about a parent's drug abuse or mental health condition that limits their ability to parent a child, physical or sexual abuse of a child by a parent or other adult, or an unsanitary house. CPS agencies effectuate hidden foster care via "safety plans"[21]—agreements between CPS authorities and parents intended to keep children safe. Safety plans have a particular meaning in this context. The social work literature defines a safety plan as "a plan that is developed by the parent, worker, children (depending upon their age), and [safety] network members to ensure the safety of their children."[22] Safety plans have their roots in social work practice involving domestic violence, where social workers seek to empower family members to design plans intended to keep them safe while taking into account all of their individual circumstances.[23] Safety plans are intended to identify a "safety network"—individuals who can help keep adults and children safe as needed.[24] Crucially, safety plans leading to hidden foster care[25] follow a CPS agency's threat to remove children and/or initiate child protection proceedings in family court if parents refuse to change the child's custody as the CPS agency insists.

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20. *See infra* Part I.B.

21. The term "safety plan" can also refer to a plan developed after a CPS agency has removed the child directly or filed a petition. For instance, District of Columbia law refers to a "safety plan" that the CPS agency develops during the seventy-two hours between the removal of a child and a family court hearing. D.C. CODE § 16-2312(a)(1) (2019).

22. *E.g.*, Stephanie Nelson-Dusek et al., *Assessing the Value of Family Safety Networks in Child Protective Services: Early Findings from Minnesota*, 22 CHILD & FAM. SOC. WORK 1365, 1365 (2017).

23. *See id.* at 1365-66.

24. *See id.*

25. Safety plans need not lead to hidden foster care; they can, instead, require parents to comply with steps short of changes in children's custody. While important to child protection practice, such safety plans are beyond the scope of this Article. These safety plans present somewhat different legal and policy issues—they, for instance, do not introduce alternative caretakers and they infringe less on the right of family integrity. *See, e.g.*, *id.* at 1372 (describing safety plans that do not aim to change custody but rather aim to "identify specific people and strategies that support parents and act as safety monitors for the children").

1. How it begins: Threats of deeper involvement

The social work goals of safety planning include "increas[ing] family engagement."[26] It bears analysis whether safety plans are truly voluntarily accepted by families and thus whether this goal is met. That analysis is essential when the social worker works for a CPS agency and has authority to remove children from parents' custody and initiate legal action to declare the parents unfit. As Part II will discuss, a central legal debate is whether these safety plans are voluntary agreements akin to any contract or civil settlement or whether a CPS threat to remove children renders such plans coercive.

While the debate over the implication of CPS agency threats remains open, there is no question that CPS does threaten to remove children immediately if parents do not agree to a safety plan that calls for children's physical custody to change, typically shifting the child to the custody of a kinship caregiver. CPS agency policies, safety plan forms, and caseworker reports all confirm that CPS induces agreements to safety plans through threats to remove children. Threats are sometimes stated explicitly on safety plan forms. A Kentucky safety plan form, for example, stated in all capital letters that "ABSENT EFFECTIVE PREVENTATIVE SERVICES" through the CPS agency's safety plan, "PLACEMENT IN FOSTER CARE IS THE PLANNED ARRANGEMENT FOR THIS CHILD."[27] The form used in South Carolina is similarly forceful, providing in bold type, "If the parent(s) refuse to sign a valid safety plan, an out of home placement must be sought by Law Enforcement or Ex parte Order to keep the child safe, pending the completion of the investigation."[28] Other states use somewhat subtler but similarly threatening language.[29] Such threats are confirmed by CPS agency policies, which make clear that agencies will seek the immediate removal of children if parents do not agree to a safety plan, and emphasize that this threat is essential to inducing compliance. One illustrative policy states that a safety plan

> is only effective if all parties agree to the plan and understand that [CPS] will consider the child unsafe if the parties do not comply with the agreed terms of the

26. *See id.* at 1365.

27. Schulkers v. Kammer, 367 F. Supp. 3d 626, 634 (E.D. Ky. 2019), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

28. S.C. Dep't of Soc. Servs., Safety Plan (Form 3087), at 2 (2012), https://perma.cc/3YPF-D3QG; *see also* Dupuy v. Samuels, 462 F. Supp. 2d 859, 868 (N.D. Ill. 2005) (noting that Illinois CPS officials used safety plan forms with boilerplate language stating that they could remove children if parents refused to agree to the safety plan), *aff'd*, 465 F.3d 757 (7th Cir. 2006).

29. *See, e.g.*, Smith v. Williams-Ash, 520 F.3d 596, 598 (6th Cir. 2008) (reporting Ohio's form language threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe").

> plan and [that CPS] will initiate the legal action to protect the child through the removal of the child from the parent's custody and control.[30]

Threats are sometimes otherwise stated in communications between CPS authorities and parents—often with little nuance.[31] As one CPS worker told the Annie E. Casey Foundation, a major child welfare research and funding organization: "We say we want a child welfare system that values family decisions . . . , but once the government gets involved, relatives and parents don't always have real choices. Sometimes it's auntie or else."[32]

Even without explicit threats, the absence of court oversight of safety plans provides "opportunities for manipulation of the parents"[33] through implied threats or by CPS agencies' failure (intentional or not) to fully inform parents of their options. CPS agencies can, through form language and verbal threats, communicate that parents must agree to safety plans or else see the agency place their children in foster care, even when no plans to follow through on that threat exist.[34] The absence of court oversight also means that a CPS agency's precise words and actions taken to induce parental agreement to a safety plan can remain subject to dispute and unresolved.[35] Indeed, the absence of court oversight removes a strong incentive for CPS officials to be careful to avoid overly threatening language.

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30. S.C. DEP'T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL: CHAPTER 7, CHILD PROTECTIVE AND PREVENTIVE SERVICES § 719.02 (2019), https://perma.cc/VG69-M958.

31. For instance, in *Smith*, the parents alleged that the CPS caseworker threatened that they could lose their children forever if they did not follow the safety plan. 520 F.3d at 598. In a case in South Carolina, a CPS agency lawyer wrote to a parent's attorney:

> If [the parent] chooses to violate the safety plan, we can seek a court action and a finding of physical abuse and central registry along with removing custody, if she wants to go that route OR she can continue to cooperate, and we can attempt to resolve this matter without court intervention.

Email from Emily Sordian, Managing Attorney, Orangeburg & Calhoun Ctys., to Skyler Hutto et al. (July 24, 2018, 9:21 AM), *reprinted in* Plaintiffs' Response to Motion to Dismiss, exhibit A, Adams v. S.C. Dep't of Soc. Servs., No. 2019-CP-38-00036 (S.C. Ct. Com. Pl. Apr. 12, 2019). In the interest of full disclosure, I was retained as an expert by the plaintiff in *Adams*.

32. ANNIE E. CASEY FOUND., *supra* note 13, at 1.

33. *See* Pearson, *supra* note 14, at 842.

34. *See, e.g.*, Schulkers v. Kammer, 367 F. Supp. 3d 626, 634 (E.D. Ky. 2019) (reciting threats from CPS agencies even though "[i]n truth, there was no planned arrangement for foster care"), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

35. Pearson, *supra* note 14, at 841-42. Pearson also cites to cases raising questions about the specific circumstances of safety plan agreements, such as one alleging that CPS staff made a parent sign a safety plan agreement that was partially blank, threatening to "tell the judge" if she did not. *See, e.g.*, *id.* at 841 & n.31 (quoting *In re* J.H., 480 So. 2d 680, 683 (Fla. Dist. Ct. App. 1985)).

CPS agencies' role in inducing safety plans creates definitional challenges for scholars. Consider this distinction between private and public kinship care by leading scholar Dorothy Roberts: "As a matter of definition, private kinship care is arranged by families without child welfare agency involvement; kinship foster care, meanwhile, is provided to children who are in the legal custody of the state."[36] Hidden foster care not only follows CPS agency involvement, but is usually specifically requested by CPS authorities.[37] Still, legal custody does not transfer, and certainly does not transfer to the state, leaving parents, children, and kinship caregivers without a clear legal status governing the situation insisted upon by the CPS agency.[38]

Similarly, child protection agencies and policy leaders have struggled to precisely define CPS agencies' role in setting up hidden foster care. They often use language that avoids stating that CPS agencies direct the process, but nonetheless makes clear that CPS agencies have central, even decisive, roles. Consider, for instance, a 2016 white paper published by Child Trends, a leading child welfare think tank. It opens by using the passive voice to describe the phenomenon—"kinship diversion" occurs when "children *are placed with* relatives as an alternative to foster care"—avoiding the question of who precisely does the placing.[39] The federal Children's Bureau has similarly used the passive voice—"children who are known to the child welfare agency *are placed with* relatives without the State or Tribe assuming legal custody."[40] Meanwhile, by the next paragraph of its white paper, Child Trends moves on to an ambiguous verb—"a child welfare agency *facilitates* the placement of a child with relatives or fictive kin."[41] Deeper in, the white paper makes clear that when abuse or neglect is suspected, CPS agencies are "the primary influence in suggesting" a change in custody and seeking parental agreement.[42] The Children's Bureau chose a different, slightly less ambiguous verb—"the child welfare agency *arranges* for a placement without any court involvement."[43]

36. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001).

37. *See supra* notes 27-32 and accompanying text.

38. *See supra* text accompanying notes 16-18.

39. *See* KARIN MALM & TIFFANY ALLEN, CHILD TRENDS, PUB. NO. 2016-24, RESEARCH BRIEF: A QUALITATIVE RESEARCH STUDY OF KINSHIP DIVERSION PRACTICES 1 (2016) (emphasis added), https://perma.cc/2JM7-4KMK.

40. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., WORKING WITH KINSHIP CAREGIVERS 3 (2018) (emphasis added), https://perma.cc/B389-JZB7.

41. MALM & ALLEN, *supra* note 39, at 1. "Fictive kin" refers to individuals with family-like relationships that lack a relationship through blood or marriage. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 2 (2018), https://perma.cc/MD86-CJGS.

42. *See* MALM & ALLEN, *supra* note 39, at 3.

43. CHILDREN'S BUREAU, *supra* note 40, at 3 (emphasis added).

Multiple other scholars and think tanks emphasize state authorities' central role in making kinship diversion placements happen.[44] CPS caseworkers are "often" the ones to call potential caregivers and ask if they will take the child into their home.[45]

Safety plans are generally arranged without the provision of counsel to parents.[46] Parents therefore do not generally have a lawyer to consult about the validity of CPS threats to remove children, their likelihood of success in any court hearing, or the tactical advantages or disadvantages of cooperating temporarily with CPS officials. Moreover, parents lack a lawyer to help negotiate terms of any safety plan, such as duration, visitation, decisionmaking authority, or events that would trigger the plan's termination.

2. What it does: Changes physical custody

Through hidden foster care, CPS agencies effectuate changes in physical but not legal custody,[47] while in formal foster care a court order shifts legal custody from parents to a CPS agency. But hidden foster care effectuates the same day-to-day changes in children's reality—it changes the person with whom they live, often permanently. Family court judges can, of course, remove children from their parents' physical custody and place them in foster care, including kinship foster care.[48] Family courts can also allow children to remain in their own homes and order one or both parents to leave.[49] Both steps mirror what happens in hidden foster care. A safety plan could require the child to leave the home and move in with a kinship caregiver—with or without a parent present.[50] Or the child could remain in the home, but a parent whom CPS has concluded has maltreated the child would be required to leave.[51]

44. *See, e.g.*, ANNIE E. CASEY FOUND., *supra* note 13, at 1 (describing how "child welfare agencies rely" on kinship diversion and "direct[] children to live with willing relatives").

45. Gerard William Wallace & Eunju Lee, *Diversion and Kinship Care: A Collaborative Approach Between Child Welfare Services and NYS's Kinship Navigator*, 16 J. FAM. SOC. WORK 418, 422 (2013).

46. *See* Tara Grigg Garlinghouse & Scott Trowbridge, *Child Well-Being in Context*, 18 U. PA. J.L. & SOC. CHANGE 105, 117 (2015).

47. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02. Legal custody refers to who holds decisionmaking authority regarding a child. *Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019). Physical custody refers to where the child lives. *Physical Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019).

48. *E.g.*, S.C. CODE ANN. § 63-7-1660 (2019).

49. *See, e.g.*, *In re* Blakeman, 926 N.W.2d 326, 328 (Mich. Ct. App. 2018) (describing a parent's appeal from a family court order removing him from the family home).

50. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

51. *E.g.*, Croft v. Westmoreland Cty. Children & Youth Servs., 103 F.3d 1123, 1124-25 (3d Cir. 1997).

The child could remain in the home, and a kinship caregiver could be required to move in.[52] These last two options could be combined, with one or both parents required to leave their child and their home *and* a kinship caregiver agreeing to move in and take physical custody of the child.[53] Through the most severe of these options—when parents leave their home without their children or when children move into a kinship caregiver's home without their parents—parents and children lose their right to live together. Even when parents and children can remain together, the required addition of another adult in the home gives that person significant power and diminishes the parents' authority over the child.[54]

Kinship care is not limited to hidden foster care and physical custody changes. In fact, kinship care is frequently used in the formal foster care system and has a strong research base in that context. While CPS agencies placed only about 18% of foster children in kinship homes in the mid-1980s, they dramatically increased their usage of kinship care later in the decade as the number of children those agencies removed increased sharply following concerns about increasing drug addiction (among other causes), and there was an increased desire to keep children in their own extended families and communities when possible.[55] Though kinship care initially began to fill an urgent need for more foster placements, a growing body of research showed significant benefits from kinship care.[56] Children are more likely to feel that they belong with kinship caregivers than in foster care with strangers,[57] can

52. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

53. *See, e.g.*, REDLEAF, *supra* note 7, at 5, 22-24 (describing one such case and noting that this fact pattern is "routine" in Illinois).

54. Safety plans can also require parents to change a parenting practice without changing physical custody. For instance, in one well-publicized case, CPS authorities were concerned about ten- and six-year-old siblings walking home from a park alone and required the father to sign a safety plan agreeing not to leave his children unsupervised or else face the removal of his children. *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 239 n.8 (2015) (describing the case and citing its media coverage).

55. *See* Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 405, 410-11 (Gerald P. Mallon & Peg McCartt Hess eds., 2005); *see also* Roberts, *supra* note 36, at 1624 ("An exploding foster care population combined with a shortage of licensed nonrelative foster homes made relatives an attractive placement option.").

56. For a recent summary of research findings on the benefits of kinship care, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD. LEGAL RTS. J. 101, 104-08 (2019).

57. *See* Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RES. 105, 115 (2008).

more easily remain with their siblings,[58] have fewer behavioral problems and better mental health,[59] and are significantly less likely to have their initial placement disrupted or to experience multiple moves from one foster placement to another.[60] Some advocates also argue that kinship foster care is consistent with long traditions of extended family and fictive kinship care, especially among black families.[61] Kinship care rates have continued to grow in recent years; in 2017, about one-third of all children in formal foster care lived with a kinship caregiver, up from one-fourth in 2007.[62]

3. How long it lasts and how it ends

The length and long-term outcomes of hidden foster care are similar to those of the formal foster care system. Relatively little data demonstrates hidden foster care cases' duration or how they end, and significant variations between states are likely. One detailed review in Texas, however, reveals that in most cases, hidden foster care triggers a long-term if not permanent change in custody. In fiscal year 2014, Texas authorities used hidden foster care in 34,000 cases and reunified children and parents that same year in around 13,000 of those[63]—meaning that in more than 60% of hidden foster care cases in Texas, children remained with kinship caregivers. While CPS authorities brought some cases to court (about 4,000, or 12%), most of the remaining children lived with kinship caregivers without a formal change in custody or the court oversight that such a change would require.[64]

Safety plans last for inconsistent periods of time, and agency practice and policy do not always align. In South Carolina, for instance, a policy provides that safety plans may only be in place for ninety days.[65] But individual cases

58. CHILDREN'S BUREAU, *supra* note 40, at 4.

59. *See* Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment (Review)*, COCHRAN DATABASE SYSTEMATIC REVIEWS 19 (Jan. 31, 2014), https://perma.cc/A5AG-Y63Y.

60. *See, e.g.*, Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILD. & YOUTH SERVICES REV. 389, 390, 393, 396 (2010); Koh & Testa, *supra* note 57, at 112.

61. *See, e.g.*, Roberts, *supra* note 36, at 1621-22; Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK 190, 190-92 (1996).

62. CHILDREN'S BUREAU, *supra* note 17, at 4.

63. CHILDREN'S COMM'N, SUPREME COURT OF TEX., PARENTAL CHILD SAFETY PLACEMENTS 3, 13 (2015), https://perma.cc/5UVU-RC5J.

64. *See id.*

65. S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

show the agency enforcing safety plans beyond ninety days.[66] Beyond South Carolina, a majority of state CPS agencies surveyed by Child Trends said they used hidden foster care, and a majority of those states reported that they "discontinue ongoing supervision with the caregiver and leave the caregiver as the physical custodian of the child."[67] That is, CPS agencies often cause (or, if one prefers, facilitate[68] or arrange[69]) a change in a child's physical custody and then end their involvement with the family without doing anything to change legal custody. Most agencies reported that they did not believe they were obligated in these cases to go to family court and seek an adjudication of neglect.[70]

Long-term (and certainly permanent) parent-child separations through hidden foster care resemble the most drastic consequences of formal foster care cases. Even when hidden foster care does not last long and children return to their parents' physical custody quickly, the system resembles the formal foster care system. Children who reunify within weeks or months follow a timeline that is normal in formal foster care cases: 9% of all children removed into foster care leave in less than one month, 24% leave in less than six months, and 43% leave in less than twelve months.[71]

B. Scope of Hidden Foster Care

There is no precise count or even estimate of hidden foster care cases. States generally do not track the number of children whose custody changes through safety plans, and certainly not in a consistent manner, preventing any precise and reliable national estimate.[72] This data gap exists because federal foster care reporting requirements do not require the collection of such data.

66. *E.g.*, Complaint ¶ 13, Adams v. S.C. Dep't of Soc. Servs., No. 2019-CP-38-00036 (S.C. Ct. Com. Pl. Jan. 6, 2019).

67. *See* TIFFANY ALLEN ET AL., CHILD TRENDS, STATE KINSHIP CARE POLICIES FOR CHILDREN THAT COME TO THE ATTENTION OF CHILD WELFARE AGENCIES: FINDINGS FROM THE 2007 CASEY KINSHIP FOSTER CARE POLICY SURVEY 12 (2008), https://perma.cc/R7RN-BUR9.

68. *See supra* text accompanying note 41.

69. *See supra* text accompanying note 43.

70. *See* ALLEN ET AL., *supra* note 67, at 13.

71. CHILDREN'S BUREAU, *supra* note 16, at 3 (providing data from fiscal year 2017).

72. *See, e.g.*, MALM & ALLEN, *supra* note 39, at 6 ("With no standardized policies and procedures for kinship diversion practice, and no data gathered to track children who have been diverted, agencies do not know exactly how [the] practice is carried out and how diverted families are being served."); Wallace & Lee, *supra* note 45, at 419 ("Many of these diversion placements are unlikely to be included in official child welfare databases. Therefore, the actual number of children placed with child welfare agency involvement is unknown . . . ." (citations omitted)).

States must report data regarding all children in foster care,[73] and federal data reporting regulations apply only to children living in formal foster care.[74] Children in hidden foster care are simply not covered, so states need not track these cases.[75]

Despite this data gap, strong evidence suggests that the scope of the hidden foster care system is quite large; the number of children who pass through hidden foster care each year is roughly comparable with the number of children removed from their families, brought to court, and placed in formal foster care.

The few studies to offer specific estimates suggest that hundreds of thousands of children go through hidden foster care each year. A child welfare think tank studied several local jurisdictions and found that the ratio of hidden foster care to formal foster care cases ranged from 7:10 to roughly 1:1.[76] Those ratios are consistent with older estimates. Detailed data regarding 5,873 children with child protection cases in 2008 and 2009 in eighty-three counties across the country[77] revealed that nearly half of children who did not live at home following a CPS investigation lived in informal kinship care.[78] That is, when a CPS investigation leads to a child not living with a parent, about half of the

73. *See* 45 C.F.R. § 1355.40(b)(1) (2019). These requirements govern the Adoption and Foster Care Analysis and Reporting System (AFCARS). *See AFCARS*, CHILD. BUREAU, https://perma.cc/NGZ3-7WBW (archived Feb. 12, 2020) (describing the AFCARS data system).

74. 45 C.F.R. § 1355.42(a) (listing three circumstances that trigger reporting requirements, all of which are conditioned on CPS agencies having placement and care responsibility or paying foster care maintenance payments).

75. A different federal child welfare data collection program, the National Child Abuse and Neglect Data System, similarly fails to collect data regarding hidden foster care. That data, and publications based on it, reports the number of cases investigated by CPS agencies and the findings of those investigations but does not count CPS-arranged changes in custody as results of such investigations. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2017, at viii-ix (2018), https://perma.cc/7UUZ-KL5Y; *About NCANDS*, CHILD. BUREAU (June 18, 2015), https://perma.cc/ZTV3-LCBT. Moreover, this data reporting system is voluntary, not mandatory, for states. 45 C.F.R. § 1355.20(a).

76. KARIN MALM ET AL., CHILD TRENDS, PUB. NO. 2019-34, VARIATIONS IN THE USE OF KINSHIP DIVERSION AMONG CHILD WELFARE AGENCIES: EARLY ANSWERS TO IMPORTANT QUESTIONS 3 (2019), https://perma.cc/LR2N-GSVW.

77. Data were gathered from the second National Survey of Child and Adolescent Well-Being, a federally funded study of children whose child protection investigations closed between February 2008 and April 2009. MELISSA DOLAN ET AL., OFFICE OF PLANNING, RESEARCH & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., REP. NO. 2011-27a, NSCAW II BASELINE REPORT: INTRODUCTION TO NSCAW II, at 1 (2011), https://perma.cc/UHD8-U9WR.

78. *See id.* at 9. The percentage of such children in informal kinship care following a CPS investigation is 47% in rural areas and 49% in urban areas. Wendy A. Walsh, Carsey Inst., Fact Sheet No. 24, Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment 1 (2013), https://perma.cc/AQN9-3746.

time a child ends up in the formal foster care system (meaning the child has a court case and some kind of formalized placement with kin, with nonkinship foster parents, or in a group home), and the other half of the time the child ends up living with kin informally in hidden foster care. Extrapolated nationwide, this study suggests that 250,000 or more children enter hidden foster care every year.[79] A 2002 study estimated that at least 137,000 abused or neglected children were living with kinship caregivers after CPS agency, but not court, involvement.[80] Other data points are consistent with there being tens if not hundreds of thousands of children in hidden foster care each year. A 2007 survey of state CPS agencies found that thirty-nine states used hidden foster care—or, in the language of the survey, "rel[ied] on kin to divert children from foster care."[81] Whatever the precise number, multiple scholars and think tanks reviewing the topic describe the practice as frequent—it is "quite common,"[82] "increasing,"[83] "an increasingly important part of child welfare practice,"[84] and used "often."[85]

Data from some specific states confirm that tens of thousands of children pass through hidden foster care each year in those states alone—suggesting the national figure is likely in the hundreds of thousands. Texas authorities documented that in 2014, they facilitated "informal kinship placements" about 34,000 times[86]—almost three times as often as Texas authorities brought cases

79. The number of children who enter formal foster care (kinship or otherwise) is reported by each state to the federal government and has ranged from 251,000 to 273,000 annually between 2009 and 2018. Children's Bureau, U.S. Dep't of Health & Human Servs., Trends in Foster Care and Adoption: FY 2009-FY 2018, at 1 (2019), https://perma.cc/6R6H-73LJ.

80. *See* Jennifer Ehrle et al., Urban Inst., Snapshots of America's Families III: Kinship Foster Care; Custody, Hardships, and Services 2 fig.1 (2003), https://perma.cc/67Z7-8VSM (reporting that 542,000 abused and neglected children with kinship caregivers were "involved with social services" but only 405,000 of those were also "involved with courts," a difference of 137,000). The estimate increases to approximately 400,000 when excluding only those children in formal foster care, as at least one think tank has done. ANNIE E. CASEY FOUND., *supra* note 13, at 5.

81. ALLEN ET AL., *supra* note 67, at 11-13.

82. James P. Gleeson et al., *Becoming Involved in Raising a Relative's Child: Reasons, Caregiver Motivations and Pathways to Informal Kinship Care*, 14 CHILD & FAM. SOC. WORK 300, 308 (2009).

83. MALM & ALLEN, *supra* note 39, at 6.

84. Wallace & Lee, *supra* note 45, at 427.

85. Eunju Lee et al., *Placement Stability of Children in Informal Kinship Care: Age, Poverty, and Involvement in the Child Welfare System*, 95 CHILD WELFARE, no. 3, 2017, at 87, 89. Lee and her coauthors found that for children living informally with kin, "[a]lmost two-thirds had at least one CPS record prior to moving in with the current kin caregiver," *id.* at 98, although public child welfare agencies along with other community sources helped identify families for the study, which may have skewed the results, *see id.* at 105.

86. CHILDREN'S COMM'N, *supra* note 63, at 3.

involving alleged child abuse or neglect to court.[87] Hidden foster care cases in Illinois have been estimated at 10,000 per year.[88] In Virginia, data for some local CPS agencies suggest that statewide, CPS agencies placed about 5,000 children in hidden foster care between July 2016 and December 2017[89]—a figure greater than the number of children placed in formal foster care in the same period.[90] In South Carolina, at least 2,318 children were living in kinship care under a safety plan rather than with their parents in the summer of 2018, without having gone to court.[91] South Carolina authorities reported that 4,239 children "entered foster care" that year;[92] had they brought all of the hidden foster care cases to court and counted them as removals, the number of reported removals would have increased 55%. Data taken from a New York state program to better support kinship caregivers found that, of those children with prior CPS involvement, the vast majority (77%) were placed with kinship caregivers without court proceedings.[93] Arizona media reported that 702

87. Texas reported 11,334 "victims with court action" in 2014. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2014, at 85 tbl.6-5 (2016), https://perma.cc/K44L-EBTQ.

88. *See* REDLEAF, *supra* note 7, at 43.

89. Katie O'Connor, *Every Year, Children Are Diverted Away from Foster Care and Placed with Relatives. Nobody Knows What Happens Next.*, VA. MERCURY (June 3, 2019), https://perma.cc/HEV6-H4JE; *see also* VA. DEP'T OF SOC. SERVS., REVIEW OF CURRENT POLICIES GOVERNING FACILITATION OF PLACEMENT OF CHILDREN IN KINSHIP CARE TO AVOID FOSTER CARE PLACEMENTS IN THE COMMONWEALTH AND THE RECOMMENDATIONS FOR REGULATIONS GOVERNING KINSHIP CARE PLACEMENTS 4 (2016), https://perma.cc/HET8-8VJG (reporting that 94% of local Virginia CPS agencies use the "widespread" practice).

90. Virginia removed and placed into formal foster care 2,158 children in fiscal year 2017. *See* CHILDREN'S BUREAU, *supra* note 75, at 90 tbl.6-4 (indicating that 1,280 victims and 878 nonvictims received foster care services). Assuming a roughly similar removal rate, there would have been about 3,300 children placed in formal foster care in the same eighteen-month time period when 5,000 were placed in hidden foster care.

91. *See* Taron Brown Davis, S.C. Dep't of Soc. Servs., State of Child Welfare Services 17 (Aug. 31, 2018) (presentation on file with author). This figure includes 105 "children living with a kinship caregiver during an open investigation" and 2,213 "children living with a kinship caregiver while [they are] receiving family preservation/in home treatment services." *Id.*

92. S.C. Dep't of Soc. Servs., Reasons Youth Entered Foster Care During SFY 2018, at 1 (2018) (capitalization altered), https://perma.cc/NGT7-VHD9.

93. Wallace & Lee, *supra* note 45, at 422. The director of that program testified that New York data show about 2,000 children every year are placed in a "kin placement" through "direct custody" other than foster care. Gerard Wallace & Ryan Johnson, NYS Kinship Navigator, Testimony for the Joint Legislative Hearing on the Governor's Proposed Human Services Budget 15 (2019) (capitalization altered), https://perma.cc/8DCA-MR49.

children were "removed under a present-danger plan" in 2018.[94] Studies of states' differential response programs—which are designed to provide alternatives to formal investigations, court proceedings, and removals—have found that "at least five states permit a child to be removed from the home while the family participates in a differential response system."[95]

These authorities show that hidden foster care is used both while a child protection investigation is pending and after the agency concludes its investigation.[96] The distinction is important because limiting the practice to pending investigations would limit its scope significantly, both in overall number and in length, because state laws require CPS agencies to complete investigations within a set time period.[97] The record of CPS agencies using hidden foster care well beyond investigation periods—and sometimes for permanent changes in custody[98]—is thus a key element of the practice's wide scope.

In addition to the practice's wide scope, evidence also suggests that hidden foster care has grown in frequency over the last decade and a half. A 2007 survey found an increasing reliance by states on the practice as part of a larger trend in which states sought to avoid foster care placements.[99] By 2010, the National Conference on State Legislatures (NCSL) listed "divert[ing] children from foster care, when safe and appropriate, through voluntary placement with relatives" as a recommended practice.[100] Moreover, Congress enacted federal statutes that facilitate the practice in 2008 and again in 2018,[101] making continued expansion likely.

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94. Patty Machelor, *Arizona's Voluntary Child Removals Use Method Challenged in Other States*, ARIZ. DAILY STAR (May 25, 2019), https://perma.cc/A2UR-9BCW. As a percentage of the system, this count is relatively modest—4.6% of all removals in Arizona—likely because they are limited to twenty-eight days. *Id.*

95. Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 633 (2012).

96. Safety plans are sometimes described as only governing cases during pending investigations. *See, e.g.*, Shellady, *supra* note 14, at 1616. But, as certain sources cited in notes 91-95 above have found, the practice is used in cases when investigations are complete and CPS agencies seek to work with the family without using formal foster care. *See, e.g.*, Davis, *supra* note 91. The practice is also used in some states' differential response programs, which do not involve any investigation. *See* McGrath, *supra* note 95, at 633.

97. *See, e.g.*, D.C. CODE § 4-1301.06(a) (2019) (30-day limit); S.C. CODE ANN. § 63-7-920(A)(2) (2019) (45-day limit, with a single 15-day extension available for good cause).

98. *See supra* Part I.A.3.

99. *See* ALLEN ET AL., *supra* note 67, at 12.

100. MADELYN FREUNDLICH, NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE STRATEGIES TO SAFELY REDUCE THE NUMBER OF CHILDREN IN FOSTER CARE 8-9 (2010), https://perma.cc/5HD8-UZ29. The NCSL went so far as to recommend legislation requiring CPS agencies to use hidden foster care. *See id.*

101. *See infra* Part V.A.

This large and growing scope leads to an important conclusion—hidden foster care is so common that it is roughly on par in frequency with formal foster care itself. It affects roughly as many children—many of whom likely are unaware of the difference between being in the formal or hidden foster care systems. This practice is not a narrow one used in unusual cases,[102] but one that is a system of its own, and one that requires a comparable amount of regulation and critical analysis.

II. Due Process Challenges and Justifications

Any state action that interferes with parental authority over children—and certainly state action that separates parents and children—raises substantive and procedural due process concerns. Parents have the fundamental right to the care, custody, and control of their children, as the Supreme Court has recognized in a long set of opinions for nearly a century.[103] The law also presumes that children benefit from this arrangement—absent evidence of parental unfitness, parents are presumed to act in their children's best interest.[104] Consistent with that presumption, multiple lower courts have recognized that children also have a fundamental constitutional right to live in their parents' custody.[105] To protect these rights, the Supreme Court, state courts, and state legislatures have adopted a range of due process protections. Before the state can declare a child neglected or dependent, the state must prove a parent unfit.[106] If the state seeks to remove a child before it is able to prove a parent unfit at trial, it must meet an even more difficult standard—not only that the parent has abused or neglected the child, but that the abuse or neglect presents a risk so substantial and imminent that emergency action is necessary to protect the child.[107]

102. *Cf.* ANNIE E. CASEY FOUND., *supra* note 13, at 3 (noting that supporters argue that kinship diversion is only appropriate for "cases in between" and critics argue that it is "too often used as a default").

103. *See* Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion); Santosky v. Kramer, 455 U.S. 745, 753, 758-59 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981); Parham v. J.R., 442 U.S. 584, 602 (1979); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

104. *See Troxel*, 530 U.S. at 68 (plurality opinion); *Parham*, 442 U.S. at 602.

105. *See, e.g.*, Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1999); Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *In re* Juvenile Appeal, 455 A.2d 1313, 1318 (Conn. 1983); Amanda C. v. Case, 749 N.W.2d 429, 438 (Neb. 2008). Consistent with this view, the Supreme Court in *Stanley* wrote that when children are removed from their parents, they "suffer from uncertainty and dislocation." *Stanley*, 405 U.S. at 647.

106. A parent is entitled to a "hearing on [their] fitness as a parent before [their] children [are] taken from [them]." *Stanley*, 405 U.S. at 649.

107. *See, e.g.*, S.C. CODE ANN. § 63-7-620(A)(1) (2019); *In re Juvenile Appeal*, 455 A.2d at 1319-20.

Hidden foster care avoids court hearings constitutionally required in the formal foster care system, so the most obvious legal question is whether that avoidance of court oversight violates the parents' and children's rights to family integrity without due process of law. The question hinges on the voluntariness of parents' agreements to safety plans calling for their children to live in someone else's physical custody. If parents voluntarily choose to shift physical custody, then hidden foster care is no different from the situation of millions of children who live with individuals other than their parents without state child protection agency intervention.[108] If, however, the state coerces parents to give up custody through threats to remove children and initiate court proceedings, then that is not a voluntary choice and the state has violated the Due Process Clause.

All federal courts to address these questions have agreed that CPS authorities violate parents' due process rights if they make legally unjustifiable threats to induce parents to accept a change in their children's physical custody.[109] The question whether hidden foster care is acceptable when CPS agency threats to remove children have some legal basis, however, has split federal circuits,[110] and the following Subpart will outline circuits' competing arguments. This Article takes the position that threatening to remove a child and file an abuse or neglect case against a parent is inherently coercive, thus creating a procedural due process problem with hidden foster care. The remainder of this Article, however, does not depend on that conclusion. As the next Subpart establishes, courts finding that hidden foster care is truly voluntary still use analysis that supports the proposals for regulation that I advance in Part VI.

A. Foster Care or Hidden Foster Care: Like a Choice of Cocktails

The leading case for the proposition that hidden foster care is voluntary and thus not in violation of due process is *Dupuy v. Samuels*. In *Dupuy*, the Seventh Circuit rejected class action plaintiffs' challenge to the Illinois CPS agency's

108. The U.S. Census Bureau's Current Population Survey estimates that nearly 3 million children live without any parents. *See Historical Living Arrangements of Children: Living Arrangements of Children Under 18 Years Old; 1960 to Present*, U.S. CENSUS BUREAU, https://perma.cc/5CGX-7JTC (last updated Oct. 10, 2019) (estimating that in 2019, 2,319,000 children lived with relatives without parents, and 647,000 lived with nonrelatives without parents). Only about 450,000 children are in formal foster care. CHILDREN'S BUREAU, *supra* note 16, at 1. The number of children who pass through hidden foster care is likely in the low six figures, *see supra* Part I.B, leaving the vast majority of children in kinship care without any CPS agency involvement.

109. *See infra* notes 119-22 and accompanying text.

110. *See* Daniel Pollack et al., *The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives*, 22 U. MIAMI INT'L & COMP. L. REV. 129, 142-46 (2015).

frequent practice of threatening to remove children and initiate child protection proceedings if parents did not agree to change a child's physical custody via a safety plan.[111] *Dupuy* described a safety plan as requiring one parent to leave the home and/or only see their child in the presence of an approved family member, or requiring that the child live with a family member other than a parent.[112]

The trial court findings included several details used by the plaintiffs to cast doubt on safety plans' voluntariness.[113] CPS caseworkers usually presented plans for parents to sign with no meaningful parental input.[114] The CPS agency, both in writing and verbally, threatened parents with the removal of their children if they failed to agree.[115] Safety plans generally did not specify a time period for which they would be in effect, nor did the agency create a procedure to contest a safety plan.[116]

Nonetheless, Judge Posner's opinion concluded that hidden foster care is the result of voluntary choices by parents to temporarily relinquish physical custody of their child. In the Seventh Circuit panel's view, an agency demanding that a parent relinquish physical custody through a safety plan and threatening to remove a child and open a CPS case in family court if the parent does not comply is simply giving a parent an option they would not otherwise have—the safety plan is merely an "offer" provided by CPS authorities as an alternative to going to court.[117] It continued:

> We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?[118]

Judge Posner's reasoning offers several important points in support of this conclusion. First, this scenario is only truly voluntary when the CPS agency *legitimately* threatens to remove the child and/or go to court; if the CPS agency

111. Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006). For a description of the *Dupuy* litigation, including a critique of the Seventh Circuit's ruling by an attorney for the plaintiffs, see REDLEAF, *supra* note 7, at 37-50. *See also* McGrath, *supra* note 95, at 677-81.

112. *Dupuy*, 465 F.3d at 760.

113. *See* McGrath, *supra* note 95, at 678.

114. Dupuy v. Samuels, 462 F. Supp. 2d 859, 867 (N.D. Ill. 2005), *aff'd*, 465 F.3d 757.

115. *Id.* at 868.

116. *Id.* at 871.

117. *Dupuy*, 465 F.3d at 760 (noting that "sometimes, in lieu of immediately removing the child from its parents, the state will offer the parents the option of agreeing to a 'safety plan'"); *id.* at 761 ("The state does not force a safety plan on the parents; it merely offers it.").

118. *Id.* at 762.

lacks the factual basis or legal authority to carry out such a threat, then making it would render coercive an insistence that a parent agree to a safety plan.[119] Judge Posner distinguished legitimate legal threats from "objectionable" coercion based on legally unjustifiable threats.[120] (He did not address the reasonableness of expecting parents to evaluate the legitimacy of a CPS agency threat to remove their children.[121]) Further, Judge Posner distinguished seemingly contrary precedent as involving situations in which CPS authorities made improper threats.[122]

Second, Judge Posner drew an analogy between a safety plan leading to hidden foster care and a negotiated settlement—either a criminal plea bargain or a civil pretrial settlement.[123] Criminal plea bargains provide significantly more formal procedural protections for defendants, so they present a curious analogy. Plea bargains occur after defendants have been formally charged, while safety plans occur without CPS agencies filing petitions outlining alleged instances of abuse or neglect. Moreover, plea bargain discussions occur after a defendant has retained or has been appointed a lawyer, and the prosecutor and defense attorney negotiate a settlement based in large part on what would likely happen if the case proceeded to trial.[124] Meanwhile, safety plans occur

119. *See id.* at 762-63.

120. *Compare id.* at 762 ("It is not a forbidden means of 'coercing' a settlement to threaten merely to enforce one's legal rights."), *with id.* ("Coercion is objectionable . . . when illegal means are used to obtain a benefit. . . . There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse . . . .").

121. Ryan Shellady criticizes *Dupuy*'s focus on the legitimacy of a state threat as "suggest[ing] that parents looking down the barrel of the state's gun ought to know whether its chamber is loaded." Shellady, *supra* note 14, at 1629.

122. *Dupuy*, 465 F.3d at 763 (citing Doe v. Heck, 327 F.3d 492 (7th Cir. 2003); and Croft v. Westmoreland Cty. Children & Youth Servs., 103 F.3d 1123 (3d Cir. 1997)). At least one reported case has applied *Dupuy*'s distinction between legitimate and legally unjustifiable threats to recognize a valid procedural due process claim. Schulkers v. Kammer, 367 F. Supp. 3d 626, 639-40 (E.D. Ky. 2019) (describing a CPS agency threat to remove children if parents did not agree to safety plan as lacking a sufficient basis in facts and law), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

123. *Dupuy*, 465 F.3d at 761. Cases in other circuits have relied on *Dupuy*'s analogy to civil settlement. *E.g.*, Smith v. Williams-Ash, 520 F.3d 596, 600 (6th Cir. 2008) (citing *Dupuy*, 465 F.3d at 761-62); Sangraal v. City & County of San Francisco, No. 3:11-cv-04884, 2013 WL 3187384, at *9 (N.D. Cal. June 21, 2013) (citing *Dupuy*, 465 F.3d at 760-62), *aff'd mem. sub nom.* Jones v. City & County of San Francisco, 621 F. App'x 437 (9th Cir. 2015).

124. At least that is how plea bargaining ought to work. Deviations from this norm—such as "take it or leave it" plea offers, or "meet 'em and plead 'em" practice—are rightly criticized by commentators. *See, e.g.*, Margareth Etienne, *A Lost Opportunity for Sentencing Reform: Plea Bargaining and Barriers to Effective Assistance*, 68 S.C. L. REV. 467, 482-83 (2017) (describing "take it or leave it" plea offers as inducing fast plea bargains); Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 295-96 (2016) (describing "meet 'em and plead 'em" practice).

without either side having the benefit of counsel and therefore with a weaker ability for the law and possible legal process to inform the safety plan. Moreover, criminal defendants not only have the right to counsel, but are protected from plea decisions that result from erroneous legal advice through ineffective assistance of counsel cases.[125] A judge conducts a colloquy with the defendant to ensure the voluntariness of the plea; indeed, a typical question includes whether anyone has threatened the defendant in order to induce the plea.[126] No such colloquy occurs with safety plans.

Civil pretrial settlements provide a closer, but still imperfect, analogy for the Seventh Circuit. They also involve important due process protections: all of the procedures of civil litigation, sometimes coupled with representation of all parties.[127] Moreover, they are typically negotiated over longer periods of time, allowing for calmer deliberation than a threat to take custody might permit.[128]

In contrast, hidden foster care cases are not just any civil cases. Rather, they involve the fundamental liberty interest of parents in the "care, custody, and control" of their children[129] combined with state action intended to effectuate infringement of that interest. Moreover, in the safety plan context, the only check on an overbearing state agency is a parent's willingness to say no and insist on their day in court. And this decision cannot be separated from its legal and social context. It is not a cocktail party in which a privileged host offers a drink to a privileged guest. It occurs when a state agency with awesome powers to destroy families and create new ones interacts with families largely of low socioeconomic status, often with low social capital, and typically

125. *See, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1968-69 (2017) (overturning a defendant's guilty plea based on incorrect legal advice about the immigration consequences of that plea); Lafler v. Cooper, 566 U.S. 156, 174-75 (2012) (ruling for a defendant who declined a plea offer based on incorrect legal advice and later faced more severe consequences following trial); Missouri v. Frye, 566 U.S. 134, 147 (2012) (finding constitutionally deficient performance when attorney failed to communicate a plea offer and the offer lapsed as a result); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that the failure to advise a client regarding the risk of deportation created by a plea bargain is constitutionally deficient).

126. *See* FED. R. CRIM. P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

127. There is generally no right to appointed counsel in most civil cases, but parties frequently do have counsel or at least access to "self-help" centers to obtain basic information about the law and legal process. *See, e.g.*, *Self-Help Centers*, A.B.A., https://perma.cc/E78Z-SN4B (archived Feb. 12, 2020).

128. Shellady, *supra* note 14, at 1628-29.

129. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

without funds, counsel, or much education.[130] Indeed, the Supreme Court has noted the risk of error that can result from power imbalances between the state and the disproportionately poor parents in contact with CPS agencies.[131] Other factors—such as a parent's immigration status or disability—may exacerbate this power imbalance further.[132] In this context, without the procedural protections held by criminal defendants or civil litigants, it is doubtful that much meaningful negotiation occurs.[133]

Despite these concerns about *Dupuy*'s logic, several other federal courts have ruled similarly.[134] In *Smith v. Williams-Ash*, the Sixth Circuit rejected David and Melody Smith's claim that a safety plan shifting physical custody of their children to family friends violated their procedural due process rights.[135] Following CPS officials' concern that the Smiths' house was too "filthy" and "clutter[ed]" to be safe, a social worker "persuaded the Smiths to consent to a safety plan that removed the children."[136] The Smiths alleged they cleaned their home and asked the CPS social worker what additional steps they needed to take in order to regain custody of their children, and the worker added requirements, "ignored their requests for information[,] and threatened to permanently remove their children if they stopped cooperating."[137] CPS authorities only permitted the children to return to their parents two days

130. *See, e.g.*, Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVICES REV. 42, 42 (2019) (describing poverty and related factors as affecting "[t]he vast majority of child welfare-involved parents"); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 385 (1999) ("In child welfare cases, where the individual is pitted against the vast power and resources of the state, the power imbalance is particularly extreme. And in the vast majority of cases, the fact that the parent is female, poor, uneducated, and nonwhite, exacerbates this inherent power disparity.").

131. *See* Santosky v. Kramer, 455 U.S. 745, 762-63 (1982).

132. *See, e.g.*, ANNIE E. CASEY FOUND., UNDERCOUNTED. UNDERSERVED.: IMMIGRANT AND REFUGEE FAMILIES IN THE CHILD WELFARE SYSTEM 3-5 (2006), https://perma.cc/UYL9-FVED (describing immigrant families' vulnerability in the child protection system); Ella Callow, *Maintaining Families When Parents Have Disabilities*, 28 CHILD L. PRAC. 129, 129 (2009) (describing high removal rates from parents with disabilities).

133. *See* McGrath, *supra* note 95, at 666, 679.

134. *E.g.*, Smith v. Williams-Ash, 520 F.3d 596, 597-98 (6th Cir. 2008) (affirming the dismissal of civil rights litigation because parents "consented to the removal of their children pursuant to a voluntary 'safety plan'"); Sangraal v. City & County of San Francisco, No. 3:11-cv-04884, 2013 WL 3187384, at *9 (N.D. Cal. June 21, 2013) (holding that voluntary consent to a safety plan would eliminate any constitutional claim), *aff'd mem. sub nom.* Jones v. City & County of San Francisco, 621 F. App'x 437 (9th Cir. 2015).

135. 520 F.3d at 597-98.

136. *Id.* at 598.

137. *Id. Smith* was decided on summary judgment, so these allegations were assumed to be true. *Id.* at 598-99.

after the parents filed a federal lawsuit alleging a due process violation.[138] The Sixth Circuit emphasized written elements of the safety plan at issue, including form language reciting that the parents' "decision to sign this safety plan is voluntary," threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep [their] child(ren) safe," and requiring parents to inform their caseworker if they decide not to abide by the safety plan.[139] Relying on that form language, the Sixth Circuit followed *Dupuy* and concluded the custody change was voluntary.[140]

B. An Inherently Coercive Practice

In considering whether hidden foster care violates parents' and children's due process rights, the stronger view is that even legally justified threats to remove children are so coercive as to render involuntary any subsequent parental agreements to change physical custody. This Subpart describes the Third Circuit case law that so holds and offers additional reasons to consider these agreements involuntary. As importantly, this Subpart notes the many legal and policy questions that remain even if this view of the constitutional issue prevails.

1. *Croft v. Westmoreland County Children & Youth Services*

The Third Circuit stands apart from *Dupuy* through a decision that has been understood to hold that safety plans based on a threat of child removal are inherently coercive and thus require some due process protections. *Croft v. Westmoreland County Children & Youth Services* involved a CPS investigation of vague concerns that Henry and Carol Croft were abusing their four-year-old daughter based on a child protection hotline call that the child "had recently been out of the house naked, walked to a neighbor's house, knocked on the door, and told the neighbors that she was 'sleeping with mommy and daddy.'"[141] The parents denied abuse and explained the conduct at issue, but the CPS investigator gave the father "an ultimatum: unless he left his home and separated himself from his daughter until the investigation was complete, she would take [the child] physically from the home that night and place her in foster care."[142]

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138. *Id.* at 599.

139. *Id.* at 598, 600.

140. *Id.* at 599-600; *see also* Teets v. Cuyahoga County, 460 F. App'x 498, 503 (6th Cir. 2012) (applying *Smith* and *Dupuy* to hold that parents' agreement to a safety plan was voluntary).

141. 103 F.3d 1123, 1124 (3d Cir. 1997).

142. *Id.*

The Third Circuit pointed to evidence that CPS authorities acted beyond their legal authority. It held that an emergency removal was not justified on the facts, which the court described as "a six-fold hearsay report by an anonymous informant."[143] Absent stronger evidence, CPS authorities could not lawfully remove a child, either directly or through a safety plan.[144] Moreover, one CPS witness had even testified the agency required that a "parent accused of sexual abuse must prove beyond any certainty that there was no sexual abuse before [the CPS worker] would be permitted to leave a child with his or her parents."[145] This practice unconstitutionally shifted the burden of proving parental unfitness from the state to the parent.[146] And this unconstitutional burden shift was evident in the record—the CPS investigator had testified that she insisted on separating the father from his daughter despite admitting to lacking enough evidence to determine if the Crofts had abused their daughter and needing to investigate further.[147] *Croft* could thus be read as consistent with *Dupuy*—holding that the problem was not the safety plan itself, but the CPS authorities' lack of adequate evidence to justify their insistence on that plan.

However, *Croft* also included a different key holding, which suggests that no CPS threat of removal could lead to a truly voluntary safety plan. The CPS agency gave the Crofts an "ultimatum," which caused a "dilemma" for the parents.[148] And the court scoffed at the CPS defendants' effort to describe the parents' subsequent actions as voluntary: "This notion we explicitly reject. The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken."[149] This language stands in

143. *Id.* at 1126.

144. *See id.*

145. *Id.* at 1125.

146. *Cf.* Parham v. J.R., 442 U.S. 584, 602-03 (1979) (providing that parents are presumed to act in their children's best interest); Stanley v. Illinois, 405 U.S. 645, 649 (1971) (holding that "as a matter of due process of law, [a parent is] entitled to a hearing on [their] fitness as a parent before [their] children [a]re taken from [them]"). State courts have explicitly held that the "party seeking to interfere with" the fundamental right of family integrity—in child protection cases, the state—bears the burden of proof. *See, e.g.*, *In re* Juvenile Appeal, 455 A.2d 1313, 1323 (Conn. 1983). State statutes universally impose on states the burden of proving that parents have abused or neglected their children. Ashley J. Provencher, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof at Adjudication of Abuse or Neglect: Its Influence on Case Outcomes at Key Junctures*, 17 SOC. WORK & SOC. SCI. REV., no. 2, 2014, at 22, 27.

147. *Croft*, 103 F.3d at 1127.

148. *Id.* at 1125.

149. *Id.* at 1125 n.1; *see also* Pearson, *supra* note 14, at 856 (describing this "important aspect" of *Croft*).

marked contrast to *Dupuy*'s repeated use of the term "offer" to describe CPS authorities' conduct and the term "voluntary" to describe parents' responses to CPS demands. Academic commentators have echoed these concerns that CPS agencies arrange hidden foster care through coercive threats of removal and court action, describing parents' decision to acquiesce to such agency threats as "voluntary"—complete with scare quotes.[150]

Subsequent district court cases within the Third Circuit have interpreted *Croft* to deem coercive *any* safety plan resulting from a CPS threat to remove a child. For example, *Starkey v. York County* involved abuse and neglect allegations that were supported by significantly more evidence than those in *Croft*—to the point that the district court described the two cases as "entirely distinguishable."[151] But the court understood *Croft* to have clearly established a legal rule that does not depend on the strength of the state's evidence of abuse—"that coercing parents to sign a safety plan under threat that the county or state will otherwise take emergency custody of their children raises procedural due process concerns."[152] Responding to the CPS defendants' reliance on *Dupuy*, the trial court cited *Croft*'s dicta as foreclosing any argument that the safety plan was voluntary.[153] Another federal district judge has similarly held that *Croft* "expressly rejected" any *Dupuy* argument that safety plans resting on threats to remove a child were anything other than "blatantly coercive."[154]

The dissent in *Smith v. Williams-Ash* uses *Dupuy*'s logic to show hidden foster care can, in practice, be coercive. Judge Ronald Lee Gilman emphasized that *Dupuy* rested on the conclusion that state authorities threatened only to enforce their actual legal rights and did not threaten to take action without a legal basis.[155] He reasoned that specific statements from the CPS caseworker to

150. *See* Garlinghouse & Trowbridge, *supra* note 46, at 117; *see also* Sacha M. Coupet, *What Price Liberty?: The Search for Equality for Kinship-Caregiving Families*, 2013 MICH. ST. L. REV. 1249, 1256 (describing the *Dupuy* holding as something that "would surely not be tolerated elsewhere"); McGrath, *supra* note 95, at 633, 677-81 (critiquing the voluntariness analysis in *Dupuy*); Pearson, *supra* note 14, at 836-38 (critiquing safety plans as not truly voluntary).

151. No. 1:11-cv-00981, 2012 WL 9509712, at *8 (M.D. Pa. Dec. 20, 2012).

152. *Id.* at *9. Because the plaintiffs alleged a violation of federal civil rights law and defendants claimed qualified immunity, the plaintiffs had to show that a clearly established federal right existed, and the court found such a right in *Croft*. *Id.*

153. *Id.* at *10-11.

154. *E.g.*, Isbell v. Bellino, 962 F. Supp. 2d 738, 747 (M.D. Pa. 2013) (quoting *Starkey*, 2012 WL 9509712, at *11). At least one trial court has held that *Croft* did not clearly establish a procedural due process rule, but that holding depended on a narrow reading of what constitutes a clearly established right and *Croft*'s focus on substantive due process. *See* Exel v. Govan, No. 1:12-cv-04280, 2016 WL 1118781, at *5 (D.N.J. Mar. 22, 2016), *aff'd*, 708 F. App'x 82 (3d Cir. 2018).

155. *See* Smith v. Williams-Ash, 520 F.3d 596, 601-02 (6th Cir. 2008) (Gilman, J., dissenting) (citing Dupuy v. Samuels, 465 F.3d 757, 761-63 (7th Cir. 2006)).

the parents—threatening that the "children [would not] come home, period," perhaps forever—go beyond a threat to enforce a valid legal right.[156] Indeed, the facts of *Smith*—in which CPS authorities permitted the children to return merely two days after the parents filed a lawsuit challenging CPS's actions—"suggest[] that the agency may not have had good reason for continuing to detain the children."[157]

2. Coercion in other bodies of law

Case law governing voluntariness in other contexts could also support the view that threatening to remove children is inherently coercive. In a different child protection context, the Supreme Court raised in dicta (but did not decide) whether "supposedly 'voluntary' [foster care] placements are in fact voluntary."[158] Cases beyond child protection provide additional support for the conclusion that state actors threatening to take children into foster care is at least sometimes grounds for finding subsequent actions by parents involuntary.

Police interrogation cases are particularly informative because both the presentation of a safety plan and a police interrogation involve state actors with massive power speaking to a person, typically unrepresented, under suspicion and seeking cooperation—sometimes making some kind of threat to induce that cooperation. Cases evaluating the voluntariness of criminal suspects' confessions have explored what amounts to an unconstitutional threat and what constitutes a permissible warning of the consequences of a suspect's decisions.[159] And the Supreme Court has held police threats to have children "taken away" and placed with "strangers," along with statements that a parent "had better do what they told [them] if [they] wanted to see [their] kids again," are unduly coercive and render a subsequent confession involuntary.[160]

156. *Id.* at 602 (alteration in original).

157. *Id.* at 603.

158. Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 834 (1977). While related to the hidden foster care discussed in this Article, the practice of voluntary foster care placement differs in that parents place children in state legal custody, and the practice is generally subject to long-standing statutory regulation. *E.g.*, N.Y. SOC. SERV. LAW § 384-a (McKinney 2019).

159. In *Miranda v. Arizona*, the Court wrote that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." 384 U.S. 436, 476 (1966). In contrast, police statements that certain decisions would or would not help suspects are not necessarily viewed as threatening. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 727 (1979) (concluding that police "indicat[ing] that a cooperative attitude would be to [the] respondent's benefit" was not threatening).

160. Lynumn v. Illinois, 372 U.S. 528, 531, 534 (1963). The officers "largely corroborated" this account of events. *Id.* at 532. One subsequent lower court case held that a similar threat

footnote continued on next page

As Katherine Pearson has argued, those holdings support the *Croft* conclusion that threats to remove children if parents do not agree to hidden foster care render any such agreement inherently suspect.[161]

Similar issues have arisen in Fourth Amendment search cases, with some courts holding that threats to remove children at least sometimes render consents to search involuntary. In *United States v. Ivy*, the Sixth Circuit held that "hostile police action against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent."[162] In *Ivy*, the "hostile police action" included a law enforcement officer threatening to take the suspect's child into state custody if the suspect did not consent to a search of his home, leading the court to declare the suspect's consent was involuntary.[163] In *United States v. Tibbs*, an officer's threat to call the CPS agency to remove a child rendered the parent's consent involuntary.[164] Determining the voluntariness of a search depends on the totality of the circumstances and thus depends on the facts of particular cases.[165] Some courts have held alleged threats do not constitute coercion when, among other things, they are not explicit[166] or the threats accurately share law enforcement plans without other indicators of coercion.[167]

3. No prohibition on safety plans

Courts in the Third Circuit finding constitutional violations make clear they do not prohibit CPS agencies from using safety plans to effectuate changes in physical custody. Rather, they hold "a parent is entitled to some level of procedural protection in order to challenge the alteration of their parental rights, and that such opportunities must be provided in a meaningful and

to separate parent and child "for a while" rendered a resulting confession involuntary. United States v. Tingle, 658 F.2d 1332, 1334, 1337 (9th Cir. 1981); *see also* United States v. Byram, 145 F.3d 405, 408 (1st Cir. 1998) ("Certainly some types of police trickery can entail coercion: consider a confession obtained because the police falsely threatened to take a suspect's child away from her if she did not cooperate.").

161. *See* Pearson, *supra* note 14, at 836 & n.4 (describing the "voluntary label" as "often misleading").

162. 165 F.3d 397, 404 (6th Cir. 1998).

163. *Id.* at 402, 404.

164. 49 F. Supp. 2d 47, 53 (D. Mass. 1999).

165. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

166. *E.g.*, United States v. Henderson, 437 F. App'x 96, 99 (3d Cir. 2011); United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005).

167. United States v. Miller, 450 F.3d 270, 272-73 (7th Cir. 2006), *abrogated on other grounds by* Kimbrough v. United States, 552 U.S. 85 (2007). The Seventh Circuit decided *Miller* four months before *Dupuy*, in a decision by Judge Easterbrook who also sat on the *Dupuy* panel.

timely manner after the deprivation."[168] As with any procedural due process violation, the remedy is not a prohibition on the practice, but more process. Courts in the Third Circuit have not specified what process is required,[169] leaving it to legislative and executive branches to determine in the first instance what process would suffice, subject to future court challenges.[170]

An earlier Second Circuit case also demonstrates that procedural protections can justify safety plans and kinship diversion. In *Gottlieb v. County of Orange*, the court considered the procedural due process claim of a father who CPS officials required, under threat of immediate removal of the children, to leave his home pending an investigation into sexual abuse allegations.[171] The Second Circuit acknowledged that the father suffered a substantive deprivation, but noted that under the applicable local procedures, he could have insisted upon judicial review of that deprivation at any time, and that he had the opportunity to consult with an attorney before agreeing to give up physical custody of his children.[172]

In sum, the coercive beginnings of hidden foster care cases raise profound due process concerns; and this Article concludes that they likely violate parents' and children's due process rights. Accordingly, one cannot escape the need to outline a set of legal regulations to govern this practice. Before outlining such regulations, a deeper exploration of the risks and benefits of hidden foster care, and the regulatory and financial structures that lead to the practice, is necessary.

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168. *E.g.*, Isbell v. Bellino, 962 F. Supp. 2d 738, 758 (M.D. Pa. 2013); *cf.* Starkey v. York County, No. 1:11-cv-00981, 2012 WL 9509712, at *11-12 (M.D. Pa. Dec. 20, 2012) (describing the law as preventing separation of parents and child "absent *any* procedural safeguards," and faulting CPS documents for "mak[ing] no mention of . . . the Plaintiffs' rights" related to the safety plan).

169. *E.g.*, *Starkey*, 2012 WL 9509712, at *11-12.

170. These courts likely could order the state to provide some specific protections—for instance, a procedure that permits a parent to challenge a safety plan within, say, forty-eight hours. But courts' holdings reflect an apparent preference to defer to other branches of government to define specific procedures. Moreover, legislative and executive branch regulation could lead to more comprehensive regulatory schemes. Both points underscore that legislative and regulatory changes are necessary reforms, even if courts uniformly followed the *Croft* analysis. Other scholars have also concluded that, even with *Croft*, legislative changes are needed. *See* Pearson, *supra* note 14, at 873; *infra* notes 332-35 and accompanying text.

171. 84 F.3d 511, 515 (2d Cir. 1996). In *Gottlieb*, the father's five-year-old daughter alleged abuse, but later medical examinations led doctors to conclude that there was no evidence of sexual abuse. *Id.* at 513, 515.

172. *Id.* at 522.

III. Policy Concerns About and Justifications for Hidden Foster Care

Hidden foster care has elicited criticism from across the child protection ideological spectrum. Those concerned about CPS agencies removing children too frequently have litigated against the practice and written critically of its implications for family integrity.[173] Those concerned that CPS agencies defer to family integrity too much have critiqued hidden foster care for leaving children in what they see as unsafe situations without the safety precautions of formal foster care.[174] At the same time, there is an argument to be made for hidden foster care in some situations—it is less legally invasive, it reduces the risk of the state placing children in foster care with strangers, and it threatens parents and children with less state intervention.

The comparative pros and cons of hidden foster care and formal kinship foster care could lead some parents and kinship caregivers to seek one option and others to seek the other—which raises the question of how these individuals make these decisions. But the social work and think tank literature gives reason for concern that CPS agencies do not provide caregivers or parents with the information necessary to make those decisions and instead effectively make those decisions for families. One recent think tank summary concludes that "practice varies" and "families do not obtain consistent and comprehensive information about the service and custody options available during a family crisis," and, in particular, that CPS caseworkers "infrequently" tell kinship caregivers that formal foster care brings with it financial assistance.[175]

A. Benefits of Hidden Foster Care and Downsides of Formal Kinship Care

Despite the concerns raised in Part III.B below, there are strong reasons why some families might prefer informal changes in custody to avoid the formal foster care system. Placing the child in CPS agency custody subjects the child (and the kinship caregiver) to agency rules and supervision—something many families "consider[] intrusive and not family-friendly."[176] Kinship caregivers face a potential trade—they could receive foster care maintenance payments and other support from the state CPS agency, but only in exchange for greater oversight. Dorothy Roberts has argued that "transferring parental authority to

173. Diane Redleaf, then the director of the Family Defense Counsel, was counsel for the plaintiffs in *Dupuy* and has written about that case and related safety plan issues. REDLEAF, *supra* note 7, at 37-50. Other commentators have raised similar concerns. *See, e.g.*, Pearson, *supra* note 14, at 836; Shellady, *supra* note 14, at 1626-34.

174. Bartholet, *supra* note 15, at 1365-67.

175. MALM & ALLEN, *supra* note 39, at 3, 5-6.

176. *Id.* at 3.

the state is the price poor people must often pay for state support of their children."[177] Commentators have long critiqued public programs designed to enhance poor families' welfare as exercises in social control.[178] In the CPS context, family members may reasonably chafe at CPS agencies taking on greater formal authority over their lives.[179] For some, the financial benefits will make this trade worth it, but for some they will not. Many families would choose to forgo state assistance to avoid paying that price—but many would also accept state aid even with that price.[180]

One particular concern is that the imposition of formal foster care licensing requirements could prevent children from living with kin and instead lead to stranger foster care. Foster care licensing typically imposes multiple requirements that could disproportionately limit licenses for poor families—such as minimum bedroom space requirements or limits on the total number of children in a home,[181] or criminal background checks.[182] CPS agencies may waive such requirements if they deem the standard to be "non-safety" in nature.[183] Thus, kinship families, who are disproportionately poor, may reasonably fear they will face difficulty getting licensed. While CPS agencies could license them even with some concerns,[184] many parents and kinship caregivers may (reasonably) not trust CPS agencies with that discretion or be willing to risk that the children could end up with strangers rather than in kinship foster care.

177. Roberts, *supra* note 36, at 1621.

178. *E.g.*, Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 959-61 (1991) (describing welfare policies relating to single mothers as "social control" of those women and their families).

179. *See* McGrath, *supra* note 95, at 655-60 (describing parents' distrust of and "feeling of vulnerability" in the face of CPS authority).

180. *See* ANNIE E. CASEY FOUND., *supra* note 13, at 18; *see also* Coupet, *supra* note 150, at 1259; McGrath, *supra* note 95, at 655-60; Dorothy E. Roberts, Essay, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 892-93 (2007).

181. *E.g.*, D.C. MUN. REGS. tit. 29, §§ 6005.2-.3, 6007.16-.22 (2019).

182. When an adult applies for a license to be a foster parent in the formal foster care system, all adults in their home must submit to criminal background checks, and rules prohibit foster care licenses based on certain convictions, including any felony drug conviction within the past five years, and require consideration of any other conviction. 42 U.S.C. § 671(a)(20)(A), (C) (2018). State and local licensing codes apply this federal requirement. *E.g.*, D.C. MUN. REGS. tit. 29, § 6008.

183. 42 U.S.C. § 671(a)(10)(D).

184. Indeed, some evidence suggests that state practice in granting kinship waivers of foster care licensing requirements varies widely. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON STATES' USE OF WAIVERS OF NON-SAFETY LICENSING STANDARDS FOR RELATIVE FOSTER FAMILY HOMES 5-7 (2011), https://perma.cc/DB8V-9K78 (reporting a widely varying frequency of CPS agencies granting waivers and the actual number of children placed in formal kinship foster care by state).

A family court case and formal foster care bring with them certain other risks, which parents or children might choose over the risks of hidden foster care. The child's fate will be up to a judge—who may be more or less favorable to the parent than the agency. Removal into formal foster care also triggers a timeline that can lead to termination of parental rights; states are often required to seek such terminations when children have been in foster care for fifteen months.[185] Some state termination statutes authorize judges to permanently sever the legal relationship between parents and children if the problem leading to removal is not rectified on an even shorter timeline.[186]

B. Risks of Hidden Foster Care

Formal kinship foster care requires several steps that trigger family court involvement, due process protections, and CPS agency support to and oversight of kinship caregivers.[187] In such cases, a CPS agency files a petition alleging parents have abused or neglected their children, and convinces family courts both that the petition is accurate and that the court should order that custody of the children be transferred to the CPS agency.[188] The agency then, in the language of federal child welfare financing statutes, has "placement and care" authority over the child.[189] When the agency has identified a kinship caregiver with whom it wishes to place the child, it can grant that caregiver a foster home license and place the child in that home.[190] The agency then has a set of court-supervised obligations to affected children, parents, and kinship caregivers. The agency must provide services to help the parent and child reunify.[191] The agency pays the kinship caregivers a foster parent subsidy (as it does to any unrelated licensed foster parent), provides social work case management and other services to the child, and oversees the placement to

185. *See* 42 U.S.C. § 675(5)(E).

186. *See, e.g.*, S.C. CODE ANN. § 63-7-2570(2) (2019) (providing a six-month timeline).

187. For a summary of the procedures triggered by formal kinship foster care, compared with the absence of such procedures in hidden foster care, see LEGISLATIVE AUDIT COUNCIL, S.C. GEN. ASSEMBLY, A REVIEW OF CHILD WELFARE SERVICES AT THE DEPARTMENT OF SOCIAL SERVICES 53-56 (2014), https://perma.cc/7VGS-SUNG.

188. The Constitution requires states to give parents hearings on their fitness before removing their children. Stanley v. Illinois, 405 U.S. 645, 649 (1972). States have codified these requirements. *E.g.*, S.C. CODE ANN. § 63-7-1660(A)-(E) (describing the process for filing and adjudicating petitions alleging abuse or neglect).

189. 42 U.S.C. § 672(a)(2)(B).

190. *E.g.*, S.C. CODE ANN. § 63-7-2320 (describing kinship foster home licensing).

191. *See* 42 U.S.C. § 671(a)(15)(B)(ii).

ensure it meets the child's needs.[192] The family court holds regular hearings until the child has a permanent legal status—either by reunifying with parents or by forming new permanent legal connections with a family through permanent guardianship or adoption.[193]

All of those steps are missing from hidden foster care. This Subpart will outline distinct policy concerns with the use of hidden foster care expressed both by advocates for less state intervention in families and advocates for greater intervention, as well as by advocates for kinship caregivers. In so doing, this Subpart will also argue that advocates of different stripes all raise legitimate concerns, as do those who argue that hidden foster care has benefits in at least some cases. That nuanced view underscores the need for regulation and the specific proposals in Part VI.

1. Denial of court oversight

The absence of court oversight raises multiple significant concerns—both the due process concerns discussed in Part II and several overlapping policy concerns.

First, avoiding court proceedings removes an important opportunity to provide a check on unnecessary removals. Hidden foster care happens when CPS officials determine children cannot remain safely in their homes, and they then catalyze a change in physical custody. There is good reason to think that CPS officials often incorrectly determine a change in physical custody is necessary and, absent court hearings to check such decisions, children are unnecessarily separated from their parents. The most analogous decision in the formal foster care system is whether CPS officials should remove children and initiate court proceedings, and existing research demonstrates that CPS agencies remove a large number of children only for them to return home in a matter of days.[194] Studying this phenomenon, Vivek Sankaran and Christopher Church conclude many of these children should never have been removed at all.[195] Frequent errors in initial removal decisions have been documented in

192. *See id.* § 672(a)(1) (providing payments to licensed foster homes); *id.* § 675(1)(B) (establishing "case plan" requirements, including providing "services . . . to the parents, child, and foster parents").

193. *See id.* § 675(5).

194. *See* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 216-26 (2016).

195. *Id.* at 210. Sankaran and Church also question the effectiveness of family court checks on agency removal. *Id.* While those checks could be strengthened, they are nevertheless superior to the total absence of judicial checks as occurs in hidden foster care.

multiple jurisdictions.[196] The decision that a child has to be separated from a parent is ripe for inaccuracy—it requires balancing multiple complex factors, but typically must be made with incomplete and imperfect information.[197] It is thus unsurprising that errors related to hidden foster care are evident in some court decisions.[198]

Recognizing the existence of such errors is essential for due process analysis. Even those circuits rejecting due process concerns with safety plans do so on the premise that CPS agencies must have a factual and legal basis for the threat to remove the child or file a case asking a family court to order a removal.[199] Recognizing a significant risk that CPS agencies may make errors in determining when they can lawfully threaten to remove a child should lead to significant skepticism about endorsing that practice without some judicial check. In practice, CPS caseworkers often make that judgment on their own—perhaps in consultation with a supervisor, but without any consultation with a lawyer. Consider, for instance, the South Carolina CPS agency's policy

196. *See, e.g.*, Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 384, 388-91 (2019) (describing such errors and attorneys' success in correcting them, leading to prompt reversals of child removals); Kathleen B. Simon, Note, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 358-59 (2018) (describing such findings in the District of Columbia); Ark. Div. of Children & Family Servs., Title IV-E Waiver Demonstration Project Proposal (2012) (on file with author) (acknowledging that many children who enter and leave foster care quickly "should have never come into care" in the first place).

197. *See* Simon, *supra* note 196, at 361.

198. *See, e.g.*, Schulkers v. Kammer, 367 F. Supp. 3d 626, 639-40 (E.D. Ky. 2019) (describing a CPS agency's threat to remove a child if the parents did not agree to a safety plan as unsupported by facts and contrary to legal standards), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020). As an illustration, consider *South Carolina Department of Social Services v. Wiseman*, 825 S.E.2d 74 (S.C. Ct. App. 2019). In that case, the CPS agency found no evidence to support physical abuse allegations. *Id.* at 75. Nonetheless, the CPS caseworker testified that upon the child's release from a psychiatric hospital, the agency "would have asked for relative placement until the agency was able to complete its investigation." *Id.* at 77. The court ruled that the parents had not maltreated their child, *id.* at 76-77; as a result, insistence on a temporary informal relative placement would not have been justified, *see* S.C. CODE ANN. § 63-7-1660(E) (2019) (requiring a finding that the child was mistreated before ordering a child removed from the parents' custody).

199. *See, e.g.*, *supra* notes 119-22 and accompanying text. The Seventh Circuit noted that a trial on the "administration of the safety plans"—not a facial challenge to their use—had not yet occurred, and evidence of "misrepresentations or other improper means" by CPS officials had not yet been produced. Dupuy v. Samuels, 465 F.3d 757, 763 (7th Cir. 2006). In one later case, the Seventh Circuit applied the rule stated in *Dupuy*, ruling that the state CPS agency may have violated a family's constitutional rights when it allegedly insisted that parents sign a safety plan when it lacked legal authority to keep the child in its custody. *See* Hernandez v. Foster, 657 F.3d 463, 482-84 (7th Cir. 2011).

manual. It requires caseworkers to consult with agency attorneys only when they are preparing to file a petition, thus preventing any legal advice, even by the agency's own counsel, to caseworkers before they threaten to remove children.[200] Parents also generally lack counsel to advise them or challenge the caseworker on the legal basis of the threat. Thus, all parties involved are flying blind on an essential legal foundation of safety plans.

Second, due process checks in a court proceeding can provide a modest correction to racial and economic disparities within the child protection system and help limit the contribution of racial stereotypes or implicit or explicit biases to removal decisions. A central concern regarding those disparities is that high levels of discretion can permit implicit biases based on race, class, sex, disability, or other characteristics to infect decisions—a particularly significant concern given the imperfect information often available.[201] Racial disparities are particularly pronounced at these initial stages of a case,[202] indicating a particular need for vigilance. Unchecked decisions can have more disparities; Kathleen Simon concluded that reducing individual removal discretion by limiting circumstances in which emergency removals are permitted, and thus strengthening judicial review of postremoval decisions, was correlated with reductions in racial disparities in removals.[203]

Third, court proceedings trigger statutory right-to-counsel laws in child protection cases, ensuring the parents will have an attorney to aid them, not only in challenging the state's evidence but also in negotiating temporary or permanent arrangements with CPS agencies and in advocating for prompt reunifications.[204]

2. Denial of reasonable efforts to reunify

The child protection system is intended to be rehabilitative—even when the state must remove children from their parents, the law presumes reunifying children with their parents will serve their best interest, and, indeed, reunification

200. *Compare* S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 718 (requiring DSS attorney reviews before initiating family court proceedings), *with id.* § 719.02 (making no reference to legal review or consultation when initiating safety plans).

201. *See* Simon, *supra* note 196, at 362-63.

202. *See id.* at 354-55; *see also* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERV., ISSUE BRIEF: RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 9 (2016), https://perma.cc/DC9K-XFUF.

203. *See* Simon, *supra* note 196, at 375-85.

204. Most states provide parents with a categorical right to counsel, and the remainder provide a discretionary or qualified right to counsel. *See Status Map*, NAT'L COALITION FOR CIV. RIGHT TO COUNS., https://perma.cc/UD92-SL28 (archived Feb. 12, 2020).

is the most common means by which children leave foster care.[205] But hidden foster care exempts agencies from the core legal requirements to meet this rehabilitative goal.

Child protection law furthers reunification through two core requirements: first, that agencies make "reasonable efforts" to reunify parents and children;[206] and second, that agencies work with families to develop individualized case plans to aid rehabilitation and reunification.[207] If a state removes a child due to concerns arising from a parent's substance abuse, a parent's untreated mental health condition, or a parent's abusive partner, then the state must work to connect the parent to appropriate services or find a way to protect the child from the abusive partner so that the parent and child can reunite.[208] Some states have provided more explicit guidance.[209]

Crucially, the legal obligation to help reunite parents with their children is triggered by placing children in foster care—thus, agencies avoid it by using hidden foster care. Agencies must also make reasonable efforts to avoid removing children from their parents,[210] but that obligation is only adjudicated if the agency brings the case to court, which an agency relying on hidden foster care need not do. As at least one CPS agency has acknowledged explicitly, using hidden foster care means the agency "has no further legal obligation to the parent in terms of reunification."[211]

In addition, when agencies bring a case to court and place a child in formal foster care, they must craft case plans that include details of services to parents "to improve the conditions in the parents' home [and] facilitate return of the child."[212] Case plans must describe "the appropriateness of and necessity for the foster care placement."[213] Procedurally, CPS agencies must "develop[] [case

205. About half of all children leaving foster care do so via reunification. The next most frequent outcome—adoption—accounts for 24% of children leaving foster care. CHILDREN'S BUREAU, *supra* note 16, at 3.

206. 42 U.S.C. § 671(a)(15)(B)(ii) (2018). Narrow exceptions to this requirement apply. *See id.* § 671(a)(15)(D).

207. *Id.* §§ 671(a)(16), 675(1).

208. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (2019), https://perma.cc/YQJ7-M2MY (describing common examples of reasonable efforts).

209. *See, e.g.*, D.C. CODE § 4-1301.02 (2019) (enumerating specific services as examples of reasonable efforts); 325 ILL. COMP. STAT. 5/8.2 (2019) (same); S.C. CODE ANN. § 63-7-1640(A)(2) (2019) (requiring the CPS agency to ensure parents with disabilities receive services tailored to their needs and abilities).

210. 42 U.S.C. § 671(a)(15)(B)(i).

211. VA. DEP'T OF SOC. SERVS., *supra* note 89, at 5.

212. 42 U.S.C. §§ 671(a)(16), 675(1)(B).

213. *See* 45 C.F.R. § 1356.21(g) (2019).

plans] jointly with the parent(s) or guardian of the child."[214] Some state laws provide further due process checks by requiring family courts to approve case plans and providing for specific roles for parents and sometimes their attorneys,[215] as well as by adding substantive details to the types of services that ought to be listed.[216] These requirements, including the opportunity to bring disputes to court, are not triggered when CPS agencies do not remove children or file abuse or neglect petitions against their parents.

The loss of these two critical protections—reasonable efforts to reunify and case planning obligations—is particularly acute when hidden foster care lasts longer than a few days. Then the invasion of family integrity becomes even more severe, and the need for a meaningful plan to resolve the case even more important. When such separations are triggered by real concerns about parents' ability to raise their children, rehabilitation is crucial to address those concerns. But the legal status of hidden foster care permits a CPS agency to treat the case as lower priority—there is no legal obligation for the state to develop a detailed case plan or provide rehabilitative services, and there is no pending court hearing to prepare for and thus no moment when a judge will question the agency's efforts to prevent removal or reunify the child with their parents.[217] Moreover, the agency may perceive the child as stable in the kinship caregiver's home and thus deprioritize the case relative to others with more pressing concerns.

The loss of reasonable efforts to reunify and related case planning duties is even more acute when hidden foster care leads to long-term changes in children's custody, as it did in more than 60% of hidden foster care cases studied in Texas—covering about 21,000 children in one year.[218] It is reasonable to wonder how many of those children and their parents might have been reunified had these legal obligations applied.

214. *Id.* § 1356.21(g)(1).

215. *E.g.*, N.M. STAT. ANN. § 32A-3B-15(A), (C) (West 2019) (requiring the development of case plans and the dissemination of such plans to all parties before a disposition hearing); OKLA. STAT. tit. 10A, § 1-4-704(C) (2019) (requiring CPS agencies to obtain signatures from parties and their counsel and creating court procedures to challenge elements of case plans); UTAH CODE ANN. § 62A-4a-205(1)-(4) (LexisNexis 2019) (requiring the involvement of parents and others in developing case plans and informing courts of disagreements regarding their contents).

216. *E.g.*, N.M. STAT. ANN. § 32A-3B-15(B); OKLA. STAT. tit. 10A, § 1-4-704(D)-(E); UTAH CODE ANN. § 62A-4a-205(6).

217. *See* Pearson, *supra* note 14, at 848.

218. *See supra* text accompanying notes 63-64.

3. Denial of services and financial support to kinship families

Much criticism of hidden foster care involves concerns about how it enables CPS agencies to avoid providing financial and other services to kinship caregivers that would be available were CPS agencies to take a more formal route.[219] These critiques include calls for CPS agencies to enhance services and financial support to kinship caregivers.[220] Critics also worry that CPS agencies' use of hidden foster care is "motivated . . . by budget deficits and the desire to keep foster care numbers low."[221]

The most prominent illustration of this concern is how hidden foster care enables CPS agencies to avoid their obligations to kinship caregivers in the formal foster care system, particularly the provision of foster care maintenance payments. The absence of such payments raises a particular concern that CPS agencies are failing to support kinship caregivers (and children in their homes) who in the aggregate tend to have lower incomes than nonkinship foster parents.[222] Hidden foster care thus denies financial assistance to families who, in general, are most likely to need it. Kinship caregivers in these situations have raised concerns about the absence of both foster care subsidies and related services—such as automatically provided Medicaid cards and vouchers for furniture and clothing to help take care of children.[223] Other child welfare services are also often available only to children in formal foster care (kinship or otherwise) but not children in hidden foster care—including respite care[224]

219. *See* Ehrle et al., *supra* note 80, at 2 ("Many children in kinship foster care, therefore, may not be receiving the services needed to ensure the safety of their placements."); Walsh, *supra* note 78, at 2 ("Our findings point to the need to develop ways to better support informal kin, especially among very poor households. . . . [K]in caregivers . . . are less likely to receive services, including financial assistance, than other types of substitute caregivers."); *see also* Jill Duerr Berrick, *Trends and Issues in the U.S. Child Welfare System*, *in* CHILD PROTECTION SYSTEMS: INTERNATIONAL TRENDS AND ORIENTATIONS 17, 30 (Neil Gilbert et al. eds., 2011) (describing the "two-tiered system" of care caused by "voluntary kinship care"); Coupet, *supra* note 150, at 1256 (noting that kinship caregivers who take custody through hidden foster care "are deprived of all of the support, services, and therapeutic resources that foster parents of children who are adjudicated dependent would receive").

220. *See, e.g.*, Lee et al., *supra* note 85, at 105-06.

221. ANNIE E. CASEY FOUND., *supra* note 13, at 7. Part IV will discuss in more detail financial incentives for agencies to use hidden foster care.

222. *See* Riehl & Shuman, *supra* note 56, at 109, 111. This concern has attracted some media attention. *See, e.g.*, Katie O'Connor, *"They Forgot About Us:" Thousands of Families Are Doing the Same Work as Foster Parents in Virginia, Without the Support*, VA. MERCURY (June 2, 2019), https://perma.cc/U4N2-UUQB.

223. *See* Ofelia Casillas & Dahleen Glanton, *Is DCFS Diverting Cases to Save Costs?*, CHI. TRIB. (Apr. 5, 2010), https://perma.cc/D3HQ-EF52.

224. *See* Roberts, *supra* note 36, at 1631 (noting that respite care "is often subsidized by the state for foster parents").

or assistance with transportation to school.[225] The absence of a change in legal custody can also raise questions about kinship caregivers' authority to make health care, educational, or other decisions for children in their homes.

Defenders of hidden foster care justify denying these financial supports because hidden foster care cases involve kinship caregivers, arguing that people should take care of their kin "without compensation."[226] Indeed, the wide scope of hidden foster care seems to suggest that states do not need to pay kinship caregivers direct subsidies to recruit them to take care of their relatives. The ability to recruit kinship caregivers is a different matter, however, than the needs of those caregivers to provide for children brought into their home through CPS agency action. Moreover, the purpose of foster care maintenance payments as established by Congress and described by the Supreme Court focuses on children's needs, not perceived kinship duties.[227] That legal standard asks what financial and other supports are necessary to help raise a child, especially a child who may have been traumatized by past abuse or neglect or by the CPS-induced move to live with kin.

4. Potential safety risks to children of hidden foster care

Hidden foster care can also leave children in danger that the formal foster care system could mitigate. Kinship foster families typically facilitate more informal visitation between parents and children than does placement with strangers.[228] That is normally a good thing, but it can be dangerous when parents are dangerous to children. Family court and agency oversight of kinship foster homes can help protect against such dangers in formal kinship care cases through visitation orders and oversight of kinship placements—steps absent in hidden foster care cases.[229] Moreover, hidden foster care does not involve any change in legal custody, so a parent has every legal right to take the child at any time. When parents pose an immediate physical danger to children, hidden foster care provides at most weak protection.

Moreover, hidden foster care may lead CPS agencies to approve children living with kin who could provide an unsafe home. Think tanks that have surveyed caseworkers found a dearth of policies regarding how to determine the safety of potential kinship homes and "inconsistent" guidance to individual caseworkers.[230] Surveys of CPS state agencies reveal that most, but not all,

225. *See* 42 U.S.C. § 675(4)(A) (2018) (making federal financial assistance available for foster children to obtain transportation to school).

226. ANNIE E. CASEY FOUND., *supra* note 13, at 5-6.

227. *See infra* text accompanying notes 266-69.

228. Riehl & Shuman, *supra* note 56, at 110.

229. LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 53-56.

230. MALM & ALLEN, *supra* note 39, at 4.

require kinship caregivers to undergo a background check, but this is less than a full kinship licensing assessment.[231] Overly rigid rules could screen out perfectly safe kinship caregivers, but removing too many safety checks could leave children vulnerable to further maltreatment.

Given these concerns, Elizabeth Bartholet—an advocate for more state intervention to protect children who opposes more family preservation efforts—has written critically of the "stunning" scope of hidden foster care and its possible harmful results.[232] "Surely a child-friendly system would question such a massive diversion program and insist at a minimum on research assessing how children do in such informal, uncompensated, and unsupervised kinship care as compared to formal foster care."[233] Other critics have raised concerns that the more modest assessment of informal kinship caregivers (compared with kinship foster caregivers) may lead "[o]verworked agents [to] save time and resources by placing children with relatives" outside of foster care and court oversight.[234] These concerns are reflected in data from Texas's hidden foster care system. Texas authorities found that when they closed hidden foster care cases with children still living with kinship caregivers who lacked legal custody, children were deemed to be victims of later abuse or neglect at higher rates than other children in kinship placements.[235]

IV. Follow the Money: Federal Funding and Perverse Incentives

Effectively regulating hidden foster care requires an understanding of the existing federal funding structures and how they create incentives for state CPS agencies to use the practice. Many of the practices that CPS agencies avoid by using hidden foster care[236] are connected to federal child protection funding and, more specifically, requirements states must meet to access that funding. This Part will explore how the federal child protection funding system contained in Title IV-E of the Social Security Act[237] (known in the field simply as "Title IV-E") creates a perverse incentive to avoid all of these costs. Under our existing federal funding scheme, hidden foster care allows CPS agencies to effectuate the change of children's custody from parents to kinship caregivers on the cheap.

231. ALLEN ET AL., *supra* note 67, at 13.

232. *See* Bartholet, *supra* note 15, at 1367.

233. *Id.*

234. Naomi Schaefer Riley, *Reconsidering Kinship Care*, NAT'L AFF. (Summer 2018), https://perma.cc/Q9B9-PAR8.

235. CHILDREN'S COMM'N, *supra* note 63, at 13.

236. *See supra* Part III.B.

237. 42 U.S.C. §§ 670-679c (2018).

In explaining the incentives to use hidden foster care, this Part offers an adjustment to the occasional claim that the federal financing system "encourage[s] agencies to separate families" through formal foster care.[238] Federal funding structures provide *partial* federal reimbursement to state CPS agencies for the costs of providing for children in foster care and thus make foster care cheaper for states than it otherwise would be and, more specifically, make foster care for Title IV-E-eligible families—that is, poor families[239]—less expensive than it is for ineligible families. Nonetheless, there is a difference between making foster care less expensive and making it more financially appealing than other options; foster care remains an expensive enterprise, so avoiding foster care altogether remains cheaper for state agencies. While much could be said to critique foster care financing policies—for instance, that these policies make it cheaper to remove poor children, support too many services for children in foster care rather than services to prevent abuse and neglect, or otherwise prevent the need for foster care—the financial incentives remain to avoid foster care, especially because Title IV-E requires states to take on certain expenses when they use formal foster care. CPS agencies thus have strong financial incentives to use hidden foster care—they do not need to pay foster care subsidies and do not need to provide as many services to children and families.[240]

238. Simon, *supra* note 196, at 360; *see also* Pimentel, *supra* note 54, at 271 ("The greatest incentive for CPS to remove children is the resulting financial benefit associated with foster care under [Title IV-E].").

239. For the state to be eligible to receive Title IV-E funds in individual foster care cases, the child removed by the state and placed in foster care must be from a family that would have been eligible for Aid to Families with Dependent Children (AFDC), as it existed in 1996 before welfare reform (which converted AFDC into Temporary Aid to Needy Families) took effect. *See* 42 U.S.C. § 672(a)(3).

240. A related issue is whether hidden foster care could absolve state agencies from liability if children faced harm in kinship care. When the state takes custody of a person, that triggers a constitutional obligation "to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989). CPS agencies could plausibly argue that because they do not take legal custody of a child in hidden foster care, this practice does not trigger such liability. If accurate, that would add an additional financial and legal incentive to use that practice. However, CPS agencies likely *would* be liable even in hidden foster care cases because the state role in arranging hidden foster care placements could be viewed as a state-created danger; if a kinship placement in hidden foster care creates a danger for the child, the state created the danger by arranging the placement. *See* Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996); *see also DeShaney*, 489 U.S. at 198-201 (distinguishing cases in which the state had a role in the "creation" of dangers); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."). A full analysis of whether the frequently applied test for determining if a state-created danger exists, *e.g.*, *Kneipp*, 95 F.3d at 1208-09, is met in hidden foster care cases is beyond the scope of this Article.

A. Child Welfare Federal Financing Overview

Removing children and placing them in foster care triggers a range of costs to states: payments to foster parents to take care of the children, services for the children and their parents to facilitate reunification, and costs associated with court hearings to adjudicate CPS agency petitions alleging abuse and neglect and obtain a court order changing custody to the agency.[241] A partial accounting of these costs—including payments to foster parents and some services for children in addition to agency administrative costs, but excluding reunification services for parents—reveals an average annual cost of more than $25,000 per child in foster care.[242]

The federal government partially reimburses state CPS agencies for many of these costs through Title IV-E. That exercise of federal spending power accounts for a significant proportion of child protection spending—federal spending accounts for about 45% of overall child protection spending (nearly $13 billion annually), and Title IV-E accounts for the largest share of that federal funding (about $6.5 billion annually).[243] This substantial federal financial commitment provides the federal government—both Congress and the Children's Bureau, a subdivision of the Department of Health and Human Services that administers child welfare funding—substantial influence over state child welfare policy decisions.

Importantly, Title IV-E focuses largely on what happens *after* CPS agencies remove a child and open a court case—thus foster care is necessary to trigger most federal child protection funding as well as the conditions the federal government imposes on states to receive that money. In particular, Title IV-E requires states to pay foster care maintenance payments including subsidies to foster parents, offering partial federal reimbursement for those costs,[244] and requires states to operate a case review system including regular court hearings for foster children.[245] These obligations to kinship caregivers are triggered

241. Federal spending statutes require states to take these steps as a condition of receiving federal funding. *See* 42 U.S.C. § 672 (providing foster care maintenance payments); *id.* § 671(a)(15)(B) (conditioning those payments on "reasonable efforts" being made to "reunify families"); *id.* §§ 671(a)(16), 675(5)(B) (calling for a "case review system" including regular court reviews). Some steps are required as a matter of constitutional law: Due process requires states to provide parents with a hearing on their fitness before removing children. Stanley v. Illinois, 405 U.S. 645, 649 (1972).

242. Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, ADOPTION ADVOC. 3 (May 2011), https://perma.cc/PP67-7CCG.

243. Child Trends, How States Fund Child Welfare Activities 1 (2016), https://perma.cc/2BQA-75KF.

244. *See* 42 U.S.C. §§ 671(a)(1), 672(a).

245. States must hold court or administrative reviews at least every six months, *id.* § 675(5)(B), and court reviews at least every twelve months, *id.* § 675(5)(C).

by transferring "placement and care . . . responsibility" to a state child welfare agency.[246] In contrast, if children remain in a kinship caregiver's informal custody via a safety plan, then these obligations do not exist. In addition to these substantive obligations triggered by removing children and placing them in formal foster care, Title IV-E imposes administrative requirements on CPS agencies—at least when they use formal foster care.[247]

In 2018, Congress acted to permit states greater flexibility in using federal funds to prevent the need for foster care rather than insisting that CPS agencies go to court and remove children. The Family First Prevention Services Act, discussed in more detail below, provides states that meet certain conditions the ability to use Title IV-E funds for prevention efforts.[248] This Article will discuss whether Congress's means of achieving that goal risk incentivizing greater use of hidden foster care.[249]

Congress's action responded to concern that Title IV-E focused too much on foster care spending and not enough on prevention of abuse or neglect, or on alternatives to foster care. Some have even suggested that Title IV-E federal funding incentivized removing children.[250] That overstates the financial dynamic. Title IV-E provides federal funding only for eligible children[251]—and only about half of children in foster care are eligible.[252] Moreover, even for eligible children, federal funds only cover a portion of costs.[253] The costs of foster care, however, generally apply to all children in the formal system; states provide foster care maintenance payments to families even if they do not qualify for Title IV-E reimbursement.[254] Thus, on average, state and local CPS agencies still

246. *Id.* § 672(a)(2)(B).

247. *See supra* notes 73-74 and accompanying text.

248. *See infra* Part V.A.2.

249. *See infra* Part V.A.2.

250. *E.g.*, Simon, *supra* note 196, at 360-61.

251. *See* 42 U.S.C. § 672(a)-(b).

252. KRISTINA ROSINSKY & SARAH CATHERINE WILLIAMS, CHILD TRENDS, CHILD WELFARE FINANCING SFY 2016: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 16 (2018), https://perma.cc/7LY9-ZBVH.

253. The state-specific percentage covered by the federal government and by each state is calculated by the same formula used to calculate federal Medicaid funding to states. 42 U.S.C. § 674(a)(1) (citing 42 U.S.C. § 1396d(b)). That formula varies between 50% and 83% federal reimbursement, determined by the state's relative wealth as measured by its per capita income, such that poor states receive a higher federal reimbursement rate than rich states. *Id.* § 1396d(b) (cited in 42 U.S.C. § 674(a)(1)).

254. *See, e.g.*, D.C. CHILD & FAMILY SERVS. AGENCY, RESOURCE PARENT HANDBOOK: WHAT RESOURCE PARENTS SHOULD KNOW BEFORE A CHILD IS PLACED IN THEIR CARE AND HOME 93-95 (2018), https://perma.cc/6T9D-QFXC (describing foster care board rates and their calculation without reference to Title IV-E eligibility).

bear the majority—57%, according to a recent estimate—of total costs for foster care.[255]

B. *Miller v. Youakim* and Payments in Formal Foster Care

Title IV-E's incentives for states to avoid formal kinship foster care's costs are ironically strengthened by case law limiting states' efforts to provide less financial support to formal kinship foster families than to stranger foster families. CPS agencies had long sought to arrange for formal kinship foster care at low cost—that is, without paying the same subsidies that agencies pay nonkinship foster parents. The Supreme Court rejected these efforts in 1979 in *Miller v. Youakim*, insisting that CPS agencies pay kinship and nonkinship foster homes the same subsidies.[256] While the Court was right on the statutory interpretation question and right to push against state efforts to provide formal kinship foster care on the cheap, this decision made the difference between formal kinship foster care and hidden foster care even greater. *Miller* thus strengthened a perverse incentive: The only way for CPS agencies to avoid paying kinship caregivers is to avoid licensing them as foster parents.

Miller v. Youakim challenged an Illinois policy that excluded children living with related foster parents from the state's foster care funding.[257] The state CPS agency placed two foster children with their adult sister and her husband, Linda and Marcel Youakim, after determining that the Youakims' home met state foster home licensing standards.[258] The agency had previously placed the children in nonkinship foster homes and paid $105 per month per child to the foster care providers.[259] But when it moved the children to the Youakims, it refused to pay the same rate, asserting that because theirs was a kinship placement, it did not count as foster care, citing an Illinois law definition of a "foster family home" as limited to adults providing a home to children who were not related.[260] The state did pay the Youakims $63 per child per month in welfare benefits—40% less than the state paid nonkinship foster parents.[261]

The Supreme Court held that the federal funding statute prevented states from treating kinship foster families differently from other foster families.[262]

255. ROSINSKY & WILLIAMS, *supra* note 252, at 4.

256. 440 U.S. 125, 145-46 (1979).

257. *Id.* at 126-27.

258. *Id.* at 129-30.

259. *Id.* at 130.

260. *Id.* at 130-31.

261. *See id.* at 131.

262. *Id.* at 133.

The federal statutory definition of "foster family home" made no mention of the kinship status of any foster family, requiring only that the CPS agency license their home.[263] Other provisions of the statute required states to pay foster care maintenance payments for children "in the foster family home *of any individual*," providing no distinction between kinship and nonkinship foster care.[264] The conclusion is straightforward—once a state gave foster care licenses to kinship caregivers and placed children with those caregivers following a family court order to remove the children from their parents,[265] the state had to pay kinship caregivers the full foster care subsidy.

The *Miller* Court envisioned a foster care system in which any time a child needed to be removed from their parents, the state would financially support whomever it placed the child with via foster care payments commensurate with the child's anticipated needs, and all such removals would be reviewed by a family court judge to provide a meaningful due process check. That is, the Court emphasized the importance of two features of kinship foster care that are lacking in hidden foster care.

Miller also described foster care maintenance as payments to meet children's needs rather than based on any perceived obligation that family members could have toward children in their extended family.[266] The Court emphasized Congress's determination that trauma endured by children in foster care led to a "need for additional . . . resources—both monetary and service related—to provide a proper remedial environment" for abused and neglected children.[267] That is why Congress increased the payments for foster children above those made via welfare payments—"to meet the special needs of neglected children[, which] cost more than basic . . . care."[268] This view of foster care maintenance payments has been strengthened in the intervening years as Congress has defined foster care maintenance payments as those necessary to pay for a list of needs of children in foster care.[269] Foster care maintenance payments exist, therefore, to meet the presumptively significant needs of foster children. They do not exist to provide financial incentives to recruit foster parents. If it were the latter, one could justify (at least on policy grounds) paying a lower rate to kinship foster parents, who largely agree to take in a

263. *Id.* at 135 (citing 42 U.S.C. § 608 (1976)).

264. *Id.* (citing 42 U.S.C. § 608(b)(1) (1976)).

265. *Miller* made clear that these other criteria were necessary to trigger a state's obligation to pay foster care maintenance payments. *See id.* at 134-35.

266. *See id.* at 138-45.

267. *Id.* at 145.

268. *Id.* at 143.

269. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, sec. 101(a)(1), § 475(4), 94 Stat. 500, 510 (codified as amended at 42 U.S.C. § 675(4)(A) (2018)).

child because of their already existing relationship with the child or the child's parent and thus may need less of a financial incentive to agree to take that step.

The *Miller* Court also emphasized the essential role of judicial findings in justifying removing children from parents and placing them with anyone else—and it presciently feared that permitting states to treat kinship foster families differently from nonkinship foster families could erode this essential due process check. The federal foster care financing system required judicial approval before states could make (and seek partial federal reimbursement for) foster care maintenance payments.[270] But if states could exclude kinship placements from those requirements, the Court feared

> the State would have no obligation to justify its removal of a dependent child if he were placed with relatives, since the child could not be eligible for Foster Care benefits. But the same child, placed in unrelated facilities, would be entitled under the Foster Care program to a judicial determination of neglect. The rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed . . . .[271]

All children—even those placed with kin—deserve "protect[ion] from unnecessary removal."[272]

The irony of *Miller v. Youakim*, therefore, is that its decision rested precisely on the concerns triggered by states' use of hidden foster care. At the same time, by rejecting states' efforts to make formal kinship care less expensive than foster care, *Miller* strengthened the distinction between informal and formal kinship care and thus created stronger financial incentives for states to use informal arrangements.[273]

Given those incentives, it is not surprising that *Miller* did not lead Illinois to treat kinship caregivers equally to nonkinship foster parents. Indeed, Illinois—the state whose discrimination against kinship foster placements the Court rejected in *Miller*—today offers a leading example of prevalent hidden foster care. It is the state that gave rise to the *Dupuy* litigation, and its frequent use of hidden foster care has been documented in the years after *Miller*.[274]

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270. *See Miller*, 440 U.S. at 134, 139.

271. *Id.* at 139-40.

272. *Id.* at 140.

273. To be clear, I do not suggest that the Court decided *Miller* incorrectly; quite the contrary. Rather, I suggest that additional regulation of hidden foster care is necessary to prevent the apt fears that *Miller* articulated from continuing.

274. *See supra* text accompanying note 88. The *Chicago Tribune* documented at least a "handful" of probate court cases—which could shift custody from a parent to a kinship caregiver—involving families willing to state to a reporter that the CPS agency pushed them toward hidden foster care instead of filing a juvenile court case. Casillas & Glanton, *supra* note 223.

* * *

One important issue related to *Miller v. Youakim* remains subject to inconsistent application around the country—whether kinship foster parents have a private right of action to enforce their right to equal treatment in federal court. Three circuits have ruled kinship foster parents do have a private right of action.[275] The Eighth Circuit, however, has taken a different path—holding that foster parents lack a private right of action to challenge the amount of foster care maintenance payments from the state.[276] Like *Miller*, the majority rule appears correct on the individual facts and in its application of the test for private rights of action,[277] but it risks strengthening incentives to avoid formal foster care altogether—states could avoid federal courts forcing them to pay equal foster care subsidies to kinship caregivers by arranging for the child to go to kin via hidden foster care.

C. Hidden Foster Care's Cost Advantages to State CPS Agencies

Families with hidden foster care cases are not entirely without state support. Two points, however, are essential for comparing this support with that of the formal foster care system. First, from the perspective of kinship caregiving families, the support is substantially less generous financially, as the facts of *Miller* illustrate. Kinship caregivers who have physical custody of children can obtain public benefits to help take care of those children through Temporary Aid to Needy Families (TANF).[278] While such benefits surely help, they are quite modest in comparison to foster care subsidies.[279] Thus, to kinship caregivers, there is a significant financial difference between informal kinship care through safety plans and formal kinship foster care through a family court action initiated by a CPS agency.

Second, from the perspective of state agencies, this federal support does not require a state match—that is, it is essentially free to state agencies, compared to any formal foster care intervention, which, as discussed above, requires sizable state matches. While federal funds only partially reimburse

275. *See* N.Y. State Citizens' Coal. for Children v. Poole, 922 F.3d 69, 74 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 956 (2020); D.O. v. Glisson, 847 F.3d 374, 378 (6th Cir. 2017); Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 977 (9th Cir. 2010).

276. *See* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1203 (8th Cir. 2013).

277. That test, and a full analysis of the competing cases, is beyond the scope of this Article.

278. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM 5, 10 (2016), https://perma.cc/VL9W-T7LM.

279. Roberts, *supra* note 36, at 1626-27. In Virginia, for instance, one kinship family receives $247 per month for two children, compared with potential foster care subsidies between $470 and $700 per child. O'Connor, *supra* note 222.

states for foster care subsidies,[280] TANF funds come as federal block grants to states that do not require state matching funds for each new case, so adding a child in hidden foster care to the state's TANF rolls does not add to state costs.[281] So a CPS agency that steers a child into hidden foster care can also help that family obtain TANF benefits at no cost to the agency.

Worryingly, using TANF for kinship caregivers diverts TANF funds from other impoverished families. TANF block grants have a fixed value,[282] so allocating those funds is a zero-sum game; giving those funds to a kinship caregiver diminishes TANF funds available for all other purposes. That result is especially concerning given the availability of an alternative funding stream (Title IV-E) to at least partially support kinship caregivers who could be in the formal foster care system.[283]

* * *

Putting the pieces of child protection financing together reveals a clear fiscal conclusion: Formal kinship foster care is significantly more expensive for states than hidden foster care, so state CPS agencies have strong financial incentives to use hidden foster care. Going to family court and obtaining legal custody of a child triggers a range of costs to and legal obligations on CPS agencies. While federal funds will help CPS agencies pay those costs, those agencies will be left with significant financial obligations, possibly for a long time. In contrast, hidden foster care is cheaper overall (with no foster care subsidies or family court costs), and federal financing systems make it even cheaper for CPS agencies because no state funding is required for TANF grants to hidden foster care kinship caregivers.

States are conscious of these incentives—indeed, any rudimentary child protection agency budgeting process would account for these funding differences. And CPS agencies have explicitly noted the cost. Consider South Carolina, which, as noted above, frequently uses hidden foster care.[284] When a state

280. *See supra* notes 251-53 and accompanying text.

281. States do have a maintenance-of-effort requirement, which replaced a matching fund obligation. *See* GENE FALK, CONG. RESEARCH SERV., RL32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 5-6 (2017), https://perma.cc/Y9CG-6WYD. States must therefore spend a certain amount of money on various TANF-related activities in order to access federal TANF block grants. This structure creates a different incentive in individual cases. Adding an individual child to the state's TANF rolls does not add new state costs: The state will have already arranged for its maintenance-of-efforts obligations, and no state matching funds will be required. That contrasts with using formal foster care, which, even if the child is eligible for Title IV-E, will trigger a requirement that the state pay matching funds. *See id.*

282. *See id.* at 4-5 (describing TANF block grants as "fixed," with only narrow exceptions).

283. *See supra* text accompanying note 243.

284. *See supra* notes 91-92 and accompanying text.

legislative audit recommended eliminating hidden foster care and applying "similar oversight by the family court and [CPS agency]" whenever abuse or neglect leads CPS to facilitate a relative placement,[285] the CPS agency responded with a thinly veiled focus on costs and impacts on the state's bottom line: "Before mandating a probable cause hearing and court oversight for all alternative caregiver cases, the General Assembly should consider the impact on" the Department of Social Services.[286]

V. Institutionalizing Without Strongly Regulating Hidden Foster Care

Following legal developments since 2008, hidden foster care is now more institutionalized and financially supported than ever before—but is not significantly more regulated. In 2008, Congress added provisions to Title IV-E that both implicitly recognized the hidden foster care system and provided federal financial support for it. In 2018, Congress added further provisions more directly recognizing and funding hidden foster care. In the same time period, state efforts to codify the practice have grown. Recent statutory enactments provide, at most, minimal regulation of hidden foster care, so their greatest impact is to codify the practice. Similarly, some states have adopted policies that impose minimal limits on hidden foster care. The overall trend, therefore, is that new statutes and policies have institutionalized the practice without imposing much regulation on it.

A. Federal Statutes

Two federal funding statutes now provide financial support for state CPS agency action in hidden foster care cases.

1. 2008: Kinship navigator programs

Congress first recognized—however indirectly—hidden foster care when it created "kinship navigator" grants in 2008.[287] These grants were intended to help state CPS agencies connect kinship caregivers to non-Title IV-E services and supports outside of formal foster care and thus prevent the use of foster care.[288] These grants were explicitly for "children who are in, or *at risk of*

285. LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 56.

286. Letter from Amber E. Gillum, Acting State Dir., S.C. Dep't of Soc. Servs., to Perry K. Simpson, Dir., Legislative Audit Council 7 (Oct. 2, 2014), *reprinted in* LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 65.

287. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, sec. 102(a), § 427, 122 Stat. 3949, 3953-56 (codified as amended at 42 U.S.C. § 627 (2018)).

288. *See* 42 U.S.C. § 627(a)(1).

entering, foster care."[289] With the vast majority of children in kinship care living outside of the formal foster care system, some kinship care advocates saw those grants as an opportunity to support children living with kin outside of family court jurisdiction, including through "diversion practices where child welfare services utilize kin as a nonfoster care resource."[290] These grants also served to address one (and only one) of the policy concerns discussed in Part III—the lack of support and services to support kinship caregivers.[291]

The statute creating these grants said nothing explicitly about hidden foster care. States have used kinship navigator grants to help connect kinship caregivers to TANF and other public benefits to help them take care of children informally in their care.[292] Some of these kinship caregivers had obtained physical custody of children with no CPS agency involvement and thus did not form part of hidden foster care.[293] But some kinship navigator programs explicitly sought to "place the children with suitable kin caregivers"—that is, operate a small hidden foster care system and use kinship navigator funds to help kinship caregivers after CPS agencies effectuated a change in custody to them.[294] Indeed, a study of the first states to receive kinship navigator grants identified three that focused on kinship caregivers outside of formal foster care—and grant-funded work in all three states included a

289. *Id.* § 627(a) (emphasis added).

290. Wallace & Lee, *supra* note 45, at 418-19.

291. *Id.*

292. *See, e.g.*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-05, FISCAL YEAR 2018 FUNDING AVAILABLE FOR DEVELOPING, ENHANCING OR EVALUATING KINSHIP NAVIGATOR PROGRAMS 2 (2018), https://perma.cc/52WX-ZRUK (reporting that the Children's Bureau had funded twenty kinship navigator programs, including seven focusing specifically on "improving coordination between Child Welfare and Temporary Assistance to Needy Families (TANF) agencies to better support families providing kinship care"); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., SYNTHESIS OF FINDINGS: TITLE IV-E FLEXIBLE FUNDING; CHILD WELFARE WAIVER DEMONSTRATIONS 18 (2011), https://perma.cc/J7MH-NJKK (describing the efforts of the kinship navigator program in Ohio); JAMES BELL ASSOCS., FAMILY CONNECTION DISCRETIONARY GRANTS: 2009-FUNDED GRANTEES; CROSS-SITE EVALUATION REPORT—FINAL, at viii, 24 (2013), https://perma.cc/7BD7-XR5Q (reporting that kinship navigator programs provided "information and referral" regarding "existing programs and services to meet caregiver needs").

293. JAMES BELL ASSOCS., *supra* note 292, at 156 (describing the population served as including informal kinship caregivers with the "potential" of child welfare system involvement but who had not yet had such involvement).

294. *Id.* at 25. The impact of this practice is evident in the short time frame many kinship caregivers served by kinship navigator programs had had physical custody of children—nearly half in South Carolina, for instance, had been kinship caregivers for less than three months. *Id.*

significant portion of children "diverted" from foster care to informal kinship care.[295]

Kinship navigator programs' wide eligibility standards also helped CPS agencies work with families involved in hidden foster care. CPS agencies could use federal kinship navigator funds for these purposes for any family, regardless whether the family would be otherwise eligible for Title IV-E services.[296] That broader eligibility enables CPS agencies to use the funds to serve families regardless of income, contrasting with Title IV-E support for formal kinship foster care, which is limited to children from families who meet very low poverty thresholds.[297] That contrast strengthens the financial incentives for CPS agencies to use hidden foster care: CPS agencies can get federal financial assistance for providing *any* child in hidden foster care with kinship navigator services, but receive federal support for only *some* children whom they place in formal kinship foster care.

This Article does not intend to criticize kinship navigator programs. Indeed, some evidence exists suggesting that they have both helped kinship caregivers obtain legal custody and reunified children with parents, rather than making them live in limbo with kinship caregivers, all while protecting children's safety.[298] Rather, this Article asserts that kinship navigator programs support hidden foster care without regulating that practice by providing a relatively easy and federally funded mechanism to better support kinship caregivers—with no corresponding requirement or support for efforts to address other concerns about hidden foster care. Virginia's experience illustrates this concern. Charged by the legislature with reviewing its hidden foster care practices, the state CPS agency noted the practice was "widespread" and raised concerns that the practice was sometimes implemented poorly.[299] But the agency's recommendations were all about better supporting kinship caregivers, including through the creation of a kinship navigator program.[300] The agency made no recommendations regarding how to ensure hidden foster

295. Gerard Wallace, Summary Article, *Diversion from Foster Care and Informal Kinship Families*, *in* KINSHIP NAVIGATORS: PROFILES OF FAMILY CONNECTIONS PROJECTS FROM 2012 TO 2015, at 113, 114-15 (Gerard Wallace et al. eds., 2015). Wallace is the program director of the kinship navigator program of one of those three states (New York). *NYS Kinship Care Staff*, N.Y. STATE KINSHIP NAVIGATOR, https://perma.cc/6YL7-VASC (archived Feb. 12, 2020).

296. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-11, REQUIREMENTS FOR PARTICIPATING IN THE TITLE IV-E KINSHIP NAVIGATOR PROGRAM 3 (2018), https://perma.cc/759S-RGTT.

297. *See supra* note 239.

298. *See* JAMES BELL ASSOCS., *supra* note 292, at ix, 33-41.

299. VA. DEP'T OF SOC. SERVS., *supra* note 89, at 1, 4-5.

300. *See id.* at 2, 17-18.

care was only used when necessary and was truly entered into voluntarily; nor did it require the agency to work to reunify families when using hidden foster care.[301]

2. 2018: The Family First Act

While Title IV-E funding primarily supports CPS agency actions *after* placing a child in foster care, the 2018 Family First Prevention Services Act seeks to provide financial support to state efforts to *prevent* the need for foster care placements by providing prevention services to children and families.[302] This essential reform rests on the recognition of the harms of removing children from their parents—as the federal Children's Bureau put it in 2018, "the trauma of unnecessary parent-child separation."[303] Unfortunately, the Family First Act provides funds to help states avoid foster care, even if states can do so without avoiding parent-child separations. This point is written into the statute's goals—funding is available for services "directly related to the safety, permanence, or well-being of the child *or* to preventing the child from entering foster care."[304]

The statute explicitly envisions avoiding formal foster care through kinship placements, and a review of the statute shows how it could be used to support state efforts to use hidden foster care to prevent a child from entering formal foster care. The Family First Act provides funding to CPS agencies to serve foster care "candidates"—children "at imminent risk of entering foster care" but "who can remain safely in the child's home *or in a kinship placement*"

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301. *See id.* at 2.

302. Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.); *id.* § 50702, 132 Stat. at 232 (codified at 42 U.S.C. § 622 note (2018)).

303. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-09, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 2 (2018), https://perma.cc/3PV2-VGTL. This view responds to well-documented harms of removing children from their families when a viable means of keeping the children with their families exists. *See, e.g.*, Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008) (finding that children placed in foster care for any length of time were three times more likely to be arrested, convicted, and imprisoned as adults than were similarly at-risk children left with their parents); Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1607 (2007) (suggesting that children placed in foster care may have had higher delinquency rates, higher teen birth rates, and lower earnings than did similarly at-risk children left with their parents); *see also* Vivek Sankaran et al., *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165-69 (2019) (collecting and summarizing studies demonstrating harms to children from removal).

304. Family First Prevention Services Act § 50711(a)(2), 132 Stat. at 232-33 (codified as amended at 42 U.S.C. § 671(e)(1)) (emphasis added).

with some kind of prevention services.[305] Those services must be mental health or substance abuse treatment services or "in-home parent skill-based programs."[306] This could include a range of services relevant to hidden foster care cases—services to aid reunification with parents, services to help the child with a mental health or substance abuse condition (including mental health care to help the child adjust to their new living arrangements), and any assistance offered to the kinship caregivers to facilitate permanence.

So the Family First Act *could* lead to more reunification services in hidden foster care cases, addressing an important concern with present practice.[307] But the statute does not require states to make these efforts. CPS agencies could facilitate a change in physical custody through hidden foster care, provide the kinship caregiver with TANF support, and provide some kind of mental health service to the child or some kind of "parenting" skills program to the kinship caregiver.[308]

Other provisions of the Family First Act explicitly envision using federal funds to support children in hidden foster care, including the most extreme forms of the practice that effectuate permanent changes in custody. To access federal funds, a state agency must develop a "written prevention plan" for each child it seeks to keep out of foster care.[309] Those plans require agencies to "identify the foster care prevention strategy for the child so that the child may remain safely at home, *live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver.*"[310] Congress thus explicitly envisioned that these new federal funds would be available to provide services to children and their family members when state action temporarily—or even permanently—changed their custody. The Family First Act contains no provision ensuring any such change of custody meets any

305. *Id.* § 50711(b), 132 Stat. at 240 (codified as amended at 42 U.S.C. § 675(13)) (emphasis added); *see also id.* § 50711(a)(2), 132 Stat. at 233 (codified as amended at 42 U.S.C. § 671(e)(2)(A)) (permitting states to use funding to support services to foster care candidates who "can remain safely at home *or in a kinship placement* with receipt of services or programs" (emphasis added)). CPS agencies must meet certain other conditions to access this funding. *Id.* § 50711(a)(2), 132 Stat. at 233-38 (codified as amended at 42 U.S.C. § 671(e)(4)-(5)).

306. *Id.* § 50711(a)(2), 132 Stat. at 232-33 (codified as amended at 42 U.S.C. § 671(e)(1)).

307. *See supra* Part III.B.2.

308. Indeed, discussion of how to implement Family First in one state that heavily uses hidden foster care has focused on more funding for kinship navigator programs so that they exist statewide. *See* O'Connor, *supra* note 222.

309. Family First Prevention Services Act § 50711(a)(2), 132 Stat. at 233-34 (codified as amended at 42 U.S.C. § 671(e)(4)(A)).

310. *Id.* § 50711(a)(2), 132 Stat. at 233 (codified as amended at 42 U.S.C. § 671(e)(4)(A)(i)(I)) (emphasis added).

particular legal standard, or that states provide any specific due process protections before effectuating such a change in custody.

Moreover, the Family First Act creates a new performance measure that further incentivizes CPS agencies to use hidden foster care. Starting in 2021, the federal Children's Bureau must track the percentage of foster care candidates whom CPS agencies successfully keep out of foster care.[311] Given the Act's purpose of keeping children out of foster care, this seems like a reasonable data point. Yet Congress explicitly included "those [children] placed with a kin caregiver outside of foster care" as children to be counted as *not* entering foster care,[312] and Congress did not require states to report the number of foster care candidates who were successfully kept with their parents. Federal agency guidance for reporting data for children with "prevention plans" similarly omits any requirement to distinguish foster care candidates successfully kept in their homes from those moved through CPS action to informal kinship placements.[313] CPS agencies can thus make themselves look good to federal overseers by using hidden foster care—that practice will successfully keep children out of foster care and thus look like successful foster care prevention. Such actions will not, of course, involve successfully protecting family integrity—CPS agencies will still facilitate changes in children's custody.

B. State Codification and Minimal Regulation of Hidden Foster Care

Parallel to federal statutes institutionalizing and further incentivizing hidden foster care, several states have acted over the last decade to codify hidden foster care while imposing only modest regulations on it, if any at all.

A small number of states have enacted statutes to this effect. In 2014, the Illinois legislature passed a brief statute that added one paragraph regarding safety plans to its Children and Family Services Act, explicitly recognizing them in statute for the first time.[314] That law imposes minimal requirements on safety plans: They must be written and be signed by all parties including a parent or guardian, the "responsible adult caregiver" who is taking physical custody of the child, and a CPS representative.[315] CPS must provide all parties a copy of the plan, along with information on their legal rights, and must obtain

311. *Id.* § 50711(a)(2), 132 Stat. at 238 (codified as amended at 42 U.S.C. § 671(e)(6)(A)(i)).

312. *Id.*

313. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., TECHNICAL BULLETIN NO. 1: TITLE IV-E PREVENTION PROGRAM DATA ELEMENTS 2, 9 (2019), https://perma.cc/V2ES-RPL7.

314. Pub. Act No. 98-830, § 5, 2014 Ill. Laws 3922 (codified at 20 ILL. COMP. STAT. 505/21 (2019)).

315. *Id.* § 5, 2014 Ill. Laws at 3925 (codified at 20 ILL. COMP. STAT. 505/21(f)).

supervisory approval of the plan.[316] But the statute does not define what those rights are, nor does it establish any procedures for resolving disagreements about any safety plan provisions or the length a plan would be in place, nor does it put any substantive limitations on safety plan contents, require consultation with agency attorneys, or provide attorneys for parents or children. As Diane Redleaf described these changes, they did not provide "much comfort to the parents who were still coerced into accepting safety plan separations."[317] They codified the practice without regulating it.

Florida similarly enacted legislation in 2014 that codified hidden foster care without regulating it much.[318] The legislature required CPS investigators to use safety plans when identifying a danger to a child and explicitly permitted safety plans to be "in-home" or "out-of-home."[319] The legislation includes neither any limits on safety plan contents nor any procedural limitations close to those proposed in Part VI.A.[320]

Somewhat more frequent than statutes are CPS agency policies, and occasionally regulations, that address safety plans that change children's custody.[321] These policies have increased in number in recent years, institutionalizing the hidden foster care practice.[322] Despite their number, these policies do not impose much regulation. Some states describe "out-of-home" safety plans in their policies, but without imposing limits on the time such out-of-home plans may be in effect or providing clear rules on what conditions require such plans to end.[323] Others limit the duration of safety

316. *Id.*

317. REDLEAF, *supra* note 7, at 190.

318. Act of June 23, 2014, ch. 224, § 8, 2014 Fla. Laws 2981, 2998-3003 (codified as amended at FLA. STAT. § 39.301(9), (14) (2019)).

319. *Id.* § 8, 2014 Fla. Laws at 2999-3001 (codified as amended at FLA. STAT. § 39.301(9)(a)(6)).

320. Implementing regulations direct that CPS investigators "must develop an out-of-home safety plan" when they determine that the child cannot remain safely at home. FLA. ADMIN. CODE ANN. r. 65C-29.003(3)(a)(1) (2019). Florida regulations do require supervisory review within twenty-four hours of a safety plan, but require no agency lawyer review or any other due process checks. *See id.* r. 65C-29.003(3)(c).

321. Ryan Shellady has helpfully catalogued these policies and regulations. *See* Shellady, *supra* note 14, at 1634 n.130.

322. For instance, Georgia and South Carolina adopted their policies in 2015. GA. DIV. OF FAMILY & CHILDREN SERVS., CHILD WELFARE POLICY MANUAL § 5.6, at 1 (2015), https://perma.cc/77C5-ZSDT; S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02. Texas adopted its policy in 2018. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., PARENTAL CHILD SAFETY PLACEMENT (PCSP) RESOURCE GUIDE 1 (2018), https://perma.cc/SXZ2-2AQ6.

323. *E.g.*, ADMIN. OFFICE OF THE COURT, SUPREME COURT OF IDAHO, IDAHO CHILD PROTECTION MANUAL 18-20 (5th ed. 2018), https://perma.cc/2CEX-VC94; VA. DEP'T OF SOC. SERVS., CHILD PROTECTIVE SERVICES: A GUIDE TO INVESTIGATIVE PROCEDURES (2019), https://perma.cc/5L63-RES8.

plans—usually to one to three months.[324] Others require reviews by agency staff or other ongoing agency monitoring of safety plans, but no external checks and balances or even internal legal reviews.[325] Agency policies that require court oversight when physical custody changes are the outliers.[326]

A central feature of this state-by-state policymaking is that it is mostly just that—policymaking, not lawmaking. CPS agencies write the policies that they want and may adjust them as they desire. With the exceptions noted above, state safety plan policies lack legislative approval, or the comparative difficulties of amending statutes. Similarly, because they are policies and not regulations, CPS agencies have adopted them without notice-and-comment rulemaking or any other checks provided through administrative law.[327]

Moreover, agencies' compliance with their own policies can be lacking—especially in hidden foster care, which does not involve court oversight. Indeed, there is evidence that CPS agencies frequently violate their own policies. In Illinois, the Family Defense Center (with law firm assistance) documented CPS agencies' violations of their own policies requiring regular reviews of safety plan terms, notice to parents of the factual basis for insisting upon a safety plan, and meaningful consideration of parental requests to terminate or amend safety plans.[328] In South Carolina, litigation has alleged that a safety plan remained in effect for far longer than the ninety days permitted by CPS agency policy.[329]

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324. *E.g.*, ALA. ADMIN. CODE r. 660-5-34.06(3)(a)(2) (2019) (90 days); GA. DIV. OF FAMILY & CHILDREN SERVS., *supra* note 322, § 5.6, at 1 (45 days); ME. OFFICE OF CHILD & FAMILY SERVS., CHILD AND FAMILY SERVICES POLICY § IV.D(VI)(A)(C)(6) (2018), https://perma.cc/4ZUQ-UKZ6 (30 days); MONT. DEP'T OF PUB. HEALTH & HUMAN SERVS., CHILD AND FAMILY SERVICES POLICY MANUAL § 202-3, at 11 (2015), https://perma.cc/964Y-52JA (30 days); S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02 (90 days); TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 322, at 1 (60 days "in most instances"); VT. DEP'T FOR CHILDREN & FAMILIES, FAMILY SERVICES POLICY MANUAL ch. 52, at 8 (2019), https://perma.cc/Y5NU-JBQ9 (one month).

325. *E.g.*, ARIZ. DEP'T OF CHILD SAFETY, POLICY AND PROCEDURE MANUAL ch. 2, § 7 (2019), https://perma.cc/3LRY-H76K; GA. DIV. OF FAMILY & CHILDREN SERVS., *supra* note 322, § 5.6, at 3-4; OHIO ADMIN. CODE 5101:2-37-02(J) (2019); OR. DEP'T OF HUMAN SERVS., DHS CHILD WELFARE PROCEDURE MANUAL ch. 4, § 4, at 486 (2020), https://perma.cc/4WW3-M2J9 (requiring review every 30 days).

326. I have identified only one state that so requires. *See* ALASKA OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES MANUAL § 2.2.5.1(F)(1)(c) (2019), https://perma.cc/WJ7S-KSUT.

327. Shellady, *supra* note 14, at 1636-37. *But see id.* at 1636 n.137 (noting Louisiana as an outlier for having its safety plan framework codified by statute).

328. *See* FAMILY DEF. CTR., UNDERSTANDING AND RESPONDING TO DEPARTMENT OF CHILDREN & FAMILY SERVICES' ABUSE AND NEGLECT INVESTIGATIONS IN ILLINOIS: A BASIC GUIDE FOR ILLINOIS PARENTS AND OTHER CAREGIVERS 48-50, app. B (2016), https://perma.cc/PQ44-WBEP; Shellady, *supra* note 14, at 1626-27.

329. Complaint, *supra* note 66, ¶ 13.

VI. Legally Domesticating Safety Plans and Hidden Foster Care

Many advocates have called for greater regulation of hidden foster care—some with the primary goal of requiring CPS agencies to work more effectively with and provide more supports to kinship caregivers,[330] others focused on protecting parents' and children's rights to family integrity.[331] Both are important goals, and greater regulation is necessary not only to ensure kinship caregivers get necessary support, but also to ensure that children's custody changes only when legally warranted and that the process leading to such decisions gathers the essential evidence and takes into account all related perspectives.

This Article's call for regulation requires two prefatory comments. First, regulation rather than prohibition of hidden foster care is necessary because informal and truly voluntary changes in custody are sometimes appropriate actions, as described in Part III.A. Second, while this Part is largely focused on legislative and executive branch regulation, court-imposed reforms through litigation remain worth pursuing. Courts can declare that procedures leading to hidden foster care are unduly coercive and could even order certain reforms to meet minimal standards of due process—such as a requirement that parents be able to challenge agency actions in hidden foster care cases, as discussed in Part VI.A.5.

This Part will focus on legislative and executive regulation because the litigation history discussed in Part II reveals significant limitations in courts' willingness or ability to regulate this practice fully. Several circuits have ruled that there is no due process issue at all.[332] Moreover, no matter how the circuit split regarding the due process implications described in Part II is resolved, legislative and administrative action is necessary. Even if courts universally held that hidden foster care violates the constitutional right to family integrity without due process, courts are unlikely to replace existing practice or to prohibit the use of any safety plans.[333] Rather, courts that find safety plans to violate parents' due process rights indicate that these state actions trigger the need for some procedural protections—but do not specify what those protections are.[334] These courts suggest that, institutionally, they want to defer to other

330. *See, e.g.*, Wallace & Lee, *supra* note 45, at 425 (arguing for services to "diverted kinship families").

331. *See, e.g.*, REDLEAF, *supra* note 7, at 37-50 (critiquing *Dupuy*); Pearson, *supra* note 14, at 836 (criticizing safety plans as unduly limiting family integrity without adequate procedures); Shellady, *supra* note 14, at 1627-34 (criticizing *Dupuy*); Simon, *supra* note 196, at 348.

332. *See supra* Part II.A.

333. *See supra* Part II.B.3. Others have concluded that legislative reforms are needed. *See, e.g.*, Pearson, *supra* note 14, at 837.

334. *See supra* text accompanying notes 168-69.

branches of government to define the precise structure of procedural reforms. And even if courts were to impose their own reforms, courts could only order reforms necessary to meet constitutional minimums, leaving out several important reforms that could be achieved through legislative or executive action.[335] Accordingly, this Article advocates that hidden foster care be hidden no longer and that the practice be legally domesticated[336]—regulated to ensure accurate and voluntary decisionmaking, fair procedures, and individual case and systemic oversight.

To that end, this Part proposes a set of protections for individual cases, as well as a set of federal child welfare law reforms designed to bring hidden foster care cases under the umbrella of federal data tracking and oversight. Both sets of recommendations recognize that kinship diversion is a practice that will continue and that the practice involves a severe enough exercise of state power—involving important rights of multiple people—to warrant strong regulation.

A. Procedural Protections and Substantive Limits

Congress, state legislatures, the federal Children's Bureau, and state CPS agencies should enact a set of procedural protections and substantive limits to follow in each individual case to ensure CPS agencies effectuate changes in custody only when necessary, and to mitigate the concerns outlined in Part III.B. These protections should be enacted by legislatures or, at a minimum, promulgated as agency regulations to alleviate the challenge of an agency regulating itself via its internal policies.[337]

These procedural reforms would impose costs on state child protection systems—costs of lawyers for parents, costs of court hearings when sought by parents, and costs of additional staff. CPS agencies are sensitive to these costs and have invoked them when pressured to provide more procedural protections for families in hidden foster care.[338] These costs are well worth incurring. As the Supreme Court said in an early due process case involving the child protection system, "the Constitution recognizes higher values than speed and efficiency," and constitutional protections serve to protect individuals "from

335. The most significant reform that would likely be beyond the present state of federal constitutional law is the right to counsel proposed in Part VI.A.1. The Supreme Court has ruled that the Constitution does not guarantee parents facing a termination of parental rights the right to counsel. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981). So it is unlikely that the Court would hold that due process requires the provision of counsel to parents facing a choice whether to agree to a safety plan.

336. *See supra* note 8.

337. *See supra* text accompanying note 327.

338. *See, e.g.*, *supra* text accompanying note 286.

the overbearing concern for efficiency" that can drive government agencies.[339] Moreover, these procedural costs are essential to addressing the policy concerns discussed in Part III.B. Nonetheless, addressing those concerns within real-world budgetary and political constraints is important for any achievable reform agenda, so this Subpart will also address both how states can use federal financial assistance to pay for one of these proposed reforms (prepetition counsel for parents) and how the proposed reforms moderate additional costs.

1. Appoint attorneys for parents subject to possible safety plans

Hidden foster care is hidden from court oversight, meaning it is also generally hidden from lawyers for individuals affected by CPS agency action, who are typically appointed only once formal court proceedings begin. Providing lawyers for parents in such cases is a crucial means to impose a meaningful check on these assertions of CPS agency authority. This Subpart will explain the importance of providing these lawyers and detail a recent change in federal funding policy that can help states pay for them.

Whenever CPS agencies ask parents to agree to change the physical custody of their child, they should provide an appointed attorney for the parent.[340] As the Seventh Circuit explained in *Dupuy*, a justification for safety plans is that they are like criminal plea bargains or civil settlements.[341] As discussed above, safety plans differ in several key ways from plea bargains and civil settlements—especially in the absence of attorneys for parents.[342] Providing attorneys to parents can help make bargaining situations much more fair. After all, an agency and a parent negotiate "in the shadow of the law,"[343] so having a lawyer advise a parent as to their rights and the agency's rights under the law provides essential information about the law's shadow.[344]

339. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

340. Time pressures could affect how such attorneys could interact with their clients. CPS agencies could reasonably impose safety plans on parents that last for no more than twenty-four or forty-eight hours, until an attorney could consult with the parents and then negotiate a somewhat longer-lasting safety plan with the agency.

341. *Supra* note 123 and accompanying text.

342. *See supra* notes 124-33 and accompanying text. As noted above, the presence of counsel is less frequent in some civil cases. *See supra* note 127. It is, however, the norm in formal foster care cases. *See supra* note 204 and accompanying text.

343. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (discussing this phenomenon in the context of divorce negotiations).

344. *See* Gottlieb v. County of Orange, 84 F.3d 511, 522 (2d Cir. 1996) (noting parents' consultation with an attorney as an important factor in procedural due process analysis); *see also* Garlinghouse & Trowbridge, *supra* note 46, at 117 ("[A]dvice of counsel as to likely outcomes and rights regarding voluntary participation can be helpful.").

Providing lawyers at this stage would expand existing statutory rights to counsel, which are typically triggered by the initiation of court proceedings.[345] A central point of this Article is that state CPS agencies engage in critical intervention in families without ever initiating court proceedings. That level of intervention outside of court justifies providing counsel to parents.

Lawyers are essential for helping parents navigate safety plan negotiations—perhaps more so than any of this Article's other recommendations—because legal analysis is required to understand parents' leverage in these negotiations. Parents' leverage will depend on several factors, including: first, the substantive legal standards, especially whether the CPS agency is justified in declaring a child abused or neglected, and, even if so, whether an emergency or pretrial removal is legally justified;[346] second, the state's burden to prove abuse or neglect to a family court;[347] third, application of the state's obligation to prove that it made reasonable efforts to prevent removal;[348] and, fourth, whether the particular facts rise to abuse or neglect under the state's statute or the related question whether the state can prove such facts through admissible evidence at trial. Exercising a parent's leverage requires a lawyer to understand the case and advise the parent accordingly. Otherwise, the agency has a tremendous information advantage—they are repeat players negotiating with parents who, in the aggregate, are of a low socioeconomic status and likely do not understand the nuances of child protection law, but certainly understand that the agency is threatening their relationships with their children.

Lawyers for parents can help craft safety plans that address each family's individual needs more effectively. Indeed, the Children's Bureau has concluded that legal representation enhances the parties' engagement in case planning and leads to more individualized case plans.[349] Similar improvements to the quality of safety plans should be expected—including more accurate determinations regarding both the need for a safety plan at all and specific safety plan provisions.

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345. *See, e.g.*, D.C. CODE § 16-2304(b)(1) (2019) (triggering appointment of counsel for parents of children named in court petitions); S.C. CODE ANN. § 63-7-1620(3) (2019) (providing a right to counsel to parents "subject to any judicial proceeding"). Katherine Pearson proposes informing parents of their right to consult with counsel if a case proceeded to court. Pearson, *supra* note 14, at 873. But establishing a clear right to counsel before agreeing to a safety plan would broaden existing right to counsel statutes.

346. These standards may also vary by jurisdiction. *See* Simon, *supra* note 196, at 368-75 (categorizing state removal statutes).

347. This burden also varies by state. Provencher et al., *supra* note 146, at 27.

348. *See* 42 U.S.C. § 671(a)(15)(B)(i) (2018).

349. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 2 (2017), https://perma.cc/3TLU-G8JK.

Providing parents with attorneys could lead CPS agencies to catch some of their own errors. Some kind of internal review by agency lawyers is commonplace before bringing a case to court, but is often lacking in hidden foster care cases.[350] Providing lawyers to parents in these cases should trigger the involvement of CPS agency lawyers as well, and thus provide appropriate counseling to agency caseworkers (including advising caseworkers when they lack legal authority to remove children and thus lack leverage to insist upon a safety plan).

This call for parent representation also finds some empirical support. Emerging evidence from two quasi-experimental studies demonstrates parents' attorneys from model parent representation offices generally help achieve positive outcomes for their clients *and* the system—accelerating the time to reunify children with parents and finalize guardianships, reducing length of stays in foster care, and doing so without compromising safety.[351] Children were reunified with parents significantly faster when their parents had attorneys from model parent representation offices.[352] Importantly, this increased speed of reunification did not leave children in any greater safety risk, as measured by the frequency of documented repeat maltreatment.[353] That finding suggests parent representation is not likely to jeopardize the safety of children subject to safety plans. Of course, state CPS agencies would be free to bring cases to family court if they could prove that a parent had abused or neglected a child and that foster care was necessary. In addition, both studies found that speed to reach other forms of permanency—guardianships and adoptions in the Washington study,[354] and guardianships in the New York study[355]—increased through model parent representation. That finding suggests parents' lawyers do negotiate permanent custody arrangements that involve their clients losing custody of their children. A reasonable extrapolation is

350. At least one state requires review by agency lawyers before bringing a case to court by policy. *See supra* text accompanying note 200. More broadly, the American Bar Association considers a lawyer's involvement in "prepar[ing] the initial petition" a "basic obligation[]" of lawyers representing CPS agencies. AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 4 (2004) (capitalization altered), https://perma.cc/GR5Z-6TCE; *see also id.* at 7 ("The agency attorney should work with the agency to bring only appropriate cases to court.").

351. *See* Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVICES REV. 1337, 1338, 1340-42 (2012); Gerber et al., *supra* note 130, at 52. Other studies have found similar benefits but have various limitations. *See* Gerber et al., *supra* note 130, at 44 tbl.1.

352. Courtney & Hook, *supra* note 351, at 1338, 1340-42; Gerber et al., *supra* note 130, at 43, 52.

353. Gerber et al., *supra* note 130, at 51-52.

354. Courtney & Hook, *supra* note 351, at 1340-42.

355. Gerber et al., *supra* note 130, at 52.

that parent attorneys would negotiate reasonable safety plan conditions in appropriate cases.[356]

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The Children's Bureau expanded Title IV-E funding eligibility in January 2019 to include legal representation for parents.[357] Title IV-E authorizes the Children's Bureau to reimburse states for half of the expenditures "found necessary by the Secretary . . . for the proper and efficient administration of the State plan."[358] Through the January 2019 guidance, the Children's Bureau determined that providing "independent legal representation by an attorney" for both children and parents qualifies under this standard.[359] This federal funding is available both when children are in CPS agency custody and subject to an open family court case *and* when the child is a "candidate for title IV-E foster care."[360] The statute defines a foster care "candidate" as including someone "at imminent risk of entering foster care" but "who can remain safely in the child's home *or in a kinship placement*" with some kind of prevention services.[361] A child subject to safety plans seems to fit easily in the statutory definition of a foster care "candidate." Thus, the new Children's Bureau guidance establishes that federal funds may support the provision of counsel to the parents of these children.

This reform opens the door to significant increases in funding for parent and child representation—estimated to be in the hundreds of millions of dollars[362]—and thus could pay much of the cost to provide counsel in safety plan cases when that reform was not possible in prior years. The new federal funding will cover 50% of the cost of counsel in eligible cases.[363] Roughly half of cases are Title IV-E eligible,[364] so this new funding would cover about 25% of the total cost. However, that percentage applies not only to an *expanded*

356. These extrapolations from existing data should, of course, be subject to evaluation; states should create prepetition parent representation so such evaluations may occur.

357. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL § 8.1B(30) (2020), https://perma.cc/AV9D-W6B4.

358. 42 U.S.C. § 674(a)(3) (2018). Legal representation for parents falls into the catch-all category of such costs, for which the statute sets a 50% reimbursement rate. *Id.* § 674(a)(3)(E).

359. CHILDREN'S BUREAU, *supra* note 357, § 8.1B(30).

360. *Id.*

361. 42 U.S.C. § 675(13) (emphasis added).

362. *See* John Kelly, *Trump Administration Rule Change Could Unleash Hundreds of Millions in Federal Funds to Defend Rights of Parents, Children in Child Protection Cases*, CHRON. SOC. CHANGE (Feb. 5, 2019), https://perma.cc/2225-JE78.

363. CHILDREN'S BUREAU, *supra* note 357, § 8.1B(30).

364. CHILD TRENDS, TITLE IV-E SPENDING BY CHILD WELFARE AGENCIES 4 (2018), https://perma.cc/62WM-J2VG.

provision of counsel—that is, in safety plan cases without a petition—but to all provision of counsel. Previously, states had to pay the full cost of providing appointed counsel, but now they can receive a federal reimbursement of a significant percentage of that total amount—which should be sufficient to provide counsel in prepetition cases.

2. Provide parents notice of the factual basis for a change in custody

Some amount of notice appropriate to the circumstances of a case is "no doubt" a required part of due process.[365] In safety plan cases in which CPS agencies insist on any form of a change in custody, the agency should provide the parent with specific written notice of the factual basis for that insistence.[366] Even cases like *Dupuy*, where the court held safety plans to be voluntary, recognize that voluntariness depends on the legitimacy of the CPS agency's insistence on that separation.[367] Providing notice forces CPS agencies to write down their justification and enables parents (ideally with their lawyers, as described below) to evaluate the legal strength of that insistence and determine whether to contest or agree to it.

3. Set a maximum length of time for safety plans

No safety plan should change a child's physical custody indefinitely. To the contrary, a relatively brief maximum length of time should govern such safety plans, after which either the safety plan ceases to be in effect and the child must be able to reunify or courts must become involved.[368] If a case cannot be resolved in that time frame—for instance, if a parent's need for rehabilitation is so severe that he or she cannot regain custody—the case warrants court oversight. A maximum timeline also creates deadline pressure for the agency to help a parent reunify (and for the parent to cooperate with those efforts) to avoid the cost and uncertainty of court proceedings.

The Family First Act, discussed in Part V.A.2, implies the need for time limits. The Family First Act provides funding flexibility to provide services "for not more than a 12-month period."[369] Some state policies provide even shorter timelines, such as ninety days.[370]

365. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

366. Shellady, *supra* note 14, at 1644-45.

367. *Supra* notes 119-22 and accompanying text.

368. Several states have recognized this point. *See supra* note 324 and accompanying text. Other critics have recommended such rules without specifying a precise limit. *E.g.*, Pearson, *supra* note 14, at 873.

369. 42 U.S.C. § 671(e)(1)(A)-(B) (2018).

370. *E.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

Maximum time limits should be quite brief—no longer than thirty days. Many formal foster care cases are resolved faster than that.[371] Longer time periods—like the twelve months permitted under the Families First Act—make sense for provision of services to a family that remains intact. But when CPS agencies effectuate a breakup of the family, even a temporary one, twelve months is far too long.[372] If separations of parents and children longer than thirty days are truly necessary, this suggests a need for court oversight because the parent poses a more significant danger to the child or needs a more intensive set of rehabilitative services before reunification is safe. If either is the case, then family court checks and balances and oversight are particularly important for all the reasons explained in Part III.B.

In addition, statutes or regulations should make clear that once a maximum timeline expires, absent court rulings to the contrary, a parent has the right to regain physical custody of their child without negative repercussions. Such statements are necessary given the existence of cases in which safety plans are extended indefinitely, even past state agency policy guidelines.[373]

4. Include an exit strategy

Formal foster care triggers state obligations to develop detailed and individualized case plans and to make reasonable efforts to prevent the need for removal and reunify parents and children, and hidden foster care avoids those requirements.[374] A reasonably short time limit avoids many of the concerns with the loss of those requirements; either families will reunify or

371. Sankaran & Church, *supra* note 194, at 216-17.

372. Some states have voluntary foster care statutes that have longer timelines than suggested in this Article. *E.g.*, CAL. WELF. & INST. CODE § 16507.3(a) (West 2019) (providing a default limit of 180 days on placements, with the possibility of extension). Voluntary foster care cases impose on the CPS agency obligations equivalent to those in formal foster care cases. *See, e.g.*, *id.* § 16507.5 (requiring local CPS agencies to "make any and all reasonable and necessary provisions for the care, supervision, custody, conduct, maintenance, and support of the minor"); CHILDREN'S BUREAU, *supra* note 357, § 8.3A.13(5), https://perma.cc/U25R-2HRJ (requiring the CPS agency to take "placement and care responsibility for the child"). This Article's conclusion is that parents should have counsel, notice, and access to court oversight in those cases. Federal funding law suggests that court oversight is available; when parents seek to terminate a voluntary placement agreement, such agreements "shall be deemed to be revoked unless the State agency . . . obtains a judicial determination" that the child must remain in state custody, 42 U.S.C. § 672(g). A state that has existing law for such formal voluntary foster care placements could use that as a template for regulation of hidden foster care cases, and the Children's Bureau could cite that option as one means to provide adequate due process protections. Because not every state has or uses such statutes, this Article does not further address them.

373. *E.g.*, *supra* text accompanying note 66.

374. *See supra* Part IV.B.

CPS agencies will have to go to court and thus trigger those requirements. Nonetheless, plans should be clear regarding what would enable parents and children to reunify, especially when that could be possible fairly quickly. This proposal recognizes that a maximum time limit is just that, and that a change in a child's custody should last no longer than necessary given the individual needs of a case. The length in a specific case should be subject to case-by-case negotiation and renegotiation as the case develops. Perhaps a restraining order against or arrest of a parent's partner who had abused the child, medical or mental health treatment that stabilizes a parent after an acute crisis, or new housing would suffice. When that is the case, it should be spelled out in safety plans so that when parents meet those conditions they can insist upon reunification.[375]

5. Permit parents to seek court review of safety plans

Much room exists for reasonable debate regarding the contents of individual safety plans—CPS agencies and parents could reasonably disagree on whether abuse or neglect has occurred, whether a change in physical custody is necessary, whether one or both parents or adults in a home need to be separated from children, what level of supervision of a parent's contact with children is required, or what is necessary before parents and children can reunify. Parents should be allowed to challenge such safety plan provisions without risking foster care and an abuse or neglect petition against them.

Absent any provision to trigger court oversight during a safety plan, parents must either abide by CPS agency safety plan demands or face tremendous risks—and parents rarely choose the latter.[376] Providing a mechanism for parents to challenge a safety plan in court without triggering an abuse or neglect petition or removal would create a more meaningful check on CPS agency authority while respecting the occasional benefits of safety plans. Parents should be able to insist on a court hearing to review a safety plan under the same standards that govern pre-adjudication removals, and under the same timeline—usually forty-eight or seventy-two hours—provided to review emergency removals because those are the most closely analogous actions.[377]

375. Spelling out such conditions would also aid decisionmaking in closer cases when parents claim that they have substantially complied with conditions or have met as many conditions as ought to be necessary.

376. Indeed, *Dupuy* made no reference to even a single parent rejecting a CPS agency request to agree to a safety plan, Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006), and an attorney for the plaintiffs has asserted that the full trial record revealed no such parent, REDLEAF, *supra* note 7, at 44-45.

377. Other critics of safety plans have made similar recommendations. *See, e.g.*, Pearson, *supra* note 14, at 873; Shellady, *supra* note 14, at 1646-47.

Parents should be able to trigger this provision at any point. Consider, for instance, a case of suspected physical abuse. The evidence early in a case might raise probable cause of abuse justifying an emergency removal, and a parent might therefore agree to a safety plan to avoid going to court, even if the parent insists that they did not abuse their child.[378] But additional medical evidence might raise doubts about the abuse allegations,[379] and the parent could then request the termination of the safety plan. If the agency does not agree, the parent should be able to press their case in court, rather than be bound by their earlier decision made with less information.

These reviews would impose only minimal procedural costs. They would involve single hearings reviewing a safety plan—unlike a formal foster care case, which may involve a full trial and a series of review hearings for an indeterminate period of time.[380] Moreover, they would be triggered only by parents who feel aggrieved by a safety plan decision; cases in which families decide that safety plans present the best option,[381] and involve a more genuine agreement with families, need not trigger court reviews.

B. Applying the Federal Regulatory Apparatus

The federal government plays an essential role in the operation of and policy debates within the modern child protection system. While the federal child welfare legal architecture now implicitly recognizes the hidden foster care system through the steps discussed in Part V.A, it has not brought the practice within the federal child protection regulatory system. That is a central reason why the practice remains hidden—basic data is not gathered or reported, federal requirements do not regulate the practice, and federal reviews of state performance do not evaluate state use of the practice. This Article calls on Congress and the federal Children's Bureau to bring hidden foster care within the federal child protection regulatory system, and this Subpart discusses three central elements for such federal regulation.

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378. *See, e.g.*, Gottlieb v. County of Orange, 84 F.3d 511, 522 (2d Cir. 1996) ("[F]rom the departing parent's standpoint, judicial review may not be the preferred method of resolving the matter, for the statutory procedures envision a hearing within three days, and the evidence or allegations may be such that the parent believes the matter likely cannot be adjudicated quickly.").

379. *See, e.g.*, *In re* Juvenile Appeal, 455 A.2d 1313, 1317, 1321 (Conn. 1983) (describing medical evidence that eventually exonerated the parents after a child's unexplained death).

380. Federal funding law spells out requirements for regular reviews for children in formal foster care. *See* 42 U.S.C. § 675(5) (2018).

381. *See supra* Part III.A.

1. Data gathering

States gather and report key data as a condition of receiving federal funding. This data then informs policy discussions. If the data is not gathered or reported, important policy discussions either do not happen or happen without adequate information.[382] As discussed above, there is a dearth of hard data about states' use of hidden foster care, and this is a key reason hidden foster care is hidden.[383] An essential step is for the federal government to require state CPS agencies to report the number of cases in which they effectuate a change in physical custody through safety plans, the duration of such changes in custody, safety outcomes for affected children, and how such cases are resolved (that is, by reunification with the parent with whom the child lived prior to the safety plan, by permanent custody with the alternative caregiver, by the state opening a family court case, or by some other means).[384]

Such data reporting is important everywhere and is especially important in states using flexible federal funding pursuant to the Family First Act, lest removals via safety plans become a way for states to use federal dollars to prevent foster care without preventing children's removals. Congress should amend the Family First Act's data reporting requirements to require reporting on the number of foster care candidates for whom CPS agencies prevent a parent-child separation, not only those who CPS agencies keep out of foster care.[385]

Even without congressional action, provisions within the Family First Act could provide the basis for important data tracking. States using flexible funding under the Act must provide data regarding children's placement status at the start and end of a one-year period in which the state provides some mental health or caregiving support service.[386] States must also identify individual strategies used to prevent foster care.[387] The Children's Bureau should read these two provisions together to require states to report detailed data on when they use changes in physical custody to prevent foster care and

382. *See* Shellady, *supra* note 14, at 1648 (arguing for better data gathering to inform policy discussions).

383. *See supra* Part I.B.

384. Such data is currently excluded from federal data reporting requirements. *See supra* notes 73-74 and accompanying text. Some states require it to be collected, minimizing the administrative burden of a new reporting requirement. *See, e.g.*, ARIZ. DEP'T OF CHILD SAFETY, *supra* note 325, ch. 2, § 7. Safety outcomes include whether the child was the subject of further child protection hotline reports and whether any such reports were substantiated by child protection agencies.

385. *Cf. supra* text accompanying note 311 (noting the existing provision of the Family First Act focusing on preventing foster care placements).

386. 42 U.S.C. § 671(e)(4)(E)(iii) (2018).

387. *Id.* § 671(e)(4)(A)(i), (e)(4)(E)(i).

what happens to children, parents, and kinship caregivers in those cases. Unfortunately, existing administrative guidance from the Children's Bureau does not require states to report when they effectuate a change in physical custody to hidden foster care;[388] the Bureau should revisit that issue.

Requiring greater data reporting would resolve one of the oddities of the present child protection data reporting regime: States need not report what happens with the majority of children who CPS agencies deem to be abused or neglected. CPS agencies report that they take into formal foster care only 23.7% of children deemed victims of abuse or neglect.[389] That percentage varies significantly from state to state—from a low of 3.9% to a high of 53.1%.[390] What happens to the more than 500,000 children[391] deemed victims who are not brought into formal foster care by CPS agencies? Federally required data cannot say. This Article projects that a large portion of these children—from the high tens to the low hundreds of thousands—end up in hidden foster care.[392] And what happens to those children? For instance, how many reunify with parents (and after how long), how many stay with kinship caregivers permanently, and how many eventually enter foster care? Federally required data cannot say, and some CPS agencies even admit they do not know.[393] Requiring states to report all uses of hidden foster care would go a long way toward providing important insights into a large population of children.[394]

2. Child and Family Services Reviews

The Children's Bureau should regulate CPS agencies' use of kinship diversion through its Children and Family Services Reviews. CPS agencies are already subject to these federal reviews of their work in cases involving

388. *Supra* text accompanying note 313.

389. CHILDREN'S BUREAU, *supra* note 75, at 81, 90 tbl.6-4.

390. *See id.* at 90 tbl.6-4.

391. CPS agencies identified roughly 674,000 children as abuse or neglect victims in 2017. *Id.* at 20. If 76.3% were not removed, *id.* at 81, that amounts to 514,262 children.

392. *See supra* Part I.B.

393. The *Virginia Mercury* quoted the director of the Division of Family Services within the Virginia Department of Social Services as follows:

> If you're asking me, at the state, what's occurring with that diversion practice—how is that happening, how is it occurring, which families are getting services, which are not, how quickly are the kids going back to the family[,] . . . what are the outcomes, do they ultimately stay with that family, that sort of thing, I can't answer those questions for you.

O'Connor, *supra* note 89; *see also* VA. DEP'T OF SOC. SERVS., *supra* note 89, at 4 ("However, once diverted, the case is often closed and no additional tracking of the child occurs.").

394. The federal government could go even broader and require more detailed reporting about what happens to children deemed victims but not removed by CPS agencies, including those who remain at home subject to CPS agency oversight of some kind. While such a step would be beneficial, it is beyond the scope of this Article.

removals to formal foster care, court petitions, and expenditures related to certain abuse and neglect prevention grants.[395] These reviews have become a primary means of the federal government's oversight of the quality of state child protection systems.[396] The Children's Bureau should evaluate the use of hidden foster care to ensure CPS agencies use it only when necessary and consistent with procedural requirements outlined above.

Indeed, federal regulations already provide a basis for evaluating hidden foster care cases—the Children's Bureau evaluates states on how well they balance children's need for safety with the goal that "[c]hildren are safely maintained in their own homes whenever possible and appropriate."[397] Notably, the regulation focuses on keeping children in their own homes—not merely keeping them out of foster care. Thus, causing children to leave their own homes through safety plans should fall well within the Children's Bureau's mandate when performing Child and Family Services Reviews.

3. Family First Act funding reforms

The Family First Act wisely permits states to use federal funds to prevent the need to remove children from their parents rather than, as Title IV-E has historically done, simply to help states pay for foster care. As discussed in Part V.A, however, the Family First Act's references to kinship care risk paying states to use hidden foster care—and thus risk preventing foster care without preventing the *need* for removing children from their parents.

Congress should amend the Family First Act to ensure it is implemented consistently with the goal of preventing unnecessary parent-child separations and not merely preventing formal foster care placements. When CPS agencies effectuate a change in physical custody of a child, Congress should require them to use Family First Act funds to support reunification efforts—not merely services to support the new kinship placement. Congress should further insist that when state action causes physical custody changes, states must follow requirements like those discussed in Part VI.A as a condition of using Family First Act funds.

Even without congressional action, the Children's Bureau has authority to impose similar requirements. Crucially, federal funding via the Family First Act is discretionary—the Secretary of Health and Human Services "*may* make a

395. The Reviews, described in 45 C.F.R. §§ 1355.31-.34 (2019), apply to state CPS agencies' use of certain federal funds. *See id.* § 1355.31 (delineating the scope of the regulations).

396. *See* Sankaran & Church, *supra* note 194, at 234 (describing the Reviews' history, process, and function).

397. 45 C.F.R. § 1355.34(b)(1)(i)(A)-(B).

payment to a State"[398]—compared with other provisions of Title IV-E that are mandatory.[399] Requirements reasonably related to the purpose of preventing "the trauma of unnecessary parent-child separation,"[400] as the Children's Bureau has put it, are thus relevant to how the Bureau exercises its discretionary funding authority. Other more specific provisions of the Family First Act also imply this authority. For each child, the state must "identify the foster care prevention strategy" it will use.[401] When that strategy is a change in physical custody, it is reasonable to expect states to explain why that strategy is necessary, and the Bureau may reasonably insist on some steps to ensure that identified prevention strategies are appropriate.[402]

Conclusion

Beyond the well-established foster care system operated by CPS agencies and supervised by family courts, most states operate hidden foster care systems—systems that make profound decisions without court involvement or oversight, or any meaningful checks and balances. The hidden foster care system changes custody of children (sometimes permanently), removes legal obligations for agencies to help reunify parents and children or supervise children to ensure their safety and well-being, and fails to provide kinship caregivers with supports comparable to those provided in formal foster care. This system is literally hidden in that existing data-tracking and reporting laws do not require states to count how frequently they use this system, let alone what happens to children who are in it. Despite the lack of data, it is clear the hidden foster care system is large—roughly on par in size with the number of children CPS agencies remove from their families and place in formal foster care every year. And the hidden foster care system intervenes in families analogously to the formal foster care system. This hidden system is likely growing and is certainly becoming institutionalized through federal funding

398. 42 U.S.C. § 671(e)(1) (2018) (emphasis added). The Children's Bureau sits within the Department of Health and Human Services, *id.* § 191, and administers federal child welfare funding, Children's Bureau, *What We Do*, U.S. DEP'T HEALTH & HUM. SERVICES, https://perma.cc/MK7U-LR8R (archived Feb. 12, 2012).

399. *E.g.*, 42 U.S.C. § 671(b) (providing that "[t]he Secretary *shall* approve any plan which complies with" the Title IV-E requirements in effect before the Family First Act (emphasis added)).

400. CHILDREN'S BUREAU, *supra* note 303, at 2.

401. 42 U.S.C. § 671(e)(4)(A)(i)(I).

402. The Bureau has required states to explain how a "prevention plan" will help the child live at home or with kin, temporarily or permanently, but has not yet issued details requiring states to explain why changing custody away from parents is necessary. *See* CHILDREN'S BUREAU, *supra* note 303, at 6.

incentives, new federal funding that strengthens those incentives, and state policies that seek to codify the practice.

The legal defense to due process challenges—that these are voluntary placements—is unconvincing in light of the threats to remove children built into the practice. That conclusion alone requires consideration of meaningful procedures to protect children's and parents' fundamental constitutional right to family integrity. Even if this defense were convincing as a matter of constitutional due process, it would be unconvincing as a policy defense of the system. Taking the due process defense of hidden foster care on its own terms—terms that insist CPS agencies only make legally justifiable threats to remove children and that analogize development of safety plans to plea bargains and civil settlements—underscores the need for significant reforms. Checks and balances are required to ensure CPS threats are legally justified in the tens or hundreds of thousands of cases in which they occur and to make safety plan agreements truly voluntary.

It is thus time to legally domesticate the hidden foster care system though a mixture of state legislation and reform of federal funding and oversight systems.

their resources toward a city, county, or school district where they know they can reach other young people in need of OST.

As a member of DC Action's Out-of-School Time Coalition, Jubilee Housing would like to make the following recommendations:

- We urge the Council to call on the leaders of education agencies to take additional steps to improve the clearance processing time. While the legislation at hand might speed up some of the individual pieces of the process, it does not address the fundamental flaw of the clearance process, which is that it is decentralized, outdated, and disorganized.

- Use more advanced technology to implement a tracking process for individual applicants to receive updates on their application status and give real-time feedback about missing required information on an application. This must be implemented into the background clearance process so that human errors can be flagged and corrected within seconds, rather than an applicant having to wait weeks or months to be notified that they missed a section on a form.

- Support Deputy Mayor Kihn's proposal to remove the Child Protection Register as a component of the background clearance process. In the statement of introduction for this bill, Councilmembers wrote that the CPR check is not a useful tool for judging a person's ability to work with youth, and that other elements of the clearance process adequately capture information about applicants' suitability. Most substantiated allegations in the Child Protection Register will overlap with the findings of one or all of the FBI Criminal History Record, the MPD criminal history record, and the National Sex Offender Registry. Therefore, the CPR check is at best, redundant and therefore not a good use of time and resources, and at worst, could lead to discrimination against low-income applicants.

Thank you for the opportunity to provide written testimony on this important piece of legislation.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

District of Columbia Public Schools (DCPS)

Public Hearing

On

Bill 24-989, "Educator Background Check Streamlining Amendment Act of 2022"

Testimony of

Sharon Gaskins

Resource Strategy Officer

District of Columbia Public Schools

Before the

Committee of the Whole

Council of the District of Columbia

The Honorable Phil Mendelson, Chairman

November 2, 2022

12:00 PM

Via Zoom Teleconference

Good afternoon, Chairman Mendelson, members of the Council, and staff. I am Sharon Gaskins, Resource Strategy Officer at DC Public Schools (DCPS), and I am honored to testify before you on the topic of educator background checks for DC Public Schools.

DCPS appreciates and supports the intent of B24-989, which we believe will greatly enhance our efforts to hire talented staff across the system while continuing to implement important safeguards that keep our students safe.

We also would like to take this opportunity to suggest further refinement of the bill and address implementation challenges related to the addition of the Child Protection Register (CPR) check in the School Safety Omnibus Amendment Act of 2018 (SSOAA) (D.C. Law 22-294, D.C. Code §§ 38-951.01 *et seq*.).

Pre-Existing DCPS Background Check Procedures

Prior to the SSOAA, DCPS had already implemented a comprehensive background check process required by statute (in the Criminal Background Checks for Protection of Children Act of 2004, or CBC) that captures any criminal act, including instances of abuse or neglect for which there was an arrest or conviction.

Further, the CBC Act has a seven-step process required for the evaluation of background checks that DCPS follows, except for cases of sexual offenses involving a minor and sexual felony offenses, for which applicants are immediately deemed unfit for service in our schools. For all other acts, DCPS considers seven factors to determine whether an individual poses a present danger to children or youth and therefore may not serve as an employee or unsupervised volunteer. The factors that are considered include:

- The duties/responsibilities of the job position;
- Whether the criminal offense for which the individual was convicted will affect their fitness/ability to perform their job duties;
- How much time has elapsed since the criminal offense occurred;
- The age of the individual when the criminal offense occurred;
- How frequent/serious the criminal offense was;
- Information about the individual's rehabilitation/conduct since the criminal offense occurred; and
- The benefits for ex-offenders to obtain employment.

Our investigations unit conducts these reviews with an evaluation rubric aligned with the Act in consultation with our Office of General Counsel. This required process ensures the integrity of our hiring practices in accordance with DC Code and ensures that individuals are not cleared for employment with DCPS if they may pose a present danger to children.

Current DCPS Background Check Procedures

Our current background check process includes several elements, each with its own turnaround timeline. These timelines are dependent on the actions of the individual applicants, in terms of completing steps and correcting errors as needed in a timely manner

These steps include:

- Criminal Background Check (Fingerprints) – 2 days (no criminal record) to 60 days (criminal record)
- National Sex Offender Registry (SOR) – 2 days to 5 days
- DC Child Protection Register (CPR) – 14 days
- TB Screening – variable, dependent upon candidate self-reported results
- Mandatory Drug and Alcohol Testing (MDAT) – 5 days (negative specimen) to 14 days (positive specimen)

When executed quickly and smoothly, the process has traditionally taken a candidate approximately three weeks to complete. To further expedite the process, DCPS has made data system improvements and assessed its suitability matrix to allow for tiering of applicants based on their role in the school. However, we have experienced delays due to the volume of checks needing to be processed by CFSA and the time-intensive nature of conducting the CPR check.

Challenges with Implementation of CPR Checks

After the SSOAA was enacted, DCPS reviewed guidance provided by the Office of the State Superintendent of Education (OSSE) and worked diligently to partner with CFSA to implement the CPR requirements of the Act. However, implementing these requirements has caused challenges which we anticipated when the Act was first proposed.

While the addition of the CPR check for employment suitability purposes in a school setting was well-intended, its utility is limited to determine fitness for duty. We know that the majority of substantiated CPR reports — i.e., those that do not involve an MPD investigation — are for reasons of neglect such as inadequate supervision or educational neglect. These reports do not rise to the level of a criminal charge. Further, any information that would be relevant to determine fitness for duty is received through previously established background check processes as established by the CBC Act that I referenced earlier.

To implement CPR checks, CFSA conducts checks of the District of Columbia's local database. It is important to note that each CPR check requires a manual search through CFSA's investigation history. While CFSA has created a unit dedicated to processing DCPS applications and has been a very strong partner in this work, the volume of checks required is overwhelming.

To help strengthen the capacity of CFSA, DCPS provided funding to the agency so it could add staff during the height of the hiring season. We also made several system improvements, including eliminating a third-party vendor to streamline the process, launching a QuickBase application to make the process more user-friendly for applicants and automated for staff, and connecting the QuickBase database between DCPS and CFSA to facilitate information transfer. However, the complexity and individualized nature of the checks limits efficiencies which can be achieved through automation and standardization. Thus, implementation remains a challenge to continuity of operations for DCPS. In essence, we are hamstrung by a processing requirement that does not increase student safety.

Conclusion

In conclusion, DCPS is proud of the process improvements it has made and is grateful to the Council for introducing a bill that will remove some of the legislative hurdles to further streamlining the clearance process without compromising student safety. To strengthen the bill, and the process, DCPS recommends removing the CPR check. This will ensure that the CPR check is used for its intended purpose and not employment suitability for staff, contractors, and volunteers in school settings, and will reduce redundancies with the criminal background check, which will capture any report of abuse or neglect for which there is an arrest or conviction. The removal of the CPR check will also have the beneficial result of greatly expediting the clearance check process.

Thank you for the opportunity to speak before you today. I am happy to answer any questions you may have at this time.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Child and Family Services Agency

Public Hearing on B24-989, The "Educator Background Check Streamlining Amendment Act of 2022"

Testimony of
Robert L. Matthews
Director of the Child and Family Services Agency

Committee of the Whole
Phil Mendelson, Council Chairman

Council of the District of Columbia
John A. Wilson Building,
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

Wednesday, November 2, 2022
12:00 p.m.
Chairman's Website (www.ChairmanMendelson.com/live)
DC Council Website (www.dccouncil.us)

Introduction

Good afternoon, Chairman Mendelson, Councilmembers, and staff. My name is Robert L. Matthews, and I am the Director of the DC Child and Family Services Agency (CFSA). Thank you for the opportunity to testify before you today in support of Bill 24-989, the "Educator Background Check Streamlining Amendment Act of 2022." I am joined today by members of CFSA's executive leadership team, Michele Rosenberg, who is the Deputy Director for the Office of Planning, Policy, and Program Support (OPPPS), and Elizabeth Muffoletto, our Deputy Director for Entry Services.

CFSA's Position on the Proposed Legislation

I would like to thank Councilmember Christina Henderson for her leadership in introducing this very important piece of legislation as it will make some important improvements to the current School Safety Omnibus Amendment Act of 2018 (SSOAA), while ensuring an appropriate screening process for individuals who have direct access to children. Being listed on the Child Protection Register (CPR) can impact an individual's ability to find certain forms of employment, participate in school activities, provide kinship care, and serve as a foster parent.

Additionally, it will amend the current expungement law and address harm done to individuals, and in turn, their families, who have found themselves placed on the Register for infractions that do not warrant a harsh, lifelong penalty. And finally, CFSA supports an amendment to the Prevention of Child Abuse and Neglect Act of 1977 included in the bill to remove the notary requirement for CPR check applications.

My testimony today focuses on the two primary, substantive issues:

1. Requested removal of the CPR component of the background check process.

CFSA is responsible for conducting investigations of reports of alleged child abuse and neglect when the alleged perpetrator is the victim's parent, guardian, kinship caregiver, day-to-day caregiver, relative or godparent caregiver, or custodian. There are three possible findings for completed investigations: substantiated, unfounded, or inconclusive.[1] A "substantiated report" is

[1] D.C. Official Code § 4-1301.02.

a report that is supported by credible evidence; an "Unfounded report" is a report, which is made maliciously or in bad faith or which has no basis in fact; and an "Inconclusive report" is a report which cannot be proven to be either substantiated or unfounded.

By law, CFSA is required to maintain a CPR, which must include, for each substantiated or inconclusive report of child abuse or neglect, the identity of the person responsible for the abuse or neglect.[2] Currently, substantiated reports are never expunged,[3] and inconclusive reports are expunged either five years after the closing of a CFSA case or the 18th birthday of the victim child, whichever occurs first.

We urge the Council to include in this bill the removal of the CPR check from the educator background check process because the CPR check is primarily intended for individuals in a parental or custodial role, not school staff, contractors, or volunteers. Without the CPR check, the background check process will still include a federal and local criminal background check and a check of the National Sex Offender Registry, which would effectively capture any report of abuse or neglect for which there was an arrest or conviction.

It is important to note that CFSA does not investigate reports of abuse or neglect when the maltreater is not in a custodial role with the child, like that of a parent, guardian, or family member. For school personnel, if a teacher or other school employee is reported to have abused a student, CFSA does not have jurisdiction to investigate; that report is referred to the Metropolitan Police Department (MPD). Similarly, if a teacher is the confirmed perpetrator of abuse of a student, the CPR check would not provide any history of that abuse. That history would only be included in the findings of a criminal background check.

Adding the CPR check for employment suitability purposes expands its use beyond its originally established purpose. Prior to SSOAA, CPR checks were legally required in the District for two primary reasons:

[2] D.C. Official Code §§ 4- 1302.01 and 4-1302.2.
[3] D.C. Official Code § 4-1302.07.

- Child welfare purposes – to license a foster or adoptive home or to make a custody decision for a kin caregiver
- Employment purposes – as part of the background check process for staff in a residential facility or for a licensed childcare provider due to the role being a custodian of children

CFSA is the only entity that can process a CPR check for the District of Columbia, and CFSA staff cannot search Registers from any other state or jurisdiction. Each jurisdiction maintains its own database of confidential social investigations and findings; requests for CPR checks must be made separately to each jurisdiction where the applicant has lived and/or worked. Few jurisdictions have an online application process; most rely on printed applications that must be mailed or faxed, and the turn-around time for results easily exceeds 14 days. CFSA does not have the authority to conduct CPR checks in other jurisdictions for school employees, and states may not share information with CFSA, as the agency is not the licensing or hiring entity.

In cases where a report of abuse and neglect rises to the level of a criminal act, CFSA and MPD will conduct a joint investigation. For criminal matters involving abuse and neglect, MPD, in conjunction with the United States Attorney's Office, would determine whether to prosecute. The criminal background check conducted for any DCPS staff member, contractor, or volunteer would capture a criminal complaint related to abuse or neglect through arrest records and/or convictions. It would not capture a substantiated finding of abuse or neglect made by CFSA that MPD did not believe rose to the level of a criminal act. The majority of substantiated reports that do not involve an MPD investigation are for reasons of neglect such as inadequate supervision or educational neglect.

An unintended consequence of the CPR check requirement is the disparate impact on applicants of color who may face a permanent barrier to school-based employment when listed on the Register. The majority of allegations reported to CFSA are substantiated for neglect, and they occur because of circumstances of poverty. Due to the demographic makeup of the District, this means that almost all individuals who are listed on the Register are people of color from low-

income communities. Being on the Register and potentially being barred from employment with children exacerbates the challenges faced by these families.

2. Amendment of the Expungement Provisions.

In 2017, the DC Children's Justice Task Force (Task Force)[4] reviewed the expungement provisions of the CPR law and the long-term impact permanent placement on the CPR had on families. The permanent placement on the CPR often has negative consequences for the children and families the agency seeks to protect. This is in part because no distinction is made for minor offenses as opposed to those that are criminal or severe in nature. A person can be placed on the CPR permanently for one bad parental decision that meets the legal definition of abuse or neglect, but not severe enough to warrant separating the child from their family. For example, a parent with poor or unsafe housekeeping behaviors that puts a child at risk of harm would be subjected to the same consequences under the current CPR law as a parent who intentionally burned their child as a form of punishment. The law also does not take into consideration that an individual may be rehabilitated and supported to being a safer parent. For example, a young parent found to have neglected their child will permanently remain on the CPR even if they successfully complete the service plan recommended by the agency, are reunited with their child, and there are no further allegations of abuse or neglect made against them.

Individuals who are listed on the CPR are being barred from jobs in the childcare industry and professions that involve direct contact with children regardless of the severity of their offense. Individuals have had employment offers rescinded, been terminated from their jobs, or not been allowed to participate in their child's school activities and events that require parental background checks because of permanent placement on the CPR. As I mentioned, these consequences disproportionately impact people of color. Data from around the country show that people of color are more likely to be reported to child protective services for minor offenses than their white counterparts.

[4] The Task Force was established in 2010 pursuant to a federal Children's Justice Act grant to enhance investigative, administrative, prosecutorial, and judicial processes that protect the interests of child victims of abuse and neglect. The Task Force includes professionals from across the District with expertise in the fields of criminal justice, child physical abuse, child neglect, child sexual abuse and exploitation, and child maltreatment-related fatalities.

The current law requires that substantiated findings remain on the CPR indefinitely and permits inconclusive findings to be expunged after five years. In line with the recommendations of the Task Force, this bill, if passed, will amend the law and allow for a three-tiered system:

Tier I

Inconclusive reports will be expunged after one year. A new inconclusive finding would extend the time by one year from the newest finding. Any new substantiated finding would extend the time from the newest substantiated finding by either three or five years as provided in Tier 2.

Tier II

Substantiated reports except those reports that fall into Tier III will be expunged three years after the date of substantiation if the child was not removed from the home. If the child is removed from the home and there was an adjudication of abuse or neglect, then the substantiated report will be expunged three years from the date of reunification or five years from the date of substantiation, whichever occurs first. Any new substantiation or inconclusive finding will extend the time by one, three, or five years.

Tier III

Substantiated reports involving a child fatality, sexual abuse, or serious physical injury can never be expunged.

A three-tiered system provides an opportunity for individuals who have been placed on the CPR to eventually be removed when certain conditions are met.

Conclusion

In closing, we support this legislation and urge the Council to add the removal of the CPR check requirement in order to expedite the employment process for staff, contractors, and volunteers working with students without compromising the integrity of the District's robust background check process. Timely staffing for schools, Out of School Time providers, and other partners have many positive implications for education in the District. Furthermore, we believe amending

the CPR expungement law promotes fairness for families by removing a barrier that the lifetime rule has had on residents who are either seeking work or to take part in their child's educational experience through volunteering.

Thank you for the opportunity to testify today. I am happy to answer any questions you may have at this time.

Committee of the Whole
December 6, 2022
COMMITTEE PRINT

A BILL

24-989

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

To amend the School Safety Omnibus Amendment Act of 2018 to revise the process by which local education agencies screen applicants; to require that local education agencies review the National Sex Offender Registry in reviewing applicants for employment to education positions; to amend the Prevention of Child Abuse and Neglect Act of 1977 to remove a notarization requirement; and to remove the review of the Child Protection Register as a required step in the educator background check process.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Educator Background Check Streamlining Amendment Act of 2022".

Sec. 2. Section 103 of the School Safety Omnibus Amendment Act of 2018, effective April 11, 2019 (D.C. Law 22-294; D.C. Official Code § 38–951.03), is amended as follows:

(a) Subsection (a) is amended as follows:

(1) Paragraph (3) is amended by striking the phrase "any former employers" and inserting the phrase "each former employer in the preceding 7 years, or each of the applicant's previous 3 employers, whichever period of time is longer," in its place.

(2) Paragraph (5) is repealed.

(3) A new paragraph (5A) is added to read as follows:

"(5A) Reviews the United States Department of Justice Dru Sjodin National Sex Offender Public Website, also known as the National Sex Offender Public Registry, to determine if the person has been convicted of sex offenses or offenses against children."."

(b) A new subsection (c) is added to read as follows:

"(c) An applicant who intentionally provides false information on an application submitted to a local education agency under subsection (a)(1) of this section shall be subject to prosecution under section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405).".

(c) Subsection (b) is amended by striking the phrase "and shall provide, when contacted by another local education agency or school that is considering hiring the applicant, information pursuant to subsection (a)(3) of this section" and inserting the phrase "and shall provide such information to another local education agency or school that is considering hiring the individual when contacted by the local education agency or school" in its place.

Sec. 3. Title II of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977 (D.C. Law 2-22; D.C. Official Code § 4-1302.02 *et seq.*), is amended as follows:

(a) Section 203(a-1)(1) (D.C. Official Code § 4–1302.03(a-1)(1)) is amended as follows:

(1) The lead-in language is amended by striking the phrase "decisions regarding employees and volunteers or prospective employees and volunteers" and inserting the phrase "decisions regarding employees, contractors, and volunteers or prospective employees, contractors, and volunteers" in its place.

(2) Subparagraph (B) is amended to read as follows:

"(B) The request is accompanied by:

"(i) A consent for release of information from the Child Protection Register signed by the employee, contractor, or volunteer or prospective employee, contractor, or volunteer; and

"(ii) Government issued photo identification that allows the staff that maintain the Child Protection Register to verify the identity of the employee, contractor, or volunteer or prospective employee, contractor, or volunteer.".

(b) Section 205(b) (D.C. Official Code § 4-1302.05(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(2) Paragraph (3) is amended by striking the period and inserting the phrase "; and" in its place.

(3) New paragraphs (4) and (5) are added to read as follows:

"(4) A statement, in all capital letters, that "THIS IS A VERY SERIOUS MATTER"; and

"(5) A statement that the person may be prevented from working in an organization serving children or in a public or private school" if the person's name remains in the Child Protection Register.".

(c) Section 207 (D.C. Official Code § 4-1302.07) is amended to read as follows:

"(a) The staff that maintain the Child Protection Register shall expunge an inconclusive report from the Child Protection Register one year after the date the report was entered in the Child Protection Register if no subsequent substantiated or inconclusive reports involving the person identified as responsible or possibly responsible for the abuse or neglect was entered in the Child Protection Register during the preceding one-year period.

"(b) The staff that maintain the Child Protection Register shall expunge a substantiated report from the Child Protection Register:

"(1) Three years after the date the report was entered in the Child Protection Register if the child was not removed pursuant to section 304 and no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register during the preceding 3-year period; or

"(2) Three years from the date the that the child, if removed pursuant to section 304 and a court made a finding that the child was abused or neglected, was reunified with the person identified as responsible for the abuse or neglect, or 5 years from the date that the substantiated report was entered in the Child Protection Register, whichever occurs first; provided, that no subsequent substantiated or inconclusive report involving the person identified as responsible for the abuse or neglect was entered in the Child Protection Register.

"(c) If, during the time a prior substantiated or inconclusive report is on the Child Protection Register, a subsequent substantiated or inconclusive report is entered in the Child Protection Register that identifies the same individual as responsible or possibly responsible for the abuse or neglect, the prior report shall not be expunged until the subsequent report is expunged from the Child Protection Register.

"(d) The staff that maintain the Child Protection Register shall expunge from the Child Protection Register:

"(1) Any unfounded report immediately upon such classification by the Agency; and

"(2) Any material successfully challenged as incorrect pursuant to the rules adopted under section 206.

"(e) Notwithstanding any other provision of this section or other District law, substantiated reports involving a child fatality, sexual abuse, sex trafficking, and serious physical injury shall not be expunged from the Child Protection Register.

"(f) For purposes of this section, a serious physical injury includes:

"(1) Broken bones or fractures;

"(2) Medical abuse;

"(3) Adult-sized human bites;

"(4) Cases involving children who have been tortured, tied, or confined;

"(5) Suspicious burns or head injuries, or significant injuries with an implausible explanation;

"(6) A physical injury that:

"(A) Creates a substantial risk of death;

"(B) Causes serious and protracted impairment of health or protracted loss or impairment of the function of a bodily organ;

"(C) Involves hospitalization; or

"(D) Requires surgical procedures.".

"(g) The Mayor or their designee shall have the right to overrule any expungement provided by this section on a case-by-case basis.".

Sec. 4. Applicability.

Section 3(c) shall apply as of October 1, 2023.

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 6. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1), and publication in the District of Columbia Register.