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Testimony Before the Council of the District of Columbia

Committee on Human Services

**Public Hearing:
Legislation B23-437
“Child Safety and Well-Being Ombudsperson Establishment Act of 2019”
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Good morning Chairperson Nadeau and Members of the Committee on Human Services. My name is Marla Spindel and I am the Executive Director of DC KinCare Alliance. I am pleased to testify today in support of the Child Safety and Well-Being Ombudsperson Establishment Act of 2019.

As you may know, before founding DC KinCare Alliance, I spent ten years managing the Child Advocacy Practice at the DC Volunteer Lawyers Project (DCVLP). Through that work as well as my current work representing relative caregivers, I have become aware of many instances in which the DC Child and Family Services Agency (“CFSA”) is involved with families, fails to address serious concerns about the children’s safety, and leaves children to continue to be abused or neglected in their homes. I also identified a practice, called kinship diversion, that CFSA typically utilizes when it is forced to remove abused or neglected children from their homes because of serious ongoing dangers, often occurring when a parent is physically or mentally incapable of caring for their children. In these instances, CFSA arranges for the children to live with relatives informally by threatening that if the family does not agree to the arrangement, the children will go into foster care with strangers. CFSA does not tell families that the relatives can become foster parents for the children, that the goal of foster care is to safely reunify the children with their parents, or that the relatives would receive a foster care subsidy to help defray the costs of caring for these children. Instead, CFSA deprives these families of their legal rights and desperately needed economic resources. Indeed, most of the relatives who care for these at-risk DC children are already living close to the margins of economic stability themselves, face an uphill battle to maintain their housing, and struggle to put food on the table when these children come into their care. In other words, instead of finding the best solutions, CFSA sets these families up to fail.

Both DCVLP and DC KinCare attorneys have raised concerns with upper level CFSA officials, including Director Donald, Principal Deputy Director Matthews, and Chief of Staff Joseph about CFSA policies and practices that are failing to ensure the safety of DC's at-risk children. However, our efforts to work with CFSA have consistently been met with tremendous resistance. Indeed, CFSA's policies and practices appear to be motivated by the pursuit of two goals: to substantially reduce the number of children in foster care and the associated costs and administrative burdens; and to exit 30 years of court oversight in the *LaShawn* litigation. Neither of these goals is to protect children and keep them safe. Rather, CFSA works to do what is best for itself as a governmental body, and not what is best for children and families.

CFSA's misguided priorities renders it intransigent and unable to consider constructive criticisms or inquiries in a productive way. Even more troubling is how CFSA engages with its constituents. Specifically, CFSA staff are frequently insensitive and condescending towards families, fail to provide them with the information they need to make decisions during extremely traumatic times, and mislead or misrepresent the facts, the law and/or their policies in order to coerce families to comply with the agency's objectives. Likewise, agency staff, including the Director, have lied to or misled this Committee and the Court in the *LaShawn* litigation. We also are aware of instances where CFSA staff have prepared or stored records in a manner designed to hide their existence, as well as their true meaning and significance. While CFSA is afforded vast confidentiality protections with respect to its records and information, the purpose of those protections is to safeguard the identities of the children it is tasked to serve. However, the protections have been used as a shield by CFSA to conceal its failures, avoid accountability, and deceive the people it is supposed to serve. In all of these ways, CFSA has shown that it cannot be a trusted partner

with the community to attain better outcomes for DC's at-risk children, and that an independent arbiter is needed to do so.

While CFSA may contend that it already has an internal ombudsperson, we know from the experience of the prior ombudsperson and others that there is no real power vested in this position to fully investigate and resolve complaints, or hold the agency accountable. Indeed, the internal ombudsperson testified as to the types of complaints she has successfully addressed, and they all relate to minor issues, such as providing a winter coat to a foster youth, furnishing foster parents with food cards, or providing assistance with obtaining daycare vouchers or applying for the Grandparent Caregiver Program Subsidy. At the same time, Ms. Sandalow from Children's Law Center testified that lawyers with her organization were forced to go to court to compel CFSA to provide basic needs to their child clients, such as a pair of shoes. Moreover, the internal ombudsperson's annual reports only discuss complaints related to foster youth, thereby excluding complaints related to the vast majority of children CFSA serves -- abused or neglected children who are not in foster care.

Right now, the only way for District families and children to challenge CFSA's practices before an **independent** decisionmaker is to bring a lawsuit, which we have been forced to do on behalf of a number of our clients. If there had been an independent ombudsperson when our clients brought their concerns to the attention of the agency, they might not have had to turn to the judicial system for redress.

I cannot stress enough how critical it is that the ombudsperson be independent from agency or political influence. Indeed, the United States Ombudsman Association provides that "independence is the core defining principle of an effective and credible Ombudsman." See Governmental Ombudsman Standards at Section II.A., *available at* <http://www.usombudsman.org/wp-content/uploads/USOA-STANDARDS1.pdf> ("USOA

Standards”). The USOA Standards further provide that “appointment by a legislative body is the preferred means to ensure independence.” We submit that in order for the ombudsperson to be truly independent, he or she must be appointed by the DC Council and subject to removal by the Council only in the limited circumstances identified in the proposed law.

It is also essential that the ombudsperson be granted not only the power to address and mediate community complaints, but also to investigate agency actions through unfettered access to agency staff, documents and systems. All witnesses at the Public Hearing, even those who did not agree with establishing an independent ombudsperson, acknowledged that the ombudsperson must be able to identify systemic issues. In this regard, the *LaShawn* Court Monitor Judith Meltzer testified that she often receives multiple complaints about a similar issue, which will prompt her to investigate to determine if it is a systemic issue. Certainly, there would be no way for her to identify systemic issues if she does not have the authority to investigate. While Ms. Meltzer indicated she has been able to work collaboratively with the agency and seeks to see an ombudsperson who would do the same, we do not believe that should be the paramount criterion for the position. Rather, the ombudsperson should be able to collaborate with the agency, but also have the independence and fortitude to stand up to the agency when that is necessary to protect children. Indeed, there are underlying systemic issues we have brought to Ms. Meltzer’s attention, including the agency’s repeated violations of law and policy, that have never been resolved. Most importantly, Ms. Meltzer will soon no longer be a resource for the community. On October 31, 2019, the Court in the *LaShawn* case approved a new Exit and Sustainability Plan, that sets forth the pathway for conclusion of the case in the near future.

Director Donald also attempted to dissuade the Committee from including investigatory powers to the ombudsperson, contending they are more typically associated with

an Office of the Inspector General and are not appropriate for an ombudsperson. Nothing could be further from the truth. The United States Ombudsman Association's (USOA's) Principles of Effective Ombudsman Legislation recommends that an ombudsman office manifest, among other things, the following characteristics: (1) the responsibility to receive and investigate complaints against governmental agencies; (2) full powers of investigation, to include access to all necessary information both testimonial and documentary, and (3) the authority to criticize governmental agencies and officials within its jurisdiction and to recommend corrective action. *See* <https://www.usombudsman.org/about/model-legislation/>. Further, the USOA Model Ombudsman Legislation specifically lists the powers of the ombudsman to include the authority to investigate, take testimony under oath, and subpoena persons and documents. *See* USOA Model Ombudsman Act for State Governments, Sections 11 (a) and (f), *available at* <http://www.usombudsman.org/wp-content/uploads/USOA-MODEL-ACT.pdf>. Finally, the USOA Standards explain that because “[g]overnment entities and individual government employees that are the subjects of complaints may be resistant to cooperating in investigations,” the ombudsperson should have clearly established and sufficient powers to conduct them as provided by law. *See* Standards at Section II.D.7.

We want to address the concerns raised by Director Donald at the hearing that the ombudsperson would interfere with clinical decision-making. The proposed legislation, as written, does not give the ombudsperson authority to override any decisions of the agency, including clinical decisions. In our opinion, the Director presented this issue as a diversion tactic and/or to prompt social workers and others to oppose the legislation. Correspondingly, the Director and the internal ombudsperson distributed talking points to foster parents to guide their testimony on the legislation. The talking points include several false and deceptive claims, including that the ombudsperson could subject foster parents to civil and

criminal penalties, and that the ombudsperson would investigate abuse and neglect. These misrepresentations turn the legislation on its head by insinuating that the ombudsperson's role is to investigate foster parents, rather than agency action or inaction. *See* Exhibit A, CFSA talking points, attached.

Further, we want to respond to Director Donald's request for a working group to review the legislation. In light of the Director's efforts to undermine the legislation with CFSA's constituents as described above, we believe this request is not intended to engage the community in a meaningful discussion, but is a maneuver to stonewall and delay enactment of the legislation and/or influence the narrative. In this regard, there has been ample opportunity for members of the community to provide input on the legislation before, during, and after the Public Hearing. In fact, there were several foster parents and relative caregivers who testified in favor of the legislation, and one member of the community who testified against it, parroting CFSA's talking points. In reality, CFSA's concern is not lack of community input, but rather controlling the substance of that input.

We are hopeful that an independent ombudsperson can ensure CFSA complies with the law, listens and is responsive to the needs of its constituents, and respects their legal and human rights. We caution, however, that the only thing that could be worse than keeping the status quo would be the creation of an Office of the Ombudsperson with watered-down authority that is independent in name only, but in reality, is subject to the influence of the executive branch. Such an ombudsperson would allow the agency to present an appearance of accountability when there is none.

Thank you for allowing me to testify today. I am happy to answer any questions. I have set forth at Exhibit B some recommendations for revisions to specific provisions in the proposed legislation.

EXHIBIT A

One-pager to guide testimonials relating to the proposed Office of the Child Safety and Well-Being Ombudsperson bill.

- After a collaborative discussion at the October Parent Advisory Committee meeting, it was determined that the proposed legislation for the Office of the Child Safety and Well-Being Ombudsperson needs to be revised to address the specific, unique functions of a child welfare ombudsperson.
- In order to ensure the legislation will truly address the concerns of District constituents, stakeholder groups need an opportunity to provide guidance and feedback on how this legislation will influence their ability to make complaints to CFSA.
 - We believe the construction of a working group would be helpful in drafting legislation that will determine the organizational structure, functions, and responsibilities of the new Ombudsman office.
 - CFSA's Ombudsman receives complaints from a variety of constituents including, but not limited to bio-families, resource parents, youth in care, and community professionals or service providers.
 - We believe it is good governance to provide each of these stakeholder groups an equal opportunity to contribute to the revision of an office designed to serve them.
- In addition, this bill raises confidentiality concerns. As written, the bill allows the Ombudsperson to enter a private residence, including resource parent homes, and inspect the premises.
 - The Ombudsperson will also have unfettered access to all records, including those that have been sealed.
 - We also have concerns relating to HIPAA and PII due to the level of access the Ombudsperson will have.
 - The bill is extremely broad and could subject resource parents to civil and criminal penalties
- This bill also mandates that the ombudsperson should investigate critical incidents that may have been caused by child abuse or neglect. We believe this is a redundant and intrusive task because both CFSA and the Child Fatality Review Committee already thoroughly investigate critical incidents.
 - To require the ombudsman to also investigate would expose families in pain to additional trauma.

EXHIBIT B

Proposed Revisions to Particular Sections of Legislation

Sec. 2. Definitions.

(5) “Critical incident” means any child fatality, near fatality, or serious bodily injury that comes to the attention of Agency staff **through the hotline or otherwise.**

Commentary: This revision is intended to ensure that all critical incidents that Agency staff are aware of are brought to the attention of the Ombudsperson (whether or not they are reported to the hotline).

Sec. 4. Appointment.

(a) The Citizen Review Panel on Child Abuse and Neglect shall appoint the Ombudsperson **with a majority by a** vote of **attending two-thirds of all** members.

Commentary: We believe that the Ombudsperson should be appointed by the D.C. Council. If it is determined that the Ombudsperson cannot legally be appointed by the D.C. Council, and will instead be appointed by the CRP, then a two-thirds vote of all CRP members should be required. Because the Mayor appoints a majority of CRP members (eight), a two-thirds vote of all CRP members would ensure there is agreement on the appointment by at least three non-Mayoral appointed CRP members.

Sec. 5. Qualifications.

(d) No person shall serve as Ombudsperson who, within the two years prior to appointment, was an employee of the Agency or served in the office of Deputy Mayor for Health and Human Services with supervisory authority over the Agency.

Commentary: This revision is intended to reduce the potential for conflicts of interest of those individuals who have been involved in CFSA administrative acts that could be subject to review by the Ombudsperson.

Sec. 9. Duties.

(2) Monitor the policies, procedures, and directives **(which shall include staff training materials)**, as established, implemented, and practiced by the Agency to carry out its responsibilities in delivering family and children’s services with a view toward appropriate preservation of families and ensuring children’s health and safety;

Commentary: The Ombudsperson should monitor what is included in staff trainings to ensure compliance with law and policy.

(4) Notify any person who raises a concern to an Agency employee that he or she also may contact the Ombudsperson with such concern, and provide the person with the Ombudsperson’s contact information.

Commentary: This revision ensures constituents know about the option to raise their concerns with the Ombudsperson and how to contact him/her.

Sec. 15. Duties of the Agency.

(2) To the extent possible, consult with the Ombudsperson with respect to proposed revisions to current policies and regulations, or proposed new policies or regulations, including administrative issuances. Provide the Ombudsperson with copies of proposed revisions to current policies and regulations, or proposed new policies or regulations, including administrative issuances, at least 30 days prior to issuance. The 30-day notice shall not apply to issuances of emergency regulations. **The Ombudsperson may provide the Agency with comments and/or recommended changes to any regulations or issuances, which the Agency will consider in good faith;** and

Commentary: This revision allows the Ombudsperson to collaborate with CFSA with respect to regulations, policies, and procedures, and requires CFSA to consider input from the Ombudsperson.

Sec. 16. Reporting.

(b) The Ombudsperson shall provide an annual report to the D.C. Council, or any of its committees, the Citizens Review Panel on Child Abuse and Neglect, the Mayor, and the public by December 31 of each year, which shall include the following information from the previous fiscal year:

(1) The number of contacts made to the ~~Agency~~ **Ombudsperson** by telephone, website address, or otherwise;

(2) The number and types of concerns made known to the ~~Agency~~ **Ombudsperson**;

Commentary: These changes fix what we believe to be typos.

Sec. 19. Obstruction.

(b D.C. Government Agency employees and contractors shall be prohibited, as a condition of their employment or contracting, from willfully obstructing or hindering the proper and lawful exercise of the Ombudsperson’s powers, or willfully misleading or attempting to mislead the Ombudsperson in the Ombudsperson’s inquiries, and shall be subject to appropriate disciplinary action for violating this prohibition. Further, any person who willfully obstructs or hinders the proper and lawful exercise of the Ombudsperson’s powers, or willfully misleads or attempts to mislead the Ombudsperson in the Ombudsperson’s inquiries, shall be guilty of obstruction of justice under the “District of Columbia Theft and

White Collar Crimes Act of 1982,” December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-722).

Commentary: This revision provides that DC government employees and contractors will be subject to disciplinary action for obstructing the work of the Ombudsperson.

Sec. 20. Reprisals Prohibited.

(a) No person, including **but not limited to**, an employee **or contractor** of ~~the~~ **any District Government** Agency, an employee **or contractor** of the Agency’s contracted service or place providers, an employee **or contractor** of an entity that works with the Agency, children, youth, and families it serves, a foster parent, ~~or~~ a recipient of ~~family and children’s~~ **the Agency’s or the Agency’s contracted service or place provider’s** services, **a family member of such recipient, or a mandated reporter**, who files a complaint or participates in any investigation or proceeding pursuant to this chapter shall be subject to any penalties, sanctions, or restrictions in connection with her, her, or their employment **or engagement** or be denied any right, privilege, or benefit because of such action.

Commentary: This revision provides additional examples of individuals not subject to reprisal, and also clarifies that the examples are not exhaustive.