UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

K.H., *et al.*, **Plaintiffs,** **and** **S.K., *et al.*,** **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Civil Action Nos. 1:19-03124-ACR** **1:20-00753-ACR**

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS

Defendants District of Columbia and Child and Family Services Agency move to dismiss Plaintiffs' Complaints with prejudice under Federal Rule of Civil Procedure 12(b)(6). The grounds supporting this Motion are set forth in the accompanying Memorandum. A proposed order is attached. Because this Motion is dispositive, undersigned counsel did not seek consent to the relief requested. *See* LCvR 7(m).

Dated: May 19, 2023.

Respectfully submitted,

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Table of Contents

Table of Authorities

Cases **Page(s)**

Statutes

Rules

Regulations

INTRODUCTION

Defendants District of Columbia and Child and Family Services Agency (CFSA) (collectively, the District) move to dismiss Plaintiffs' Complaints with prejudice under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs—minor children and their relative caregivers—challenge the District's practice of facilitating the movement of some children who may have been abused or neglected by parents to new homes with relatives, including some outside the District, rather than formally placing such children in the foster care system. This practice, previously known as "kinship diversion," is widely used throughout the country and has many recognized benefits over formal, traditional foster-care arrangements.[1] Plaintiffs allege that the practice violates the Constitution as well as federal and local District law, and that the relative caregivers are entitled to the same financial benefits as licensed foster parents. Plaintiffs are wrong as a matter of law, and their Complaints should be dismissed, with prejudice.

As explained below, Plaintiffs' Complaints are premised on a misunderstanding of the reach of federal law and the authority of the CFSA as a Title IV-E agency. Plaintiffs' theory of liability hangs on the proposition that federal and local law are prescriptive, prohibiting the practice of kinship diversion and mandating specific steps that must be taken—in every case—on

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[1] *See*, *e.g.*, *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies*, The Annie E. Casey Foundation, 2 (Jan. 1, 2013), https://tinyurl.com/bdhyakme (kinship diversion describes "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."). A less pejorative term might be "kinship care," which term "encompasses a variety of situations in which children are raised by other family members, relative caregivers or close non-related caregivers when the child's parents are unable to care for the child." U.S. Dep't of Health & Human Servs., Administration on Children, Youth & Families, *Information Memorandum: Use of Title IV-E Programmatic Options to Improve Support to Relative Caregivers and the Children in Their Care*, No. ACYF-CB-IM-20-08, 2 (Dec. 29, 2020), https://tinyurl.com/5r788ejy.

suspicion of abuse and neglect. But the authority of CFSA to address the difficult problems associated with child abuse and neglect is broad and flexible by necessity and design, as developed in part via the decades-long court oversight of *LaShawn A. v. Bowser*, Civil Action No. 1:89-cv-01754-TFH (D.D.C.) (*LaShawn*). Plaintiffs cannot point to any specific language—from anywhere—that outlaws kinship diversion.

Plaintiffs allege that District law requires a series of mandatory steps when CFSA learns of suspected abuse and neglect but acknowledge that those steps are not required if a parent consents to removing the child to the home of a relative.[2] That is kinship diversion or, as it is currently called by CFSA, Informal Family Planning Arrangements. *See CFSA's Performance Oversight Hearing Fiscal Year 2022–2023*, 110 (Feb. 17, 2023), https://tinyurl.com/4j93dvv8.

The District does not question Plaintiffs' good faith belief that kinship diversion is not the best method for accomplishing CFSA's goals, but that is a *policy* argument appropriate for the elected branches of government, not the courts. Indeed, Plaintiffs' counsel and other organizations have sought for years to have the Council pass legislation prohibiting the practice. But it remains legal under both federal and District law and represents one of CFSA's options for ensuring that children are provided with necessary care and assistance, ideally while remaining in the care of relatives, rather than being formally placed in a foster home.

As set forth in argument below, dismissal is appropriate because Plaintiffs fail to state a claim for any violation of the Social Security Act, which is not, in any event, privately enforceable; and they have not pled a colorable violation of any constitutional provision. And, regardless of whether Plaintiffs have stated federal claims, this Court should not reach Plaintiffs'

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[2] The first paragraph of both complaints here preface their allegations of "mandatory" actions by noting "[u]nless the parent consents to removal …"

local law claims. But even if the Court decides otherwise, the District did not violate the D.C. Human Rights Act; and Plaintiffs have not stated claims for common law negligence, fraudulent misrepresentation, or negligent misrepresentation.

BACKGROUND

I. Legal Framework

A. The Social Security Act

In 1980, "Congress used its Spending Clause powers" to enact the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.* (AACWA), as Title IV-E of the Social Security Act. *T.M. v. DeWine*, 49 F.4th 1082, 1085 (6th Cir. 2022). The AACWA created "a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services." *Suter v. Artist M.*, 503 U.S. 347, 350–51 (1992). "In order to obtain [federal] funding, the state must submit a plan for the operation of its foster care system and receive approval from the Secretary of the [U.S. Department of] Health and Human Services (HHS)." *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 61 (1st Cir. 2014). HHS is directed to take corrective actions if a state substantially fails to conform to the requirements of its plan and may require a state to implement a corrective action plan or, if necessary, withhold federal funds. *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir. 2013).

B. District of Columbia Law

1. The Child Abuse and Neglect Act

The Prevention of Child Abuse and Neglect Act (Abuse and Neglect Act) is codified, as amended, at D.C. Code §§ 4-1301.01, *et seq*. Under the Act, CFSA's legal obligation to "conduct a thorough investigation" is triggered when it receives a report of "suspected child abuse or neglect." D.C. Code §§ 4-1301.04(a)(1), (8). If CFSA substantiates the report, it must determine whether any children at risk "should be removed from the home or can be protected by

the provision of resources, such as those listed in §§ 4-1303.03 and 4-1303a." *Id*. § 4-1301.06(b)(3). That list of resources is broad and coextensive with the authority of the Director of CFSA,[3] and includes "services for families of neglected and abused children including services designed to help children, where safe and appropriate, to return to families from which they have been removed" and "services to families with children, child protective services, foster care, and adoption." *Id*. §§ 4-1303.03(a)(3), (a)(7).

If an abused or neglected child "cannot be adequately protected" by the services provided by the agency, CFSA "is authorized to," among other things, "[r]emove the child with the consent of the parent[.]" *Id*. § 4-1303.04(c)(1) (emphasis added).[4] CFSA may assist a parent to help arrange for the child to live temporarily with a relative, providing information and services to the family. *See* CFSA, *Kinship Care: A Guide to Exploring Your Options*, *available at* https://tinyurl.com/3d6ed6ya.

CFSA is also directed to make "reasonable efforts … to preserve and reunify the family …." *Id*. § 4-1301.09a(b)(1); *see also id*. § 4-1301.09a(b)(3) ("Reasonable efforts shall be made

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[3] D.C. Code § 4-1303.03 is titled, "Duties and powers of the Director." The Director's broad authority includes operation of "a program of treatment of services designed to promote the safety of children, reunification of families, and timely permanent placements"; "rehabilitative services to the child's family in an effort to reunify the family when a child has been adjudicated a neglected child and placed in foster care"; the power to "develop and test innovative models of practice" and "issue grants to community and neighborhood-based groups for programs that deliver prevention and intervention service"; and "[t]o provide other programs and services that are consistent with the purposes of this subchapter[.]" *Id*. §§ 4-1303.03(a)(11), (a)(14), (a-1)(2), (a-1)(3), (a-1)(3A)(A), and (a-1)(6).

[4] The use of the phrase "is authorized to" (as opposed to the term "shall") prior to listing the three options in D.C. Code § 4-1303.04(c), suggests that these are simply examples, not an exclusive list of the actions CFSA *must* take. *Cf., e.g., Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion.")).

to make it possible for the child to return safely to the child's home."). "Reasonable efforts to place a child for adoption, with an *approved kinship caregiver*, with a legal custodian or guardian, or in another permanent placement may be made concurrently with the reasonable efforts required by subsection (b) of this section." *Id.* § 4-1301.09a(f) (emphasis added).[5]

Thus, if a child is alleged to be abused or neglected, the District has a duty to investigate and, if the claim is substantiated, to take the child out of harm's way. *Turner v. District of Columbia*, 532 A.2d 662, 667 (D.C. 1987). But the District is not *required* to put every such child into foster care.[6] Fundamentally, foster care is intended to be a *temporary* bridge to some enduring home placement. For example, the Congressional Research Service (CRS) describes the concept at the highest level as follows: "When a child is found to be … unsafe in his or her own home, the state *may* act to remove the child from that home and to place him or her in foster care. Foster care is a *temporary* living arrangement intended to ensure a child's safety and well-being *until a permanent home can be reestablished or newly established for the child*." CRS,

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[5] Custody cannot be granted or revoked by CFSA. *See* D.C. Code § 16-2301(21) ("The term 'legal custody' means a legal status created by [an order of the Family Division of the Superior Court of the District of Columbia] which vests in a custodian the responsibility for the custody of a minor . . ."). *See also* D.C. Code § 16-2320(a)(3) (for children found to be neglected, the Court may transfer legal custody to CFSA; an authorized private organization; or "a relative or other individual who is found by [the Court] to be qualified to receive and care for the child[.]").

[6] Plaintiffs allege that the District, once a child has been "removed" from their home, "is required to place the child with a licensed foster parent[,]" *K.H.* Compl. ¶ 28, or "is required to place the child with a licensed or approved foster parent . . . ." *S.K.* Compl. ¶ 31. As support for these legal conclusions, Plaintiffs cite D.C. Code §§ 4-1303.04(a-1)(1), 4–217.02, and 16-2313. Plaintiffs are incorrect for two reasons. First, D.C. Code § 4-1303.04(a-1)(1) does not exist. Second, the other cited provisions only apply to children who have been formally removed from their homes (or had custody reassigned) by judicial order and/or formally placed into foster care. *See* D.C. Code § 4-217.02 (stating "foster care shall be provided in a foster family home"); § 4-217.01 (requiring the Mayor to provide aid "when removal of a child from the home … results from a judicial determination that continuation in such home is contrary to the child's welfare"); § 16-2313 (applies to "in custody" children).

Child Welfare: An Overview of Federal Programs, at 15 (2018), *available at* https://tinyurl.com/yzzn9hec (emphases added). Indeed, the "major objectives of the [AACWA] were to prevent *unnecessary* placement of children into foster home situations and to prevent children who were placed in foster care from getting 'lost in the system.'" H.R.Rep. No. 96–136, 96 Cong. 1st Sess. 46 (1979)." *In re Scott Cnty. Master Docket*, 672 F. Supp. 1152, 1204 (D. Minn. 1987), *aff'd sub nom.*, 868 F.2d 1017 (8th Cir. 1989) (emphasis added).[7] Not *every* child, or family, needs or desires this service, but Plaintiffs' proposed interpretation of law would force foster care on every family.

The practice of assisting families through Informal Family Planning Arrangements—or kinship diversion, as Plaintiffs call it—is one tool in CFSA's toolbox for helping families keep children safe. CFSA may utilize this tool when "[f]amilies may develop their own plan and identify supportive resources to help safely care for their children." *See* CFSA, *Administrative Issuance CFSA-22-2*, *available at* https://tinyurl.com/573pb58j, at 1. When a family in need of this service comes to CFSA's attention, a social worker—among other actions—assesses the child's safety and offers "supports and services based on the family's needs." *Id.* at 2. The social worker informs the family of material assistance and programs that offer financial benefits—including the Grandparent Caregiver Program and Close Relative Program—and can make referrals to community-based supports. *Id.* And "[o]nce a final determination has been

[7] The court went on to quote Congress in part as follows: "The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child. H.R.Rep. No. 96–136 at 47." *Cf. also Child v. Beame*, 412 F. Supp. 593, 596 (S.D.N.Y. 1976) (impact suit in which plaintiffs claimed defendants deprived them of their rights to "a permanent stable home" by keeping them in "temporary foster care settings" indefinitely).

made than an informal family planning arrangement is appropriate, and no further CFSA involvement is needed," the matter is closed and the family is free from further CFSA involvement. *Id.*

2. The Interstate Compact for the Placement of Children (ICPC)

The ICPC, codified at D.C. Code §§ 4-1421, *et seq.*, "is a uniform law that governs the [foster] placement of children across state lines. It has been adopted by all fifty states, the District of Columbia, and the Virgin Islands." *In re T.M.J.*, 878 A.2d 1200, 1202 (D.C. 2005) (citation omitted). The ICPC establishes procedures for "sending states" to propose formal foster-care placements in "receiving states," including, among these procedures, that the receiving states confirm, in writing, "that the proposed placement does not appear to be contrary to the interests of the child." *Id*. (citing D.C. Code § 4-1421, Art. III(d)). According to the ICPC, the sending state retains jurisdiction over and financial responsibility for the child "during the period of the placement." D.C. Code § 4-1421, Art. V. But the ICPC is "inapplicable" if the child is sent or brought into the receiving state by the parent or left with a relative in the receiving state. *In re T.M.J.*, 878 A.2d at 1203 (citing D.C. Code § 4-1421, Art. VIII(1)). In other words, the ICPC "does not apply to private arrangements for a child's placement when those arrangements are made between a limited class of persons consisting primarily of close relatives and not brought about by a 'sending agency.'" *Id*. at 1203–04 (quoting *In re Miller*, 36 P.3d 989, 991 (Or. App. 2001)).

II. Plaintiffs' Allegations and Claims.

Plaintiffs challenge CFSA's informal practice of arranging for children who are suspected victims of abuse or neglect to live with a relative caregiver rather than formally placing them with a foster parent or in a group setting.[8] *K.H.* Compl. ¶ 3; *S.K.* Compl. ¶ 4.

In *K.H.*, Plaintiffs allege that, after substantiating abuse and neglect by their parents, CFSA helped informally place Plaintiff K.J. in the care of her maternal aunt, K.H.; helped informally place Plaintiff L.E. in the care of her maternal great-aunt, M.M.; and helped informally place Plaintiff T.C. and four of his siblings with their paternal grandmother, L.C. *K.H.* Compl. ¶¶ 4–6. In *S.K.*, Plaintiffs allege that C.G.1, C.G.2, and C.G.3 lived with their father, C.A.G., after the death of their mother in 2014. *S.K.* Compl. ¶ 5. After C.A.G. became unable to care for the children, Plaintiffs allege that the District informally placed the children with N.G., in Texas. *Id.*

In both *K.H.* and *S.K.*, Plaintiffs allege that a CFSA employee "did not follow the legally required removal procedures" and "did not inform [the relative caregiver] of all her options to participate in [the child's] care . . . ." *K.H.* Compl. ¶¶ 48, 66, 84; *S.K.* Comp. ¶ 54.

Plaintiffs contend that if a charge of abuse or neglect is substantiated, "[u]nless a parent consents to removal," CFSA must initiate a legal proceeding and seek custody of the child "so that the child can be placed in foster care." *K.H.* Compl. ¶ 1; *S.K.* Compl. ¶ 1. Plaintiffs allege

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[8] Plaintiff K.H. is the maternal aunt of K.J., a girl who was six years old (at the time of filing of the operative Complaint, as are all ages subsequently referenced). *K.H.* Compl. ¶ 4. Plaintiff M.M. is the maternal great-aunt of L.E., a one-year-old girl. *Id.* ¶ 5. Plaintiff L.C. is the paternal grandmother of T.C., a fifteen-year-old boy. *Id.* ¶ 6. Plaintiffs C.G.1 and C.G.2 (12-year-old twin girls) and C.G.3 (an 11-year-old boy) are siblings; Plaintiff N.G. is their maternal aunt, who resides in Texas, and Plaintiff S.K. is the children's maternal great grandmother, who resides in Maryland. *S.K.* Compl. ¶¶ 5–7.

that under District law, CFSA may only take specified actions upon a report of "child abuse or neglect," *K.H.* Compl. ¶ 26; *S.K.* Compl. ¶ 29, and that it must follow formal procedures for placing a child in foster care, with a relative or otherwise. *K.H.* Compl. ¶¶ 27–28; *S.K.* Compl. ¶¶ 30–31. Plaintiffs claim that CFSA will:

> [C]ontact a relative to see if they are willing to care for the child. If CFSA identifies a willing relative that is available to care for the child, CFSA deliberately ignores its responsibility to inform the relative of their option to [become licensed as a foster parent or have the child be placed with them through the ICPC procedures and] typically directs or pressures the relative to file an emergency motion for legal and physical custody, including by threatening to place the child in foster care with a stranger if the relative does not agree to do so.

K.H. Compl. ¶ 37; *S.K.* Compl. ¶ 46.

Plaintiffs allege that, as a result of kinship diversion, they are "denied the full services, economic benefits and other rights to which they are entitled" under law, including foster care maintenance payments. *K.H.* Compl. ¶¶ 3, 7; *S.K.* Compl. ¶¶ 4, 10. The *S.K.* Plaintiffs also allege that this practice results in CFSA not taking steps required under the ICPC for children formally placed in other states under the ICPC, such as receiving approval from the appropriate receiving state to "ensure the placement is safe and appropriate for the child." *S.K.* Compl. ¶ 47.

Plaintiffs allege the District has violated several provisions of the AACWA. *K.H.* Compl. ¶¶ 95–99 (Count I); *S.K.* Compl. ¶¶ 61–65 (Count I). In addition, Plaintiffs allege violations of the Equal Protection Clause, *K.H.* Compl. ¶¶ 100–106 (Count II); *S.K.* Compl. ¶¶ 66–72 (Count II); the Due Process Clause, *K.H.* Compl. ¶¶ 107–113 (Count III); *S.K.* Compl. ¶¶ 73–78 (Count III); and the D.C. Human Rights Act, *K.H.* Compl. ¶¶ 114–119 (Count IV); *S.K.* Compl. ¶¶ 79–84 (Count IV). Plaintiffs also claim the District committed common law negligence, *K.H.* Compl. ¶¶ 120–124 (Count V); *S.K.* Compl. ¶¶ 85–89 (Count V); fraudulent misrepresentation, *K.H.* Compl. ¶¶ 125–129 (Count VI), *S.K.* Compl. ¶¶ 90–93 (Count VI); and

negligent misrepresentation, *K.H.* Compl. ¶¶ 130–132 (Count VII); *S.K.* Compl. ¶¶ 94–96 (Count VII).

Based on these claims, Plaintiffs seek a declaration that CFSA's "policy of kinship diversion" is unlawful as well as an injunction prohibiting the practice prospectively, *K.H.* Compl. at 40–41; *S.K.* Compl. at 32–33, compensatory damages in the amount of foster care maintenance payments they would have been entitled to "since the kinship diversion was effected," if CFSA had formally placed them in foster care in a licensed foster family home, and "other damages," attorney's fees and costs. *K.H.* Compl. at 41; *S.K.* Compl. at 33.[9]

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Twombly*, 550 U.S. at 556). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. at 679. "[A] complaint [does

[9] In their Prayers for Relief, Plaintiffs expressly seek a declaration that the Defendants' actions violate "the D.C. Child Abuse and Neglect Act, the Interstate Placement Compact, and the D.C. Human Rights Act," but Plaintiffs do not allege independent violations of the Abuse and Neglect Act or ICPC. To the extent Plaintiffs allege violations of those laws, the allegations are included in support of Plaintiffs' claims for constitutional violations or negligence. Id. and infra. Accordingly, Defendants will not read Plaintiffs' Prayers for Relief as separately alleging such violations. *See Rayner v. Yale Steam Laundry Condo. Ass'n*, 289 A.3d 387, 401 (D.C. 2023) (affirming dismissal of "claims" for injunctive relief and damages because such "claims" are "legal remedies, not causes of action, and a court cannot grant a remedy without a cause of action"); Fed. R. Civ. P. 8(a).

not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 557).

ARGUMENT

I. Plaintiffs Fail To State a Claim for Violation of the Social Security Act and the Cited Provisions Are Not Privately Enforceable (Count I).

Plaintiffs argue that federal law prohibits kinship diversion and that the District violated numerous provisions of that law when it failed to formally place the Plaintiff-children in foster care, conduct formal removal proceedings in Superior Court, and inform certain individuals of their option to become licensed foster parents and license them. *K.H.* Compl. ¶¶ 96–97; *S.K.* Compl. ¶¶ 62–63.[10] But Plaintiffs' allegations do not establish that the District violated federal law; even if they could, there is no private right of action to enforce these provisions.

A. Plaintiffs Fail to State a Claim for Violation of the AACWA.

1. Plaintiffs Fail To State a Claim That They Are Entitled to Maintenance Payments or Formal Removal and Placement under 42 U.S.C. § 672.

Section 672(a) describes specific requirements that make a child eligible to receive foster care maintenance payments. Section 672(a)(1)(A) states that maintenance payments must be made only if the removal and foster care placement meet the definition of Section 672(a)(2)(A).

[10] Plaintiffs specifically seek to enforce certain provisions of 42 U.S.C. §§ 671, 672, and 675. *K.H.* Compl. ¶¶ 96–97; *S.K.* Compl. ¶¶ 62–63. Plaintiffs allege that those statutory provisions require the District to: (1) remove children "from their home pursuant to a voluntary placement agreement or judicial determination that continuation in the home would be contrary to the welfare of the child"; (2) place children in a home that "meets the standards for foster family homes, and has been licensed or approved" by the District; (3) provide quality "services to protect the child's safety and health"; (4) establish a written case plan and case review system that meets various requirements; (5) provide foster care maintenance payments; (6) inform children's relatives of their options to participate in the care and placement of the child"; and (7) inform children's relatives of "the requirements to become a foster family home and the additional services and support that are available for children placed in such a home[.]" *K.H.* Compl. ¶¶ 96–97; *S.K.* Compl. ¶¶ 62–63.

That provision, in turn, requires the "removal and foster care placement" to be made "in accordance" with "a voluntary placement agreement," or "a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 671(a)(15) . . . have been made." 42 U.S.C. § 672(a)(2)(A). The child's placement must also be the responsibility of the state, *id*. § 672(a)(2)(B), and the child must be placed "in a foster family home." *Id*. § 672(a)(2)(C). "Foster family home" is further defined as a home "that is licensed or approved by the State … that meets the standards established for the licensing or approval." *T.M.*, 49 F.4th at 1089 (quoting 42 U.S.C. § 672(c)(1)(A)(i)).

Plaintiffs do not allege that they meet the requirements of Section 672. In fact, Plaintiffs make clear that the Plaintiff-children were *not* placed in formal foster care, *K.H.* Compl. ¶¶ 48–53, 66–74, 84–92; *S.K.* Compl. ¶¶ 54–57, and that the relative caregivers were *not* licensed as foster parents, *K.H.* Compl. ¶¶ 4–6, 23(b); *S.K.* Compl. ¶¶ 5, 7, 26(b), 45. Nor do Plaintiffs allege that the Plaintiff-children's "placement and care" were the responsibility of the state. As numerous federal courts have made clear, failures like these doom Plaintiffs' claim to foster care maintenance payments. *See T.M.*, 49 F.4th at 1090 (affirming trial court's holding that, because the plaintiff-children were not placed in a Title IV-E licensed "foster family home," they were ineligible for foster care maintenance payments); *id*. at 1091 ("[HHS] told us directly that caregivers who are held to a different standard than licensed foster family homes are ineligible for [foster care maintenance payments].") (citing *J.B-K. v. Sec'y of Ky. Cabinet for Health & Fam. Servs.*, 48 F.4th 721, 729–30 (6th Cir. 2022)); *H.C. v. Governor of Ohio*, Civil Action No. 1:20-cv-00944, 2021 WL 3207904, *13 (S.D. Ohio July 29, 2021) (holding that relative caregivers are not entitled to foster care maintenance payments unless they are approved under

the same standards used for licensed foster caregivers); *Johnson v. N.Y. State Office of Child and Family Servs.*, Civil Action No. 16-1331, 2017 WL 6459516, at *8 (N.D.N.Y. Dec. 18, 2017) (citing *Maher v. White*, Civil Action No. 90-4674, 1992 WL 122912, at *3 (E.D. Pa. June 2, 1992)) (an individual who is not a foster child or foster parent has no claim under the AACWA, as the provisions' benefits "'are only available to maintain the child while in foster care'").

The gravamen of Plaintiffs' claim seems to be that CFSA was required to treat relative caregivers as licensed foster parents, to formally remove the Plaintiff-children, and to then place them into Plaintiff-caregivers' homes as foster children. But the plain text of 42 U.S.C. § 672 creates no such duties. It does not *require* that children be placed in foster care; it only makes payments applicable to certain children. *See D.O. v. Glisson*, 847 F.3d 374, 381 (6th Cir. 2017). ("Section 672(a) restricts the class of children entitled to benefits . . . .").

2. Plaintiffs Fail To State A Claim Under 42 U.S.C. § 671.

Nor does the plain text of 42 U.S.C. § 671 create any such duties, as discussed below. Plaintiffs allege violations of multiple subsections of Section 671(a), which are all enumerated as "[r]equisite features of [a] State plan," which must be approved "by the Secretary" in "order for a State to be eligible for payments under this part . . . ." But none of these provisions express that the District is required to formally remove the Plaintiff-children, license the Plaintiff-caregivers, and then indefinitely place the children into the caregivers' homes as foster children. Nor have Plaintiffs otherwise alleged violations of these provisions.[11]

[11] Plaintiffs do not allege that the District has violated federal law by not putting into place a "plan" approved by HHS; they only allege vaguely that CFSA's "custom and practice of kinship diversion" has deprived Plaintiffs of their rights under Title IV-E, *K.H.* Compl. ¶ 98; *S.K.* Compl. ¶ 64. In any event, the responsibility for enforcing the requirement for a plan would fall on HHS, not Plaintiffs here. *See* 42 U.S.C. § 671(b).

Section 671(a)(1) simply requires that a State plan "provides for foster care maintenance payments in accordance with section 672," as well as adoption assistance, and "at the option of the State," other specified services. As discussed above, Plaintiffs have not alleged entitlement to foster care maintenance payments and nothing in this subsection changes that.

Section 671(a)(10) requires that a state plan: (1) provide "for the establishment or designation" of a state authority responsible for "establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations"; (2) apply those standards to institutions and homes receiving funds; and (3) include policies as to liability. Again, nothing in this text creates a duty on the District to formally remove and place the Plaintiff children in foster care, and the Complaints do other otherwise suggest how the District has violated this provision. *E.g.*, *K.H.* Compl. ¶ 96(b) (alleging Defendants deprived Plaintiffs of rights conferred on them by AACWA to "placement in a home that meets the standards for foster family homes, and has been licensed or approved by the State, 42 U.S.C. §§ 671(a)(10), 672(c)"); *S.K.* Compl. ¶ 62(b) (same).

Similarly, 42 U.S.C. § 671(a)(16) requires the state plan to "provide[ ] for the development of a case plan . . . for each child *receiving foster care maintenance payments* under the State plan . . . ." 42 U.S.C. § 671(a)(16) (emphasis added). "A case plan is a written document that must include the child's records and information about the plans for the child, such as the prospective placement, the services the child will receive, and the steps taken toward stability and eventual permanency." *Connor B.*, 774 F.3d at 61 (citing 42 U.S.C. § 675(1)). As discussed above, Plaintiffs do not meet the statutory definition to receive foster care maintenance payments. As such, the requirement of Section 671(a)(16) is not triggered. Nor does anything in its text separately create a requirement that the District place children into foster care.

Likewise, Section 671(a)(22) provides that "the State shall develop and implement standards to ensure that children *in foster care placements* in public or private agencies are provided quality services that protect the safety and health of the children." *Id.* (emphasis added). Again, Plaintiffs are not in foster care; and nothing in this subsection creates a requirement that they be placed in foster care. Further, Plaintiffs fail to allege that the District has not developed such standards or even that the District has failed to protect children's health and safety.

Finally, Section 671(a)(29) requires that the state plan "provides that, within 30 days after the removal of a child from the custody of" the parents, the state shall provide notice to adult relatives of the child "that the child has been or is being removed from the custody of" the parents, "explain[] the options the relative has under Federal, State, and local law to participate in the care and placement of the child," including "the requirements under … this subsection to become a foster family home . . . ." Plaintiffs do not allege that the District removed them from the custody of their parents; they allege that the District *failed* to do so. Accordingly, per its plain text, this provision also does not apply. Nor does it create any requirement that the District remove the children, license the caregivers, or create a foster family.

B. Plaintiffs Lack a Cause of Action for Violations of the AACWA.

"Congress creates federal causes of action," but "[i]f the text of a statute does not provide a cause of action, there ordinarily is no cause of action." *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1097 (D.C. Cir. 2017). The text of the AACWA does not expressly create any private right of action to enforce any of the provisions Plaintiffs cite. On "rare occasions, the Supreme Court has recognized implied causes of action . . . ," *id*. at 1097, or permitted enforcement of federal statutory rights through 42 U.S.C. § 1983, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Although these inquiries are different, they "overlap" in that, for both,

courts must "determine whether Congress *intended to create a federal right*." *Id*. (emphasis in original).

"A statute creates a right enforceable under Section 1983 if (1) 'Congress . . . intended that the provision in question benefit the plaintiff,' (2) 'the plaintiff . . . demonstrate[s] that the right . . . protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence,' and (3) 'the statute . . . unambiguously impose[s] a binding obligation on the States' using 'mandatory, rather than precatory, terms.'" *DuBerry v. District of Columbia*, 824 F.3d 1046, 1051 (D.C. Cir. 2016) (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)). The Supreme Court has clarified the first prong of that analysis, finding that a statute must provide for an "unambiguously conferred right to support a cause of action." *Gonzaga*, 536 U.S. at 283. In other words, the focus is on whether the "text and structure" indicates that "Congress intends to create new individual rights." *Id*. at 286. That analysis looks to whether: (1) the statute contains "'rights-creating' language," *id*. at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)); (2) the statute has an "aggregate focus" instead of being "concerned with whether the needs of any particular person have been satisfied," *id.* (quotation omitted); and (3) Congress created a mechanism for federal review. *Id*. at 289–90.

1. Congress Has Strongly Indicated the Challenged Provisions Do Not Create Federally Enforceable Rights.

Here, Plaintiffs attempt to enforce 42 U.S.C. §§ 671(a)(1), (10), (16) 671(22), and (29), as well as 672(a)(2), and 672(c). *See Estate of Place v. Anderson*, 398 F. Supp. 3d 816, 843 (D. Col. 2019) (analysis of AACWA rights "requires attention to the specific provisions to have been violated"). *See also Melton v. District of Columbia*, 85 F. Supp. 3d 183, 191 (D.D.C. 2015) ("A private individual has no cause of action under the [AACWA] itself or through an action under 42 U.S.C. § 1983."). None of the cited provisions permit private enforcement.

The Supreme Court has only yet ruled on one subsection of the AACWA (§ 671(a)(15)) and found it did not create an enforceable federal right. More than 30 years ago, in *Suter*, it held that "[s]ince the [AACWA] conferred no specific, individually enforceable rights, there was no basis for private enforcement, even by a class of the statute's principal beneficiaries." 503 U.S. at 357. Congress subsequently amended the law to expressly address the holding in *Suter*, by responding to the Court's reasoning, though it confirmed that § 671(a)(15) "is not enforceable in a private right of action." It stated:

> [T]his section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2, as added by Pub. L. 103-382, Title V, § 555(a), Oct. 20, 1994, 108 Stat. 4057. Two years later, Congress amended the law again, this time to expressly state that "[a]ny individual who is aggrieved by a violation of Section 671(a)(18) of this title by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court." 42 U.S.C. § 674(d)(3)(A), as added by Pub. L. 104-188, Title I, § 1808(b), Aug. 20, 1996, 110 Stat. 1903.

But *none* of the provisions Plaintiffs seek to enforce were so amended. Consequently, Congress's choice to amend the statute to include a private right of action to enforce only *some* provisions of the AACWA, but not others, "is strong evidence that Congress did not intend these other various State plan elements . . . to confer rights enforceable pursuant to § 1983.'" *T.F. by Kenner v. Hennepin Cnty.*, Civil Action No. 17-1826, 2018 WL 940621, *6 (D. Minn. Feb. 16, 2018) (quoting *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 489 (D.N.J. 2000)). *See also*

Gonzaga, 536 U.S. at 286 ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.").

2. Subsections (10), (16), (22), and (29) of § 671(a) Are Not Privately Enforceable Per Their Plain Text.

Further, none of the individual subsections meet the high bar set by *Gonzaga*. Section 671(a)(10) sets out how a state agency should establish and enforce standards for foster homes and childcare institutions; it is not, however, "concerned with whether the needs of any particular person have been satisfied," *Gonzaga*, 536 U.S. at 288, nor does it create any clear standards by which a court could determine if an individual beneficiary's alleged right has been violated, *see DuBerry*, 824 F.3d at 1051. Section 671(a)(10) is therefore not worded in sufficiently mandatory terms to meet the standard set out in *Gonzaga*. *See also White ex rel. White v. Chambliss*, 112 F.3d 731, 739 (4th Cir. 1997) (holding that Section 671(a)(10) does not create an enforceable right).

Section 671(a)(16) requires that the state plan "provid[e] for the development of a case plan for each child receiving" maintenance payments for "a case review system." It too is not concerned with the needs of particular children; it imposes an obligation on the state to receive approval from HHS, and it is not privately enforceable. *T.F.*, 2018 WL 940621, at *6 ("[T]he provision at issue here is phrased as a directive to states regarding what the state must do to be eligible for foster-care and adoption-assistance payments, not as an 'unambiguously conferred right' . . . for the children mentioned in the case plan section.").[12] *See also Huey v. Russell*, Civil

[12] Plaintiffs seek to enforce the definition of "case plan" in 42 U.S.C. § 675(1), but that provision is, for the reasons discussed in n.13, below, not enforceable as it appears only in the definitions section of the AACWA. *T.F. by Kenner*, 2018 WL 940621, at *5 (definition provision in Section 675(1) cannot support private action under Section 1983). Similarly, 42

Action No. 2:21-cv-00091-JPH-MG, 2022 WL 973041, *3 (S.D. Ind. Mar. 31, 2022) ("While children in the foster care system are undoubtedly the intended beneficiaries, the text of § 671(a)(16) is a directive to the States. Merely referencing "each child" in the statute does not unambiguously confer the "sort of 'individual entitlement' that is enforceable under § 1983."); *31 Foster Children v. Bush*, 329 F.2d 1255, 1271 (11th Cir. 2003) (explaining Section 671(a)(16) "conditions receipt of federal funds on the existence of a state plan that, among other things, provides for a case review system which meets the requirements described in section 675(5)(B) . . . [it] does not go beyond that and explicitly require a plan to meet the requirements described in" Section 675(5)) (cleaned up).[13]

Section 671(a)(22), too, by its very terms, requires a state to take further, generalized actions (*i.e.*, providing "quality" services), not the specific types of mandatory actions necessary to meet the standard set out in case law. *Gonzaga*, 536 U.S. at 288 (statute with "aggregate" focus "cannot give rise to individual rights"); *DuBerry*, 824 F.3d at 1051. Section 671(a)(29) has much more specific language than (22), but the only decision Defendants have found considering

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U.S.C § 675(5) simply defines the term "case review system," and does not place a substantive obligation on states or confer a benefit to children or caregivers.

[13] To the extent Plaintiffs' claim for damages, *K.H.* Compl. at 41; *S.K.* Compl. at 33, is based on Section 671(a)(16), the "written case plan requirement does not confer rights that can be the subject of an action for damages under § 1983." *Estate of Place*, 398 F. Supp. 3d at 844. Several federal courts have held that plaintiffs may not bring an action under 42 U.S.C. § 1983 seeking to recover damages for a violation of the AACWA. *See, e.g.*, *Timmy S. v. Stumbo*, 916 F.2d 312, 316 & n.6 (6th Cir. 1990); *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, 928 (8th Cir. 1987); *Johnson ex rel. Estate of Cano v. Holmes*, 377 F. Supp. 2d 1084, 1097 (D.N.M. 2004). *Cf. Kincade*, 712 F.3d at 1197–98 (Congress in AACWA did not confer on foster care providers an individually enforceable right under § 1983 to payments from the state sufficiently large to cover the cost of each item enumerated in the provision defining foster care maintenance payments).

whether it confers a federally enforceable right has found it does not. *Murphy v. Baker*, Civil Action No. 2017 WL 2350246, at *9–10 (D. Mass. May 4, 2017).

3. Subsections Pertaining to Foster Care Maintenance Payments Do Not Create Privately Enforceable Rights Per Their Plain Text.

Plaintiffs claim the District has violated the AACWA by failing to provide them with foster care maintenance payments when the Plaintiff-children were sent to live with relative caregivers. *K.H.* Compl. ¶¶ 96(j), 97(c); *S.K.* Compl. ¶¶ 62(l), 63(c). But the text and structure of Sections 671(a)(1) and 672(a)(1) demonstrate that neither provision confers an enforceable right.[14]

First, Section 671(a)(1) speaks to the requirement that a state plan provide for payment of foster care maintenance payments. *See Kincade*, 712 F.3d at 1198 ("the overwhelming focus is upon the conditions precedent that trigger" the requirement states "remit foster care maintenance payments"). Section 671(a)(1) does not set out the content of those payments, or describe who the payments benefit; instead, it simply sets out the requirement that a state plan include certain services and instructs HHS to not approve plans lacking those requirements and to take action if a state fails to meet its obligations. Those requirements are not consistent with the Supreme Court's stringent test of private enforceability. *See Gonzaga*, 536 U.S. at 287 ("'rights-creating' language").

Although Section 672(a) provides that a state "shall make foster care maintenance payments" on behalf of specified children, as the Eighth Circuit noted in *Kincade*, rather than

[14] Plaintiffs seek to enforce 42 U.S.C. §§ 672(d) or 675(4), but those provisions cannot confer an enforceable right because they merely provide definitions. *31 Foster Children*, 329 F.2d at 1271 (where provisions "are definitional in nature, they alone cannot and do not supply a basis for conferring rights enforceable under § 1983"); *see also Kincade*, 712 F.3d at 1197 ("[F]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent.").

conferring a private right, "[t]he function of § 672(a)(1) is to serve as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds; otherwise, the state bears the full cost of these payments," 712 F.3d at 1198, and the "remainder of § 672(a) defines and expands upon the eligibility limitations in" subsection (a)(1), *id*. at 1199. Said differently:

> The title of § 671(a)(1), 'Eligibility,' is thus an apt descriptor of the subsection's focus—it sets forth limitations on when a foster care maintenance payment is eligible for partial federal reimbursement . . . [t]he asserted provisions inescapably serve to establish restrictions on the state foster care expenditures that will be eligible for federal matching.

Id. at 1199. As such, "the failure to meet the requirements of § 672(a) 'triggers a funding prohibition,' and the asserted right is only mentioned in the context of these funding prohibitions." *Id.* at 1202.

II. Plaintiffs Fail To State a Claim For a Violation of the EPC (Count II).

Plaintiffs claim that the District has discriminated against them in violation of the Equal Protection Clause[15] by using kinship diversion, as opposed to placement in licensed foster care, to deprive them of their "rights" and "entitlements" under the AACWA, the Abuse and Neglect Act, and the ICPC. *S.K.* Compl. ¶¶ 67–70; *K. H.* Compl. ¶ 102. Specifically, Plaintiffs allege that the children affected by kinship diversion were not given the same "procedures, services, and support" as provided to other children who have "experienced a similar type and severity of mistreatment," and caregivers also lacked the "same procedures, services, and support" as foster

[15] The District of Columbia is subject to the requirements of the Fifth Amendment Due Process Clause, which contains an equal protection component that is considered substantially the same as that in the Fourteenth Amendment. *E.g.*, *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) ("Equal protection analysis is substantially identical under the Fifth Amendment and the Fourteenth") (subsequent history omitted).

parents caring for children who experienced a similar type and severity of mistreatment." *S.K.* Compl. ¶¶ 69, 70; *K.H.* Compl. ¶¶ 103, 104. And Plaintiffs allege that the District's policies are not rationally related to advancing a legitimate government interest. *See S.K.* Compl. ¶ 69; *K.H.* Compl. ¶ 104.

The Equal Protection Clause protects against intentional and arbitrary discrimination, "whether by express terms of a statute or by its improper execution through a duly constituted agent." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1918). "To advance an equal protection claim, a plaintiff must assert facts that support the allegation that the government intentionally treated [him or her] differently from others who were similarly situated …." *BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 34 (D.D.C. 2015) (citation omitted). The Supreme Court has "made clear that proof of [ ] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003). Moreover, discriminatory intent or purpose "implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). And, even if Plaintiffs show that there has been intentional differential treatment, the practice would not violate the Equal Protection Clause if it is shown to have a rational basis. *See Romer v. United States*, 517 U.S. 620, 631 (1996). As shown below, Plaintiffs' equal protection claim fails to meet this standard.

A. Plaintiffs Have Not Plausibly Alleged That the District Intentionally Treated Them Differently Than Others Who Were Similarly Situated.

Plaintiffs do not allege facts supporting their claim that they were intentionally treated differently than other children or caregivers in the foster care system. *S.K.* Compl. ¶ 69, 70; *K.H.* Compl. ¶ 103, 104. "To advance an equal protection claim, a plaintiff must assert facts that

support the allegation that the government intentionally treated [him or her] differently from others who were similarly situated . . . ." *BEG Invs.,* , 85 F. Supp. 3d at 34 (citation omitted). The Supreme Court has "made clear that proof of [ ] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls*, 538 U.S. at 194.

As to Plaintiffs' first argument—differential treatment of those in foster care as opposed to kinship diversion—Plaintiffs do not allege facts supporting their claim that they were intentionally treated differently than others. Instead, Plaintiffs allege facts regarding their *own* interactions with CFSA and placement in kinship diversion, and then aver that CFSA acted with discriminatory intent. But Plaintiffs do not actually plead *facts* that would support an inference of intent to treat *them* differently than those children placed into formal foster care, or allegations regarding CFSA's basis for doing so. So too, Plaintiffs fail to include any facts regarding "children who have experienced a similar type and severity of mistreatment" but were treated differently. As a result, "[s]ince Plaintiffs do not even allege intentional discrimination, their equal-protection claim must be dismissed." *Porter v. U.S. Capitol Police Bd*., 816 F. Supp. 2d 1, 6 (D.D.C. 2011); *see also Williamson v. Lee Optical of Ok., Inc.*, 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination").

Plaintiffs' equal protection claim also falls short because they fail to include any facts that would show that they were treated differently from others who were similarly situated. *See Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996) ("The dissimilar treatment of dissimilarly situated persons does not violate equal protection."); *see also Atherton v. District of Columbia Office of the Mayor*, 567 F.3d 672, 688 (D.C. Cir. 2009) (affirming dismissal of equal protection claims where plaintiff's "spare facts and allegations" did "not permit the court to infer more than the mere possibility of

misconduct"). Specifically, Plaintiffs allege that children in kinship diversion are treated differently than "other children who have experienced a similar type and severity of mistreatment" and caregivers are treated differently than foster parents. *S.K.* Compl. ¶ 69, 70; *K.H.* Compl. ¶ 103, 104. But children and caregivers involved in kinship diversion are not similarly situated to children and caregivers in the foster system. As noted above, caregivers and children placed through kinship diversion are not required to go through the same process as those in the foster care system and are not held to the same standard; for example, the children placed through kinship diversion are not removed through formal court proceedings and caregivers are not required to be licensed. *See* Background, Section I.B.1 and n5, n.6, above. Kinship caregivers can apply for foster care licensure just as foster parents had to apply and be deemed eligible before participation in the foster care system. Indeed, two Plaintiffs did apply, but were not approved. *K.H.* Compl. ¶¶ 55, 69, 86. Those Plaintiffs do not allege they were treated differently than other individuals as to their applications for licensure or benefits, or that those who are treated differently, if any exist, are similarly situated. Plaintiffs' allegations are therefore insufficient. *See Women Prisoners*, 93 F.3d at 924 (("The dissimilar treatment of dissimilarly situated persons does not violate equal protection."). As a result, Plaintiffs have failed to allege a plausible claim under the Equal Protection Clause.

B. Even If Kinship Diversion Treated Plaintiffs Differently from Individuals Involved in the Foster Care System, There Is a Rational Basis for the Differential Treatment.

"The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way." *Metro. Wash. Ch., Assoc. Builders & Contractors, Inc. v. District of Columbia*, 57 F. Supp. 3d 1, 28 (D.D.C. 2014)

(quotations and citation omitted). When a challenged classification impinges on a fundamental right or targets a suspect class, it is subject to strict scrutiny. *Id.* The particular rights asserted here—certain procedures, services, and support provided to foster families—have not been determined to be fundamental, in a constitutional sense, by the Supreme Court or the D.C. Circuit. *See S.K.* Compl. ¶ 68–70; *K.H.* Compl. ¶ 102. And Plaintiffs do not allege that the children and caregivers affected by the kinship diversion practice are a suspect class. *See generally K.H.* Compl.; *S.K.* Compl. Consequently, to the extent there is any difference in treatment, the classification need only bear a "rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The Plaintiffs do not appear to dispute that the rational basis test applies here. *See S.K.* Compl. ¶ 69; *K.H.* Compl. ¶ 104.

Given how "highly deferential" the standard is, *Dixon v. District of Columbia*, 666 F.3d 1337, 1342 (D.C. Cir. 2011), "it should come as no surprise that the [Supreme] Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny," *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). "On the few occasions where [it has] done so, a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group." *Id.* (alterations and internal quotation marks omitted). Such a finding is not plausible here.

Here, Plaintiffs simply cannot point to factual allegations that plausibly establish irrationality. As noted above, CFSA, through its Director, is charged with the obligation to design services and programs that "promote the safety of children" and "reunification of families," including the power to "develop and test innovative models of practice." D.C. Code § 4-1303.03(a)(11), (a-1)(2). It is conceivably rational that the kinship diversion practice provides a reasonable option for the District to carry out this mission. The kinship diversion practice

allows children to stay with a trusted caregiver while not subjecting the family to involvement in the court system and the foster care standards, which could be a family's preference if they are averse to court involvement or concerned about the rigorous foster care standards. Plaintiffs do not actually challenge that kinship diversion, as a practice, is a sensible option for achieving the ends of child safety and well-being. Rather, Plaintiffs' arguments are predominantly about certain details around the District's *policy* of kinship diversion—for example, the use of case plans, monetary supports, and other services—but even imperfect policies do not escape a finding of rational basis; "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993).

III. Plaintiffs' Fifth Amendment Procedural Due Process Claim Should Be Dismissed Because Plaintiffs Have Not Been Deprived of Any Protected Liberty or Property Interest (Count III).

All the Plaintiff children allege that Defendants have deprived them of "their rights" under the AACWA and District law "without providing an adequate or meaningful opportunity to be heard." *S.K.* Compl. ¶ 74; *K.H.* Compl. ¶ 108. The Plaintiff children in *K.H.* further allege deprivation of "their constitutionally protected right to familial integrity without providing an adequate or meaningful opportunity to be heard." *K.H.* Compl. ¶ 109. And all the Plaintiff caregivers allege deprivation of their "right to receive foster care maintenance payments, without" adequate or meaningful opportunity to be heard. *K.H.* Compl. ¶ 110; *S.K.* Compl. ¶ 75. Plaintiffs' claims should be dismissed because they fail to allege what process is due, fail to allege that existing procedures are inadequate, and fail to allege deprivations of cognizable interests.

A. Plaintiffs Fail To Allege What Process Is Due.

Plaintiffs' procedural due process claims can be quickly dismissed because the Complaints lack any mention of what process is allegedly due. *See generally id.* Indeed, in *Doe by Fein v. District of Columbia*, the D.C. Circuit rejected a procedural due process claim similar to Plaintiffs' because the plaintiff there failed to allege "what, if any, additional process is due." 93 F.3d 861, 868 (D.C. Cir. 1996). There, the plaintiff alleged that the Abuse and Neglect Act created a substantive right to "protective services" and that she had been denied those services without due process of law. *Id*. at 867–68. The court affirmed dismissal, reasoning that one cannot allege such a claim "without even suggesting what sort of process is due." *Id*. at 869. *See also Elkins v. District of Columbia*, 690 F.3d 554, 561 (D.C. Cir. 2012) (affirming dismissal of due process claim when complaint said "nothing about the process [plaintiff] claims is due").

So too here. Plaintiffs' Complaints contain no hints of what procedures they "should have" received. Their procedural due process claims should therefore be dismissed.

B. Plaintiffs Fail To Allege That Existing Procedures Are Inadequate.

Relatedly, and as in *Doe*, Plaintiffs here have failed to allege that existing procedures are inadequate. *See Dist. Atty's Off. For Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–71 (2009) (rejecting procedural due process claim when available state procedures were "adequate on their face" and plaintiff had never tried them); *Doe*, 93 F.3d at 869 (reasoning plaintiff failed to state a claim because she did "not call into question the adequacy of her tort remedy under D.C. law"). The AACWA requires that state plans "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 671(a)(12). And the District has made such provisions: The Plaintiff caregivers, *if* they applied for a foster home license, have a right to a fair hearing concerning any denial and to appeal the administrative

decision to the D.C. Court of Appeals. *See* 29 DCMR §§ 5901.1(d), 5908, 5909, 5911. The Plaintiff children also have available tort remedies. *Turner*, 532 A.2d at 667; *see also District of Columbia v. Harris*, 770 A.2d 82 (D.C. 2001) (affirming duty under the Act); *District of Columbia v. Sierra Club*, 670 A.2d 354, 359 (D.C. 1996) (holding review of allegedly unlawful government action is available to "an aggrieved party" as a claim for equitable redress in D.C. Superior Court pursuant to D.C. Code § 11-921(a)(6)," providing for general equitable jurisdiction).[16]

C. Plaintiffs Fail To Allege Any Deprivation of a Protected Interest.

Plaintiffs' due process claims should also be dismissed because they do not allege a deprivation of any constitutionally protected liberty or property interests. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Liberty interests arise from two sources—the Constitution or state law. *Atherton*, 567 F.3d at 689.

The *K.H.* Plaintiffs claim that they have been deprived of a constitutional liberty interest, namely, their right to family integrity, *K.H.* Compl. ¶ 109, but Plaintiffs have not sufficiently alleged a deprivation of that right. The right to family integrity is a right to be *free from* government interference. *Franz v. U.S.*, 707 F.2d 582, 595 (D.C. Cir. 1983) (describing the "many avatars" of "constitutional interest in the development of parental and filial bonds free from government interference"). Here, the "real problem alleged by Plaintiffs is not that the state actors *interfered* with [Plaintiffs' family integrity]; rather, it is that the state actors did not *assist* [them] or affirmatively *foster* the parent/child relationship." *Anspach v. City of*

[16] As discussed below, the District disputes that the Abuse and Neglect Act required CFSA to formally remove the Plaintiff-children and to place them into foster care; these decisions are committed to agency discretion by law. The point here is simply that the real dispute between the Parties is *not* some plausibly alleged lack of constitutionally adequate procedure to decide that question, and Plaintiffs' procedural due process claims fail for that reason.

Philadelphia, 503 F.3d 256, 266 (3d Cir. 2007). "However, [Plaintiffs] are not entitled to that assistance under the Due Process Clause." *Id*. (citing *DeShaney v. Winnebago Cnty*, 480 U.S. 189, 109 (1989) (holding that state did not violate substantive due process by failing to take abused child into its care, and reasoning that the Due Process Clause does not "confer an affirmative right to governmental aid, even where such aid may be necessary to secure" constitutionally protected interests)); *see also Beame*, 412 F. Supp. at 602–03 (rejecting argument that substantive due process requires the government to "create a status of family life for the child").

All the Plaintiff children also assert deprivations of liberty and property interests allegedly conferred by the Abuse and Neglect Act. Specifically, they point to rights to "be removed from their home," D.C. Code § 4-1303.04(c); to "be placed in a licensed or approved foster care home or facility," D.C. Code § 4-217.02; to "receive appropriate services," D.C. Code §§ 4-1301.09(b), 4-1301.02(3); to "receive a case plan and have their status reviewed periodically," D.C. Code §§ 4-1301.09(b), 4-1301.09(d); and to "have monetary support provided by CFSA on their behalf," D.C. Code § 4-217.01. *S.K.* Compl. ¶¶ 74, 68; *K.H.* Compl. ¶ 108.[17]

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[17] Plaintiffs also mention the ICPC in Count III, but do not cite to the portion allegedly violated or otherwise describe the liberty interest or alleged deprivation. *See* Compl. ¶¶ 73–78. Accordingly, Plaintiffs have failed to provide fair notice of this claim. *See* Fed. R. Civ. P. 8(a)(2); *Ciralsky v. CIA*, 355 F.3d 661, 669 (D.C. Cir. 2004) (explaining that enforcement of Rule 8 "is largely a matter for the trial court's discretion" and that Rule 41(b) authorizes the court to dismiss either a claim or an action because of the plaintiff's failure to comply with the" rules). In any event, as discussed above in the Background Section, the ICPC only applies to children whom CFSA has formally removed and is attempting to formally place into foster care or adoption in another state. *See also* D.C. Code § 4-1422 ("ARTICLE III Conditions for placement. (a) No sending state shall send, bring, or cause to be sent or brought into any other party state a child for placement in foster care or prior to a possible adoption . . . ."). Plaintiffs

One of these provisions—D.C. Code § 4-1301.02(3)—merely provides a definition of the term "case plan;" it does not, by its plain terms, create any rights or duties. And for two others—D.C. Code §§ 4-217.01 and 4-217.02—even if they created protected interests, Plaintiffs fail to allege a deprivation because the provisions apply only to children who have been formally removed from their homes (or had custody reassigned) by judicial order and/or placed into foster care. *See* D.C. Code § 4-217.02 (stating "foster care shall be provided in a foster family home"); § 4-217.01 (requiring the Mayor to provide aid "when removal of a child from the home … results from a judicial determination that continuation in such home is contrary to the child's welfare"). Again, Plaintiffs allege that they have *not* been formally removed or placed into foster care; they therefore have not plausibly alleged that they have been deprived of these interests.

The two remaining provisions—D.C. Code §§ 4-1303.04(c), 4-1309(b)—do not create enforceable liberty interests because they do not "place substantive limits on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). In other words, none of the remaining provisions of District law "contain explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997) (quoting *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989) (cleaned up). Plaintiffs thus fail to state a claim.

D.C. Code § 4-1303.04(c) is discretionary on its face. To be sure, the provision states:

> (c) When an investigation made pursuant to § 4-1301.04 or § 4-1301.05 indicates that a child is an abused or a neglected child and when it has been determined that

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do not fit those criteria, nor have they pointed to anything in the text of that law which would require the District to apply it to them.

> the child cannot be adequately protected by any of the services set forth in § 4-1303.03(a)(7) or (b) of this section or by any other services, the Director of the Agency *is authorized to*:
>
> (1) Remove the child with the consent of the parent, guardian, or other person acting in loco parentis;
>
> (2) Request the Corporation Counsel of the District of Columbia to petition the Family Division of the Superior Court of the District of Columbia for a finding of abuse or neglect and, where appropriate, the removal of the child; and
>
> (3) Request the police to remove the child when the consent of a parent, guardian or other custodian cannot be obtained and the need to protect the child does not allow sufficient time to obtain a court order.

D.C. Code § 4-1303.04(c) (emphasis added). In short, this Section does not create any specific *directive* for CFSA—or any substantive entitlements for the Plaintiff-children. It merely provides that, if certain conditions are met, CFSA's Director "is authorized to" take certain actions. A grant of authorization, or permission, cannot be read as a command. *Cf. Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776 (2005) (Stevens, J., dissenting) (reasoning that the phrase "is authorized to" suggests "discretion" to act); *Murphy*, 138 S. Ct. at 787 (stating use of the word "'shall' usually creates a mandate").

Further, even if this Section could somehow be read to create a mandatory list of options, as Plaintiffs suggest, the predicate conditions are *also* left to agency discretion. This list of options only possibly applies "when it has been determined that the child cannot be adequately protected by any of the services set forth in § 4-1303.03(a)(7) or (b) of this section or by any other services." D.C. Code § 4-1303.04(c). The statue provides no guidance or direction as to how that determination should be made. *Id*. Nor do the incorporated provisions. Section 4-1303.03(a)(7) states: "(a) The Director of the Agency shall have the following duties and powers, … [including] (7) [t]o provide services to families and children who are eligible for such services, consistent with the requirements of this subchapter, through programs of services to

families with children, child protective services, foster care, and adoption[.]" And subsection (b) of D.C. Code § 4-1303.04 simply states the Agency "is authorized to make a temporary custodial placement of the child" provided that certain conditions are met.[18] Again, none of this language is mandatory, so it cannot create substantive entitlements accruing to Plaintiffs.

Similarly, D.C. Code § 4-1309(b) pertains to agency preparation of "a plan for each child and family for whom services are required on more than an emergency basis," and subsection (d) states that "[a]s part of its activities under this section, the agency … shall assure … (1) [t]hat each child has a case plan … consistent with the best interests and special needs of the child . . . ." But nothing in the language of this statue creates a clear mandate that the District must create a plan for *each* child in *every* case, or even in every case where abuse or neglect is found. *Id*. There is no guidance, for example, explaining when "services are required on more than an emergency basis," such that it is clear when the District would have to create such plans.

Finally, the Plaintiffs also assert they have been deprived of property interests created by federal law, namely, foster care maintenance payments. *S.K.* Compl. ¶¶ 74–75, 62, 63; *K.H.* Compl. ¶¶ 110. For the same reasons Plaintiffs fail to state a claim for violation of federal law directly, as discussed above, Plaintiffs fail to state a claim for deprivation of this interest: First, Plaintiffs are not entitled to these payments because they are not foster care parents or children in

[18] Other provisions of District law reinforce the breadth of CFSA's discretion and the contention that District law does not always *require* CFSA to take custody of neglected children then place them into foster care. *See e.g.*, D.C. Code §§ 16-2305(a) ("[C]omplaints alleging neglect shall be referred to the Director of [CFSA] . . . wh[o] shall conduct a preliminary inquiry to determine whether the best interests of the child or the public require that a petition be filed [in Superior Court]."); 16-2320 (authorizing Superior Court judges to "(3) [t]ransfer legal custody to . . . (A) a public agency responsible for the care of neglected children; . . . or; (C) a relative or other individual who is found by the Division to be qualified . . . .").

foster care; and, second, in any event, the AACWA does not create enforceable federal rights. *See* Section I, above.[19]

IV. Plaintiffs' Local Law Claims Should Be Dismissed (Counts IV–VI).

A. Plaintiffs' District Law Claims Should Be Decided by Local Courts.

Under 28 U.S.C. § 1367, this Court may exercise jurisdiction over Plaintiffs' District law claims (Counts IV–VII), but, under that same statute, the Court should decline the invitation. This Court may decline to decide a District law claim when "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances . . . ." 28 U.S.C. § 1367(c). The decision is within the trial court's discretion. *E.g.*, *Artis v. District of Columbia*, 138 S. Ct. 594, 599 (2018); *Women Prisoners*, 93 F.3d at 921. Courts should weigh judicial economy, convenience, fairness, and comity in considering whether to exercise jurisdiction. *Id.* at 920; *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265–66 (D.C. Cir. 1995).

If, for the reasons discussed above, this Court dismisses all of Plaintiffs' federal claims, Plaintiffs' District law claims should also be dismissed under 28 U.S.C. § 1367(c)(3). *Araya v. JPMorgan Chase Bank, N.A.*, 775 F.3d 409, 417 (D.C. Cir. 2014). "[I]n the usual case in which all federal-law claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (quoting

[19] Plaintiffs also refer to interests allegedly created by federal statute in Count III, but Defendants are unaware of any authority stating that constitutionally protected liberty interests can be created by federal statute. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Plaintiffs also cite "16-213" in ¶ 87(b), but counsel for Defendants cannot identify the law cited.

Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). This is "the usual case" in that it is in the earliest stages of proceedings. *See Mitchell v. Yates*, 402 F. Supp. 2d 222, 235 (D.D.C. 2005).

More importantly, the D.C. Circuit has repeatedly placed special emphasis on the comity factor, explaining that "needless decisions of state law should be avoided . . . ." *Araya*, 775 F.3d at 417 (discussing cases) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). And the comity factor makes this an *un*usual case, such that it would be error to exercise jurisdiction, because, as discussed below, Plaintiffs raise novel, possibly complex, and locally sensitive questions of District law. The D.C. Circuit has repeatedly held it is an abuse of discretion to rule on such claims in the absence of federal claims. *E.g.*, *Doe v. Bd. on Pro. Resp. of D.C. Ct. of Appeals*, 717 F.2d 1424, 1427–29 (D.C. Cir. 1983), *Fin. Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982).

Indeed, even if this Court does *not* dismiss Plaintiffs' federal claims, it should decline to decide Plaintiffs' District law claims. In another unusual case, the D.C. Circuit found that the trial court abused its discretion when it decided novel, sensitive questions of District law, even while the trial court *also* found in favor of plaintiffs on their related federal claims. *Women Prisoners*, 93 F.3d at 921–23 (holding trial court erred in deciding novel and complex questions concerning management of D.C. Jail alongside viable federal claims). The Circuit reasoned that a federal court should not intervene when exercising jurisdiction would usurp decisions of "unsettled issues of state law," the meaning of which was "sharply disputed," thereby "assum[ing] control over local political processes" and, incidentally, institutions. 93 F.3d at 923 (citing *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984)).

Here, similarly, at least one question of District law at issue is novel, sharply disputed through local political processes (though not in the local courts), and its resolution by this Court in favor of Plaintiffs would effect significant changes in the powers of local institutions. Advocates have argued for years that the practice of kinship diversion should be illegal, including before the Council for the District of Columbia (Council), which is well-aware of CFSA's practices, but which has not amended District law to foreclose them. According to Plaintiffs, CFSA has engaged in kinship diversion since at least 2009. *See K.H.* (original) Compl. [3] ¶ 3. Plaintiffs—and others—have been complaining about the practice for almost as long, to no avail. It is no exaggeration to say that CFSA has been under the microscope for years, first as part of *LaShawn* and later during annual performance oversight hearings.

The District's current system for protecting abused and neglected children scarcely resembles the one in place in 1989, when a class action was filed challenging the "disastrous condition of the agency" and "the unconstitutional treatment of the children . . ." Transcript (Sep. 9. 2022) at 12, *LaShawn A. v. Bowser*, Civil Action No. 1:89-cv-01754-TFH (DDC). After "decades of work" and "great struggles," *id*., the parties settled the case, leaving CFSA as "one of the outstanding agencies in the country [ ] in the foster care area." *Id*. at 13.

The creation of CFSA as a cabinet-level agency and its broad powers are a direct result of *LaShawn*.[20] Although Plaintiffs' counsel here, DC KinCare Alliance, explicitly challenged

[20] *See* Child and Family Services Agency Establishment Amendment Act of 2000, § 2(n) ("The Agency shall be the successor in interest to the Child and Family Services Agency under receivership in the case of *LaShawn A., et al. v. Anthony Williams, et al.*, C. A. No. 89–1754 (TFH), in the United States District Court for the District of Columbia. [T]he provisions of this act are intended to be consistent with all outstanding orders of the United States District Court in the *LaShawn A, et al. v. Anthony Williams, et al*., case."), *codified* at D.C. Code § 4-1303.02a (2023).

kinship diversion in *LaShawn*, the Court never found—as they argued—that the children "diverted" by the practice were members of the plaintiff class there, nor did the Court take any other action they requested. *See* Docket, *LaShawn*, ECF Nos. 1180-1, 1187, 1197.[21]

Notwithstanding this, the Council holds "performance oversight hearings" annually for each agency, "to review the agency's operations and effectiveness in implementing its budget over the last year." *A Resident's Guide to the DC Budget*, DC Fiscal Policy Institute (May 5, 2023), https://www.dcfpi.org/all/a-residents-guide-to-the-dc-budget-2023/. Those hearings allow the Council to review, in close detail, the performance of each District agency during the previous year. "The head of the agency is required to discuss the agency's performance and expenditures in the past fiscal year and answer oversight questions from Councilmembers. Before each performance oversight hearing, each Council committee submits a detailed set of questions to the agencies they oversee. Those questions and the answers are posted on the DC Council website." *Id*. For at least the last five years, CFSA has provided detailed information to the Council before and during these hearings on its operations overall and specifically regarding

[21] If Plaintiffs were correct, Judge Hogan in *LaShawn* would have allowed their repeated efforts to intervene and challenge the process they challenge here. The broad authority and discretion of CFSA—refined and clarified over the years as part of the *LaShawn* litigation—allows the practice of kinship diversion. Plaintiffs have not shown otherwise.

its use of kinship diversion.[22] And Plaintiffs' counsel, DC KinCare Alliance, and others have testified in opposition to kinship diversion each year.[23]

Despite this, the Council has taken no action to prohibit kinship diversion. This lack of action cannot be ignored.[24] In response to the repeated legal and policy arguments identical to those made here, the Council has not acted. The Council knows how to clearly indicate its intent, act "explicitly" when it wants to, and "specifically prohibit" certain practices.

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[22] *See CFSA's Responses: Performance Oversight Hearing FY 2017 and FY 2018*, 754 (Feb. 12, 2018), https://tinyurl.com/59k5nc9f ; *CFSA's Responses: Performance Oversight Hearing FY 2018 and FY 2019 (First Quarter)*, 4 (Feb. 19, 2019), https://tinyurl.com/mrydjktk ; *CFSA Responses to Hearing Questions, Performance Oversight Hearing Fiscal Year 2019–2020*, 7, 98–99 (Jan. 31, 2020), https://tinyurl.com/mv4kszz7; *CFSA Responses to Hearing Questions, Performance Oversight Hearing Fiscal Year 2020–2021*, 7, 80 (Feb. 19, 2021), https://tinyurl.com/3hyv32js; *CFSA's Responses: Performance Oversight Hearing Fiscal Year 2021–2022*, 29–31, 86, 88, 115, 117, 118, 120–29, 132, 212, 213, (Feb. 3, 2022), https://tinyurl.com/yt5zuptm; *CFSA's Responses to Pre-Hearing Questions: Performance Oversight Hearing Fiscal Year 2022–2023*, 50, 84–85, 110, 113, 116–25, 128, 129, 212 (Feb. 17, 2023), https://tinyurl.com/4j93dvv8.

[23] *See, e.g.*, Testimony of Stephanie McClellan, Co-founder and Deputy Director, DC KinCare Alliance, before the Council of the District of Columbia Committee on Health and Human Services, Performance Oversight Hearing: CFSA (Feb. 26, 2019), https://tinyurl.com/5n8bwuzt (beginning at p. 67); Testimony of Marla Spindel, Executive Director, DC KinCare Alliance, before the Council of the District of Columbia Committee on Human Services, Performance Oversight Hearing: CFSA (Feb. 12, 2020), https://tinyurl.com/ycx5f3vs (beginning at p. 46); Testimony of Stephanie McClellan before the Council of the District of Columbia Committee on Human Services, Performance Oversight Hearing: CFSA (Feb. 25, 2021), https://tinyurl.com/yckpwsdf (beginning at p. 18); Testimony of Marla Spindel before the Council of the District of Columbia Committee on Human Services, Performance Oversight Hearing: CFSA (Feb. 17, 2022), https://tinyurl.com/mrx9bpwd (beginning at p. 50); Testimony of Stephanie McClellan before the Council of the District of Columbia Committee on Facilities and Family Services, Performance Oversight Hearing: CFSA (Feb. 24, 2023), https://tinyurl.com/2yfnc7j7 (beginning at p. 122); Testimony of Marla Spindel, *id*. (beginning at p. 146).

[24] Especially as the Council regularly amends the Prevention of Child Abuse and Neglect Act of 1977, where, presumably, the Council would insert any prohibition on kinship diversion. *See, e.g.*, Preserving our Kids' Equity Through Trusts and Fostering Stable Housing Opportunities Amendment Act of 2022, Law 24-309 (eff. Mar. 10, 2023), 70 D.C. Reg. 3514, 3540 (Mar. 24, 2023).

Washington Teachers Union v. District of Columbia, 77 A.3d 441, 449–50 (D.C. 2013). It did not do so here to prohibit kinship diversion, even after years of requests. For this Court to reach out now and decide that issue in particular would be improvident; the Court should decline supplemental jurisdiction. *Women Prisoners*, 93 F.3d at 921–23.

B. Plaintiffs' D.C. Human Rights Act Claim Should Be Dismissed Because Plaintiffs Cannot Show Discrimination (Count IV).

Plaintiffs allege that CFSA's kinship diversion practice violates the D.C. Human Rights Act, D.C. Code §§ 2-1401.01, *et seq*. (HRA), because it intentionally discriminates against them based on familial status by refusing to provide the same "benefits and services" it provides to foster families. *S.K.* Compl. ¶ 81; *K.H.* Compl. ¶ 116; *see also* D.C. Code § 2-1402.73). Plaintiffs' allegations fail to state a claim.

Although the HRA is interpreted broadly, its protections also have limits. *Siddique v. Macy's*, 923 F. Supp. 2d 97, 104–105 (D.D.C. 2013). To state a claim, Plaintiffs must allege facts that "establish a nexus between the defendants' allegedly discriminatory motive and the adverse action." *Easaw v. Newport*, 253 F. Supp. 3d 22, 30 (D.D.C. 2017); *see also Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016) (dismissing discrimination claim because the complaint did not sufficiently allege a causal nexus); *McNair v. District of Columbia*, 213 F. Supp. 3d 81, 87 (D.D.C. 2016) (holding that plaintiff failed to support an inference of gender discrimination where her allegations "suggest[ed] that, at best, she was treated differently from all other employees—which presumably includes both men and women").

Plaintiffs alleging disparate treatment under the HRA must first establish that they were discriminated against on the basis of their membership in a protected class. *Boykin v. Gray*, 895 F. Supp. 2d 199, 208 (D.D.C. 2012). Plaintiffs have failed to do so here. Under the HRA, familial status is defined as:

> [O]ne or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or in the process of securing legal custody of any individual under 18 years of age.

D.C. Code § 2-1401.02 (11A). In discrimination case law, courts assume that "familial status" refers to the presence of minor children in the household. *Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d 1, 22 (D.D.C. 2016) (citing cases).[25] But Plaintiffs claim the District impermissibly treats them differently than "foster families." *S.K.* Compl. ¶¶ 81, 83; *K.H.* Compl. ¶ 118. And this granular level of specificity is not protected under the HRA. The HRA does not identify particular legal arrangements for maintaining custody of minor children as a protected class; it is the *presence of the minor children* that confers protected status. *See* D.C. Code § 2-1401.02 (11A). In other words, Plaintiffs do not allege that those *with* the protected characteristic (presence of minor children in the household) are treated differently than those *without* the protected status (households without minor children); they allege an entirely different basis for their alleged differential treatment. This fails to state a disparate treatment claim.

Moreover, Plaintiffs' allegations do not support an inference that they were discriminated against *because of* familial status. *E.g.*, *Easaw*, 253 F. Supp. 3d at 26 (plaintiff claiming disparate treatment must allege sufficient facts to create a reasonable inference that the protected

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[25] Courts have found plaintiffs in familial status cases state claims when they allege that families with children are treated differently or less favorably than adults-only households. *See, e.g.*, *Borum*, 218 F. Supp. 3d 1, 22 (tenants stated *prima facie* Fair Housing Act claim by alleging that a redevelopment project would reduce the amount of apartments available to households with minor children compared to those without); *Belcher v. Grand Reserve MGM, LLC*, 269 F. Supp. 3d 1219, 1234 (M.D. Ala. 2017) (residents stated *prima facie* Fair Housing Act claim by alleging that apartment complex's facially discriminatory "adult supervision rule," "curfew rule," and "pool rule" raised inference of discrimination against families with children).

characteristic was a factor in the decision at issue) (quoting *Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir. 1984)); *Cf. De La Fuente v. DNC Servs. Corp.*, 2019 WL 1778948, *8 (D.D.C. Apr. 23, 2019) ("Mr. De La Fuente's allegations 'are consistent with an arbitrary, *but not racially discriminatory*, decision-making process.'" (emphasis in original) (citation omitted)). Plaintiffs' allegations are insufficient to connect their treatment to their familial status because Plaintiffs have not alleged that similarly-situated individuals of a different familial status were treated differently. *See* Section II.A above; *Schmidt v. United States Capitol Police Bd.*, 826 F. Supp. 2d 59, 62 (D.D.C. 2011) (motion to dismiss granted because plaintiff failed to "allege with sufficient specificity why the [adverse action] amounted to disparate treatment, or how that purportedly disparate treatment was based on [familial status]."). In other words, "[t]he plaintiffs have made no allegations that, accepted as true, could serve as 'direct evidence of discriminatory intent,' nor that could 'permit an inference of discrimination.' Without any supporting factual allegations, the plaintiffs' assertions reduce to mere legal conclusions that are not entitled to the assumption of truth." *Boykin*, 895 F. Supp. 2d at 208 (citing, among others, *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077 (D.C. Cir. 1999)). Plaintiffs have thus failed to state a claim under the HRA.

C. Plaintiffs Fail To State a Claim for Fraudulent or Negligent Misrepresentation (Counts VI and VII).

The Plaintiff caregivers allege that the District "had a statutory duty to explain" their "options to participate in" the Plaintiff-children's "care and placement, and [the District's alleged] failure to provide such explanation constitutes a breach of this duty to disclose." *K.H.* Compl. ¶ 126; *S.K.* Compl. ¶ 91. Further, they allege the District "knowingly . . . concealed the truth . . . with the intent to induce reliance on their . . . omissions," *id.*, resulting in the Plaintiff caregivers' choice to file emergency motions for custody of the Plaintiff-children, rather than

taking custody as foster parents, as well as "emotional and financial harm," *K.H.* Compl. ¶ 127; *S.K.* Compl. ¶ 92.

To "allege fraudulent misrepresentations or omissions, a plaintiff must allege facts showing that a person or entity (1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce another to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as a result of that reliance." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015) (cleaned up). "In contrast to a complaint that alleges fraudulent misrepresentations, a complaint alleging negligent misrepresentations need not allege that the defendant had knowledge of the falsity of the representation or the intent to deceive." *Id*. at 1131. "A false representation may be either an affirmative misrepresentation or a failure to disclose a material fact when a duty to disclose that fact has arisen." *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 438 (D.C. 2013).

The Plaintiff caregivers have not stated claims for fraudulent or negligent misrepresentation because Defendants had no duty of disclosure; Plaintiffs do not allege Defendants omitted a material "fact"; and Plaintiffs do not concretely allege damages.

At base, Plaintiffs again rest their arguments on a misreading of the AACWA. As discussed above in Section I, the AACWA does not confer enforceable rights on Plaintiffs or require the actions by CFSA that Plaintiffs believe it does. To be sure, 42 U.S.C. § 671(a)(29) requires a state to *develop a plan* to provide notice to a child's family members and relatives, within 30 days of a removal, regarding the placement of the child and the options for the family members or relatives to become a licensed foster home. However, the provision does not, by its terms, require specific disclosures, and therefore cannot support Plaintiffs' claim. *See Sundberg*,

109 A.3d at 1131 ("[M]ere silence does not constitute fraud unless there is a duty to speak." (quoting *Kapiloff v. Abington Plaza Corp.*, 59 A.2d 516, 517 (D.C. 1948))). And Plaintiffs do not allege that CFSA misrepresented the content of the District's plan under the AACWA. As such, the Court may dismiss this claim by finding that Plaintiffs have failed to allege a false or misleading representation.

Alternatively, Plaintiffs' claims should be dismissed because "the alleged misrepresentation is in essence an alleged misrepresentation of *law,* not a misrepresentation of fact." *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 555 (D.C. 2016). Plaintiffs essentially allege that the District should have advised them that they might be eligible to become foster parents and explain the options that might create for them. *K.H.* Compl. ¶ 127; *S.K.* Compl. ¶ 92. However, to the extent the District may have believed the Plaintiff caregivers were *not* eligible to become foster parents—and Plaintiffs do not allege otherwise—that would be a misrepresentation of law, not of fact, and is thus not actionable. *Falconi-Sachs*, 142 A.3d at 550.

Finally, as with the Plaintiff children's claims for negligence, these claims should be dismissed because the Plaintiff caregivers fail to concretely allege damages. The Plaintiff caregivers generally describe financial harms they have allegedly suffered as a result of the District's actions, namely, lost foster care maintenance payments. *S.K.* Compl. ¶¶ 9. But they do not anywhere allege that they would have met all the eligibility criteria to become foster parents under District law; and they do not, therefore, sufficiently allege that they suffered these damages because of the District's actions.

Accordingly, Counts VI and VII should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion and dismiss the Complaint with prejudice.

Dated: May 19, 2023.

Respectfully submitted,

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