

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

K.H., et al.,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, et al.,

Defendants.

Case No. 1:19-cv-3124 (TFH)

BRIEF OF AMICUS CURIAE FOSTER KINSHIP

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CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

I, the undersigned, counsel for *amicus curiae*, Foster Kinship, pursuant to D.C. District Court Local Rule 7(o)(5) and Fed. R. App. P. 26.1, certify that Foster Kinship is a non-profit entity, has no corporate parent, and has no corporate stock.

STATEMENT OF COUNSEL

Pursuant to D.C. District Court Local Rule 7(o)(5) and Fed. R. App. P. 29(a)(4)(E), Foster Kinship also notes that none of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. No person—other than Foster Kinship and Proskauer Rose LLP—contributed money intended to fund preparing or submitting this brief.

INTEREST OF THE AMICUS

Foster Kinship is a nonprofit kinship navigator program serving the state of Nevada and providing help to over 4,000 kinship families since 2011. Foster Kinship works to ensure equitable outcomes for vulnerable children by providing kinship caregivers with the options, knowledge, and tools to navigate the multiple systems with which they come in contact, including the foster care system.

Foster Kinship's interest in this case is especially strong. Dr. Alison Caliendo, Founder and Executive Director of Foster Kinship, is an expert on the subject of kinship diversion, and her academic work investigates the intersection between law and child welfare policy in regards to kinship family formation. Through its work in Nevada, Foster Kinship has seen firsthand the harmful effects of kinship diversion and the disparate impact it causes for children who have experienced abuse and neglect.

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OTHER AUTHORITIES

CFSA, *Become a Foster or Adoptive Parent*, available at <https://cfsa.dc.gov/service/become-foster-or-adoptive-parent>.....2

CFSA, *CFSA FY2019 Annual Progress and Services Review* (June 30, 2018), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/DC_CFSA_APSR_2019_63018_FINAL.PDF8, 9

CFSA, *Annual Public Report FY 2017: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2018), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/APR%202017%20FINAL_0.pdf8

CFSA, *Annual Public Report FY 2019: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2020), available at <https://cfsa.dc.gov/publication/fy19-cfsa-annual-public-report>.....12

CFSA, *Annual Quality Service Review Report for Calendar Year 2018* (Mar. 2019), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/CY_2018_Annual_Quality_Service_Review_Report_%28QSR%29.pdf10

CFSA, *Grandparent Caregivers Program: Annual Status Report, CY 2018* (Feb. 28, 2019), available at <https://cfsa.dc.gov/publication/grandparent-caregivers-program-annual-report-cy-2018>.....13

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INTRODUCTION

The District's Child and Family Services Administration ("CFSA") is placing children at risk through the use of kinship diversion and subsequent refusal to license kin caregivers as foster parents. Kinship diversion is an informal practice used in place of adjudicating the formal removal of a child into foster care. Instead, when that child cannot remain safely at home with his or her parents, the child welfare agency facilitates placement of a child with relatives or fictive kin outside the foster care system. It is also a form of discrimination. Though intended to place the child in the least-restrictive, most-family like placement, without the oversight and support of the child welfare system, kinship diversion has increasingly been shown to harm the diverted child, the kinship caregiver, and the biological parent. Kinship diversion does not provide D.C.'s abused and neglected children the necessary protections, financial assistance, and support needed to ensure their wellbeing. Nor does kinship diversion provide continuing oversight to ensure the safety of the child. Finally, diversion does not afford the parents due process or a formal path to, and support for, reunification. As a result, a child may end up in a situation no better than the one they were removed from in the first place, putting both the physical and mental health of the child at risk. All the while, the child is outside of the structure and support provided to similar children in the foster care system.

Foster Kinship writes in opposition to the District's Motion to Dismiss and to educate the Court on issues raised by plaintiffs' discrimination claims and not discussed in the parties' briefing. As a kinship navigator program, Foster Kinship helps kin caregivers navigate the child welfare system and is intimately familiar with the disparate treatment and impacts of kinship diversion. Through its child welfare training program, Foster Kinship provides training to new kin caregivers to increase the safety, stability, and nurturing capacity of kinship families, in partnership with the

child welfare system. Foster Kinship has witnessed firsthand the struggles of children and their kin caregivers as a result of kinship diversion, and urges this court to deny the District's Motion.

ARGUMENT

Thousands of children are diverted into informal kinship care on an annual basis. These children are placed with relatives or fictive kin and kept outside of formal child welfare statistics. They live in what some advocates call hidden foster care and often do not receive any of the benefits associated with traditional foster care. As plaintiffs allege, kinship diversion is discriminatory, and a violation of the District's Human Rights Act (the "DCHRA") and other obligations CFSA owes to children in its care. Compl. (ECF No. 13) ¶¶ 8, 32–33. CFSA pressures kin caregivers to file for legal custody without informing them of their right to apply to become a licensed foster parent. *See, e.g.*, Compl. ¶¶ 4–5, 50, 84, 86. Because kinship caregivers care for a child when no formal foster care case is opened, these caregivers are not eligible to receive foster care funding—an outcome often not explained to families asked to take custody of the child so that child does not enter foster care, as was the case with plaintiffs. *See, e.g.*, Compl. ¶¶ 3, 28. If, however, a kin caregiver later requests to become a licensed foster parent, CFSA—the agency charged with licensing foster care parents¹—denies their request on the basis of familial status. Compl. ¶¶ 69, 75, 86, 117–18. This discriminatory practice harms diverted children and their kin caregivers, depriving them of the benefits other similarly situated children in foster care receive, including appropriate housing, food, clothing, education, health care, privacy, extracurricular activities, transportation, as well as the right to be free from abuse or neglect. D.C. Mun. Regs. tit. 29, § 6004.1 (2015).

¹ CFSA, *Become a Foster or Adoptive Parent*, available at <https://cfsa.dc.gov/service/become-foster-or-adoptive-parent> ("CFSA [] recruits, trains, and licenses District residents to be foster parents.").

I. Plaintiffs Adequately Allege Discrimination on the Basis of Familial Status under the D.C. Human Rights Act

Plaintiffs plead facts sufficient to allege that children with available kin caregivers receive different treatment than those children who do not have available kin caregivers, in violation of the DCHRA. The DCHRA—“the most comprehensive of its kind in the nation”—makes it “an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual’s actual or perceived . . . familial status.” D.C. Code § 2-1402.73 (2019); *see Jackson v. Dist. of Columbia Bd. of Elections & Ethics*, 999 A.2d 89, 98 (D.C. 2010). Familial status is defined as “one 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 . . . in the process of securing legal custody of any individual under 18 years of age.” D.C. Code § 2-1401.02(11A). The DCHRA also specifies that “[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter,” is an unlawfully discriminatory practice. D.C. Code § 2-1402.68.

To allege disparate treatment, plaintiffs must establish “that the defendant intentionally discriminated against them on the basis” of their membership in a protected class. *2922 Sherman Ave. Tenants’ Ass’n v. D.C.*, 444 F.3d 673, 682 (D.C. Cir. 2006). Plaintiffs sufficiently allege that they are members of a protected class—kin caregivers who have or are seeking legal custody of the diverted child. *See, e.g., Compl.* ¶¶ 4–6, 117. By contrast, foster families do not possess legal custody of a child, because CFSA retains legal custody and physical care responsibility. *Mot. to Dismiss* (ECF No. 15-01) at 35. As alleged in the complaint and described further below, CFSA

provides benefits to foster care families (who are not members of the protected class), but has refused to do so for plaintiffs (who are members of the protected class). In other words, CFSA selectively discriminates against diverted children and their kin caregivers on the basis of familial status by unlawfully refusing to license kin caregivers as foster parents and provide them foster care benefits and services. *See* Compl. ¶¶ 116–18.

When CFSA diverts a child, it routinely directs and pressures kin caregivers to file for legal custody of the diverted child in court. *See, e.g.*, Compl. ¶ 116. If the kin caregiver requests to become a licensed foster parent, CFSA refuses to provide that approval. Plaintiffs allege that CFSA directed them to file “an emergency motion for legal custody of their respective minor child.” *See* Compl. ¶ 117. Subsequently, plaintiffs requested that “CFSA allow them to apply to be foster parents and thereby receive foster care maintenance payments on the children’s behalf and other benefits.” *Id.* However, CFSA denied the requests based on plaintiffs’ familial status. Compl. ¶ 118.

CFSA denies that plaintiffs’ allegations “support an inference that they were discriminated against *because of* familial status,” saying “[t]he Complaint does not connect plaintiffs’ alleged failure to receive ‘benefits and services’ with their familial status.” Mot. to Dismiss at 35–36. CFSA argues “plaintiffs complain that the District treats them (households with newly resident minor children) differently than licensed foster families (households with newly resident minor children).” *Id.* at 35. However, as stated in plaintiffs’ opposition, the “discriminatory practice does not hinge on,” as Defendants suggest, “the presence of minor children in the home, which applies to both groups, but rather on the caregivers’ legal relationship to those minor children.” Opp. (ECF No. 18) at 35. In other words, plaintiffs’ DCHRA discrimination claim hinges on familial status.

In its reply, CFSA makes two arguments, neither of which hits the mark. First, CFSA argues plaintiffs have interpreted “familial status” in the DCHRA too narrowly. Reply (ECF No.

24) at 20. And Second, CFSA argues plaintiffs have not connected their membership in a protected class with any discriminatory intent. *Id.* Each is discussed below.

A. The Plain Language of the DCHRA Supports Plaintiffs’ Reading

The plain meaning of the statute and this court’s case law support plaintiffs’ reading of the DCHRA. CFSA argues that though “plaintiffs adopt a narrow reading of the statute . . . limited to strict ‘legal custody’ of children,” the “courts generally interpret the requirement to mean that minor children are present in the household.” *Id.* at 20-21. To reach this conclusion, CFSA cites this court’s decision in *Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d 1, 22 (D.D.C. 2016).

However, a later decision in that case rebuts this argument. In March 2020, this court stated in *Borum v. Brentwood Village, LLC*, No. CV 16-1723 (RC), 2020 WL 1508906 at *7–8 (D.D.C. Mar. 30, 2020) that “‘familial status’ under the FHA . . . is restricted to minor children residing with a parent or other designated individual *with legal custody*.” *Id.* at 7 (emphasis added).² The decision also specifically rejected a broader definition that did not “require a direct connection between parent (or legal guardian) and a minor child to establish familial status.” *Id.* at 8. This interpretation supports plaintiffs’ plain language reading of the DCHRA.

CFSA urges that, despite the plain language of the statute, the law should include foster families. CFSA does not argue that plaintiffs are outside the protected class. Reply at 20–21. The DCHRA defines familial status with reference to “legal custody,” which both parties agree includes plaintiffs. However, CFSA argues that the words “legal custody” must include foster families because “a more sensible reading . . . suggests that both foster parents and plaintiff

² Because the FHA and DCHRA contain similar definitions of familial status, these provisions are often read in conjunction with one another. *Borum v. Brentwood Village, LLC*, No. CV 16-1723 (RC), 2020 WL 1508906 (D.D.C. Mar. 30, 2020) (“the definition of ‘familial status’ under the FHA and DCHRA is identical for all purposes relevant to the pending suit.”).

caregivers enjoy the familial status protections based on the custody of children in their care rather than the strict definition of ‘legal custody.’” Reply at 21. CFSA cites no authority for this statement.

CFSA then argues that if “legal custody” includes foster families, plaintiffs cannot bring their claim for discrimination under the DCHRA. For this point, CFSA relies on a case—*McNair v. District of Columbia*—that is readily distinguishable from the plaintiffs’ allegations. 213 F. Supp. 3d 81 (D.D.C. 2016). In *McNair*, the court held that the 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.” *Id.* at 87. Plaintiffs, however, do not allege they were treated differently than *both* foster parents and other kinship diversion caregivers. Rather, plaintiffs allege that “CFSA intentionally treats relative caregivers . . . differently from licensed foster parents....” Opp. at 36. In *McNair*, the plaintiff never alleged that her employer specifically treated men differently than women. 213 F. Supp. at 87. By contrast, plaintiffs here specifically allege that CFSA’s pattern and practice of kinship diversion treats kinship caregivers differently from non-kinship caregivers. Compl. ¶ 116. Finally, in *McNair*, the plaintiff was actually allowed to proceed on other discrimination claims, by alleging “the denial of her telecommuting request was racially discriminatory because she alleged that coworkers of a different race were allowed to work from home.” *See* Mot. to Dismiss at 36. Applying the same logic, plaintiffs here have alleged facts sufficient to proceed with their discrimination claim on the basis of familial status.

B. Plaintiffs Connect Their Protected Familial Status to CFSA’s Discriminatory Intent

Plaintiffs also connect the District’s discriminatory intent to their protected familial status. They argue that CFSA “refuses to license as foster parents those relatives who are seeking or who

obtain legal custody of diverted children.” Opp. at 36. They also allege that “CFSA’s decision to selectively deny Plaintiffs the opportunity to receive these services and support is based solely on familial status.” Compl. ¶ 118. In support of these allegations, plaintiffs describe how CFSA routinely pressures caregivers, like plaintiffs, to file for custody by threatening to place a child in foster care and then refuses to license kin caregivers as foster parents. Compl. ¶ 116. These and other facts in the complaint are more than sufficient to state a claim for discrimination under the DCHRA.

CFSA relies on two cases to argue the opposite. CFSA cites to *Boykin v. Gray* for the assertion that plaintiffs “do not establish the connection between Plaintiffs’ familial status and unfavorable treatment necessary to show “direct evidence of discriminatory intent” or “an inference of discrimination.” 895 F. Supp. 2d 199, 207 (D.D.C. 2012); Reply at 20. But just as *McNair* is distinguishable, so too is *Boykin*. The plaintiffs in *Boykin* only alleged the “bare assertion that the District’s PSH program has been used as an excuse for closing the shelters in the predominantly white parts of the city. . . . Entirely missing are any factual allegations that would support their stark accusation of intentional discrimination based on race.” *Boykin*, 895 F. Supp. 2d at 208. The plaintiffs made no allegations that, accepted as true, could serve as “direct evidence of discriminatory intent, nor that could ‘permit an inference of discrimination.’” *Id.* at 209 (internal citations omitted). *Boykin* is distinguishable as Plaintiffs allege sufficient facts that, accepted as true, are direct evidence of discriminatory intent or would permit an interference of discrimination.

Specifically, Plaintiffs allege that

CFSA has intentionally discriminated against Plaintiffs based on familial status by refusing to provide the same benefits and services, including the tangible benefit of foster care maintenance payments, it provides to foster families. CFSA’s decision to selectively deny Plaintiffs the opportunity to receive these services and support is based solely on familial status.

Compl. ¶ 118. Plaintiffs also allege that “after learning about the option to become a foster parent from a third party, [they] submitted numerous requests to CFSA to license [each caregiver plaintiff] as a foster parent and provide services and foster care maintenance payments.” Compl. ¶¶ 4–6. However, “CFSA [instead] unlawfully discriminate[d] against [the] diverted children and their relative caregivers by refusing to provide them with foster care benefits and services on the basis of familial status.” Compl. ¶ 33. By denying their requests, CFSA “treat[ed] kinship families differently and less supportively than ... children in licensed foster care and their foster parents.” *Id.* ¶ 8.

The District’s second case similarly misses the mark. CFSA cites to *Laureys v. District of Columbia*, No. CV 18-223 (RDM), 2019 WL 4673492, at *6 (D.D.C. Sept. 25, 2019) for the proposition that “[p]laintiff’s bare allegation that, on a single occasion, he was subjected to solitary confinement while three differently-situated African American inmates were not does not plausibly support the inference that the District discriminated against him based on his race.” However, *Laureys* is also distinguishable. *Laureys* involved a single plaintiff treated differently on a single occasion. Here, plaintiffs allege multiple instances of discrimination on the basis of their familial status. Compl. ¶¶ 4–6. Plaintiffs also allege that CFSA “for at least the last 10 years, have consistently and repeatedly engaged in the custom and practice of kinship diversion.” Compl. ¶ 3. These allegations differ dramatically from those in *Laureys*, and outline a longstanding discriminatory practice sufficient to defeat a motion to dismiss.

C. CFSA Has Incentives for Diverting Children and Refusing to License Kin Caregivers as Foster Parents

CFSA is also incentivized to discriminate against kinship caregivers like the plaintiffs, which only strengthens plaintiffs’ allegations of discrimination. CFSA has a financial incentive to divert children. Kinship diversion reduces the number of children in foster care, thereby

reducing foster care spending. CFSA also sets internal benchmarks for reducing the foster care population, further incentivizing kinship diversion.³ These benchmarks are not clearly related to real-life risk factors such as the number of children born in D.C. in a particular year, or the amount of crime, drug use, homelessness, poverty, domestic violence, mental illness, or other established indicators that influence the rate of child abuse and neglect. Rather, the benchmarks include hitting various target goals, such as increasing kinship care placements and decreasing new entries into foster care.⁴ These arbitrary benchmarks create a perverse incentive to divert children outside of the system, rather than license kin caregivers as foster parents.

The court may properly consider these and other CFSA filings at this stage because these materials are subject to judicial notice. *Herron v. Fannie Mae*, No. CV 10-943 (RMC), 2012 WL 13042852, at *1 (D.D.C. Mar. 28, 2012). “Specifically, a court may take judicial notice of historical, political, or statistical facts, or any other facts that are verifiable with certainty.” *Id.*; *see also Hamilton v. Paulson*, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008) (judicial notice may be taken of public records and government documents available from reliable sources on the internet), *rev’d on other grounds, Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012). This includes materials published on CFSA’s website, giving this court leave to consider these materials on a motion to dismiss.

³ CFSA, *CFSA FY2019 Annual Progress and Services Review* (June 30, 2018), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/DC_CFSA_APSR_2019_63018_FINAL.PDF; CFSA, *Annual Public Report FY 2017: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2018), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/APR%202017%20FINAL_0.pdf.

⁴ CFSA, *CFSA FY2019 Annual Progress and Services Review* (June 30, 2018), available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/DC_CFSA_APSR_2019_63018_FINAL.PDF.

II. CFSA's Discriminatory Practice Disparately Impacts Diverted Children and Their Kin Caregivers

Not only has CFSA intentionally discriminated against plaintiffs, its practice of diverting children has had a disparate impact on a host of children in the District. It is difficult to accurately count the number of diverted children, but CFSA's own published data offer insight.⁵ Since CFSA adopted a new strategic agenda favoring kinship care, the number of children who entered the foster care system decreased dramatically. At the end of fiscal year 2006, there were 2,313 D.C. children in foster care; by the end of fiscal year 2018, that number had fallen by 64% to 839 children, with a 22% decrease between fiscal years 2015 and 2018 alone.⁶ Yet in 2018, the number of child abuse and neglect victims was 1,699.⁷ This suggests that in 2018, hundreds of children were living with kin caregivers outside of the protections afforded by foster care.

Kinship diversion deprives diverted children of resources and protections afforded to children placed in licensed/unlicensed kinship or traditional foster care. When CFSA places a child in foster care, it is required under the D.C. Child Abuse and Neglect Act to: (1) conduct a criminal background check; (2) require the foster parent to meet conditions related to the child's sleeping arrangement, education, and health care; (3) prepare a case plan for the child and family; (4) assign a social work to the child; provide and arrange for services and supports for the child, foster parent, and birth parent; and (5) provide services aimed at safely reuniting the child with the

⁵ As noted above, government statistics are properly subject to judicial notice. *See Herron v. Fannie Mae*, No. CV 10-943, 2012 WL 13042852, at *1 (D.D.C. Mar. 28, 2012).

⁶ CFSA, *Annual Quality Service Review Report for Calendar Year 2018*, available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/CY_2018_Annual_Quality_Service_Review_Report_%28QSR%29.pdf.

⁷ U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth & Families, Children's Bureau, *Child Maltreatment 2018* (2020), available at <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>.

birth parent or where not possible, ensuring timely permanent placement. *See, e.g.*, D.C. Code §§ 4-1302.03, 4-1303.04, 4-1305.02, 4-1401 *et seq.*, 7-2105, 16-2313, 16-2320; D.C. Mun. Regs. tit. 29 § 6000 (2012) *et seq.* However, kinship diversion—due to the lack of ongoing CFSA involvement after the diversion—deprives a child and their caregiver of training, financial support, and oversight, despite these children experiencing traumatic events similar to children in foster care. *See, e.g.*, Compl. ¶¶4–7, 33, 39.

A. **Diverted Children Receive Reduced Protections**

Diverting children reduces the protections they would otherwise receive under state and federal law. Kinship diversion often means placing a child without a background check or analysis of the kin caregiver’s living conditions, education, health care, or child’s new sleeping arrangement. Kinship diversion also results in no case plan, social worker support, or permanency plan. Compl. ¶¶ 52, 54, 74, 89. In short, diverting children means they often do not receive the safeguards intended to protect abused and neglected children. Compl. ¶¶ 109, 121.

Kinship diversion deprives diverted children and their caregivers of support and training. To become a licensed foster parent, D.C. requires 30 hours of pre-service training, and another 30 hours of in-service training after becoming licensed. D.C. Mun. Reg. tit. 29, §§ 6026.2 (2019) and 6026.5 (2019). However, a kin caregiver does not receive training to care for a diverted child. CFSA’s lack of involvement leaves kinship caregivers to care for a child on their own, with little to no training compared to foster parents. Kinship diversion families lack not only access to resources that foster families have, but they also lack knowledge of available resources. Compl. ¶¶ 4–6.

Diverted children are also at a disadvantage when it comes to permanency planning. CFSA’s permanency practice policy requires social workers to develop a formal written case plan

within 30 days of opening a case.⁸ The birth parents, foster parents, child, and other service providers are all involved in the planning effort.⁹ Plans are reassessed and updated regularly.¹⁰ While children in foster care have access to CFSA's permanency planning resources, children in kinship diversion arrangements often do not receive the same resources. Compl. ¶¶ 31, 58, 77, 93.

B. Diverted Children Receive Fewer Benefits

Kinship diversion can deprive diverted children of significant benefits. D.C. foster children can be entitled to benefits, such as clothing vouchers; aftercare programs; college preparation programs, college tours, and financial aid; grants for college or vocational training programs; housing programs; and intensive programs for transition to adulthood. *See* D.C. Mun. Regs. tit. 29, § 6000 (2012) *et seq.* Further, foster parents receive a maintenance payment to assist with the costs of raising the child, such as clothing, food, and school supplies. *Id.* These benefits are not available for diverted children. Compl. ¶¶ 23(e) n.4, 118.

One of the greatest difficulties faced by kin caregivers and their families is financial hardship, yet diverted children and their caregivers lack access to funds available to foster families. Some defenders of kinship diversion contend that grandparents and other relatives who care for children informally can receive a subsidy under the D.C. Grandparent Caregivers Program ("GCP") or the D.C. Close Relative Caregivers Pilot Program. D.C. Code § 4-251.01 (2015) *et seq.*; D.C. Code § 4-241.21 (2019) *et seq.* However, in 2018, the average GCP subsidy was

⁸ CFSA, *Annual Public Report FY 2019: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2020), available at <https://cfsa.dc.gov/publication/fy19-cfsa-annual-public-report>.

⁹ *Id.*

¹⁰ *Id.*

between 40% and 60% of the foster care maintenance rate.¹¹ Both programs also require that the caregiver live in D.C and have a household income under 200 percent of the federally-defined poverty level—neither of which is required for foster parents to receive foster care benefits. The Caregiver Programs are simply not sufficient to meet the demand for assistance from D.C.’s kinship families and to ensure the safety or stability of the at-risk children they raise.

CONCLUSION

At bottom, CFSA discriminates when it diverts children and refuses to license their kin caregivers as foster parents. Plaintiffs’ experiences exemplify the disparate treatment and harms of kinship diversion; harms which include being denied access to the benefits, support, and protections given to foster parents. As described above, plaintiffs have adequately alleged a violation of the DCHRA. Therefore, for these reasons and those in plaintiffs’ briefing, we respectfully request this Court deny the District’s Motion to Dismiss.

Dated: April 24, 2020

Respectfully submitted,

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¹¹ Compare CFSA, *Grandparent Caregivers Program Annual Status Report, CY 2018* (Feb. 28 2019), available at <https://cfsa.dc.gov/publication/grandparent-caregivers-program-annual-report-cy-2018>; with Foster Care Rates Effective January 1, 2010, CFSA-10-H-0016 Attachment J.1.2, available at <https://cfsa.dc.gov/publication/foster-care-rates>.

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

/s/ Colin R. Kass
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