

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

K.H., et al.,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, et al.,

Defendants.

Civil Action No.: 1:19-cv-3124-TFH

Hon. Thomas F. Hogan

**ALLIANCE FOR CHILDREN'S RIGHTS' MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS**

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The Alliance for Children’s Rights (“Alliance”) respectfully submits this motion for leave to file the attached *amicus curiae* brief under Local Civil Rule 7(o). Plaintiffs’ Counsel at DC KinCare Alliance have been notified of the filing, and take no position at this time as to the merits of the motion or *amicus curiae* brief. Defendants have also been notified, and do not consent to the filing of this motion. A Proposed Order accompanies this motion.

### INTRODUCTION

The Alliance seeks leave to file the attached *amicus curiae* brief to bring to the Court’s attention certain abused and neglected children who are being deprived of crucial rights by the D.C. Child and Family Services Agency’s (“CFSA’s”) use of a custom known as “kinship diversion,” in lieu of the legally required procedures. Federal and state child welfare laws are designed to ensure that separation of a parent and child occurs only after reasonable efforts have been made to avoid the separation and through a process that provides due process protections for the parent and child, with the goal of family reunification where it can be done safely.<sup>1</sup> Further, child welfare laws provide for supervision, safeguards, support services and financial resources to protect the safety and well-being of abused and neglected children. All of these are denied to the child, parent and caregiver when children are diverted away from foster care through kinship diversion. Defendants have failed to meet their statutory—and fiduciary—responsibilities.

The practice of kinship diversion is not governed by D.C. law or CFSA policies nor overseen by Court. Accordingly, CFSA does not track D.C. children in kinship diversion arrangements, and there is no data to determine the outcomes of kinship diversion. Without the statutory protections

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<sup>1</sup> The Social Security Act requires any “State” that opts to receive Title IV funds to have a plan approved by the Secretary of the U.S. Department of Health and Human Services, and to agree to administer its foster care program in accordance with the statutory requirements and implementing regulation, which, in pertinent part reasonable efforts be made to preserve and reunify families. 42 U.S.C. § 671(a). *See also*, D.C. Code §§ 4-1301.09(b); 4-1301.02(3).

and meaningful data and analysis, CFSA may be placing the safety and security of diverted children at risk. The Alliance seeks to inform the Court about the risks of this unlawful practice so that the Court and Defendants can take steps to ensure preservation of the due process rights and well-being of the plaintiffs and other families impacted by kinship diversion arrangements, and that such children are supported and protected from harm.

## ARGUMENT

### I. **The Court Has Broad Discretion to Allow the Alliance's Participation as *Amicus Curiae***

District courts have the “inherent authority,” derived from Federal Rule of Appellate Procedure 29, to permit *amicus* briefing, and it is “solely within the court’s discretion to determine the fact, extent, and manner of the participation” of an *amicus*. *Youming Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 136 (D.D.C. 2008) (citing *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C.2003) (internal quotation marks omitted).

In *Portland Pipe Line Corp. v. City of S. Portland*, No. 2:15-CV-00054, 2017 WL 79948, at \*5 (D. Me. Jan. 9, 2017), the District of Maine “elected to follow the practical advice of then-judge Samuel Alito who essentially suggested that, assuming the other criteria are met, the court could grant the motion for leave to file an *amicus* brief and take the brief for what it is worth.” (citing *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132-33 (3d Cir. 2002)). Then-judge, and now Justice Alito, counseled that admission of an *amicus* brief be predicated on satisfying three elements: (1) an adequate interest, (2) desirability, and (3) relevance. *Id.* at 131. Additionally, he rejected the contention that an *amicus* be entirely impartial, reasoning that the strength of the adversarial system derives from its solicitation of rigorous advocacy from both sides of an issue, so “an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.” *Id.*

This Court regularly permits amicus briefing from non-profit groups when those organizations have “a special interest in [the] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of [the] case.” *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996); *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007); *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). Furthermore, non-profits supporting child welfare interests have appeared as *amici* in similar cases implicating the child protection system. *See e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, No. 132467 (1st Cir. Apr. 15, 2014) (order granting leave to appear as *amici* to various non-profit child advocacy organizations in case regarding claims of foster children); *Marisol A. v. Giuliani*, No. 96-9132 (2d Cir. Nov. 14, 1996) (order permitting National Coalition for Child Protection Reform to appear as *amici* in case involving allegations of child abuse in child welfare system); *C.P. v. New Jersey Dep’t of Educ.*, No. CV 19-12807, 2019 WL 6907490, at \*3 (D.N.J. Dec. 19, 2019) (order permitting various *amici* to file briefing on behalf of disabled and special-needs children in favor of plaintiff).

## **II. The Alliance Provides a Unique Perspective on Kinship Diversion Through the Depth and Breadth of its Experience and Expertise**

This Court permits amicus briefing “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Youming Jin*, 557 F. Supp. 2d at 137 (citing *Ryan v. Commodity Futures Trading Comm’n*, 125 F. 3d 1062, 1064 (7th Cir. 1997)); *Cobell*, 246 F. Supp. 2d at 62. The Alliance should be granted leave to file an *amicus* brief because it can assist this Court with its depth and breadth of experience and expertise in the issues in this case. In reference to the elements identified by then-judge, and now Justice Alito, as to which the admission of an amicus brief be predicated: The Alliance has (1) an adequate interest in the resolution of this matter as it directly relates to the mission and work of the

Alliance in advocating for the rights of vulnerable children, (2) developed, through nationwide research and years of involvement in child advocacy, information and perspective is that desirable in adjudicating this dispute, and (3) relevant knowledge and expertise. *See Neonatology Assocs.*, 293 F.3d at 132-33.

The Alliance is a nonprofit legal services organization dedicated to protecting the rights of impoverished, abused, and neglected children and youth by providing free legal and social services and promoting systemic solutions. The Alliance has represented hundreds of families who have been impacted by the practice known as kinship diversion (also referred to as hidden foster care) through its benefits and guardianship program.

In addition to its direct representation of families impacted by kinship diversion, during 2019 - 2020, the Alliance has endeavored to understand the scope of kinship diversion and to develop a set of policy recommendations to address the negative impacts of this practice. Over the course of 2019, the Alliance facilitated nineteen focus group discussions with over 200 relative caregivers, judicial officers, attorneys, service providers, and advocates, and surveyed an additional 326 individuals in order to understand the scope of the issue of hidden foster care and the impact it is having on children, parents and caregivers. Following the focus groups and surveys, the Alliance drafted a report and held two policy summits in order to vet its findings and recommendations with practitioners. Based on the feedback from the summits, the Alliance revised and finalized the report, *The Human Impact of Bypassing Foster Care for At-Risk Children*. As a result of the findings from its extensive research to understand the experiences of those in the hidden foster care system and the insights they bring to bear on the practice, and based upon the Alliance's policy recommendations arising therefrom, the Alliance is actively engaged in legislative advocacy to identify children who have been inappropriately and unlawfully diverted to ensure those children, their parents and caregivers are brought into the legal avenues to receive necessary support and services. The Alliance has hosted webinars and issued publications to bring about awareness of the failures of hidden foster care.

*Neonatology Assocs.*, 293 F.3d at 132 offers a useful proviso in considering whether to allow the Alliance to present its unique expertise and advocacy – whether the Alliance can “explain the impact a potential holding might have on an industry or other group.” More specifically, *C.P.*, 2019 WL 6907490, at \*3 explains that amicus briefing is desirable when the amicus can add to the consideration of how a court's holding “might impact *the particular populations* whom *Amici Curiae* seek to represent” (emphasis added). While the litigants in this case are well-placed to argue the

legality of kinship diversion under District and federal law, the Alliance seeks, through its attached brief, to alert this Court to the legal and policy implications of decisions rendered in this case, and their impact on children not just in the District, but nationwide. Courts around the country will take note of how the District handles this growing practice, so the resolution of this matter in the District is likely to influence the paradigm in other jurisdictions.

### **CONCLUSION**

As a result of the foregoing, the Alliance has a unique perspective beyond that which the parties to this case can provide. Accordingly, the Alliance requests this Court grant leave to address the practice of Kinship Diversion.

Dated: July 12, 2021

Respectfully submitted,

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**CORPORATE DISCLOSURE STATEMENT**

*Amicus Curiae* Alliance for Children's Rights is a not-for-profit corporation that has no corporate parent and no corporate stock.

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### INTEREST OF THE *AMICUS CURIAE*

The Alliance for Children’s Rights (“Alliance”) is a nonprofit legal services organization dedicated to protecting the rights of impoverished, abused, and neglected children and youth by providing free legal and social services and promoting systemic solutions. The Alliance provides a continuum of legal services, training, and support for children, youth, young adults, and families involved in the foster care system.<sup>1</sup>

The Alliance has represented hundreds of families who have been impacted by the practice known as kinship diversion (also referred to as hidden foster care<sup>2</sup>) through its benefits and guardianship programs. In addition to its direct representation of families impacted by kinship diversion, during 2019-2020, the Alliance endeavored to understand the scope of kinship diversion and develop a set of policy recommendations to address the negative impacts of this practice. Over the course of 2019, the Alliance facilitated nineteen focus group discussions with over 200 relative caregivers, judicial officers, attorneys, service providers, and advocates, and surveyed an additional 326 individuals in order to understand the scope of the issue of hidden foster care and the impact it is having on children, parents and caregivers. Following the focus groups and surveys, the Alliance drafted a report and held two policy summits in order to vet its findings and recommendations with practitioners, such as child protective services and child welfare agency workers, juvenile court attorneys who represent parents and children in dependency matters, kinship navigators and other professionals who provide social work and case

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<sup>1</sup> Pursuant to D.C. District Court Local Rule 7(o)(5) and Federal Rule of Appellate Procedure 29(a)(4)(E), none of the parties to the above-captioned dispute, nor their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person—other than Alliance and Mayer Brown LLP—contributed money that was intended to fund the preparing or submitting of this brief.

<sup>2</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* 841, 841 (2020), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/04/Gupta-Kagan-72-Stan.-L.-Rev.-841.pdf>.

management services for kin caregivers, foster family agencies, judges, and youth peer advocates. Based on the feedback from the summits, the Alliance revised and finalized the report, *The Human Impact of Bypassing Foster Care for At-Risk Children*. The Alliance has engaged in extensive research to understand the experiences of those in the hidden foster care system and the insights they bring to bear on the practice. Based upon the Alliance’s policy recommendations arising from this research, it is actively engaged in legislative advocacy to identify children who have been inappropriately and unlawfully diverted so as ensure those children, their parents and caregivers are brought into legal avenues to receive necessary support and services. To that end, the Alliance has hosted webinars and issued publications to bring about awareness of the failures of hidden foster care.

While the work of the Alliance has focused on the practice of kinship diversion and its impact on families in the state of California—where the Alliance is headquartered and provides services—the Alliance’s research to understand the impact of the practice, and its vision of protecting the rights of impoverished, abused, and neglected children is without borders. The work of the Alliance has provided it the insight to understand the scope of the risks of kinship diversion nationwide, including within the District of Columbia.

The Alliance’s interest in this case is especially strong. Through its work, the Alliance is aware that the practice utilized by child protective agencies, including the District of Columbia Child and Family Services Agency (“CFSA”), significantly impacts the children and their relative caregivers in the above-captioned dispute, as well as other children in the District and children throughout the Nation—and their wellbeing, safety, and care.

## **INTRODUCTION**

When a child cannot safely remain at home with his or her parents, the Government has a statutory, fiduciary, and moral responsibility to intervene. Federal and District law supply

resources to ensure that these children—the most vulnerable among our population—have the resources that they need to thrive.

This case is about children who are being let down by the system. Plaintiffs K.J., L.E., and T.C. (collectively, the “Minor Plaintiffs”) are children as young as two years old. As to each of the Minor Plaintiffs, CFSA has substantiated reports of child abuse and neglect. But rather than provide them with the formal protections and benefits that Congress and the Council of the District of Columbia have prescribed, each of the Minor Plaintiffs has been subjected to kinship diversion.

Kinship diversion is often touted as a desirable alternative to licensed foster care. After all, if a child must be removed from the physical custody of his or her parents, who better to step in than a relative or fictive kin?<sup>3</sup> The issue is not whether these children should be cared for by relatives, as placement with a relative is available through licensed foster care, and federal law requires that child welfare agencies “consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards.”<sup>4</sup> Rather, the issue is that these hidden foster care arrangements provide nearly none of the procedural safeguards or ongoing support resources that are made available to families operating under licensed foster care (including kinship foster care). CFSA’s use of kinship diversion, in its current form, as a means for responding to such substantiated cases of abuse and neglect is not only illegal, but also unsound policy, and amounts

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<sup>3</sup> “Fictive kin” refers to family-like relationships that lack a relationship through blood or marriage. Tiffany Allen & Karin Malm, *A Qualitative Research Study of Kinship Diversion Practices*, Child Trends (July 1, 2016), <https://www.childtrends.org/publications/a-qualitative-research-study-of-kinship-diversion-practices-2-2/>.

<sup>4</sup> 42 U.S.C. § 671(a)(19).



to an abdication of CFSA's fundamental responsibility to protect the safety of D.C.'s children and parental rights.

The abuse and neglect of a child followed by the separation of the child from a parent is a traumatic event. Federal and state child welfare laws are designed to ensure that separation occurs only after reasonable efforts have been made to avoid the separation. The law also requires that the separation is conducted through a process that provides due process protections for the parent and child, with the goal of family reunification under circumstances that protect the safety of the child.<sup>5</sup> Further, child welfare laws provide for supervision, safeguards, support services and financial resources to protect the safety and well-being of abused and neglected children. All of these are denied to the child, parent and caregiver when children are diverted away from foster care.

The work of the Alliance has revealed that kinship diversion is a pervasive and coercive practice that, in contradiction to the purpose of child welfare laws: (i) deprives parents and their children of due process rights and fails to support the desired objective of family reunification, (ii) deprives abused and neglected children of critical services and oversight that can impact their care, safety and well-being, and (iii) deprives relative caregivers from receiving support, financial and otherwise, desperately needed to care for abused and neglected children who have experienced the trauma of being separated from a parent.

Because CFSA's use of kinship diversion is not governed by District law or agency policies, CFSA does not track District children in kinship diversion arrangements or assess the

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<sup>5</sup> The Social Security Act requires any "State" that opts to receive Title IV funds to have a plan approved by the Secretary of the U.S. Department of Health and Human Services, and to agree to administer its foster care program in accordance with the statutory requirements and implementing regulations, which, in pertinent part, require that reasonable efforts be made to preserve and reunify families. 42 U.S.C. § 671(a); *see also* D.C. Code §§ 4-1301.09(b); 4-1301.02(3).

outcomes of such arrangements to determine whether they have positive or negative implications for these children. Without such information and analysis, CFSA may be placing the safety and security of these children at risk. Accordingly, the Alliance is submitting this brief to highlight for the Court the pervasive and profound risks associated with the practice of kinship diversion and the need to take steps to ensure the plaintiffs, and other District children in kinship diversion arrangements, are adequately protected from harm, and to set a precedent for the protection of vulnerable children, their families and their caregivers nationwide.

## ARGUMENT

### I. KINSHIP DIVERSION DEPRIVES PARENTS, CHILDREN AND KIN CAREGIVERS OF FUNDAMENTAL PROCEDURAL RIGHTS.

The Minor Plaintiffs became known to CFSA through reports of abuse or neglect. Following a report to CFSA of abuse or neglect of a child, CFSA is required to investigate the allegations. If substantiated, CFSA is required to undertake all “reasonable efforts . . . to prevent or eliminate the need for removing the child,”<sup>6</sup> a recognition of the fundamental rights of parents and children.<sup>7</sup>

If the child cannot be “adequately protected” in the home through the provision of services, then CFSA is required to remove the child to licensed foster care, and further required to consider giving preference to placement with relative caregiver.<sup>8</sup> Further, District law requires that, if a child is removed from his or her home, CFSA must, within 90 days, either return the child to his or her home or petition the Family Division of the D.C. Superior Court to initiate a

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<sup>6</sup> D.C. Code §§ 4-1301.09a; 4-1303.04(c).

<sup>7</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-45 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>8</sup> 42 U.S.C §§ 671(a)(19) and (29); D.C. Code §§ 4-1301.09a, 4-1303.04(c).

neglect case and seek custody of the child so that the child can be placed in foster care.<sup>9</sup> If CFSA determines that a child cannot be protected in the home, federal and District law require resort to the foster care system—there is no provision of law that authorizes a child that must be removed from an unsafe home to be transferred on an informal basis, without the protections and supports associated with foster care.<sup>10</sup>

When the government removes a child from a parent outside of the formal system, the child and parent are deprived of significant due process protections.<sup>11</sup> Through the formal system, the parent and child are entitled to protections and safeguards, including a requirement for CFSA to show that it made reasonable efforts to avoid removing the child from the parent, the right for the parent and child to be afforded attorneys, the obligation of CFSA to develop and implement a case plan, and the right of the child to receive funding and services to aid in his or recovery from the trauma of the separation.<sup>12</sup> These required procedural protections are missing in kinship diversion arrangements.

## **II. CFSA’S USE OF KINSHIP DIVERSION IS PERVASIVE AND COERCIVE.**

CFSA takes the position that it does not arrange for the child to be removed and transferred to the care of a relative outside of the foster care system in contravention of District law; rather, CFSA claims its broad authority allows for kinship diversion. One of the primary arguments in favor of hidden foster care for kin is that “families should retain responsibility and be empowered to drive the planning and decision making” because it is the family that is “best able to keep the

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<sup>9</sup> D.C. Code § 4-1301.09.

<sup>10</sup> The Social Security Act requires States receiving Title IV funds to remove a child from his or her home in accordance with a judicial determination. D.C. Code § 4-1303.04(c).

<sup>11</sup> Gupta-Kagan, *supra* note 2, at 860-871.

<sup>12</sup> D.C. Code §§ 4-1301.09(b)-(c); 4-1301.09a(b)-(c), (f).

child safe.”<sup>13</sup> In fact, there are significant reasons to look to relatives to care for children who cannot remain safely at home.<sup>14</sup> This “supposed voluntariness [of kinship diversion] exempts [it] from both court oversight and federal data tracking requirements.”<sup>15</sup>

However, the supposed “informal placement” by CFSA of children through kinship diversion is often coerced. CFSA enters the familial conversation once the parental treatment of the child has erupted into alleged abuse and/or neglect. Decisions on the placement of an abused and neglected child typically need to be made within 24 hours of when CFSA becomes involved. At that emotional time, most families have not given consideration to a placement of the child outside of the parent’s home and do not understand the foster care system nor the different options available to them, including that relatives are the preferred placement for a child in foster care and the right of a relative to be licensed as a foster parent.<sup>16</sup> These arrangements for care of the child outside the parent’s home typically are initiated by CFSA,<sup>17</sup> not the parent, and are used when CFSA has *substantiated* abuse or neglect and *determined it to be unsafe* for the child to remain in the home. Child welfare agencies tell parents that their child cannot stay with them, and

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<sup>13</sup> Karin Malm, et al., *Variations in the Use of Kinship Diversion Among Child Welfare Agencies: Early Answers to Important Questions* 2, Child Trends (2019), <https://www.childtrends.org/publications/variations-use-kinship-diversion-among-child-welfare-agencies-early-answers-important-questions>.

<sup>14</sup> Research shows that children who cannot remain at home have increased stability, higher levels of permanency, greater safety, better behavioral and mental health outcomes, greater likelihood of remaining connected with siblings and greater sense of cultural identity when placed with relatives or close family friends than placed with unrelated caregivers. Generations United, *Children Thrive in Grandfamilies* 1 (2021), <http://grandfamilies.org/Portals/0/16-Children-Thrive-in-Grandfamilies.pdf>.

<sup>15</sup> Gupta-Kagan, *supra* note 2, at 847.

<sup>16</sup> The Social Security Act requires that States receiving Title IV funds exercise due diligence to provide notice to adult relatives within 30 days of effecting a removal, to “explain[] the options the relative has under Federal, State, and local law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice” and “describe[] the requirements ... to become a foster family home and the additional services and supports that are available for children placed in such a home,” 42 U.S.C. § 671(a)(29).

<sup>17</sup> Gupta-Kagan, *supra* note 2, at 849; *see also* Allen & Malm, *supra* note 3, at 1.

that their child must be diverted to a relative informally to avoid a foster placement with strangers.<sup>18</sup>

By the very nature of these circumstances, parents are not in a position to freely and voluntarily agree to place a child with a relative through kinship diversion nor are kin caregivers in a position to make the best decision for the care of the child. Accordingly, kinship diversion is not fairly characterized as a voluntary, private arrangement between family members; rather, the child welfare agency has made the decision that the child and parent are going to be separated.<sup>19</sup> “When the state has the power to take your child, there’s always coercion.”<sup>20</sup> The state “effectuates the children’s loss of their parents’ care and the parents’ loss of physical custody of their children without any other branch of government checking or balancing the agency’s actions and without anyone getting a lawyer.”<sup>21</sup> It is well established, including in the criminal defense context, that the right to counsel should attach when an individual is subject to inherently coercive government action.<sup>22</sup> Yet, parents have no access to legal counsel when faced with the state’s removal of their children and diversion to kin.

Available data show that kinship diversion occurs with great frequency.<sup>23</sup> Despite the lack of data on kinship diversion, strong evidence indicates that the number of children diverted

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<sup>18</sup> The Annie E. Casey Foundation, *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies* 9 (2013) (citing child case workers), <http://www.aecf.org/resources/the-kinship-diversion-debate/> (hereinafter *Kinship Diversion Debate*).

<sup>19</sup> CFSA typically informs the kin caregiver of the option to seek custody of the child in court, and refers the caregiver to a legal services organization for assistance. However, in the experience of D.C. child welfare advocates, if the kin caregiver files for custody, the parent often vigorously contests custody in court. If that occurs, the caregiver must overcome rigorous legal requirements to be granted custody. *Id.*

<sup>20</sup> *Kinship Diversion Debate*, *supra* note 18, at 9 (citing child case workers).

<sup>21</sup> Gupta-Kagan, *supra* note 2, at 843.

<sup>22</sup> See *Miranda v. Arizona*, 384 U.S. 436, at 242 (1966).

<sup>23</sup> Gupta-Kagan, *supra* note 2, at 843.

to relatives through hidden foster care each year is roughly comparable to the number of children removed from their families and placed in licensed foster care through the court system each year.<sup>24</sup>

### **III. KINSHIP DIVERSION PLACEMENTS FAIL TO PROVIDE SUPPORT FOR FAMILY REUNIFICATION AND ARE LESS LIKELY TO PROVIDE FAMILIES WITH LONG-TERM PERMANENCY**

If a child must be removed from a home, reunification with the parent is the primary initial goal of the child welfare system, and an essential component of the case plan is to provide the opportunity for such reunification through the provision of reunification services. Reunification services are necessary in order to preserve the fundamental right of the parent to the care, custody, and control over their children, and the fundamental right of the child to remain with the parent. Child reunification efforts require not only that “reasonable efforts” be made to reunify parents and children, but also that agencies work with families on an individualized basis to aid rehabilitation of the underlying causes of the abuse and neglect.<sup>25</sup> As described further below, these individualized services and supports work.

While the safety of the child is paramount, stability and a sense of long-term permanence are also essential to the wellbeing of the child.<sup>26</sup> Critics argue that “kinship diversion without ongoing oversight, reunification services for the parents, or a concrete plan for the child does not provide the long-term permanence that children and families need to thrive.”<sup>27</sup> Instability of living arrangement and recurring exposure to abuse or neglect can have long-term adverse consequences for a child. Scientific research shows that such repetitive highly stressful experiences can alter

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<sup>24</sup> *Id.* at 855.

<sup>25</sup> *Id.* at 878.

<sup>26</sup> *Kinship Diversion Debate*, *supra* note 18, at 9-10.

<sup>27</sup> *Id.* at 9.

the normal development of a child's brain.<sup>28</sup> This, in turn, results in an increased risk for later mental illnesses, including generalized anxiety disorder and major depressive disorder; increased risk for physical ailments, such as asthma, hypertension, heart disease and diabetes; and increased risk of antisocial behavior, such as substance abuse and violent crime.<sup>29</sup>

Without the oversight, support and services that the foster care system is required to provide, families do not have the resources to facilitate reunification. Similarly, although other court systems are available for families grappling with guardianship or legal custody matters, these court systems are not designed to facilitate reunification. As a result, the child loses a parent permanently when, in many cases, they would have reunified.<sup>30</sup>

The services received to aid in reunification are critical to maintaining the family's stability following reunification. A recent study found that "Families who remained reunified were more likely to have received domestic violence services, parent counseling, and family preservation services. In particular, family counseling services remained significantly associated with the likelihood of reunification. Children whose families received family counseling were twice as likely to reunify as children in families that did not receive family counseling."<sup>31</sup> Without

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<sup>28</sup> Child Welfare Information Gateway, *Understanding the Effects of Maltreatment on Brain Development* (2015), <https://www.childwelfare.gov/pubs/issue-briefs/brain-development/>; Child Welfare Information Gateway, *ACYF-CB-IM-12-04: Promoting Social and Emotional Well-Being for Children and Youth Receiving Child Welfare Services* (2012), <https://www.acf.hhs.gov/sites/default/files/cb/im1204.pdf>.

<sup>29</sup> Nat'l Scientific Council on the Developing Child, *Early Experiences Can Alter Gene Expression and Affect Long-Term Development: Working Paper No. 10* (2010), <http://developingchild.harvard.edu/resources/early-experiences-can-alter-gene-expression-and-affect-long-term-development/>; Vincent J. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 Am. J. Preventive Med. 245 (1998).

<sup>30</sup> U.S. Department of Health and Human Services, Office of Assistant Secretary for Planning and Evaluation, *2016 ASPE Research Brief* (Dec. 2016).

<sup>31</sup> *Id.*.

the support of the child welfare system, these children and parents are denied critical services to support and strengthen the success of reunification.

#### **IV. KINSHIP DIVERSION FAILS TO SAFEGUARD THE SAFETY AND WELLBEING OF ABUSED AND NEGLECTED CHILDREN**

##### **A. Diverted Children Are Deprived of the Safeguards Necessary for their Safety**

A fundamental purpose of child protective agencies is to safeguard the safety and well-being of the child. Where there is a substantiated claim of abuse and/or neglect, CFSA is required to prepare a case plan for the child and the family, and also assign a social worker to meet with the child and family on a regular basis, oversee the case plan, and ensure all parties are complying.<sup>32</sup> The Family Division of the Superior Court must hold a review hearing every six months to assess the case, hold a permanency hearing within 12 months of the child entering foster care, and hold permanency hearings at least once every six months thereafter as long as the child is in an out-of-home placement.<sup>33</sup> Yet, none of these protections is available in the case of kinship diversion.

When CFSA engages in kinship diversion, there is a risk that the kin caregiver will return the child to the abusive or neglectful parent before it is safe to do so because the caregiver is unable or unwilling to continue to care for the child, the parent requests the child's return, and/or the child wants to go home. Even if the child continues to live with the kin caregiver, there may be no stability for the child because, unless the kin is granted custody by a court, the birth parent has the right to come get the child at any time.

Applicable law and policies require CFSA to ensure that the environment into which a child will be placed is safe. This requires CFSA to, among other things, conduct a criminal

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<sup>32</sup> D.C. Code §§ 4-1303.04, 4-1301.09; D.C. Mun. Reg. tit. 29 § 6000 et seq.

<sup>33</sup> D.C. Code § 16-2323(a).



background and child protection register check on the foster parent, as well as other adults living in the home; perform a health and safety assessment of the foster parent's home; and evaluate whether the foster parent can provide a safe and secure environment for the child. CFSA must also require the foster parent to meet conditions related to the child's sleeping arrangement, health care, education, and appropriate discipline of the child.<sup>34</sup> Further, CFSA must conduct ongoing reviews to ensure that the child continues to be safe and appropriate services are provided to stabilize the child and the family. The District's Licensure Act requires every facility providing foster care in the District to be licensed and inspected annually.<sup>35</sup>

None of the above steps is required in a kinship diversion arrangement. When CFSA facilitates such an arrangement, it does not conduct a home study to ensure that the kin caregiver's residence is safe nor collect basic information about the kin caregiver and others living in the home. There is no assurance that the kin caregiver has the means to care for the child nor any requirement that CFSA assist the caregiver in meeting the child's material needs. Accordingly, if the environment is unsafe, the child may be exposed to additional harm and trauma, as well as further instability if and when that kinship diversion arrangement is disrupted.

Even though the foster parent is a relative of the child, such licensure is necessary "to assure that each child in [CFSA's] care and custody has a placement that meets their needs for safety, permanence, and well-being."<sup>36</sup> This also ensures "the same level of protection for all children who are placed in out-of-home care" and entitles both the foster parent and foster child

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<sup>34</sup> Children in foster care have identified rights to, among other things, appropriate housing, food, clothing, education, health care, privacy, extra-curricular activities, transportation, as well as the right to be free from abuse or neglect.

<sup>35</sup> D.C. Code §§ 7-2105(2) and 4-1301.02.

<sup>36</sup> CFSA, Temporary Licensing of Foster Homes for Kin Policy, (effective Sept. 20, 2011).

to the same services and benefits afforded to other foster parents and children who are not related.<sup>37</sup>

Furthermore, CFSA does not monitor diverted children on an ongoing basis or provide even minimal post-diversion services or support to the child, birth parent, and kin caregiver.<sup>38</sup> CFSA takes the position that it has no further responsibility for the child or the family because the parent has purportedly initiated and consented to the arrangement and the child is no longer in an unsafe home with an abusive or neglectful parent. However, without CFSA oversight and accountability, the needs of the child (*e.g.*, mental health, medical, and educational services), birth parent (*e.g.*, mental health or substance abuse treatment, parent education classes), and kin caregiver (*e.g.*, child care, peer support groups, respite) can go unmet. There is no assurance of the safety and well-being of the child while in the care of relatives.

Moreover, because there are no written policies, procedures, or guidelines regarding when and how kinship diversion should be utilized, CFSA does not have a mechanism to identify (much less monitor) children who have been diverted into kinship diversion arrangements or to determine if those arrangements have positive or negative outcomes for diverted children and their families. Without such information and analysis, CFSA has no way of knowing whether kinship diversion is effective at protecting abused and neglected children from harm.

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<sup>37</sup> *Id.*

<sup>38</sup> At the family team meeting when the diversion takes place, CFSA may help the family develop a Safety Plan that includes voluntary services and may provide the family with a referral to a governmental or community-based service provider.

**B. Diverted Children Are Deprived of Other Fundamental Rights**

Hidden foster care also deprives the child of important educational rights afforded in foster care.<sup>39</sup> As a foster child, the young person gains specific rights, including the right for the child to remain in their school of origin and receive partial credits for work completed at one school if the child transfers to a new school.<sup>40</sup> Older youth in foster care also benefit from the opportunity to receive college and career supports to help with the transition to independence, including things like Education and Training Vouchers, transitional housing, and access to campus counseling programs.<sup>41</sup>

D.C. foster children are entitled to various 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.<sup>42</sup> Although children diverted away from foster care by CFSA have the same experiences of trauma, abuse, neglect, and separation from a parent that would trigger the provision of specific supports and services for children in foster care, because they were never formally placed in home of the relative through foster care, these children are deprived all these critical services.

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<sup>39</sup> Marla P. Spindel, et al., *Diversion in the District of Columbia: A Review of Local Practice to Inform National Policy*, in *5 GrandFamilies: The Contemporary J. of Research, Practice and Policy* 1, 6 (2018), <https://scholarworks.wmich.edu/grandfamilies/vol5/iss1/4>.

<sup>40</sup> 42 U.S.C. § 671(a)(30); CFSA Policy Manual, Procedure C: School Continuity and Stability; and Procedure D: School Enrollment and Withdrawal.

<sup>41</sup> CFSA Policy Manual, Procedure L: Post-Secondary Education.

<sup>42</sup> D.C. Mun. Reg. tit. 29 § 6000 *et seq.*

**V. KINSHIP DIVERSION DEPRIVES KIN CAREGIVERS OF SUPPORT REQUIRED TO PROVIDE FOR THE SAFETY AND WELL-BEING OF ABUSED AND NEGLECTED CHILDREN**

**A. Kin Caregivers Through Kinship Diversion Lack of Information Provided to Foster Families**

Finally, it is unclear to what extent CFSA informs the kin caregiver of the option to become licensed as a foster parent, and whether the caregiver understands the benefits of doing so. Indeed, a family team meeting happens at a time of significant stress, and the kin does not have an advocate present who can explain these very complex issues. Nor does CFSA provide kin caregivers with an easily understood written document that discusses all available placement options and the advantages and disadvantages of each, including the financial supports available. In the consolidated cases before this Court, CFSA failed to inform any of the Relative Caregiver Plaintiffs of their rights to become licensed foster care parents. After the Relative Caregiver Plaintiffs learned of the option to become foster parents to the Minor Plaintiffs, each submitted a request to CFSA to become licensed foster parents and/or requests for services and foster care maintenance payments. CFSA denied each of these requests.

**B. Relative Caregivers Lack Necessary Legal Rights in Kinship Diversion**

Whereas a licensed foster parent takes legal placement of the child under the foster care system, there is no change in legal custody when a child is placed in a relative's home through kinship diversion. Accordingly, although the child welfare agency determined that there was a significant enough threat of immediate harm to the child that they facilitated the physical removal of the child from the parent, they failed to transfer legal custody away from the parent leaving the kin caregiver without any legal rights with respect to the child, including the ability to make educational and health care decisions or obtain medical treatment for the child. The kin caregiver also loses eligibility for certain benefits on behalf of the child. Further, without a change in legal

custody, the birth parent has the legal right to retrieve the child at any time, leaving the child at risk of continued harm.

While a relative can independently seek guardianship through another court process, and CFSA often encourages kin to file for custody of the child in court, the kin caregiver may not want to sue the birth parent for custody or may not have legal standing to do so. Further, there is no guarantee that a court will grant kin custody, especially if the parent no longer consents to the arrangement. If the kin caregiver files for custody, the parent often contests custody in court. If that occurs, the caregiver must overcome rigorous legal requirements to be granted custody.<sup>43</sup>

**C. Kin Caregivers of Diverted Children Are Deprived of Important Entitlements Needed to Care for and Protect the Child**

In addition, kinship diversion deprives caregivers of critical supports, including a monthly financial stipend to assist with the costs of raising the child (such as clothing, food, and school supplies), respite and funding to reimburse the cost of transporting the child to their school of origin each day. Kin caregivers are also deprived of childcare, support services for the child to address the child's experiences of trauma<sup>44</sup> and to specialized support for complex medical needs.<sup>45</sup>

**VI. REASONS FOR KINSHIP DIVERSION**

**A. Kinship Diversion Improves CFSA Foster Care Statistics**

Child welfare agencies' reasons for engaging in kinship diversion are motivated, at least in part, by factors other than the best interests of diverted children. The Children's Bureau, within the United States Department of Health and Human Services, conducts Child and Family Service

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<sup>43</sup> Specifically, the kin caregiver must show by clear and convincing evidence that the parent is unable to care for the child and that it is in the best interests of the child to grant the kin caregiver custody. D.C. Code §§ 16-831.07-08.

<sup>44</sup> Spindel, *supra* note 39, at 2; *see also* 42 U.S.C. § 671(e).

<sup>45</sup> D.C. Code § 4-1303.05; 42 U.S.C. §§ 671(a)(21), (e)(10).

Reviews (“CFSR”) to ensure conformity with federal child welfare requirements, and states can incur significant financial penalties for failing to comply with their Program Improvement Plans.<sup>46</sup> In conducting the CFSR, the Children’s Bureau reviews a random sampling of child welfare cases including a combination of out-of-home placements, in-home cases, and family assessments. Children who never enter foster care are not part of this dataset and cannot be part of this review.

In 2012, CFSA adopted a strategic agenda called the Four Pillars. The “Front Door” pillar states that: “Children deserve to grow up with their families and should be removed from their birth homes only as the last resort. Child welfare gets involved only when families cannot or will not take care of children themselves.”<sup>47</sup>

In practice, CFSA has been striving to narrow the Front Door,<sup>48</sup> resulting in a dramatic decrease in the number of D.C. children removed from their homes. At the end of fiscal year 2006, 2,313 D.C. children were living in foster care; by the end of fiscal year 2017, the number had decreased by 61% to 898 children, with a 9% decrease between fiscal years 2016 and 2017 alone. As of September 2019, that number further fell to 796.<sup>49</sup> As part of the Four Pillars, CFSA sets

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<sup>46</sup> After a CFSR, a state is tasked with implementing a plan to remediate all “outcomes and systemic factors determined not to be in substantial conformity” with federal requirements. The Administration for Children and Families, the parent organization of the Children’s Bureau, “can withhold federal funds if states do not show adequate progress implementing their PIPs.” U.S. General Accounting Office, *Better Use of Data and Improved Guidance Could Enhance HHS’s Oversight of State Performance* (2004), <https://www.gao.gov/assets/250/242080.pdf>.

<sup>47</sup> CFSA, *Four Pillars: CFSA Strategic Agenda Supports Good Outcomes for Kids*, <https://cfsa.dc.gov/page/four-pillars>.

<sup>48</sup> CFSA, *Annual Public Report FY 2017: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2018), [https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/APR%202017%20FINAL\\_0.pdf](https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/APR%202017%20FINAL_0.pdf).

<sup>49</sup> CFSA, *Annual Public Report FY 2019: Implementation of the District of Columbia Adoption and Safe Families Amendment Act of 2000* (Jan. 2020),

benchmarks for reducing D.C. foster care placements. However, these benchmarks do not correlate with or seek to ameliorate 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.<sup>50</sup> As noted above, despite the lack of statistics, strong evidence indicates that the number of children diverted through hidden foster care each year is roughly comparable with the number of children in licensed foster care each year.<sup>51</sup>

CFSA's benchmarks for reducing the D.C. foster care population provide CFSA with a perverse incentive to use kinship diversion, rather than attempting to license kin caregivers as foster parents. Research demonstrates that the decision to utilize kinship diversion instead of foster care is not dependent on maltreatment type or severity, but rather on whether there is a willing relative available to take the child.<sup>52</sup> Accordingly, those D.C. children living with kin caregivers through kinship diversion are likely to have experienced the same type of abuse and neglect as another D.C. child living with licensed foster parent.

### **B. Kinship Diversion Reduces Short-Term Costs but Increases Financial Burdens over the Long Term**

Children who have been subject to substantiated allegations of abuse and neglect and for whom a child welfare agency has determined need to be moved out of the physical custody of a parent as a result of that abuse, have poorer physical and mental health outcomes when compared

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[https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/FY19\\_CFSA\\_Annual\\_Public\\_Report\\_FINAL\\_0.pdf](https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/FY19_CFSA_Annual_Public_Report_FINAL_0.pdf).

<sup>50</sup> Child Trends, *Child Maltreatment: Indicators of Child and Youth Well-Being* (2016).

<sup>51</sup> Gupta-Kagan, *supra* note 2, at 855.

<sup>52</sup> Allen & Malm, *supra* note 3; *see also Kinship Diversion Debate*, *supra* note 18; Gerard William Wallace & Eunju Lee, *Diversion and Kinship Care: A Collaborative Approach Between Child Welfare Services and NYS's Kinship Navigator*, 16 J. of Family Social Work 418 (2013).

to children in the general population. Further, “[t]hese physical and mental health problems are compounded if services are not provided in a timely and effective manner.”<sup>53</sup> However, these critical services are not provided to children diverted to a relative’s home by the child protection agency. Indeed, many of these relatives are struggling themselves either financially or with health problems. “Research suggests that many relative caregivers receiving cash assistance have low incomes and health problems. A study analyzing national survey data found that an estimated 55 percent of families in which a child was living in an informal arrangement with a nonparent caregiver receiving cash assistance had income levels below the federal poverty level. The same study found that an estimated 63 percent of these caregivers were unemployed, and an estimated 43 percent of them were in fair or poor health.”<sup>54</sup> Growing up in deep poverty – particularly after experiencing abuse, neglect and separation from a parent - has major long-term implications for the health and well-being of these children. Denying adequate supports, services and funding to children sets the relatives who open their homes to them up to fail. And, when a relative can no longer provide for a youth with unaddressed mental and physical health needs, these youth end up homeless, incarcerated, or entering foster care at a point where it is much more difficult to stabilize them in a family setting, resulting in increased placements in congregate care settings where the costs of providing for the youth skyrocket.<sup>55</sup>

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<sup>53</sup> Sarah J. Beal & Mary V. Greiner, *Children in Nonparental Care: Health and Social Risks*, 79 *Pediatric Research* 184, 186 (2016), <https://www.nature.com/articles/pr2015198.pdf?origin=ppub>.

<sup>54</sup> U.S. Gov’t Accountability Off., GAO-12-2, *TANF and Child Welfare Programs: Increased Data Sharing Could Improve Access to Benefits and Services* 13-14 (2011), <https://www.gao.gov/assets/gao-12-2.pdf>.

<sup>55</sup> Beal & Greiner, *supra* note 53, at 185-187.



**C. Voluntary Placement Agreements Provide a Reasonable Alternative to Kinship Diversion**

Kinship diversion is an unnecessary practice for giving family choices. Federal and state child welfare laws provide for voluntary placement agreements (“VPAs”) between a county agency and a parent—an alternative to kinship diversion. VPAs are mutual, written, time-limited agreements among the child’s parent, custodian, or guardian and the child welfare department, in accordance with applicable regulations, that specify the terms of the voluntary placement.<sup>56</sup> VPAs allow the government to work with families before they request a formal petition for removal and offer the parent and child services aimed at reunification while the child is cared for in the home of a relative or family friend.<sup>57</sup>

VPAs protect the due process interests of the parent and child, because they are limited in time, can be withdrawn or terminated by the parent at any time, and require the agency to take additional formal action if the child cannot be returned home within 90 days.<sup>58</sup> They also protect the caregiver by allowing them to make decisions on behalf of the child. Further, children in a VPA receive the rights associated with being in foster care, such as the right to remain in their school of origin, and these children are supported through a monthly foster care stipend.

VPAs are intended to be utilized to allow a child to live temporarily outside of the home while the parent attempts to rehabilitate. The term “voluntary placement” means “an out-of-home placement of a minor, by or with participation of a State agency, after the parents or guardians of the minor have requested the assistance of the agency and signed a voluntary placement agreement.”<sup>59</sup> VPAs are intended to be an alternative to a petition filed with the court that orders

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<sup>56</sup> Children’s Bureau, Child Welfare Policy Manual, § 8.3A.13; *see also* District of Columbia CFSA Placement Manual.

<sup>57</sup> 42 U.S.C. § 672(e) – (g); Cal. Welf. & Inst. Code §§ 16507.4, 16507.5, and 16507.6.

<sup>58</sup> D.C. Code § 4-1303.03(a)(2).

<sup>59</sup> 42 U.S.C. § 672(f).

the child into foster care while the parents receive assistance from the agency and, as is noted by the name, voluntarily agreed to by a parent.<sup>60</sup> When the state/county uses a VPA – they still have to provide the child and parent with services. The child still receives monthly financial support. The VPA is time limited to ensure that the child does not remain outside the home of the parent indefinitely. Those protections are critical to ensuring that the child/parent are supported and able to attempt reunification in any situation where they are being separated. Voluntary Placement Agreements stand in sharp contrast to CFSA’s kinship diversion practices, which deprive the parent and child of support and services, lack reasonable limitations on duration, and often result in custody being lost without a single service ever being afforded to the child or parent.<sup>61</sup>

### CONCLUSION

CFSA’s use of kinship diversion constitutes an abdication of its fundamental responsibilities to protect and ensure the well-being of District children and to allow children and parents to access services and support to aid in their reunification. For the reasons detailed in this *amicus* brief, we respectfully request that this Court *to cease the practice of kinship diversion* and to adopt policies providing for voluntary placement of children in relative homes in a way that provides the protections included in federal law, and allows for monitoring of children under such placements to allow for careful analysis of the impacts of such processes for improving the safety of the children and preserving families.

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<sup>60</sup> 42 U.S.C. § 672(a)(2)(A)(i).

<sup>61</sup> *Kinship Diversion Debate*, *supra* note 18, at 8.

Dated: July 12, 2021

Respectfully submitted,

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

K.H., et al.,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, et al.,

Defendants.

Civil Action No.: 1:19-cv-3124-TFH

Hon. Thomas F. Hogan

**[PROPOSED] ORDER**

Upon consideration of the Alliance for Children’s Rights’ motion for leave to file an *amicus curiae* brief, the Court finds that the proposed *amicus curiae* brief may assist in the determination of matters before the Court. Accordingly, IT IS ORDERED that Alliance for Children’s Rights is granted leave to file its *amicus curiae* brief.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Thomas F. Hogan  
United States District  
Judge