

**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-03124-TFH

**MOTION OF DC VOLUNTEER LAWYERS PROJECT
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

DC Volunteer Lawyers Project (“DCVLP”) respectfully requests leave to file the accompanying *amicus curiae* brief in support of Plaintiffs’ opposition to Defendants’ motion to dismiss. Pursuant to Local Rule 7(o)(2), DCVLP’s counsel reached out to the parties’ counsel to ascertain the position of each party as to the filing of the *amicus curiae* brief. Plaintiffs consent and support the filing. Defendants do not consent. A Proposed Order accompanies this motion.

District courts have “broad discretion” to permit *amicus curiae* participation. *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Engineers*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). This Court generally permits third parties to participate as *amici curiae* when they have “relevant expertise and a stated concern for the issues at stake in [the] case.” *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). Specifically, this Court has permitted the filing of *amicus* briefs in cases where a third party has “unique information or perspective” that can contribute to the Court’s understanding of the matter in question and assist the Court in the resolution of legal or factual questions. *Jin v. Ministry of State Sec’y*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

DCVLP is a non-profit organization that provides direct legal and advocacy assistance to at-risk children, including many children like the plaintiffs in this case who have been deprived of legally mandated services and support as a result of the DC Child and Family Services Agency's ("CFSA") unlawful kinship diversion practice. Given its direct interaction with children affected by the practice at issue in this case, DCVLP has "relevant expertise and a stated concern for the issues at stake," and its *amicus curiae* brief will provide "unique information" that will assist the court in the disposition of CFSA's motion to dismiss. *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d at 237; *Jin*, 557 F. Supp. 2d at 137.

Based on the foregoing, DCVLP respectfully requests that the Court grant this motion and accept the accompanying *amicus curiae* brief.

Dated: June 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion of DC Volunteer Lawyers Project for Leave to File *Amicus Curiae* Brief with the Clerk of the U.S. District Court for the District of Columbia by using the appellate CM/ECF system on June 7, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Respectfully submitted,

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**[PROPOSED] *AMICUS CURIAE* BRIEF OF DC VOLUNTEER LAWYERS
PROJECT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Dated: June 7, 2021

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CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

I, the undersigned, counsel of record for amicus curiae, DC Volunteer Lawyers Project, pursuant to D.C. District Court Local Rule 7(o)(5) and Fed. R. App. P. 26.1, certify that DC Volunteer Lawyers Project 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), DC Volunteer Lawyers Project 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 that was intended to fund preparing or submitting this brief. No person—other than DC Volunteer Lawyers Project and Clifford Chance US LLP—contributed money that was intended to fund the preparing or submitting of this brief.

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I. INTRODUCTION

DC Volunteer Lawyers Project (“DCVLP”) respectfully submits this brief in support of Plaintiffs’ opposition to Defendant Child and Family Services Agency (“CFSA”)’s motion to dismiss Plaintiffs’ claims that CFSA’s unlawful kinship diversion practice has deprived these children and their kin guardians of legally mandated support and services. As a representative for wrongfully diverted children, DCVLP witnesses firsthand the negative effect of CFSA’s practice on wrongfully diverted children, their families and the legal system.

As described in Plaintiffs’ First Amended Complaint, under federal and DC law, CFSA is tasked with investigating allegations of child abuse or neglect and, upon a finding of immediate danger, seeking a court order to place the child in foster care. First Am. Compl. at ¶¶ 1-2. Pursuant to this Court’s order in *LaShawn A.*, and recognizing that it is preferable to place children that must be removed from their parents with other family members, CFSA implemented a policy to license kin caregivers as foster parents.¹ Yet CFSA has intentionally evaded its own policy and its legal responsibility to abused and neglected children by informally diverting children to the care of a family member without licensing the family member as a foster parent. First Am. Compl. at ¶ 3. In doing so, CFSA violates its legal obligations to obtain court approval for the removal and placement of these children, as well as to provide ongoing support and services to the children and their kin guardians.

¹ See CFSA, *Temporary Licensing of Foster Homes for Kin* (2011), available at <https://cfsa.dc.gov/publication/program-temporary-licensing-foster-homes-kin> (citing as authority for the policy the *LaShawn A. v. Gray* Implementation and Exit Plan).

II. INTEREST OF AMICUS CURIAE

DCVLP is a non-profit organization that provides direct legal and advocacy assistance to victims of domestic violence and at-risk children. DCVLP and its volunteer attorneys frequently represent children as *guardian ad litem* in custody proceedings, and DCVLP's client advocates assist these children and their caregivers in connecting with social services. DCVLP receives more requests for pro bono *guardian ad litem* representations that it is able to field. Many of these requests are from family members who are forced to seek custody of a child whom CFSA has improperly diverted to the family member's care. Through its direct representation of these children, DCVLP is uniquely situated to attest to the negative impact of CFSA's unlawful kinship diversion practice, which (A) deprives children, kin guardians, and biological parents of legally mandated services and support; (B) fails to secure safe environments for children by prematurely ending investigations; and (C) drains resources from DCVLP and similar organizations that those organizations would otherwise use to serve at-risk children.

A. In its role as *guardian ad litem*, DCVLP observes the detrimental effects of kinship diversion and the resultant deprivation of resources to the child, parent and kin guardian.

When there is a substantiated report of child abuse or neglect, CFSA must seek an order from the Neglect and Abuse Division of Family Court ("Neglect Court") if CFSA wishes to remove the child and place him or her in foster care. As described in detail in Section III(B) below, Neglect Court is specially designed to oversee cases of child abuse and neglect; the legal proceedings are set up to protect and balance the parties' constitutional right to familial integrity with the child's safety and best interests. To that end, Neglect Court provides extensive support and services to the child, the biological parent, and the guardian, including:

- Specialized judges who are familiar with neglect and abuse cases;
- A court-appointed *guardian ad litem* for the child;

- A case worker;
- An attorney for the parent; and
- An attorney for the guardian.

In addition to these resources, Neglect Court works with CFSA and the parties to continuously review the child's situation and determine the best short- and long-term placement for the child.

As a result of CFSA's kinship diversion practice, however, many children never make it into Neglect Court. CFSA's practice is to encourage kin guardians to file for third-party custody before the Domestic Relations Branch ("Custody Court"). As stated in DC Kincare's complaint, and as experienced by DCVLP, sometimes CFSA will actively threaten that the child will be removed from the family altogether if the family member does not file for third-party custody. First Am. Compl. at ¶ 37. CFSA rarely, if ever, informs kin guardians of other available options to care for the child or of the support and services available to the family if CFSA were to open a case in Neglect Court.

In Custody Court, none of the above-described resources are available. Neither the guardian nor the parents have a right to be represented by counsel in custody proceedings and are only able to receive representation if they have the financial means or are able to retain pro bono counsel. Most importantly, children in custody proceedings receive no financial support and no case worker, and a *guardian ad litem* is only assigned at the court's discretion and upon availability. Through its *guardian ad litem* representations, DCVLP observes firsthand the disparity in outcomes between children who receive the legally mandated oversight and support available in Neglect Court, versus those whom CFSA unlawfully diverts to kin guardians, who must then navigate the legal system with less or no support or guidance. As one example, DCVLP was appointed *guardian ad litem* for a complicated third-party case involving two kin guardians and two biological parents. CFSA had substantiated allegations of neglect against the biological mother

for all three children in the house, including a long and continued history of drug use, as well as a significant domestic violence history perpetrated by the biological father. CFSA then informed the kin guardians that they would need to seek third-party custody or CFSA would remove the children. Once the kin guardians filed for third-party custody, CFSA closed the case. The custody case diverted substantial time and resources from Custody Court and DCVLP, without any involvement from CFSA. Treatment resources for the parents that might have otherwise been provided through Neglect Court were not available. Ultimately, the children were not able to return to a meaningful relationship with their parents.

DCVLP has seen numerous families fall into this trap, with CFSA passing its obligation on to kin guardians instead of continuing its engagement with the family, which would open up resources to benefit the children. As a result of CFSA's unlawful kinship diversion practice, these cases are redirected to Custody Court, and a limited pool of pro bono *guardians ad litem* from organizations like DCVLP must navigate a complex family situation that should receive the additional support and services the Neglect Court system was designed to provide.

B. Through its kinship diversion practice, CFSA fails to secure safe environments for children by prematurely ending investigations.

In addition to depriving children and their families of the legally mandated process and resources of Neglect Court, CFSA prematurely closes investigations as part of its kinship diversion practice, which results in children remaining in, or returning to, unsafe living situations. As described above, when CFSA diverts a child, the kin guardian is forced to seek third-party custody. To do so, the kin guardian must meet the law's strict requirements to establish standing and must overcome the legal presumption in favor of custody for the biological parents. To overcome this presumption, kin guardians and Custody Court should be able to rely on CFSA's investigation to demonstrate neglect or abuse warranting the child's removal and placement with the kin guardian.

When CFSA prematurely ends its investigation, it deprives both the kin guardian and the courts of a record to facilitate the child's placement in an appropriate environment. DCVLP has served as *guardian ad litem* in many cases in which, in the absence of a CFSA investigation, the kin guardian does not have the resources to move forward with the custody case, cannot meet the custody standing requirements or is unable to appropriately articulate the harm that the child will experience if the kin guardian is not granted custody. As result, the court often has no choice but to allow the child to return to a neglectful or abusive home—without any oversight or continuing support from CFSA.

Even more concerning, CFSA will divert children to family members who are no better equipped to care for them than their parents. DCVLP has observed many cases in which CFSA places a child in an unsafe living situation simply because the caregiver is a family member. For example, in a recent case, CFSA substantiated claims of neglect against a single mother and then placed the mother's young child with his maternal grandmother. About a year later, CFSA was called to investigate a report of abuse after the grandmother returned the child to the mother. Instead of carrying out a full investigation and locating a safe placement for the child, CFSA again called the maternal grandmother and placed the child with her. Less than a year later, CFSA was called a third time after the mother and grandmother had a physical altercation in the grandmother's home where the child was living. Nevertheless, CFSA once again asked the maternal grandmother to keep the child, but this time she refused. Only then did CFSA seek out a safer home for the child—in another kinship diversion with the paternal grandmother, whom CFSA told to seek custody. This case is just one example of a young child being bounced from home to home, or landing back in an unsafe situation, as a result of CFSA's practice of diverting to kin and then closing the investigation.

C. As a result of CFSA's unlawful kinship diversion practice, DCVLP expends extensive resources representing diverted children.

As described above, after diverting a child to a kin guardian, CFSA closes its investigation—but diverted children and the challenges that they face do not simply disappear. Rather, non-profit organizations like DCVLP often take on the important work of helping these children land in a safe home that is equipped to support them. DCVLP and its volunteer attorneys are often assigned to represent children wrongfully caught up in custody proceedings. Diversion custody cases are extremely taxing for DCVLP and other organizations assigned as *pro bono guardian ad litem* and forced to take on the role of case worker and counselor, monitoring and advising the court on the best outcome for the child without the resources or procedural protections of Neglect Court.

The time and resources that DCVLP and its volunteer attorneys dedicate to wrongful kinship diversions should be put towards representing other domestic violence victims and children in civil protection order and custody matters. Similarly, DCVLP's client advocates devote time and resources to assisting diverted children and their kin guardians to obtain support and resources that should be provided automatically through the foster system.

As described in this brief, DCVLP has observed how CFSA's unlawful and negligent kinship diversion practice prevents abused and neglected children from receiving the process and protections to which they are legally entitled. Because CFSA's improper diversions harm children and their families, DCVLP supports Plaintiffs' opposition to CFSA's motion to dismiss.

III. CFSA'S DUTIES AND THE ROLE OF NEGLECT COURT

By law, CFSA is tasked with the responsibility of “protecting child victims and those at-risk of abuse and neglect and assisting their families.”² CFSA’s mission of improving the “safety, permanence, and well-being of abused and neglected children in the District of Columbia” is supported by clear guidelines and agency policies. *Id.* As explained below, these guidelines and policies explicitly outline how CFSA should undertake its responsibilities. Contrary to CFSA’s assertion in its motion to dismiss, the practice of kinship diversion is outside of its legal mandate. The unlawful practice of kinship diversion is not supported by the child welfare principles underlying the D.C. Code and agency policies. Rather, this practice serves to extend the harm suffered by children known to CFSA because of reported abuse or neglect.

CFSA is governed by clear policies and procedures regarding how and when to implement its mission. If a report of abuse or neglect is substantiated and the child is at-risk, CFSA is required to remove the child from the home, place him or her in foster care and initiate neglect proceedings in Neglect Court. Council for Court Excellence, *Practice Manual For Child Abuse and Neglect Cases in The District Of Columbia* (Council for Court Excellence, 3rd ed. 2008). The unauthorized practice of kinship diversion undermines CFSA’s legally mandated policies and procedures. Of particular relevance for DCVLP, CFSA’s intentional practice of kinship diversion is yet another chapter in its history of shirking its responsibility for protecting abused and neglected children. DCVLP cannot and should not have to continue to fill the void created by CFSA’s unlawful practice.

² CFSA, *About CFSA*, <https://cfsa.dc.gov/page/about-cfsa> (last visited May 20, 2021).

A. D.C. law mandates that CFSA is responsible for protecting neglected and abused children in the District.

District of Columbia law charges CFSA with the duty to receive reports of child neglect and abuse, to investigate child neglect and abuse cases, to remove children from their homes if necessary and to protect children who have been abused or neglected “from further experiences and conditions detrimental to their healthy growth and development.” D.C. Code § 4-1303.01a.

CFSA is also subject to federal judicial oversight as a result of the *Lashawn A.* litigation. In 1989, a federal class action lawsuit filed on behalf of the District of Columbia’s abused and neglected children challenged nearly every aspect of the District’s child welfare system and sought expansive reforms.³ This Court held that CFSA’s predecessor—the Department of Human Services—violated the federal and local statutory rights of all of the children in the plaintiff class. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 998 (D.D.C. 1991), *aff’d and remanded sub nom. LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993). After the finding of liability, the parties worked together to develop a plan of remedial action, and, on August 27, 1991, this Court issued an initial Remedial Order. *LaShawn A. v. Kelly*, 887 F. Supp. 297, 298 (D.D.C. Aug. 24, 1995), *aff’d sub nom. LaShawn A. v. Barry*, 107 F.3d 923 (D.C. Cir. 1996). After an appeal in 1993, this Court on remand issued a second Remedial Order (hereinafter “Modified Final Order”) imposing numerous requirements, changes and more reforms. *Id.* However, due to “widespread noncompliance” with the Modified Final Order, this Court subsequently imposed a full receivership order over CFSA “to ensure full compliance with the Remedial Order and the Implementation Plan.” *LaShawn A. v. Barry*, No. CIV. 89-1754 (TFH), 1995 WL 520763, at *1

³ See Children’s Law Center, *CFSA Policies and Lashawn A.* 1 (2018), available at https://www.childrenslawcenter.org/sites/default/files/attachments/resources/PK4_II.%20LaShawn%20A.%20Information_0.pdf

(D.D.C. Aug. 24, 1995); *see also Kelly*, 887 F. Supp. at 316. The *LaShawn A.* Modified Final Order and a subsequent Implementation and Exit Plan of 2010 set judicially mandated outcomes and standards aimed at reforming the District’s child welfare system. Together, the D.C. Code and the *LaShawn A.* Modified Final Order and Implementation and Exit Plan explicitly outline how CFSA should implement each of its core functions.

First, CFSA must respond to and investigate any allegations of abuse or neglect. Pursuant to D.C. Code § 4-1301.04, CFSA “shall conduct a thorough investigation of a report of suspected child abuse or neglect to protect the health and safety of the child or children when . . . the Agency suspects a child is at imminent risk of or has experienced abuse or neglect that the Agency determines to be severe.” A CFSA social worker must initiate an investigation within 48 hours of a report—meaning that the social worker has seen the child and talked to the child away from the caregiver or has made a documented good faith effort to see the child but has been unable. *See generally* Modified Final Order II(G). The social worker must conduct, within 30 days, an “acceptable” child abuse and neglect investigation that determines if the initial abuse or neglect report is substantiated. D.C. Code § 4-1301.06(a), (b)(3); *see also* Modified Final Order II(G).

Second, if the results of the investigation demonstrate that the abuse or neglect report is substantiated and the child is at-risk, CFSA only has two options: (1) maintain the child at home and ensure safety through the provision of services, or (2) remove the child to foster care. D.C. Code § 4-1301.06(b)(3). According to CFSA policy, the agency’s goal is to keep families together

and connect “families with services so that their children can stay at home safely.”⁴ Thus, children are only removed when they cannot be safe at home.⁵

CFSA is legally authorized to take three approaches to effectuate the removal of the child: (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 [Neglect Court] 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). Kinship diversion is not among CFSA’s options.

If CFSA decides to pursue option two and remove the child, it must have “reasonable grounds to believe that the child is in immediate danger from his or her surroundings.” D.C. Code § 16-2309(a)(3). CFSA notes that the “removal of children from their homes is a traumatic event” and different policies have been implemented to minimize risks and unintended consequences. CFSA, *Temporary Licensing of Foster Homes for Kin*. For instance, CFSA’s “Temporary Licensing of Foster Homes for Kin” policy, adopted in September 2011 to conform with the *LaShawn A. Implementation and Exit Plan*, emphasizes that “placement with kin can be beneficial in many ways and, when in the best interests of the child, should be the preferred alternative to non-kin foster care placements.” *Id.* at 1. Therefore, to facilitate the goal of foster care kin placement, CFSA established a process for temporary licensure of foster homes for kin residing within the District of Columbia and Maryland. CFSA, *Temporary Licensing of Foster Homes for*

⁴ CFSA, *What Happens After you Report Child Abuse and Neglect*, <https://cfsa.dc.gov/publication/what-happens-after-report> (last visited May 20, 2021)

Kin. Licensed foster care providers receive support services from CFSA to assist with the care of the child.

These policies are the framework that describe CFSA's legally mandated response when faced with allegations of child abuse or neglect. Through its unauthorized practice of kinship diversion, however, CFSA is continuing its history of not fulfilling its obligations as a child welfare agency. Contrary to CFSA's argument in its motion to dismiss, informally diverting children to the care of a family member without licensing the family member as a foster parent is not a practice sanctioned by D.C. law or CFSA policy. In its brief, CFSA cites the Prevention of Child Abuse and Neglect Act and D.C. Code § 4-1303.03(a)(7) as granting it the legal authority to utilize kinship diversion as an "option for ensuring that children are provided with necessary care and assistance." Mot. to Dismiss at 1. This characterization of the law is incorrect. Kinship diversion is not mentioned in the cited section, and CFSA cannot point to any other authority to support its assertion that this language authorizes kinship diversion. D.C. Code § 4-1303.03(a)(7) grants the Director of the Agency the duty and power to "*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" (emphasis added). The plain language of this section directs CFSA to comply with the law in its provision of services to children and families—not divert children outside of the foster system and wash its hand of them.

Moreover, CFSA is on notice that kinship placements should be licensed and that its practice of kinship diversion is a complete dereliction of its duties to abused and neglected children. Since 1995, this Court has mandated that CFSA implement a licensure process for kinship home placements. *LaShawn A. v. Kelly*, 887 F. Supp. at 311 (D.D.C. 1995). As mentioned above, this

process was *finally* implemented in 2011. CFSA admits that the purpose of the licensure process is “to achieve significantly expedited licensure for the kinship caregivers, which can facilitate the immediate placement of children in the least restrictive, most familial settings.” CFSA, *Temporary Licensing of Foster Homes for Kin*. Despite these admissions, CFSA continues to engage in its unlawful kinship diversion practice. Instead of protecting at-risk children through placement in foster care or licensing family member foster homes, CFSA avoids its responsibility and protects its bottom line by shifting the burden to concerned family members and non-profit organizations like DCVLP.

B. Neglect Court is the appropriate forum for cases involving abuse or neglect and provides specialized judges and services that are not available to children in kinship diversion.

When CFSA removes a child from the home as a result of an abuse or neglect investigation, CFSA takes custody of the child. *See generally* D.C. Code §§ 4-1301.07(a); 16-2309(a)(4); 16-2311. Once this step occurs, D.C. law requires certain measures to be taken: (1) a *guardian ad litem* shall be appointed to represent the child’s best interest within 24 hours of the child having been taken into custody; (2) a shelter care hearing shall be commenced not later than 72 hours after the child has been taken into custody; and (3) a neglect petition shall be filed with Neglect Court at or prior to the shelter care hearing. D.C. Code § 16-2312. During the 72 hours allotted to begin a shelter care hearing, CFSA may convene a family team meeting to solicit the input of family members, relatives and others to develop a safety plan regarding the child’s welfare. D.C. Code § 16-2304.

Once the neglect petition is filed and court proceedings are initiated, more procedures attach, in particular: (1) the parents or guardian for the child must be provided notice of the neglect petition and an opportunity to be heard; (2) the parent or guardian named in the neglect petition is

entitled to legal representation at all critical stages of the proceedings and, if financially unable to obtain adequate representation, to have counsel appointed in accordance with the rules of the court; (3) and most notably, a social worker from CFSA is assigned to care for the child through the entire neglect process. D.C. Code § 16-2304(b)(1), (b)(4)(A); Council for Court Excellence, *Practice Manual For Child Abuse and Neglect Cases in The District of Columbia* 4-3 (3rd ed. 2008); *see also* CFSA, *When Child Welfare Investigates Your Family*.

CFSA complies with none of these requirements when engaging in the unlawful practice of kinship diversion. When CFSA diverts a child, CFSA is making a determination that the child is at-risk and must be removed from the home. Upon making this determination, CFSA is obligated to commence the legally sanctioned neglect proceedings described above, with the requisite process and protections for the child, their parent(s) and their guardian(s). Instead, CFSA informally contacts a concerned family member and coerces them to take the child and apply for custody. At no point does CFSA inform the family member of CFSA's legal obligation to provide temporary foster home licensing for kin guardians. This deceptive scheme serves to strip Neglect Court of jurisdiction over neglect and abuse cases and places these cases instead on already overburdened Custody Court dockets where the parties are guaranteed none of the above-described protections.

CFSA is aware of its legal and judicial obligations once it substantiates an abuse or neglect report. Nevertheless, CFSA chooses to disregard these orders to the detriment of the at-risk children it is legally mandated to protect. As a result, DCVLP and other organizations representing these vulnerable children as *guardians ad litem* in Custody Court must attempt to fill in the gap and alleviate the harms caused by CFSA and its practices. Through its unlawful practice of kinship

diversion, CFSA intentionally deprives abused and neglected children of the legally mandated protections and support.

IV. CFSA’S KINSHIP DIVERSION PRACTICE IS UNLAWFUL

As described above, CFSA’s practice of kinship diversion is an intentional deviation from the required process and protections under D.C. law, as well as this Court’s order in *LaShawn A.* CFSA’s unlawful practice (A) violates CFSA’s obligations to abused and protected children under the Adoption Assistance and Child Welfare Act; (B) deprives these children of their due process rights; and (C) is negligent as to both the children and their kin guardians.

A. The practice of kinship diversion violates CFSA’s obligations under the Adoption Assistance and Child Welfare Act.

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act (“Child Welfare Act”) to strengthen state child welfare programs, particularly those related to foster care and adoption. Pub. L. 96-272 (1980). The Child Welfare Act provides federal funding for foster care programs, among other services, and imposes detailed requirements for state agencies that receive funds. In essence, the Act requires CFSA to pursue the safety of vulnerable children, to support family members who are willing and able to care for them, to ensure that they have access to the most fundamental resources and to monitor the children’s continuing wellbeing. CFSA’s unlawful practice of kinship diversion not only directly conflicts with specific provisions of the Child Welfare Act, it flouts these basic principles.

The relevant provisions of the Child Welfare Act detailed in plaintiffs’ complaint are enforceable under Section 1983. *LaShawn A. v. Dixon*, 762 F. Supp. at 988–90. Section 1983 allows individuals to enforce “any rights . . . secured” by federal law, including statutory rights. 42 U.S.C. § 1983; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Thus, the central inquiry in

determining whether a plaintiff has a cause of action under Section 1983 is whether the statute confers an individual right. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

Three factors inform whether a particular statutory provision gives rise to a federal right: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the right asserted is not so “vague and amorphous” that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997). These three factors are satisfied here.

First, Congress clearly intended that the provisions identified in plaintiffs’ complaint, which describe in detail numerous obligations to and services for the child, were for the benefit of the child. In addition, the statute specifically identifies relatives who are owed notice and information about their options, which must include the option to apply to be licensed as a foster parent.

Second, kinship diversion deprives children of services and financial support that would be CFSA’s responsibility by misleading family members about the options they have to care for the children and coercing these relatives to apply for custody. There is nothing vague or amorphous about ceasing this practice immediately and complying with the law. This Court has regularly overseen substantial changes to the District’s child welfare system, which demonstrates that the Court’s enforcement of the Adoption Assistance and Child Welfare Act would not strain judicial competence.

Third, the statute is clearly meant to be mandatory, not precatory. The statute states: The State “shall” develop a written case plan for children that ensures they are safe and receive the necessary services. 42 U.S.C. § 671(a)(16) (emphasis added). The State “shall” provide a case review system that monitors the ongoing safety and wellbeing of the child. *Id.* The State “shall”

provide foster care maintenance payments to cover the child's basic expenses. 42 U.S.C. § 671(a)(1). CFSA's footnotes in its motion acknowledge that the provisions in question are mandatory. Mot. to Dismiss at 13.

CFSA's primary argument is that it does not owe these families foster care maintenance payments and other services because they are not formal foster homes. The point of this case, though, is that through its kinship diversion practice, CFSA is avoiding licensing kin caregivers as foster homes, thereby depriving children and families of benefits they would otherwise be owed. CFSA's technicality-focused, "gotcha" approach defies the Supreme Court's holding in *Miller v. Youakim* that relative caregivers cannot be denied the benefits of the foster system on the basis of their familial ties. 440 U.S. 125 (1979) (holding that relatives who are licensed as foster parents are entitled to the same benefits as non-relative foster parents).

CFSA relies on *Suter v. Artist M.*, which held that a provision in the Child Welfare Act requiring that reasonable efforts be made to prevent removal of children from their homes and to facilitate reunification of families where removal has occurred was not enforceable under Section 1983. 503 U.S. 347 (1992). But as CFSA's own brief notes, "in 1994 Congress overrode the reasoning in *Suter* to enable certain provisions of the [Child Welfare Act] to give rise to private enforcement." Mot. to Dismiss at 12 n.9. Specifically, the statute states, "[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2.

CFSA attempts to conceal this inconvenient fact by saying Congress did not "intend to alter the holding in *Suter* that section 671(a)(15) . . . is not enforceable in a private right of action." However, as CFSA acknowledges, the complaint in this case does not allege a violation of section

671(a)(15). Mot. to Dismiss at 12. The Child Welfare Act provisions invoked in the complaint contain specific, detailed requirements that are much more susceptible to judicial enforcement than § 671(a)(15). First Am. Compl. at ¶¶ 30–32 (alleging violations of 42 U.S.C. §§ 671(a)(1), 671(a)(10), 671(a)(16), 671(a)(22), 671(a)(29), 672(a), 672(c), 675(1), 675(4)(A) and 675(5)).

Finally, CFSA refers to *Melton v. District of Columbia*, 85 F. Supp. 3d 183 (D.D.C. 2015)—a case in which CFSA followed the *correct* process. There, a father alleged he had been deprived of his paternal rights after his child was placed with a family member—who CFSA licensed as a foster parent and who subsequently adopted the child following a proceeding in Neglect Court. In deciding whether the father had standing to bring a claim under the Child Welfare Act, the court relied on *Suter* but inexplicably extended the holding with respect to § 671(a)(15) to the entire act. The court provided no clear rationale for why it believed this jump was warranted, but the single paragraph on this issue begins by characterizing the Act as “a federal reimbursement program for certain expenses.” *Id.* at 191. If the implication is that, because the requirements arise in the context of a state plan they are not privately enforceable, the holding is in direct violation of the 1994 amendment. 42 U.S.C. § 1320a-2; *see N.Y. State Citizens’ Coal. for Children v. Poole*, 922 F.3d 69, 83 n.7 (2d Cir. 2019) (“[W]ith respect to the entire Social Security Act, including this Child Welfare Act, Congress explicitly anticipated the possibility of Section 1983 actions. Thus, Congress amended the Act to override the reasoning in *Suter* . . . and thereby to enable appropriate provisions of the Social Security Act to give rise to a private enforcement action ”).

In short, CFSA is obliged to provide children and kin guardians a variety of services under the Child Welfare Act. Through its practice of kinship diversion, CFSA is systematically failing to do so and instead shifting the burden to non-profit organizations like DCVLP that cannot keep

up with the number of improperly diverted cases without directing resources away from other cases appropriately in Custody Court that would benefit from GAL involvement. The children and family members who suffer injury as a result of CFSA's dereliction of duty have the right to remedy under Section 1983. The majority of circuit courts that have considered this issue agree. *See, e.g., Poole*, 922 F.3d 69 (2d Cir. 2019) (holding that the right to foster care maintenance payments is enforceable under Section 1983); *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017) (same); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 979-980 (9th Cir. 2010) (same). *But see Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013) (concluding that the first *Blessing* factor—that Congress intended the statutory provision to benefit the plaintiff—was not satisfied).

B. The practice of kinship diversion violates the due process rights of affected children and family members.

CFSA's kinship diversion practice deprives children and their kin guardians of liberty and property interests without due process.

1. Kinship diversion deprives children and parents of their liberty interest in familial integrity without due process.

The Supreme Court has confirmed that the Due Process Clause of the Fourteenth Amendment protects the right to familial integrity. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–20 (1984). “The constitutional interest in the development of parental and filial bonds free from government interference has many avatars . . . above all, it is manifested in the reciprocal rights of parent and child to one another’s ‘companionship.’” *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). Through its kinship diversion practice, CFSA is depriving the family of access to case management services that could allow the family to stay together or support eventual reunification. An important function of foster care is to provide children safety and care while family members and the child protection agency

plan for the future. For this reason, the Child Welfare Act requires CFSA to make “reasonable efforts to . . . preserve and reunify families.” 42 U.S.C. § 671(a)(15)(B).

CFSA tries to claim that kinship diversion is giving weight to parental considerations when it quotes ““a parent’s choice of a fit custodian for the child must be given weighty consideration which can be overcome only by . . . clear and convincing evidence.”” Mot. to Dismiss at 4 (quoting *In re D.S.*, 88 A.3d 678, 690 n.19 (D.C. 2014)). In practice, however, kinship diversion results in cases that should properly be overseen by Neglect Court being heard in Custody Court. As described above, there are substantially fewer resources for families in Custody Court than in Neglect Court. *See supra* Section III.B. Significantly, family members do not have a right to counsel in Custody Court. *Compare* D.C. Code § 16-831.06(c), -914(g), or -918(b) (appointment of counsel in Custody Court is at the court’s discretion), *with* D.C. Code § 16-2304(b)(4)(A) (establishing entitlement to representation in Neglect Court). Kinship diversion does not flow from respect for parent’s wishes. Instead, it forces parents and kin guardians into an adversarial relationship without counsel in a court that is relatively ill-equipped to deal with cases of abuse or neglect.

2. Kinship diversion deprives children and kin guardians of benefits they are owed under federal and D.C. law without due process.

The Due Process Clause of the Fourteenth Amendment prohibits the states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV § 1. Property interests “are defined by existing rules or understandings that stem from an independent source such as state law. . . that secure certain benefits and that support claims of entitlement to those benefits.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court has long since established that an individual may have a property interest in public benefits. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). To have a property interest in a

benefit, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Roth*, 408 U.S. at 577. The children and kin guardians in this case have a legitimate claim of entitlement to benefits that the CFSA should not be able to avoid by violating its legal requirements. CFSA claims that D.C. Code 4-1303.03(a)(7) authorizes kinship diversion, but as described above, this provision is merely a general authorization for the Director of the Agency to “provide services to families and children . . . consistent with the requirements” of the law. It says nothing about kinship diversion. Perhaps this provision could be read as a broad authorization of supplemental initiatives that are not described elsewhere in the statute, but there is certainly no basis for concluding that the provision authorizes the CFSA to contravene the statutory requirements that have already been described. In fact, CFSA cannot point to any authority, whether at the federal or District level, that provides a legitimate basis for its kinship diversion policy.

CFSA’s argument is, in effect, that because CFSA has not licensed the kin guardians as foster parents, it owes them nothing. To do so, it relies on an out-of-context quote from *Roth*: “procedural due process ‘is a safeguard of the security of interests that a person has already acquired in specific benefits.’” Mot. to Dismiss at 30 (quoting *Roth*, 408 U.S. at 576). But the court in *Roth* went on to explain that “the welfare recipients in *Goldberg v. Kelly* . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients *had not yet shown that they were, in fact, within the statutory terms of eligibility*. But we held that they had a right to a hearing at which they might attempt to do so.” *Roth*, 408 U.S. at 577 (emphasis added). By failing to provide the statutorily mandated notice to kin guardians of

their option to be licensed as foster parents, CFSA has denied them the opportunity to demonstrate that they are eligible for licensure and the resulting payments.

Finally, CFSA relies on *Rust v. Sullivan*, 500 U.S. 173 (1991), which concerned whether the federal government was required to provide funding for abortion-related services. The abortion right is a liberty right, i.e., the ability to receive an abortion without government interference. The argument rejected in *Rust* was that the funds were necessary to protect the underlying abortion right. The claim in this case is based on the right to receive funds that are available under federal and state law. *Rust* is inapposite.

Federal and D.C. law create clear entitlements to funds and services for neglected and abused children and for their kin guardians. Through its kinship diversion practice, CFSA has attempted to withhold these benefits without affording due process.

C. CFSA has breached its duty of care to children and kin guardians impacted by its practice of kinship diversion.

Under the public duty doctrine, the District generally cannot be held liable in negligence based on duties owed to the general public. However, there are two important exceptions to this rule: 1) specific statutory protection and 2) special relationship. *Turner v. Dist. of Columbia*, 532 A.2d 662, 667 (D.C. 1987). In this case, CFSA has breached the duty it owes to abused and neglected children who are afforded specific statutory protection. CFSA has also breached the duty owed to kin guardians who justifiably rely on CFSA to provide them complete and non-misleading information about their options to care for affected children.

1. Abused and neglected children are owed specific statutory protections that CFSA systematically fails to provide.

The D.C. and federal laws described above prescribe specific mandatory acts that are clearly intended for the protection of a particular class of persons—namely abused and neglecte

children—rather than for the public as a whole. *Turner*, 532 A.2d at 667. This applies the children who are not yet in CFSA’s custody. As the D.C. Circuit held in *LaShawn A. by Moore v. Kelly*, “*Turner* establishes that the children in the present case who are reported to be abused or neglected but who are not yet in CFSA’s custody have a private right of action under the District’s Abuse and Neglect Act.” 990 F.2d 1319, 1325 (D.C. Cir. 1993). As discussed above, CFSA has failed to satisfy the statutory provisions governing the appropriate investigation, case management and services CFSA is required to provide when there is a report of abuse or neglect. Thus, it has breached the duty it owes to diverted children.

2. CFSA has a special relationship with kin guardians and has breached duties arising from that relationship.

CFSA also owes enforceable duties to individuals with whom it has established a special relationship. *Turner*, 532 A.2d at 667. A special relationship exists where there has been direct or continuing contact between an individual and the governmental agency or official, and the individual has justifiably relied on the agency or official. *Platt v. Dist. of Columbia*, 467 A.2d 149 (D.C. 1983). In this case, CFSA has directly intervened to place endangered children with kin guardians, and the kin guardians have justifiably relied on CFSA’s misrepresentations and omissions regarding the options available to them to care for these children. CFSA owed these individuals proper disclosure of the potential for, and the benefits of, licensure as foster parents.

V. CONCLUSION

In conclusion, DCVLP respectfully recommends that the Court deny CFSA’s motion to dismiss. As described herein, CFSA’s unlawful kinship diversion policy deprives children of the oversight and support to which they are entitled, and places substantial burden on organizations like DCVLP to step in to represent these children’s interests.

Dated: June 7, 2021

Respectfully submitted,

/s/ Michaela Spero

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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-03124-TFH

**[PROPOSED] ORDER GRANTING MOTION OF DC VOLUNTEER LAWYERS
PROJECT FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Upon this Court's review and full consideration of the Motion of DC Volunteer Lawyers Project for Leave to File *Amicus Curiae* Brief, it is hereby ORDERED that the Motion is GRANTED, and the attached proposed *amicus curiae* brief shall be docketed.

Dated: _____

HONORABLE THOMAS F. HOGAN
SENIOR UNITED STATES DISTRICT JUDGE