January 10, 2022

Aysha E. Schomburg
Associate Commissioner, Children's Bureau
U.S. Department of Health & Human Services
330 C Street, SW
Washington, DC 20201

Dear Commissioner Schomburg:

Thank you for your letter of January 4, 2022, and for letting us know that the Children's Bureau is working on a letter to the field regarding hidden foster care. We are glad to learn that the Children's Bureau is taking that step, as federal leadership is badly needed in this area, and we look forward to discussing this further once that letter is released.

As the Bureau works on that letter to the field, we[1] want to share several points in response to your letter.

First, the framing of the issue is important and there are three aspects to this framing that we consider essential to the understanding of hidden foster care. The issue is not simply one of "informal use of relatives and kin." That phrase invokes the frequent practice of parents choosing to permit kin to take care of their children completely separate from the child protection system; that practice is, of course, within parents' choice and we express no concern with it. Hidden foster care, however, involves action by a state child protection agency to cause the kinship care arrangement. The critical difference between unobjectionable "informal use of relatives and kin" and hidden foster care that most concerns us is that, in hidden foster care, the agency explicitly or implicitly threatens families, and there is no mechanism for review of the arrangement nor any accountability to the agency's duty to connect children or their caregivers to the requisite supports. We are concerned about coercion of families and denial of due process at the outset of these arrangements, and as long as they are in place. Respectfully, to call this practice "informal use of relatives and kin" is, at best, an incomplete description because it does not acknowledge the coercion involved or the lack of recourse and support for parents, kin, and children. Moreover, in hidden foster care cases, the agency frequently fails to provide children with the services and support to which they are entitled when the government facilitates a change in physical custody. It includes separations of children from their parents into homes with non-kin too, and the informal nature of these separations represents a looseness of accountability by the agency, not flexibility for the families.

[1] This letter is from everyone in the Hidden Foster Care Workgroup who met with you last May, plus a new member of our group, Aubrey Edwards-Luce of First Focus on Children, who will join us when we are able to meet again.

As importantly, we urge the Children's Bureau to frame this issue as a matter of racial and class justice. The families who face implicit and explicit threats of losing their children to the formal foster care system are disproportionately Black and poor. As you are aware, 53% of Black children will experience a child welfare investigation in their childhoods. Racial injustice is endemic to a practice that allows agencies to compel unlawful and unaccountable family separation as a result of these investigations. Racial injustice is also evident when agencies presume Black and Brown kin's willingness to take over care of children without adequate support or legal rights to care for them, and then use threats (explicit or implied) of foster care with strangers to coerce the kin into doing so.

As a matter of law, morality, and racial and class justice, those families deserve due process when state-facilitated family separations are contemplated. We know the Biden Administration is committed to racial justice as a pillar of its child welfare policy; we applaud that commitment and urge that it be a foundation of guidance regarding hidden foster care.

Related to the overall framing, we urge the letter to the field to incorporate the principles that the Hidden Foster Care Workgroup has endorsed, which we have previously shared with Lexie Gruber-Perez and which is attached to this letter. Those principles are best suited to regulating this practice and ensuring that the racial and class injustices and due process violations involved in it cease. In light of the multiple recent multi-million dollar verdicts and settlements in hidden foster care cases and to protect agencies against further legal liability, we encourage ACF to bring to the field's attention the principles we have articulated as essential to ensuring all families legal rights are respected.

Second, in response to your letter, we must respectfully disagree with the assertion that "ACF cannot modify current data reporting without a legislative change." Title IV-E has long provided that state agencies must "make such reports, in such form and in such information as the Secretary may from time to time require . . . ." 42 U.S.C. § 671(a)(6). The Family First Act already requires states to provide data regarding children's placement status at the start and end of a one-year period in which agencies provide them services through their Family First plan. 42 U.S.C. § 671(e)(4)(E)(iii). And ACF has significant discretion to approve or not states' Family First plans. So, at a minimum, ACF can require data reporting about children's placement status and ensure that includes tracking of hidden foster care cases. We urge ACF to use these authorities to obtain essential data about this practice, which should include not only the numbers of children in hidden foster care, but also their outcomes.

Third and finally, we want to express that we are glad that the Children's Bureau will study this issue, and that we agree that gathering more data is essential. We note that several states *do* track hidden foster care data – demonstrating that states can do so without an undue administrative burden, and that ACF can begin by immediately working with those states to start a national hidden foster care data collection effort. It is important that this data collection is designed and completed in a manner that does not contribute to the oversurveillance of communities of color and we hope that any national effort will incorporate families with lived experience into its conceptualization and implementation.

Again, we are glad the Children's Bureau is working on a letter to the field, and we urge the Bureau to incorporate the points in this message in that letter.

Sincerely,

Andrew C. Brown, Esq.
Co-Chair, United Family Advocates

Angela Burton
Director of Quality Enhancement, Parent Representation
New York State Office of Indigent Legal Services
For affiliation purposes only

Kathleen Creamer, Esq.
Co-Chair, United Family Advocates
Managing Attorney, Family Advocacy Unit
Community Legal Services of Philadelphia

Josh Gupta-Kagan
Professor of Law
University of South Carolina School of Law
For affiliation purposes only

Aubrey Luce-Edwards, J.D., M.S.W.
Senior Director, Child Welfare and Juvenile Justice
First Focus on Children

Diane Redleaf, Esq.
Founder and Immediate Past Co-Chair
United Family Advocates

Marla Spindel
Executive Director
DC KinCare Alliance

Hidden Foster Care:
Statement of Principles on Extrajudicial State Regulation of Families

1. Family integrity is a fundamental right protected by the United States Constitution. Any proposed separation or agency-imposed restriction, including those portrayed as voluntary or that occur without court oversight, are restraints on liberty and must conform to Constitutionally required due process protections.
2. Circumstances related to poverty, race, or culture are never a valid reason for the state to separate families or impose other restrictions on families.
3. Agencies should never separate families or impose other restrictions when a child is not in imminent danger of harm due to abuse or neglect. When an agency cannot meet its burden in court to separate a family or impose other restrictions through the legal removal process, it should not do so outside of that process.
4. Parents have an absolute right to counsel whenever an agency seeks the separation of a child from their parents or other restrictions on the parent-child relationship.
5. Agencies have an affirmative duty to actively negotiate with the family and their counsel regarding the terms of the proposed arrangement and to identify community-based resources to address areas of concern or alleged grounds for separation.
6. Families and their counsel have the right to identify their own resource providers and are under no obligation to utilize providers under contract with the agency.
7. Alleged grounds for separation or areas of concern must be shared with parents and their counsel specifically and in writing at first contact.
8. Resources must be culturally responsive and narrowly tailored to address the specific areas of concern or alleged grounds for separation identified by the agency and parent. Agencies must not require unnecessary services or interventions unrelated to the areas of concern or alleged grounds for separation.
9. Parents should have a right to request a hearing related to the proposed arrangement.
10. Arrangements shall be temporary, brief, and time limited as negotiated between the agency and parents' counsel. Terms of the arrangement, including conditions for the return of the child, must be clear, understandable, and in writing.
11. Before a child is placed with a kinship caregiver under an agreement between the agency and parents, the agency shall provide the proposed kinship caregiver with written notice that sets forth: (a) the terms of the agreement, that that they are under no obligation to consent to care for the child pursuant to those terms, and that they have the right to decline to care for the child; (b) the rights, responsibilities, options, and resources available to them if they decide to care for the child; and (c) their right to consult with legal counsel and to have counsel represent them in connection with their decision whether to care for the child.
12. The agency has an affirmative obligation to assist the kinship caregiver to obtain any documentation or other resources necessary to care for the child and ensure the stability of the placement.

13. A kinship caregiver may decide not to care for the child at any time, and that decision alone shall not result in any adverse action against the caregiver, such as the bringing of a neglect case against the caregiver or future disqualification as a formal or informal resource for the child and family.
14. Seeking or facilitating parent-child separations outside of the legal removal process does not amount to reasonable efforts to preserve families or prevent removals by agencies.

This document reflects consensus views of members of the Hidden Foster Care Working Group, a diverse coalition of advocates for parents, children, and kinship caregivers. These consensus views reflect the minimum steps that Working Group members envision in response to hidden foster care and should not be read as precluding individual members or individual jurisdictions from requiring more stringent regulation. Indeed, these views should not be interpreted to mean that, if implemented, they will meet the requirements of applicable federal and state laws without additional changes to a particular state's laws.