IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

K.H., et al.	) CIVIL NO.:
	) 19-3124-ACR
Plaintiff,	)
vs.	)
	)
DISTRICT OF COLUMBIA, et al.,	)
	) January 24th, 2023
Defendant.	) Washington, D.C.
_____	) 11:30 a.m.

Transcript of Status Conference
Before the Honorable Ana C. Reyes
United States District Judge

APPEARANCES:

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Also Present: Lynsey Nix, CFSA

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P R O C E E D I N G S

THE COURT: Ms. White, could you please call the case.

THE CLERK: Yes, Your Honor. This is civil action 19-3124, K.H., et al. versus District of Columbia, et al.

Will the parties please come forward and identify themselves for the record starting with the plaintiffs.

THE COURT: Where is Ms. Badlam?

MS. WILLIAMS: Good morning, Your Honor. Ms. Badlam is in London on work, unfortunately.

THE COURT: Oh, tell her we missed her.

MS. WILLIAMS: Yes, she regrets.

THE COURT: Tell her also, I love London. So I'm jealous. There's a great restaurant -- hold on one second.

MS. WILLIAMS: Unfortunately, she's very busy. So it's not getting to enjoy the city as much as one would hope.

Ms. Williams on behalf of plaintiffs.

THE COURT: One second. I'm like on this and I won't be able to get off of it.

Okay. You have to write this down for her, there's this phenomenal restaurant in London called Fumo, F-u-m-o, and it's in the -- it's basically in the theater district. It's next to this hotel I love there called St. Martins Lane. Any way, it's Italian tapas and it's phenomenal. It's really, really good.

MS. WILLIAMS: Also, in London they have a rotating cheese wheel.

THE COURT: Where?

MS. WILLIAMS: Also in the theater district. Like a Sushi conveyor accept for nice cheeses.

THE COURT: That's awesome. Well tell her however busy she is she is ordered to take her team there at some point on her trip.

MS. WILLIAMS: I'll tell her.

THE COURT: Thank you.

MS. KELLEY: Good morning, Your Honor. Mateya Kelley for defendant District of Columbia.

THE COURT: Welcome back.

MS. KELLEY: I'm joined by my Pamela Disney and Lynsey Nix the client representative for CFSA.

THE COURT: All right. Welcome everyone. So the reason I'm calling you all here today is, one, to get a status update on your discovery, but it's also to issue a ruling on the motion to dismiss. So this is probably not going to come as a galloping shock to anyone, Ms. Kelley, I apologize in advance you're not going to like much of this. I will reiterate that I think you've done a phenomenal job on the briefing and argument and we are just where we are.

All right. So this is the oral ruling on the motion to dismiss in K.H. -- hold on, Christine do you have a copy of

this? Okay. In K.H. v. District of Columbia, No. 19-CV 3124 and related cases. I think the motion to dismiss was only as to one or two cases, but the reasoning is going to apply to all of them, unless one of you tell me I'm missing something after I finish, okay? So it's going to be entered in all of the cases.

So I'll start with the Social Security Act claims. Plaintiff's seek to enforce multiple provisions in the Social Security Act through 42 U.S.C. Section 1983. The most relevant sections are codified at 42 U.S.C. 672(a), which deals with foster care maintenance payments, and in several subsections of 42 U.S.C. Section 671, which set forth various requirements for the state plan for foster care and adoption assistance that a state must adopt to receive certain federal funds.

Defendants argue that I should dismiss those claims both because these SSA provisions do not create any private rights that plaintiffs can enforce through Section 1983 and because plaintiffs fail to state a claim even if the Act creates enforceable rights.

I'll first address the dispute as to whether the relevant SSA provisions create privately enforceable rights. In *Blessing v. Freestone* 520 U.S. 329, 1997, the Supreme Court set out a three-prong test to determine whether a federal statute creates rights enforceable through Section 1983.

Quote, first, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the states. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms, Id. at 340-41, cleaned up.

In *Gonzaga University v. Doe,* 536 U.S. 273, 2002, the Supreme Court clarified that to satisfy the first *Blessing* prong the statute must, quote, unambiguously confer a right, Id. at 283. The Court has held quote that the *Gonzaga* test is satisfied where the provision in question is phrased in terms of the persons benefited and contains rights-creating, individual-centric language with an unmistakable focus on the benefited class, end quote. And has, quote, rejected Section 1983 enforceability where the statutory provision contained no rights-creating language; had an aggregate, not individual, focus; and served primarily to direct the federal government's distribution of public funds. End quote. *Health and Hospital Corporation of Marion County v. Talevski*, 143 Supreme Court 1444-1457, 2023.

I note that, even if a statute satisfies the *Blessing* test, quote a defendant may defeat the presumption

that it creates privately enforceable rights by demonstrating that Congress did not intend that Section 1983 be available to enforce those rights end quote, Id. at 1459, cleaned up. A defendant may do so by showing either that the statute expressly forbids enforcement via Section 1983 or that Congress implicitly foreclosed private enforcement by, quote, creating a comprehensive enforcement scheme that is incompatible with individual enforcement, end quote, Id. cleaned up.

The District has not made such a showing -- sorry, the District has not made such an argument with respect to any of the provisions at issue in this case, so I will not address this possibility further.

As an initial matter, I want to address some general arguments that each side makes about how to conduct the enforceable-rights inquiry in the context of the SSA. Each side claims that the Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347, 1992 and Congress's reaction to that decision with the so-called *Suter* fix, support their case. Plaintiffs have the better of the argument.

In *Suter*, the Supreme Court held that Section 671(a)(15) of the SSA does not confer any privately enforceable rights 503 U.S. at 363. The Court concluded that the provision's requirement that a state employ, quote, reasonable efforts, end quote, to achieve various goals was

too indefinite to confer enforceable rights. Particularly given that the section appeared in a list of provisions that must appear in a state plan in order to obtain federal funding, rather than a section imposing definite obligations on states, see Id. at 358 to 63.

Congress responded in 1994 by enacting the, quote, *Suter* fix, 42 U.S.C. Section 1320(a)(2), which provides, quote, in 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. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce state plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 1113 Supreme Court 1360, 1992, but not applied to prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.*, that Section 671(a)(15) of this title is not enforceable in a private right of action, end quote.

The District reads this provision as reaffirming that *Suter* was correctly decided. That is true in a narrow sense, but the provision is more helpful to plaintiffs. It undercuts the District's argument that, because Section 671(a)

subsections plaintiff seek to enforce appear in a list of required features of a state plan, Congress did not intend them to be privately enforceable, and makes clear that the Court should not take *Suter*'s narrow holding that one provision of the SSA is not enforceable to mean that the distinct provisions at issue in this case are not enforceable.

The District also argues that Congress's decision to amend the SSA in 1996 to add an express cause of action to enforce 671(a)(18), which requires state plans to provide that state foster systems will not discriminate based on race, color, or national origin, see 42 U.S.C., Section 674(d)(3)(A) implies that Congress did not intend other sections to be privately enforceable.

The 9th Circuit rejected a similar argument in *Henry A. v. Willden*, 678 F.3d 991, 1008, 9th Circuit 2012 and I agree with its reasoning. As plaintiffs point out, one could equally well infer from Congress's action that Congress thought other subsections were already privately enforceable, or that Congress simply wanted to make it crystal clear that important anti discrimination provisions were enforceable. And as the 9th Circuit noted in *Henry A.* the express cause of actions for 671(a)(18) is potentially broader than that provided by 1983, so Congress may simply have intended to enhance enforcement of that subsection rather than prevent enforcement of other provisions, 678 F.3d at 1008.

Next, plaintiffs assert in their opposition at 13 that this Court previously determined that several provisions they cite are privately enforceable in the *LaShawn* litigation. But *LaShawn* does not really help the plaintiffs. As defendants correctly point out, on appeal from the decision, the D.C. Circuit declined to decide whether the SSA provides enforceable rights, and remanded to the District court, quote, with instructions to either fashion an equally comprehensive order based entirely on D.C. law if possible, end quote, or otherwise to reconsider its enforceability holding based on *Suter*. *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1324 to 26, D.C. Circuit, 1993.

As a final preliminary argument the District cites *Melton v. District of Columbia,* 85 F.Supp.3d 183, D.D.C. 2015, affirmed mem. 2015 Westlaw 9012019, D.C. Circuit, October 15th, 2015, for the proposition that a, quote, private individual has no cause of action under either the SSA itself or through an action under 42 U.S.C., Section 1983, Id. at 191.

Melton, which involved a pro se plaintiff, cited *Suter* for this statement and provided no supporting analysis. Id. Further, the Court noted that the pro se plaintiff in that case had, quote, neither identified the specific provision on which his claim rested nor alleged how any of the SSA's specific provisions were violated, Id. It appears

likely, from the reference to, quote, "reasonable efforts" in his complaint, that he intended to rely on Section 671(a)(15), the provision at issue in *Suter*, Id. As a result, the Court will not give Melton any weight in its analysis of the SSA provisions, does not find itself bound by it, but plaintiff's cite, and which were not at issue in *Suter*.

I will now address the specific provisions cited by plaintiffs. First, I hold that Sections 672(a) and 675(4)(A) create an enforceable right to foster care maintenance payments. The weight of circuit authority favors that conclusion. The 2nd, 6th, and 9th Circuits have all found such an enforceable right belonging to foster parents. Those cases are *New York State Citizens Coalition for Children v. Poole,* 922 F.3d 69, 76 to 85, 2nd Circuit 2019. *D.O. v. Glisson,* 847 F.3d 374, 377 to 80, 6th Circuit 2017. And *California State Foster Parent Association v. Wagner*, 624 F.3d 974, 978-82, 9th Circuit 2010. Only the 8th Circuit has come out the other way in *Midwest Foster Care and Adoption Association v. Kincade*, 712 F.3d, 1190, 1196 to 1203, 8th Circuit, 2013.

I conclude that the majority view is better reasoned. Defendants, tracking the 8th Circuit in *Kincade*, argue that the provisions merely set conditions that a state must fulfill in order to obtain federal funding. But that reading is in tension with the *Suter* fix, and, as the 2nd,

6th, and 9th Circuits have explained, the provisions meet criteria for creation of an enforceable right. The language focuses on the individuals protected and has an individual, rather than an aggregate focus: It specifies that payments must be made, quote, on behalf of each child, end quote. The District does not assert that the provision is too vague or that it is not binding, nor could it plausibly do so. Section 675(4)(a) sets detailed requirements for payments and 672(a) unambiguously commands that states shall make payments. I therefore hold that Section 672(a), together with 675(4)(a) creates an enforceable right to foster care maintenance payments.

I also conclude that Section 671(a)(16) creates an enforceable right to receive a case plan reviewed under the District's case review system. Courts have disagreed as to the enforceability of this section. For example, the 9th Circuit found an enforceable right in *Henry A. v. Willden,* 678 F.3d 991, 9th Circuit 2012. And the 6th Circuit found no enforceable right without any real analysis in *John B. v. Goetz,* 626 F.3d 356, 6th Circuit, 2010, per curiam.

The District argues that the section does not unambiguously show that Congress intended to create an individual right and so does not satisfy *Blessing* prong one; plaintiffs, obviously, disagree. On balance, based on the arguments presented to me so far, I think the 9th Circuit and

plaintiffs have the better of the argument. The section's language focuses on each child and unambiguously entitles them to a benefit, i.e. a case plan. The District's argument as to this section focuses primarily on the fact that Subsection 16 is part of the requirements for a state plan under the SSA, and so, according to the District is just a funding condition, not an individual entitlement.

As the 9th Circuit explained in *Henry A.* that argument is inconsistent with the *Suter* fix, which specifically states that an SSA provision is not to be deemed unenforceable because of its inclusion in the section requiring a state plan or specifying the required contents of a state plan, see 678 F.3d at 1007 and footnote 9. On the briefing provided so far, I hold that Subsection 16 creates a privately enforceable right.

Based on the arguments advanced by the parties thus far, I also conclude that 671(a)(29) creates an enforceable right for relatives of children removed from their parents to receive notice of their options to participate in the care and placement of those children. In its opening brief, the District dedicates only one sentence to this provision; that sentence says, quote, Section 671(a)(29) has much more specific language than Subsection 22, but the only decision defendants have found considering whether it confers a federally enforceable right has found it does not, end quote,

motion at 19 to 20, citing *Murphy v. Baker*, 2017 Westlaw 2350246 at 9 to 10, D.Mass, May 4, 2017, report and recommendation adopted, 2017 Westlaw 2363114, D.Mass, May 30, 2017.

But *Murphy* held only that, quote, the parent from whose custody the child is removed did not have a private right of action to enforce Subsection (a)(29). And noted that, quote, it might be possible to read the text of 671(a)(29) as conferring an enforceable private right to kinship notification on a child removed from the care and custody of his or her parent or parents, *Murphy,* 2017 Westlaw at 9.

Plaintiffs here are children and the would be recipients of the notification, not the parents as in *Murphy*, placing them for cleanly in the population the statute aims to benefit for purposes of *Blessing* prong one. *Murphy* also concluded that Subsection (29)'s requirement that the state, quote, exercise due diligence, identify and provide notice, end quote, to affected children's relatives, quote, fails to provide clear guidance to a state of what is required and so is too vague for private enforcement 2017 Westlaw at 9.

That point has some force. But the Supreme Court has found relatively broad language to be judicially enforceable where the remainder of the statute or other legal sources flesh out the relevant requirements. For example, in

Wilder v. Virginia Hospital Association, 496 U.S. 498, 1990, the Court found an enforceable right under Medicaid statute's requirement that the state set, quote, reasonable and adequate reimbursement rates, in part because the statute and relevant regulations listed factors that states had to consider in setting rates, Id. at 507, 509 to 10, 519.

Similarly, here, the remainder of Subsection (29) spells out a specific list of relatives that the state must seek to notify and specific requirements for the contents of the notice.

In its reply, the District also argues that Subsection (29) does not unambiguously confer a right on plaintiffs, but provides no analysis in support of that point. The Court generally will not address arguments raised for the first time in reply or that the party has not adequately spelled out. See, for example, *See, Inc. v. Walsh,* 581 F.Supp.3d 265, 280 D.D.C. 2020.

The Court will follow that course here, especially since the District's claim is far from obviously right, Subsection (29) focuses on and speaks in terms of the specific individual's benefited. Indeed, another court in this district recently held that seemingly similar language in a Medicare statute created an enforceable right. See *Salazar v. D.C.*, 729 F.Supp.2d 257, 268 to 69, D.D.C. 2010. Absent more developed argument from the District, I do not see how the

statute fails *Blessing* prong one, even post-*Gonzaga*. I therefore will not dismiss the claims under Subsection (29). However, if you want to renew the arguments at summary judgment, you're welcome to do that.

I reach a different conclusion on the last two subsections that plaintiffs cite, 671(a)(10) and (22). Plaintiffs assert that Section 671(a)(10) grants them an enforceable right to, quote, be placed in a foster care that meets applicable standards. The weight of authority cited by the parties, and that I have found, cuts against that position. The cases finding no privately enforceable right to a foster home meeting applicable standards include *White v. Chambliss,* 112 F.3d 731, 739, F -- sorry, 4th Circuit 1997, *Yvonne L. v. N.M. Department of Human Service*, 959 F.2d 883, 889 to 90, 10th Circuit, 1992; *Estate of Place v. Anderson* 398 F.Supp.3d 816, 480 to 41, District of Colorado 2019; and *Elisa W. by Barricelli v. City of New York,* 2016 Westlaw 4750178, at 4 to 5, S.D.N.Y., September 12th, 2016.

I would agree with those courts that this subsection does not create a privately enforceable right. Particularly, I agree with the *Barricelli* court that the first *Blessing* prong, as re -- as refined in *Gonzaga* is dispositive. The text of the provision has a primarily aggregate, rather than individual focus, it deals with a statewide standards that a state must create. And there's no obvious rights-creating

language. Plaintiffs point to language requiring that the standards the state must develop must apply to, quote, any foster family home, and ensure appropriate liability for caregivers and that waivers of safety standards are permissible only on a case-by-case basis.

But each of those excerpts contemplates general standards applicable on aggregate to every foster home; none specifically vests any right in individual children or parents or speaks in terms of the person benefited. The language is much closer to the statute from *Gonzaga* than to the statute from *Talevsky*, for example.

Plaintiffs do cite two decisions finding a privately enforceable right under this subsection, *Marisol A. v. Guiliani*, 929 F.Supp 662, 683, S.D.N.Y. 1996, affirmed in other part, 126 F.3d 372, 2nd Circuit, 1997. And *Brian A. v. Sundquist*, 149 F.Supp 2nd 941, 945 to 49, M.D. Tennessee 2000. But both those decisions analyzed the first *Blessing* prong only briefly, and both pre-date *Gonzaga*. For the reasons I just gave, I don't think either survives that case. I also recognize that *LaShawn* found an enforceable right under 671(a)(10), but, as I discussed earlier, the D.C. Circuit effectively vacated that reasoning on appeal. I am therefore dismissing the claims under 671(a)(10).

I also conclude that plaintiffs do not have an enforceable right to, quote, receive services to protect the

children plaintiff's safety and health under 671(a)(22), as they argue at page 22 of their opposition. Subsection (22) requires the state's plan to provide that the state shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children, end quote.

Even assuming this provision meets *Blessing* prong one, which is at least debatable, the provision speaks of children in aggregate and requires only development of standards at a statewide level, it is too vague and amorphous to satisfy prong two.

The statute does not define quality services or give any detail as to which types of services are required, beyond the extremely high-level requirement that they protect the children's safety and health. That language is too vague and amorphous for judicial enforcement. That conclusion aligns with the weight of persuasive authority.

The defendants cite five cases finding no enforceable right, and my search turned up -- when I say my search I mean my clerk's search -- turned up two more. Most of those decisions reasoned that the subsection fails *Blessing* prong two, and one cites prong one. The District's five cases are in the reply brief at 11, 12. The two additional cases I located are *Charlie H. v. Whitman,* 83 F.Supp.2d 476, 490 n.3,

District New Jersey 2000. And *Whitley v. New Mexico Children, Youth, and Families Department*, 184 F.Supp.2d 1146, 1164 District of New Mexico, 2001.

Plaintiffs cite only one decision finding the provision privately enforceable, and my search did not find any others. That one decision, *Kenny A. v. Perdue* 218 F.R.D. 277, Northern District of Georgia 2003, dedicated only one paragraph to the *Blessing* analysis, including just one conclusory sentence on prong two, see id. at 292. I agree with the majority of courts that this subsection does not create a privately enforceable right. I therefore dismiss the claims under Subsection 671(a)(22).

I will now address the District's argument that plaintiffs failed to state a claim under the Social Security Act. I will address only those provisions under which I have found privately enforceable rights, namely Sections 672(a), 671(a)(16), and 671(a)(29).

Defendants argue that plaintiffs have not alleged that they met all the requirements for payments under Section 672, and by extension, the eligibility requirements for a case plan under 671(a)(16), which applies to children receiving maintenance payments. Plaintiffs contend that the District should be equitably estopped from making that argument. The District responds first that plaintiffs can use equitable estoppel only to prevent the government from raising an

otherwise-available claim or defense, and not to fill in missing elements in their claims, and second that, even if equitable estoppel were available for that purpose, plaintiffs can not show that it applies on these facts.

As to the first argument, although the cases cited by the parties do refer to equitable estoppel in the context of preventing the government from asserting a claim or defense, all did so in the context of a party's attempting to use estoppel for that purpose. The District has not cited any case holding that a party could not use estoppel in the way plaintiffs seek to, and the District has not explained why it makes sense that the government could be estopped from, for example, raising a statute of limitations defense after causing a plaintiff to delay bringing her claim, but not from arguing that plaintiffs have not satisfied the statutory requirement the government allegedly deliberately sought to prevent them from satisfying.

As to the second argument, the District argues that plaintiffs cannot base an equitable estoppel argument on, quote, erroneous advise by government employee or passive rather than affirmative conduct, motion at 6. Maybe so, but plaintiffs do not merely allege erroneous advice or passive misconduct, rather, they allege that the District had an affirmative policy of misleading kinship caregivers about their options.

That makes this case unlike the cases the District cites. For example, in *Office of Personnel Management v. Richmond,* 496 U.S. 414, 1990, a case cited in one of the authorities on which the District relies, the Supreme Court held that, quote, erroneous and unauthorized advice by a government employee could not provide a basis for equitable estoppel, id. at 416. But that's not what plaintiffs have alleged. In their view the CFSA employee's actions were deliberate and pursuant to an agency policy.

Discovery may well show that plaintiffs' allegations are off base. But for the moment and on the arguments before me, I am not going to dismiss on that basis. Defendants also argue that plaintiffs fail to state a claim under Section 671(a)(29) because plaintiffs were not removed from their homes. I conclude that the complaints allege enough facts to make it plausible that the District effectively removed these children from their parents, even if they did not follow a formal legal process in doing so. Neither side provides any briefing on the meaning of removal in this context. Without clear briefing on that point, I will not dismiss this claim either.

Ms. Kelley, you can of course take up that argument at summary judgment with a more developed record.

I'll turn next to plaintiffs' due process claims, which I will dismiss. So just to repeat, I am dismissing the

due process claims. I'll start with the substantive due process claims. Plaintiffs argue that defendants violated plaintiffs' rights to, quote, adequate food, shelter, clothing, medical care, and reasonable safety, Opp. at 35, cleaned up. But even assuming such a right exists, nothing in the complaint supports a reasonable inference that plaintiffs' needs went unmet in any of those respects, at least to such a degree as to create a constitutional problem. There are vague references to financial and housing difficulties, but nothing specific that would support a plausible substantive due process claim. Plaintiffs also argue that the District violated their substantive due process right to family integrity without providing sufficient procedural grounds, Opp. at 36.

That claim fails for at least two reasons. First, plaintiffs do not dispute that it was appropriate to remove these children from their parents; they simply wanted them transferred to their current caregivers by a different process. The cases plaintiffs cite recognize a substantive due process right for children to remain with their parents absent some sufficiently good reason to remove them, and there's no dispute the District had a good reason -- a good enough reason in this case.

Second, while plaintiffs claim they were removed, quote, with no due process, Opp. at 36, their complaints make

clear that the plaintiff-caregivers obtained custody from the parent pursuant to court orders, albeit from a different type of D.C. court than the one plaintiffs assert was appropriate. Plaintiffs are have not explained why these court orders were constitutionally, infirm even if they think they were inappropriate as a matter of D.C. law. Indeed, they have not described the court proceedings in any detail at all. I therefore hold that the plaintiffs have not stated a substantive due process claim.

I'll turn now to the procedural due process claim. First, to the extent plaintiffs mean to bring a procedural due process claim based on a right to familial integrity, the claim fails for the same reasons as in the substantive due process context. Plaintiffs do not dispute that separation was appropriate, so it's unclear how the purported lack of process injured them with respect to their familial integrity, and the plaintiff-caregivers obtained custody by court order, and plaintiffs have cited no authority showing that the procedure was inadequate or even describing what the procedure was.

Plaintiffs do include one footnote, No. 22 in their opposition, purporting to identify deficiencies in the judicial process the District employed, but that footnote cites no authority either for its claims about the nature of the process or to show that the purported deficiencies are

constitutionally relevant.

Plaintiffs also assert the District deprived them of certain procedural rights to which they were allegedly entitled by statute, for example, CFSA's filing of a neglect petition in the D.C. family court. But the D.C. Circuit has held that plaintiffs cannot base a procedural due process claim on the deprivation of a procedural right. And that's Doe by *Fein v. D.C.*, 93 F.3d 861, 868, D.C. Circuit 1996.

Finally, plaintiffs allege that the District deprived them of various substantive entitlements purportedly owed to foster children and foster parents under District or federal law, such as foster care payments or provision of certain services. Plaintiffs argue that the District should have provided additional process in the form of formally removing the plaintiff-children from their parents, placing them into foster care, and notifying the plaintiff-caregivers of the opportunity to become licensed foster parents.

Plaintiffs argue that this procedure was required by D.C. law. But the law is clear that, quote, the fact of a state law violation does not resolve whether a plaintiff has been deprived of due process, end quote. *Tate v. D.C.*, 627 F.3d 904, 908, D.C. Circuit 2010. So plaintiffs need to show that these procedures were constitutionally required, not just mandated by D.C. or federal statutes. Quote, the fundamental requirement of due process is the opportunity to be heard at a

meaningful time in a meaningful manner, *Matthews v. Eldridge*, 424 U.S. 319, 33, 1976 cleaned up.

Procedural due process cases deal with what procedures states, or D.C., must follow before depriving a person of interest to which they are otherwise entitled by a state or D.C. law. As the Supreme Court put it, procedural due process rules are shaped by the risk of error in the truth-finding process, Id. at 344. For example, *Matthews* examined what kind of protections a state had to provide in a hearing to determine a person's eligibility for disability benefits, such as the right to a full evidentiary hearing. See Id. 335 at 49.

That's not really what plaintiffs are asking for. Plaintiffs acknowledge in their opposition that any sort of hearing about benefits eligibility in this case would be futile, since the plaintiff-caregivers don't meet the eligibility requirements to receive the benefits they seek because they aren't foster parents. Instead, plaintiffs want the District to have followed a different process for removing the children in the first instance, such that plaintiffs would now be eligible for benefits.

That might be a challenge to the procedure the District followed in a broad sense, but it isn't a procedure within the meaning of procedural due process case law. Plaintiffs are not arguing that if the District had simply

provided a fairer hearing they could have proven their entitlement to benefits. They're really seeking a different -- they are really seeking a different substantive outcome about what steps the district should have taken and what benefits it should have provided under district law. Plaintiffs' theory would turn essentially any alleged violation of state law into a federal due process claim and that is not the law. For those reasons I am dismissing the plaintiffs' due process claims.

I will also dismiss plaintiffs' equal protection claim. Plaintiffs argue that the District violated the Fifth Amendment's equal protection guarantee by depriving them of the same services and benefits provided to non-relative children and caregivers with no rational basis for doing so, Opp. at 29.

Defendants dispute whether plaintiffs have adequately alleged intentional differential treatment and whether plaintiffs are similarly situated to non-relative foster families, but the Court does not need to address those issues because even assuming plaintiffs have made those showings, they cannot show that the District's alleged kinship-diversion program fails rational basis review.

Although the parties agree that some form of rational basis review applies, they disagree as to the details. Defendants propose traditional, deferential national

basis review. Plaintiffs argue that the Court should instead employ the heightened form of rational basis scrutiny applied in *Plyler v. Doe*, 457 U.S. 202, 1982.

The Court agrees with defendants that traditional rational basis review applies. *Plyler* applied heightened rational basis scrutiny to a Texas law that brought a undocumented -- excuse me, Texas law that barred undocumented school-age children from receiving free public school education, 457 U.S. at 205. Plaintiffs make a good effort at analogizing this case to *Plyler*, asserting that heightened scrutiny is appropriate because the disadvantaged group is innocent children and the deprivation at issue is an impediment to individual achievement, Opp. at 31, quoting *Plyler* at 222 and 230. But that argument ultimately does not hold up. As the D.C. Circuit has noted, quote, the Supreme Court has limited *Plyler* to its facts, *Calloway v. D.C.*, 216 F.3d 1, 7, D.C. Circuit 2000.

In *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 1988, for example, the Supreme Court said, quote, we have not extended *Plyler*'s holding beyond the unique circumstances that provoked its unique confluence of theories and rationales, Id. at 459 cleaned up. And in *Calloway*, the D.C. Circuit applied ordinary rational basis scrutiny to a statute capping fees that the District could pay to attorneys of prevailing parties in certain disability-rights suits against

the D.C. Public Schools, notwithstanding the plaintiffs' argument that the statute would, quote, make it less likely that disabled children would receive an education that conforms to federal statutory requirements, end quote, Id. at 2-3, 7-8.

In particular, the Court rejected the plaintiffs' analogy to *Plyler*, concluding that simply burdening the educational opportunities of disadvantaged children does not trigger heightened scrutiny, Id. at 7-8. That reasoning undercuts plaintiffs' argument that heightened scrutiny is appropriate simply because some plaintiffs are disadvantaged children whom the challenged policy further disadvantages.

More generally, the Supreme Court recently observed that it, quote, hardly ever strikes down a policy as illegitimate under rational basis scrutiny, and on the few occasions where the Court has done so, a common thread has been that the laws at issue lack any purpose other than the bare desire to harm a politically unpopular group. *Trump v. Hawaii,* 138 Supreme Court, 2392, 2420, 2018 cleaned up. This case does not plausibly fit that category; if anything, plaintiffs are politically sympathetic group, and nothing in the pleadings suggests any animus against them.

The Court will therefore apply ordinary rational basis scrutiny. The Supreme Court and D.C. Circuit have explained that in the area of social and economic policy, a

statutory classification that neither proceeds along suspect line nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there's any reasonable conceivable state of facts that could deprive a rational basis -- that could provide a rational basis for the classification. *Dixon v. D.C.*, 666 F.3d 1337, 1342, D.C. Cir. 2011, quoting *FCC versus Beach Communications*, 508 U.S. 307, 313, 1993.

That standard is, quote, highly deferential. Quote, courts are compelled under rational-basis review to accept a legislature's generalization even when there is an imperfect fit between means and ends. *Heller v. Doe by Doe*, 509 U.S. 312, 321, 1993. And since the District does not need to offer evidence supporting its policy, the Court can conduct rational basis review at the motion-to-dismiss stage. See, for example, *Dixon,* 666 F.3d at 1342 to 44.

Whatever the policy merits of kinship diversion, the Court cannot say there's no conceivable state of facts that provides a rational basis for the practice. It is conceivable, for example, that the practice could be more likely to keep children with familiar caregivers, avoiding traumatizing them through involvement with the foster system and the Courts, and effectuate placements more quickly and efficiently than formal foster proceedings. I therefore dismiss the equal protection claims for failure to state a

claim.

Before turning to plaintiffs' claims under D.C. law, I will address the District's argument as to supplemental jurisdiction. Under 28 U.S.C. 1367(a), I can exercise supplemental jurisdiction over plaintiffs' D.C. law claims if they are so related to the federal claims that they form part of the same case or controversy. The test is satisfied when the claims derive from a common nucleus of operative facts. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 1966.

I conclude, and the District does not dispute, that the requirement is satisfied here, since all of plaintiffs' claims arise from CFSA's handling of the plaintiff-children's cases. The District nevertheless argued in its motion that, even if some of federal -- even if some of the plaintiff's federal claims survive, I should nonetheless exercise my discretion to decline to exercise supplemental jurisdiction under 28 U.S.C. 1367(c). I'm not going to take that personally, Ms. Kelley. I understand the District to have backed away from that position at oral argument.

When asked at page 21 of the transcript whether I could exercise jurisdiction over the D.C. law claims if at least one federal claim went forward, the District's counsel responded that I may keep them, yes.

Even assuming that the District wants to maintain

the argument from its motion, I reject it. The District argues that dismissal is appropriate because the D.C. law claims implicate allegedly novel, disputed legal issues. But even if the District is correct, the SSA claims and plaintiff's equitable estoppel argument may implicate many of the same issues about the legality of the District's conduct under D.C. law; unlike in the cases the District cites in its briefing, I can't avoid those issues by dismissing the D.C. law claims.

Further, although we are only at the motion-to-dismiss stage, these cases have been pending for years, and it would disserve judicial economy and be unfair to plaintiffs to send them back to the drawing board in the Superior Court. I will exercise supplemental jurisdiction over the D.C. law claims.

I will address the fraudulent and negligent misrepresentation claims next. I conclude that these counts survive the District's motion.

The parties agree that to state a claim for fraudulent misrepresentation under D.C. law, a plaintiff must allege facts showing that a person or entity made a false representation of or willfully omitted a material fact; had knowledge of the misrepresentation or willful omission; intended to induce another to rely on the misrepresentation or willful omission; and that the other person acted on reliance

on that misrepresentation or willful omission; and suffered damages as a result of that reliance. *Sundberg v. TTR Reality*, LLC, 109 A.3d 1123, 1130, D.C. 2015, cleaned up.

The elements of a negligent misrepresentation claim are the same, except that a plaintiff need not allege that the defendant had knowledge of the falsity of the representation or the intent to deceive, Id. at 1131.

Although the non-disclosure of material information may constitute fraud when there is a duty to disclose, mere silence does not constitute fraud unless there is a duty to speak. Id. cleaned up.

Defendants contend that plaintiffs fail to state a claim because defendants had no duty of disclosure and plaintiffs do not concretely allege damages, motion at 41.

Defendants originally also argue that any alleged misrepresentation was of law not of fact, but they withdrew that argument in their reply so I will not address it.

As to the duty argument: Plaintiffs argue that 671(a)(29) created a duty for the District to disclose the relevant information. The District first responds that this provision does not create an enforceable right, but I have already rejected that argument.

The District also argues that the provision does not require specific disclosures, but the Section's language is indeed quite specific. The notice must, quote, explain the

options the relative has under federal, state, and local law to participate in the care and placement of the child, and describe the requirements to become a foster family home and the additional services and supports that are available for the children placed in such a home. 42 U.S.C. 671(a)(29)(B) to (C). Any plausible interpretation of that requirement would seem to cover the disclosures that plaintiffs allege they were not provided.

The District also argues for the first time in its reply that plaintiffs do not cite any legal authority showing that the provision creates a duty actionable under D.C. tort law, reply at 23. But since the District did not advance this argument until its reply and does not offer any reason to think, or case law showing that, federal statutes cannot create duties under D.C. law the Court will not address that argument at this stage.

Ms. Kelley, you're welcome reargue that argument.

The District's reply also asserts that plaintiffs do not address the full text of 671(a)(29), but it does not explain what language the plaintiffs do not cite would undermine the their case, nor is it obvious what the District is referring to.

The Court therefore concludes that the Plaintiffs have adequately alleged a duty for purposes of these claims. I note that at oral argument, plaintiffs also suggested that

defendants might have had a duty under D.C. law. Since I have already rejected the District's duty argument based on 671(a)(29), I do not need to address plaintiff's D.C. law argument at this stage.

As to the damages argument, the primary damages on which plaintiffs rely is the loss of maintenance payments. Defendants argue that plaintiffs do not allege they would have met all of the eligibility criteria to become foster parents under D.C. law. And they do not therefore sufficiently allege that they suffered damages because of the District's actions, motion at 42. I conclude that plaintiffs have alleged enough facts to make it plausible that, but for the alleged misrepresentations, they would have been licensed as foster parents.

First, the defendants are wrong that no plaintiffs allege that they met the eligibility criteria to become foster parents; two of the five plaintiff-caregivers so allege, and one of those two even allege that she had previously been licensed, K.H. complaint at paragraphs 75 and 86.

Second, even where plaintiffs do not specifically allege that they met the eligibility criteria, the fact that the District urged those individuals to seek custody and that D.C. courts granted them custody, makes it plausible that they would have satisfied those criteria. Defendants do not offer any factual reason to think otherwise. I therefore conclude

that plaintiffs have adequately alleged damages.

I will address the negligent claims only briefly. The District did not address the negligence claims in any detail until its reply memorandum, and again, as a general rule, the Court will not consider arguments advanced for the first time in a reply. Were this the only claim that might survive, I would be inclined to consider the District's arguments, but since several counts will survive dismissal and the claims implicate some potentially difficult legal questions on which the Court would benefit from full briefing, I will not address these arguments now. The District is free to make its arguments at the summary judgment stage.

Finally, I will dismiss the claims under the D.C. Human Rights Act. I will dismiss the claims under the D.C. Human Rights Act. Plaintiffs assert that the District's use of kinship diversion constitutes discrimination based on familial status in violation of the act. Plaintiff's argue that kinship diversion discriminates based on familial status because under their reading of the Act participants in kinship diversion have familial status while formal foster parents do not.

To support that reading plaintiffs point out that kinship diversion caregivers take legal custody of the children diverted from their care while foster parents do not take legal custody of the children only physical custody.

Plaintiffs then argue that the Act's definition of familial status specifically requires legal custody. D.C. Code Section 2-1401.02(11A). So by providing benefits to foster families, who purportedly do not have familial status, and not to kinship-diversion participants who do, the District allegedly discriminates based on familial status.

I note that there is some dispute between the parties as to whether or not the parent has legal custody, but I would dismiss the claim even if they did or didn't. First, if CFSA has legal custody of foster children, it seems certain that even if legal custody issue precludes foster parents from qualifying for familial status based only on their physical custody of foster children, they at least qualify for familial status CFSA's designees.

In other words, the definition of familial status lists two ways to obtain that status, one is legal custody, and the other is written authorization from the child's legal custodian. Plaintiffs argue that foster families do not have familial status under the first prong, but say nothing about the second. It is not plausible that formal foster parents do not have some form of written authorization from the District memorializing their relationship with their foster children, creating familial status under the Act's definition.

And I note that several federal courts have applied this reasoning to conclude that foster families qualify for

familial status under the federal Fair Housing Act, which defines familial status almost identically to the DCHRA. The FHA definition is at 42 U.S.C. 3602(k) and cases applying this reasoning include *Gorski v. Troy,* 929 F.2d 1183, 1187 7th Circuit 1991, and *Diamond House of Southeast Idaho, LLC v. City of Ammon*, 381 F.Supp.3d 1262, 1276, District of Idaho, 2019.

These courts' reasoning is particularly persuasive because neither side has cited any case law interpreting the D.C. Act's definition of familial status. And D.C. courts interpreting the Act have generally looked for guidance to precedent applying federal civil rights laws. And that's *Boykin v. Gray,* 895 F.Supp.2d 199, 219 D.D.C. 2012, cleaned up, affirmed sub nom. *Boykin v. Fenty* 650 F.App'x 42, D.C. Circuit 2016.

Second, even if foster families did not qualify for familial status in the way I just discussed, I conclude that a D.C. court would not read the Act's language so literally as to exclude foster families from its protection.

Because I reject plaintiff's argument that traditional foster families do not have familial status and kinship diversion families do, I conclude that plaintiffs have not stated a plausible claim for discrimination based on familial status under the Act, and I therefore dismiss the D.C. human rights claims.

All right. So to sum everything up, I grant the motion to dismiss in part and deny it in part. I dismiss the equal protection, due process, and D.C. Human Right Act claims as well as the Social Security Act claims under Section 671(a)(10) and 671(a)(12) -- 671(a)(22). I deny the motion with respect to the remaining claims.

All right I hope everyone's about to hear what I'm about to say and that I haven't bored you to death yet. I want to emphasize that this is a very complicated case. Counsel for both sides have done a very able job in briefing and arguing a number of complex issues. Moving forward we're going to have a narrower set of issues and we'll have concrete facts to which to apply the law. So while I'm always hopeful that parties will be able to work out things out cooperatively, and while I will be heavily encouraging you all to try to figure this out on your own, if that does not happen and we find ourselves back here on summary judgment, I want to be absolutely clear that I'll be open to hearing new or renewed arguments on the claims which we are proceeding.

So just to be absolutely clear, Ms. Kelley, you have free reign to re-argue whatever you would like to argue, subject of course to my standing order on pre-motion conferences before we file summary judgment.

Also, while I have ruled today that plaintiffs have some plausible claims -- I've ruled today that plaintiffs have

some plausible claims, but if the district feels that I have missed something in my analysis of the law or that with fewer things to brief you could flesh out your arguments a bit more, you should feel free to visit those points again in summary judgment briefing and I'll be open to reconsidering my analysis. Okay?

So plaintiffs, you live to fight another day. I have to tell you, based on everything that I've seen and some concern that I have on your equitable estoppel claims that I'm letting them survive based on that basis. But I am -- I think the District makes some powerful arguments. And I'm basically letting it move forward to see where we get on discovery to see if we can flesh out those claims any better.

I think what we can all agree is that everyone in this room wants what's best for the foster children that are at issue here and for their families and for their caregivers. And as I said, I think the last time we were here, whatever the allegations, and whatever decisions the district has made, I have full confidence that whether they're right or wrong, misguided or not, that the individuals in charge of this program are doing the best they can with a number of limited resources. I fully appreciate that they care about what they're doing and that they're doing the very best that they can.

I also fully appreciate I'm a poli/sci major and

English minor from a small liberal arts school in Lexington, Kentucky. In other words, I am the last person that should be making decisions any decisions about what's best for foster children, especially since I don't even have any.

All of which is to say, I hope that you all are talking to each other about a way that we can resolve some of these issues, or at least resolve some of this litigation in a way that doesn't involve spending a tremendous amount of resources on both sides and a tremendous amount of time on both sides before we get to some resolution here, other than just summary judgment or trial and then an appeal. Because if all that happens, not only will you all be wasting a bunch of time in litigation, there will be a bunch of kids out there who if they're deserving of more care aren't getting it. And whatever happens here is of course going to get appealed if you guys don't figure this out. And that means that none of you are out of here for the next three or four years without any sort of meaningful resolution to this case, which I think would serve no one's interest and, in fact, would be a disservice to a number of people.

So that said, Ms. Kelley -- first of all, does anyone have any questions? I mean, obviously I know both sides will disagree with some of it, but does anyone have a question about my rulings, so far as you've had a chance to digest it?

All right. Ms. Kelley, can you let me know, please, where you all are on discovery and where the status of the case is right now?

MS. KELLEY: Good afternoon, Your Honor. Thank you for sharing your ruling. It is a lot to take in and I will just note that we will take into consideration the claims that have been dismissed and look again at the discovery going forward. I haven't processed it yet, but we are substantially complete on production of documents related to the individual families. That includes something we call the case file. We have discussed with the plaintiffs what that means. We are working hard to make sure it is anything and everything that would have been in a paper file, you know, if we had such a thing.

We have also produced most of the emails. I was a little bit confused about the time period. So we have to go back and there's less than a thousand to push out. So we expect to do that soon. I think on that front, if the plaintiffs want to start preparing to speak with the individual social workers, the people who were allegedly involved in the communications with the caregivers that are clearly part of this case now, they should do so. Otherwise, we are moving forward --

THE COURT: Well, hold on, the social workers still work for the Government?

MS. KELLEY: Most of them.

THE COURT: You're not giving them free range to just reach out to them.

MS. KELLEY: No. They would --

THE COURT: You mean depose.

MS. KELLEY: Yes.

THE COURT: Okay. You said speak to, so it just sounded like you meant call them up and see, you know, have a beer, but I assume what you meant is deposed.

MS. KELLEY: Please do not call them up. No, in the ordinary course, they would give us a list of witnesses we would reach out about scheduling, yada, yada.

We have agreed on a set of search terms for what we call the policy documents. They are a search -- obviously, we have hard policies we have already produced, anything and everything that is a formal written policy that is conceivably related to what the social workers might have said have been produced.

We, as I said, as we said in the status report, would like the opportunity to file a written brief suggesting that we narrow the scope of the policy discovery. We will reconsider -- I have bullet points with the argument, we will reconsider that in light of the ruling. But we have -- we also expect to move to dismiss the plaintiffs prospective claims for declaratory and injunctive relief once we receive

discovery.

And this is connected to the policy documents because the Court has ordered us to produce five years, we're looking at 2018 through 2023. The allegations in the complaints stop as of July 2020. So the last complaint incident was July 2020. In our view the policy documents through 2023 are only possibly relevant if they would need to show, for prospective relief, that the policy continues. If those claims go away then there's no need to get into discovery concerning a lot of policy changes that have happened in the last couple years.

THE COURT: Is there any issue with her just giving you the years through 2020 pending whatever I do on this coming motion?

MS. WILLIAMS: Yes -- no, but we would also say that --

THE COURT: You need to come to a mike.

MS. WILLIAMS: So when we initially had decided -- or when we initial filed the motion to dismiss and got to the briefing stage back in 2021, we had agreed to stay or stop filing future motions for other caregivers who have alleged similar complaints and who D.C. KinCare represents. And so there are later in time points past '21 in sort of future plaintiffs.

THE COURT: Are these other than the six

plaintiffs -- I'm aware of six cases; right? Five or six cases. Are these plaintiffs in those cases or cases that have not been brought.

MS. WILLIAMS: Cases that we agreed not to file until after the motion to dismiss was decided. But we are happy as a preliminary matter to focus on the more limited time period.

THE COURT: I mean, look, here's what I think, I think if we focused on a more limited -- I don't know why I gave you till 2023 last time. Maybe Ms. Badlam was particularly effective that day, but Ms. Kelley is making sense. It seems to me that if you have a more limited scope of time, like two to three years, you're going to get the information faster, you're going to be able to focus on it, and you're going to be able to know if there's a there there; right?

MS. WILLIAMS: Right.

THE COURT: I mean, if you get the policies from 2018 to 2020, and you all decide -- and keep an open mind here -- and you all decide, you know what this is not what we thought it was, the District has these reasonings and is doing things in a way that we just didn't anticipate. And it actually makes some sense and maybe it makes sense to talk to the District and see if we can settle these cases and maybe figure out a different policy or some changes or whatever, you

know, stranger things have happened, it seems that would be far more fruitful for you to get some initial information to be able to determine where to go with your future filings than to just make her go through giving you years of information up front.

MS. WILLIAMS: Certainly. I think to the extent that there are very specific -- I think the concern is with the later in file, to the extent there was significant policy revisions on particular documents, particularly safety planning or, you know, how to govern family team meetings or how to effect these kinship diversions, to the extent there's discussion of what gets in there versus what isn't based on sort of what happened after we filed the lawsuit, I think that would be relevant if there's some insight into what those documents can provide into how the the District used their position sort of based on the claims in the lawsuit, or how they're refining their policies so the written form would not violate what they -- what we allege in the complaints.

THE COURT: So, Ms. Kelley, where are you in the review of these policy documents? Like, have you reviewed -- like if I said to you, hold off on '21, '22 and '23 for right now, don't -- I'm not saying those will never become at issue, I'm just saying let's put those on hold right now. Let's try to keep moving this along. If I said to you, focus on 2018, 2019, and 2020, would you be able to get her things quicker?

MS. KELLEY: Certainly, there would be at least a few thousand documents probably 4 or 5,000 documents less. And the other thing is, so the first allegation is back to October of 2018, the last is July of 2020. The District issued a written policy in July of 2020 about diversions and a few things thereafter that Ms. Williams is referring to. Those reviews are going to be much more complicated because they involve a lot more privilege. They are, as she acknowledges, partly in response to things that we learned in the lawsuit.

They are also in response to a process that was, I now understand, started by KindCare Alliance as part of the LaShawn suit. This issue was raised in the LaShawn suit. CFSA was under federal jurisdiction until 2021, essentially under monitoring. And there was a long process. Those emails are going to be complicated to review, there's also --

THE COURT: No, no, I hear you. As she was talking I had a feeling that you were going to tell me you were going to have privilege issues and work product issues.

MS. KELLEY: There's also something called the deliberative process privilege.

THE COURT: Yeah, yeah. Who are the -- I imagine some folks in this room are some of the people, but once you all finally get some information, like you have the individual care people files, and you're going to have at least 2018,

2019 and 2020 through July here pretty soon, who are your -- are you guys hiring experts to look at this stuff?

MS. WILLIAMS: We're doing it ourselves.

THE COURT: You're doing -- but like, I mean, are you going to have experts in how these things should be handled or are you just working with the people who work for your client who maybe are expert in these issues.

MS. WILLIAMS: Yeah, I think at this point we haven't contemplated sort of the whole expert --

THE COURT: Well, here's my question, here's what I want to know, I want to know who I get in a room talking to each other that's not lawyers to try to figure out some way through this morass, so who would those people be? Go ahead.

MS. KELLEY: If I may? I am -- is Ms. Spindel --

MS. WILLIAMS: She's not here. This is Ms. McLellan.

MS. KELLEY: So KinCare Alliance is an attorney for plaintiffs. They are, as best I can tell, dedicated, focused, somewhat expert advocates. They have engaged with CFSA extensively for years on this exact subject and a lot of the emails I am seeing are with them. There has been a process for years. And one of the things that we would like to put into our written motion is that the -- and this was in our status report -- the wisdom of the policy, the reasons for the

policy, the back and forth about why this and not that is not relevant.

I understand, especially since KinCare is counsel in this case, that the plaintiffs have an interest in understanding it, in presenting it, in making the fact finder feel like they're right. But it is not relevant. It is burdensome. And we should not have to produce, for example, everything explaining why we changed this draft versus that draft.

THE COURT: Yeah, yeah, look-- All right. We're going to do this: Let's hold off on depositions for right now, because that takes a ton of time for everybody. All right. You get them the 2018, 2019, and up to June or July whatever 2020 documents as soon as you can. Like, I'm giving you a break here. And I'm doing that so you get things to them quicker, not not quicker, okay? That doesn't mean you were going to take 60 days and now you're still going to take 60 days. That means, you know, I'm cutting off three years here, okay? Put those in reserve. Don't get rid of them. Put those in reserve.

You talk to your people and you talk to your people. And I want you each to identify three people from each side that can get together to have focused conversations on what we do about this once you get them these policy documents, okay. So let's say it takes you -- I'm just making up a number, 30

days to get her these policy documents, right, seems like that's the big outstanding thing that you don't have right now is the policy documents.

MS. KELLEY: They have the policy documents, we're talking about emails.

THE COURT: Okay. Well, that's what people care about. I mean, I've been a litigator enough to know --

MS. WILLIAMS: We want the complete policies.

THE COURT: I know, but you want the emails. You want what people say about the policies, who are making the policies, right? I mean, that's what litigators care about.

So you get her those documents. In the meantime you guys figure out who's already talking to each other, who can continue talking to each other or whatever. And then I want you all to appoint a working group. And if there's already a working group, by all means. I want you to have a working group. And if the lawyers want to be involved in the meetings, outside counsel, Ms. Kelley, Ms. Badlam, whoever wants to be involved, fine, but you're not allowed to intervene and talk. If you want to sit there and listen you can. But I want people who are focused on trying to figure out how to get this done correctly, in a working group with regularly scheduled meetings, once you have the information, to see if we can move this forward, other than through me.

Because I promise you, Ms. Kelley, that's going to

save you and your colleagues a lot more time than -- if it works -- than this litigation.

MS. KELLEY: Your Honor, I'll just say again, the agency has engaged in good faith with the experts for years.

THE COURT: I have absolutely every belief that you have engaged in good faith. I don't have any doubt about that at all. I'm telling you now that we're doing it under the auspices of a court order of ongoing working group to try to get these settlement things going.

MS. WILLIAMS: Can I ask a clarifying question.

THE COURT: Sure.

MS. WILLIAMS: Is KinCare they are --

THE COURT: I mean, party representatives. I mean not you two. What I mean is I want people from the Department of State meeting without people from the Department of Defense getting in the way.

MS. WILLIAMS: Okay.

THE COURT: Or the Army getting in the way, does that make sense? You guys figure out something that works, meet on a regular schedule, try to see if we can get this thing moving. Hopefully, if they now have more information than they've had, maybe these working groups will be more efficient. And please communicate to your clients that there is some wild chance out there that they are actually doing the right thing here.

MS. WILLIAMS: We acknowledge everyone is doing their best.

THE COURT: All right. Ms. Kelley, anything else?

MS. KELLEY: The working group is to meet kind of indefinitely?

THE COURT: Yup, while this litigation is ongoing, it's basically an ongoing settlement group.

MS. KELLEY: We will -- I know this has happened in other cases, and --

THE COURT: I know, because I just ordered it in one of your other cases. I assume that there's a reason that D.C. tries to get rid of me every time I'm on one of their cases, I imagine this is a big reason why.

MS. KELLEY: No, Your Honor.

THE COURT: You don't have to comment, but go ahead.

MS. KELLEY: We will --

THE COURT: I'm not going to micromanage the group. Look, I'm not saying meet every day. I'm not saying meet every week. I want people who are the actual people who are experts in these areas, and who can actually come to the right decision as to how we should move going forward, to be meeting on a regular, good faith basis, with now more information flowing between you two. It's not going to happen overnight, it's not going to happen in three months, in four months, but

this litigation is going to be going on for at least one or two more years in front of me if we just proceed on the regular pace. And what I want is during that time period for some background group to actually be trying to make progress as opposed to us just slinging at each other all the time, okay?

MS. KELLEY: Yes, Your Honor.

THE COURT: Okay. So I come from a background of international arbitration, and I've -- I've said this in a lot of my hearings, Ms. Kelley, you might have already heard this, but they have what's called hot-tubbing in international arbitration, do you all know what that is? Hot-tubbing is every litigators' worst nightmare. Does anyone here know what it is?

MR. KEARNEY: I've heard of it in the antitrust context where experts sort of chat with the judge and educate as opposed of through the --

THE COURT: Yeah, so what happens is experts from both sides get up on the witness stand at the same time and talk to each other, and the judge asks questions, and they talk to each other. And inevitably what happens, which is why litigators hate this, is that the experts come to heated agreement on things. And once they're like nerding out, talking to someone who speaks their language, they become a little bit more loose, they actually try to find solutions and

they try to get to common ground because that's who they like speaking to.

Judges Love this because they get sort of a lot more consensus than they otherwise do through peer testimony. Litigators hate it for that same reason, it's totally out of their control. So what I want is a hot tub of working group people who are experts, not in front of me, I won't do that to you, at least not yet, but in the background while I'm doing this is what I'm trying to accomplish, okay?

Oh, if anyone, especially from KindCare Alliance, is on a brief but has not yet entered a notice of appearance, please enter a notice of appearance. So if you're on the brief I need you to enter a notice of appearance. Sam seems to care about that, which means I probably should.

All right. I'm going to ask you all one more time if anyone has a problem with me applying this ruling across the board to the cases to which the motion wasn't formally made. I'm not going to put you on the spot. I'll give you seven days to tell me either way whether anyone has an objection, just let me know one way or the other so we know what to do, okay.

All right. Anything else from anybody else?

MS. WILLIAMS: Not from the plaintiffs.

MS. KELLEY: No, Your Honor. Thank you.

THE COURT: All right. Thanks everybody. I want --

why don't I get maybe status conference updates, status updates maybe every 45 days so I know what's going on with you people. Again, if anything happens and you need my attention, I don't want you all spending a bunch of time filing briefs or sending letters back and forth, just get on the email with Sam and we'll set up a time to have a conversation, okay. And we can do it by phone. Okay. Thank you.

(The proceedings were concluded at 12:39 p.m.)

I, Christine Asif, RPR, FCRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

/s/
Christine T. Asif
Official Court Reporter