

April 12, 2021

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

Dear Commissioner Schomburg:

We are a group of child welfare advocates and scholars who, collectively, advocate for parents, children, and relative caregivers in the formal foster care system, and when children are at risk both of entering that system or face other state action resulting in parent-child separations. We write to urge you and the Children's Bureau to take action to require states to report basic data on an incredibly important but often-overlooked practice – hidden foster care. We are asking you to consider steps to recognize, count, and begin to redress these issues now, in the interest of preventing longer term and more deeply entrenched practices that separate families without due process and without accountability.

A recent academic article defines hidden foster care this way: “Hidden foster care occurs when relatives are encouraged by the child protection agency to bypass juvenile court and care for at-risk children outside of formal foster care.”¹ Hidden foster care occurs, too, when parents are told that the sole way they may avoid having their child removed by the state is if they “agree” to a so-called voluntary plan under which their children must be cared for by a relative.

This practice is *hidden* in two ways. First, essential decisions (for instance, is the child abused or neglected? Is a removal necessary to protect the child?) are hidden from court oversight and legal advocacy, as noted above.

Second, and central to this letter, this practice is hidden from policy-makers and administrative oversight because the Children's Bureau does not require states to report when they use hidden foster care or what happens to children in hidden foster care. Given the importance and scope of the practice, and concerns regarding it, that is a tremendous gap in our child welfare data reporting systems.

This letter will explain those concerns, and propose ways the Children's Bureau can remedy this data gap and begin to require some accountability for state actions that cause traumatic family separations and restrictions without due process of law and without federal oversight.

¹ Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stan. L. Rev. 841 (2020), available at <https://www.stanfordlawreview.org/print/article/americas-hidden-foster-care-system/>.

I. How “hidden foster care” works

The practice typically arises in the following way: a child protection agency investigates an allegation of child abuse or neglect and determines (rightly or wrongly) that a child cannot remain safely at home. The agency then insists that the parent transfer physical (not legal) custody of the child to a family member, either by moving the child to the family member's home or by ejecting the parent from the home,² commonly replacing the parent with the family member. To ensure the parent “agrees,” the state uses the same authority it uses in formal foster care cases – it threatens (often explicitly) to remove the child and initiate family court proceedings if the parent declines to agree. Sometimes the state requires parents to sign “safety plans” to document the change in custody, while sometimes separations occur under directives not embodied in a document.³ Even when the state merely “suggests” that the parent transfer physical custody, parents reasonably understand that the state may take their child if they decline, and resulting actions are neither voluntary nor truly the “family's plan,” as state agencies sometimes argue.

This practice does not trigger court oversight (except through increasing attention to the practice in federal court decisions, as documented below). Nor do courts oversee changes in physical custody. Nevertheless, the practice operates like formal foster care in other essential respects. A child is removed from his or her parent and home (or has alternative caregivers entering his or her home after parents are ousted), triggering all the traumas of such removals, and the state directs an alternative caregiver to take over daily care responsibilities. Child protection agencies exercise state authority to effectuate changes in children's physical custody. Like about one-third of children in the formal foster care system, the child then lives with kinship caregivers, separated from their parents. And many of these children eventually reunify with their parents, while many others stay permanently with the kinship caregiver, or are moved from placement to placement (sometimes using the formal foster care system, sometimes not).

Unlike in formal foster care cases, parents do not have the right to counsel before children's custody is changed through hidden foster care, even in jurisdictions that provide robust appointment of counsel for parents. They thus face choices that are difficult to frame as truly voluntary. An agency with enormous power insists that they give up one of their most precious constitutional rights, to the care, custody and control of their children. Parents on the receiving end of this insistence – who are, of course, disproportionately poor, and certainly less well-informed about child welfare law and less powerful than child protection agencies – must then determine if the agency is making a legitimate threat that a family court judge would enforce, or an empty one. And they must do so without the assistance of counsel, under time pressure.

² In *Croft v. Westmoreland County*, 103 F.3d 1123 (3d Cir. 1997), the father was ejected from the home, and the Court of Appeals treated this action as an infringement on the parent and child's right to family integrity.

³ After litigation documented the use of boilerplate, preprinted “agreement” forms, *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 868 (N.D. Ill. 2001) that commonly were not signed by all the parties to the separation agreement, the Illinois legislature has required such separations be set forth in writing signed by the parent and caregiver. Pub. Act. 98-830, 2014 Ill. Legis. Serv. P.A. 98-830, § 5 (codified at 20 ILL. COMP. STAT. ANN. § 505/21(f)). These modest protections do not shield against the use of threats nor assure that the State has evidence of serious risk of harm before separating the family, nor set forth the rights of the parties to modify the agreements, nor establish a centralized oversight system for assessing the duration or outcome of those separations. (However, litigation following *Dupuy* has set forth some notices that are to be provided to the parents and relative caregivers, see <https://www.familydefensecenter.net/fdc-cases/2016-safety-plan-settlements/>).

Hidden foster care has raised a range of concerns from across the child welfare ideological spectrum. Without counsel for parents or family court oversight, the necessity of removing children is reasonably questioned. When children are in hidden foster care, state agencies have no obligation to make reasonable efforts to prevent family separations, nor are agencies required to provide reunification services, nor is the continued need to remain separated from a parent subject to court oversight. Separations may continue for weeks, months, or even years, without review and with uncertainty for everyone involved. During this period, authority to make crucial decisions about children's health, education, and welfare remains in limbo. Some parents ejected from their homes have become homeless or been denied or lost all contact with their children during the period in which hidden foster care is used.⁴ Kinship caregivers in hidden foster care are denied the benefits of the formal foster care system, especially foster care board rates and other services – a particularly ironic loss given that kinship caregivers are disproportionately low-income compared with non-kinship foster parents.⁵ And when parents pose an ongoing threat to children's safety, the lack of a legal custody change can leave children's safety in jeopardy.

II. Quantifying its scope

Hidden foster care is a major feature of our child protection system. A 2019 Child Trends study found that “[i]n some jurisdictions, for every 10 children entering foster care, an additional 7 were diverted, while in others there was an equal split – for every child entering foster care, another child was diverted.”⁶ An earlier study found that in cases in which substantiated maltreatment led to a child living somewhere other than their parents, about half lived in “informal kinship care” while the other half were placed through the formal foster care system.⁷ A number of individual states have documented large numbers of children placed in hidden foster care.

We cannot quantify with precision the total number of children in hidden foster care or what happens to them – an essential reason we are writing to you – but we can conclude that this phenomenon occurs with great frequency. The above studies suggest that the total number of children brought into hidden foster care each year is roughly on par with the total number of children removed and placed into the formal foster care system – in other words, hundreds of thousands of children each year.

⁴ In one of the cases in Illinois that gave rise to a civil rights suit that was settled, *see n. 3 supra*, <https://patch.com/illinois/romeoville/romeoville-woman-claims-dcfs-took-her-kids-gave-custody-abusers-family-0>, a mother who was a domestic violence victim fleeing abuse by the children's father was coerced to agree to give physical custody of her two twin toddlers to the abuser's sister. The family caring for the children then excluded the mother from participating in her children's medical care and refused to allow her contact with the children. This seven week separation ended only after extensive legal advocacy for the return of the children. For several days while this separation continued, the child welfare agency that had insisted on the safety plan did not itself know where the children were. *See* <https://www.ascendjustice.org/wp-content/uploads/2019/11/No.-7-Complaint-FILED-by-clerk-10.17.2014.pdf>; https://www.americanbar.org/content/dam/aba/administrative/child_law/conf/AB%20v%20Holliman%20DCFS%20Settlement%20Agreement.pdf.

⁵ The DC KinCare Alliance has filed six federal lawsuits, with co-counsel from the law firm Ropes and Gray, that highlight the myriad ways in which children and relative care givers are deprived of the basic protections and services that would have been available if the children had been subject to court oversight and placed with relatives under a formal foster system. *See* <https://www.dckincare.org/>.

⁶ Child Trends, *Variations in the use of kinship diversion among child welfare agencies* (2019), <https://www.childtrends.org/publications/variations-use-kinship-diversion-among-child-welfare-agencies-early-answers-important-questions>.

⁷ Wendy A. Walsh, *Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment* (2013).

What data is missing?

Any complete understanding of the hidden foster care system would begin with reliable empirical answers to basic questions:

- How many children are placed in hidden foster care around the country?
 - States should be required to count any case when the CPS agency initiates an informal change in physical custody or has told the parents that it would seek a court order for removal of the children unless they will avoid by “agreeing” to a separation; whether the change in physical custody occurs during or after an investigation; through a written safety plan, similar document, or without any documentation at all; whether the change in physical custody occurs without any legal status change, with a custodial power of attorney, with a referral to file a private custody or guardianship action, or any other legal mechanism.
- How long do these children remain in hidden foster care?
- What happens to children in hidden foster care – do they reunify? If not, do they remain with kinship caregivers and through what legal mechanism (if any)? Does their physical custody change informally? Are they placed in the formal foster care system?
- What are these children's safety outcomes – i.e. what is their re-report and re-substantiation rates and what are the circumstances of any such safety risks?
- What are the demographics of affected children – race/ethnicity, age, class, etc. – and how does that correlate with different outcomes?
- How does this practice vary by state and by county?

III. Why focus now?

Hidden foster care is not a new feature of our child protection system. But it deserves the Children's Bureau's attention now for several reasons.

First, this practice has long been overlooked. Renewed policy and academic research make clear that this is no longer tenable (if it ever was).

Second, the Family First Prevention Services Act actually codifies a form of this practice in federal law for the first time. The Act provides states with flexible funding to work with children “at imminent risk of entering foster care” but who can remain safely in the child's home *or in a kinship placement*.⁸ Services under this Act could thus be used both to keep children in kinship care, and to avoid responsibility for reuniting children with the parents from whom they are removed, while simultaneously avoid responsibility for payment of the foster care benefits to which kinship caregivers would be entitled in the formal foster care system. The Act thus strengthens existing financial incentives for states to use hidden foster care and necessitates oversight of this practice.

⁸ 42 U.S.C. §§ 671(e)(2)(A) & 675(13).

Third, this practice has garnered increased attention – significant policy and legislative reform proposals in California⁹ and Texas,¹⁰ a state scandal and related litigation in North Carolina,¹¹ and impact litigation in the District of Columbia,¹² in addition to multiple civil rights actions raising concerns about these practices in Illinois, Pennsylvania and, most recently, two suits in Kentucky.¹³ Furthermore, the connection between hidden foster care and disproportionate denial of opportunities for family reunification and services and benefits for persons of color are also concerns that are coming to the fore. Increased federal leadership that addresses abuses of family rights is needed to provide accountability to the children and families who are being separated as well.

Fourth, a stronger CAPTA (which is pending now in the Senate), contains provisions that call for curtailing family separations that are related to poverty, and those that do not meet the threshold requirement of imminent danger of serious harm and contains new protections for due process in child abuse and neglect determinations. Yet hidden foster care separations occur without any of these protections that the House has passed and that the Senate is taking up soon.

The Children's Bureau has an important leadership role to play in reforming the system that led to the prevalence of hidden foster care.

IV. Data to track and authority to require states to report it

In short, we urge the Children's Bureau to track the essential data about hidden foster care, which, as discussed above, is largely missing. That data includes:

- How many children are placed in hidden foster care around the country?
 - States should be required to count any case when the CPS agency initiates an informal change in physical custody, whether the change in physical custody occurs during or after an investigation; through a written safety plan, similar document, or without any documentation

⁹ A.B. 260, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB260 (seeking to transfer some hidden foster care cases from probate to juvenile court).

¹⁰ H.B. 2680, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB2680> (seeking to provide a right to counsel for parents of children subject to hidden foster care, and placing a 30-day time limit on changes in physical custody pursuant to a safety plan).

¹¹ *Hogan v. Cherokee County*, 1:18-cv-96 (W.D. N.C.).

¹² *K.H. et al. v. District of Columbia*, 1:19-cv-03124 (D.D.C.); *S.K. et al. v. District of Columbia*, 1:20-cv-00753 (D.D.C.); *D.B. et al. v. District of Columbia et al.*, *T.J. et al. v. District of Columbia et al.*, *M.S. et al. v. District of Columbia et al.*, and *S.S. et al. v. District of Columbia et al.*

¹³ See, e.g., notes 2-4 *supra*. There is also extensive further litigation in both Illinois and Pennsylvania concerning hidden foster care practices, establishing a requirement of due process and disputing the adequacy of procedures available to parents to avoid family separations into hidden foster care. In the more recent of two federal civil rights cases in Kentucky, *Holliday v. Leigh*, 2:17-cv-113 (E.D.Ky), the federal court denied qualified immunity to the caseworker who imposed a restrictive “prevention plan” under threats of foster care placement where the threats were found unsupported and a misrepresentation of the caseworker’s legal authority. Yet, similar threats are commonplace accompaniments that precede separations in hidden foster cases. See *Schulkeers v. Kammer*, 955 F.3d 520 (6th Cir. 2020); *Schulkeers v. Kammer*, 367 F. Supp. 3d 626, (E.D. Ky. 2019) (denying qualified immunity to state caseworker who imposed prevention plan on family). The *Holliday* case makes clear that states must provide protections for the voluntariness of agreements to abide by restrictions on parents care of children and notice on procedures for release from so-called voluntary agreements in order for such arrangements to be deemed constitutional. Guidance from the Children's Bureau would greatly assist states in understanding the minimum requirements for labelling agreements that restrict parent-child contact as “voluntary” agreements.

- at all; whether the change in physical custody occurs without any legal status change, with a custodial power of attorney, with a referral to file a private custody or guardianship action, or any other legal mechanism.
- How many children receive prevention services supported by the Family First Act in a kinship caregiver's home?
 - How many of these children are intended by the agency to be in the kinship caregiver's home temporarily and how many permanently?
 - How long do these children remain in hidden foster care?
 - How many of these children remain in hidden foster care after the completion of an investigation?
 - What happens to children in hidden foster care – do they reunify? If not, do they remain with kinship caregivers and through what legal mechanism (if any)? Does their physical custody change informally? Are they placed in the formal foster care system?
 - What are these children's safety outcomes?
 - What is their re-report and re-substantiation rates and what are the details of any such allegations and substantiations?
 - Of whatever number of re-reports and re-substantiations exist, how many allege or substantiate maltreatment by the child's parent and how many maltreatment by the kinship caregiver?
 - What are the demographics of affected children – race/ethnicity, age, class, etc. – and how does that correlate with different outcomes?
 - How does this practice vary by state and by county?

The Children's Bureau's authority to require states to provide this data comes from several sources. Title IV-E already requires state child protection agencies to "make such reports, in such form and containing such information as the Secretary may from time to time require"¹⁴

The Family First Act provides additional authority to require states to report this data – at least if they want to use flexible funding for hidden foster care cases. The Act requires states to report children's placement status at the start and end of one year periods,¹⁵ and the individual strategies used to prevent foster care.¹⁶ The Children's Bureau should read these two provisions together to require states to report detailed data on when they use changes in physical custody or in children's caregivers to prevent foster care and what happens to children, parents, and kinship caregivers in those cases. This data should include the legal status of the child, whether the agency's goal is to maintain the child in a relative home or reunify the child and parent, and what judicial or other due process procedures exist in these cases to ensure abuse or neglect has occurred, separation is necessary to protect the child from an unreasonable risk of harm, and that preventative services are properly target for that child.

The Bureau has significant discretion regarding implementation of Family First funding flexibility. Statutorily, Family First funding is discretionary – the agency "*may* make a payment to the state" under the

¹⁴ 42 U.S.C. § 671(a)(6).

¹⁵ 42 U.S.C. § 671(e)(4)(E)(iii).

¹⁶ *Id.* at § 671(e)(4)(A)(i).

Act.¹⁷ Especially now and in the next several years as states begin to obtain Family First Act funding, the Children's Bureau has an opportunity to develop a clear picture of this important child welfare practice.

At the most minimal level, the Bureau could urge states to complete the "kinship diversion estimation tool" developed by Child Trends.¹⁸

Conclusion

Hidden foster care represents a hugely important and overlooked element of our wider child protection system. It is a practice that demands attention and reforms at the federal, state, and local level. Perhaps the most important immediate role that the Children's Bureau can play is to require states to report the essential data to inform that broader reform conversation. We call on you to use your authority urgently to require states to do so.

We look forward to hearing your response on this matter. We would, of course, be happy to discuss this matter with you and your staff in whatever way you believe would be useful.

Sincerely,



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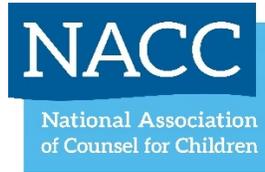
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¹⁷ 42 U.S.C. § 671(e).

¹⁸ <https://www.childtrends.org/publications/does-your-child-welfare-agency-divert-children-to-kin-guide-using-kinship-diversion-estimation-tool>.



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