

Hidden Foster Care in NYS

Proposing solutions to fix a broken system

NOVEMBER 2021

NYS Kincares Coalition
NYS Kinship Navigator



Hidden Foster Care

What are Safety Plans?

A “safety plan” refers to a series of controlling interventions available to Child Protective Services (CPS) while the worker is conducting a “safety assessment”.ⁱ The safety assessment is done to determine if children are in immediate or impending danger of serious harm. If the children are determined to be in danger, a safety plan is a set of actions or interventions taken by CPS to keep children safe. Utilizing the home of a relative, or kinship caregiver, is considered an available controlling intervention to CPS when attempting to mitigate safety concerns in the home. These out-of-home living arrangements are referred to as “alternative living arrangements” or “Relative/Resource Placements” and are considered to be an “agreement between individuals”, the prospective kinship caregiver and the parent, not an official placement made by the Local Department of Social Services.ⁱⁱ These placements are made prior to obtaining a court order and often in lieu of court involvement and are commonly referred to in the literature as “kinship diversion”.

In theory, CPS would choose to utilize an alternative living arrangement to avoid pulling a family deeper into the child welfare system and to give families time to address safety concerns that may be swiftly ameliorated. Research has shown that when children cannot remain safely in the home of their parents, placing children with kinship caregivers is in their best interest, resulting in less frequent placement moves, sustained connections with extended family and parentsⁱⁱⁱ, and higher rates of reunification with parents^{iv} when compared to non-kin foster care. However, the way these plans are implemented can disempower parents, diminish a family’s constitutional rights, cause harm and trauma to the child, and damage trust of the agency and child welfare system by the parents, children, and kin caregivers moving forward.

Having come to be known as “Hidden Foster Care”, this type of family separation has led to parents experiencing coercion by the threat of court action and/or the threat of placing the child in foster care with “strangers.” When a child welfare worker informs a parent of their intent to do a judicial removal of their child, “unless you can find someone else to take the child”, it amounts to a pseudo-removal being paraded as “family choice”, all while by-passing court oversight, parental assignment of counsel, and due process for both the children and parents.

Additionally, with limited regulation, no data collection and tracking requirements, and no court oversight of alternative living arrangements, children in these arrangements are often left for an indefinite amount of time and without a plan for permanency. The caregivers who are asked to care for these children can be left without resources and have no decision-making authority for, or legal

relationship to, the children in their care. Caregivers are told that they may not return the children to the parents and may face legal action from CPS if they do.

This sentiment was recently echoed by Josh Gupta-Kagan, Associate Professor of Law at South Carolina University, in an Op-Ed featured in The Imprint^v:

“Because no court oversight follows, there are no checks and balances on the agency’s decision that children must be separated from their parents . . . Meanwhile, kinship caregivers — who in the aggregate are much less well-off financially than stranger foster parents — do not get the financial support they may need.”

How Prevalent is Hidden Foster Care?

According to research done by Child Trends in 2019, “Kinship diversion is the most common out-of-home placement, with approximately half of children removed from their homes ending up in a diversion arrangement.”^{vi} The data for the study was collected using a “kinship diversion tool” developed by Child Trends and implemented in several jurisdictions around the country. No publicly available data exists to track these placements.

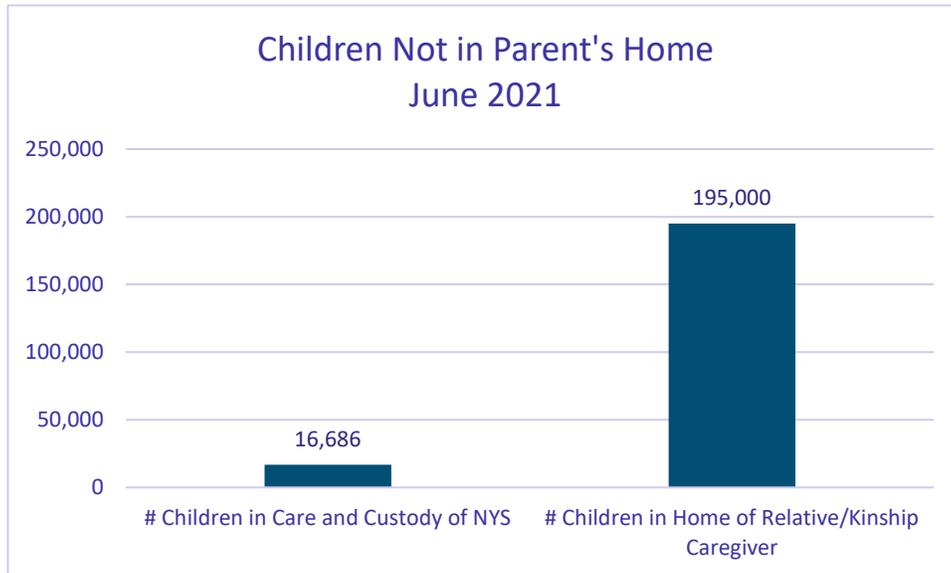
“Approximately half of children removed from their homes end up in a diversion arrangement.”

What Happens to Children in Hidden Foster Care?

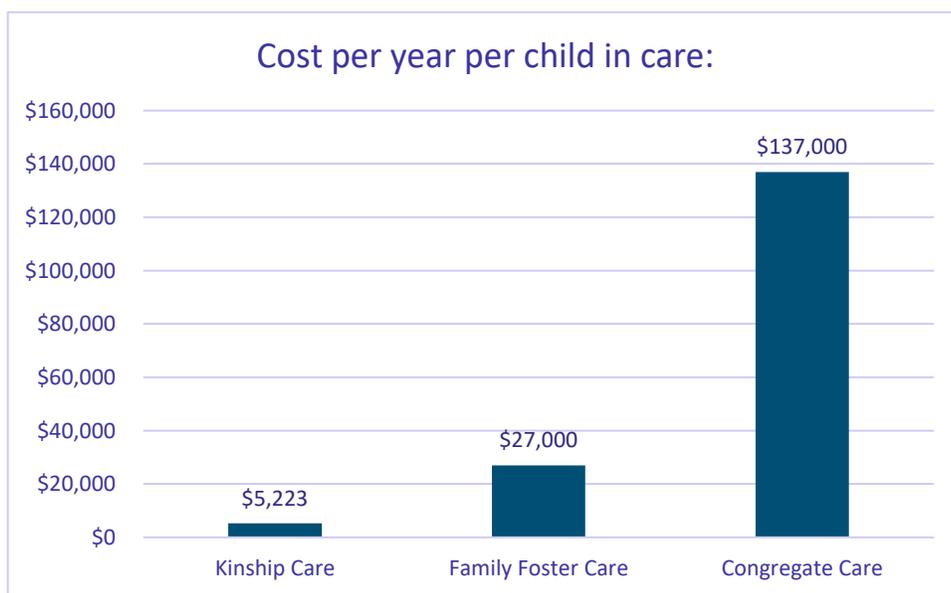
Children in Hidden Foster Care do not receive equitable access to services as a result of not being “in the system”. New York State spends well over \$1.3 billion on foster care services and supports^{vii} to sustain 16,686 children in care^{viii}. In New York, 43% of children in foster care are in kinship foster care – 7,201 children. The system of supports includes access to case management, monthly stipends and clothing allowances, access to childcare, and other services.

Conversely, estimates show there are roughly 195,000 children being raised by kinship caregivers^{ix}, the majority of whom are not in foster care. New York spends \$2.5 million on supportive services for those children and families who are not in foster care. Funds for kinship services are used to run a statewide Kinship Navigator (\$320,500) and 14 county-based case management programs (\$150,000 each).

Child Trends reports that roughly 11% of children who were diverted ended up in foster care within 6 months.^x This is due in large part to the lack of supports provided to children and their families outside of the foster care system.



Despite the lack of supports, Hidden Foster Care has been the preferred method of placing children throughout New York because of the cost-savings associated with keeping children out of foster care. Recent studies in NYS have shown congregate care can cost upwards of \$137,000 per year for one child, and family foster care averages about \$27,000 per child. Meanwhile, to sustain a child in a kinship home with access to case management supports and a Public Assistance grant, the cost is as little as \$5,223 per child.^{xi}



Research confirms that despite the lack of supports available to kin, they remain the more stable option for children in need of placement, with fewer placements and longer stays in their first placement setting when compared to non-kin foster care.^{xii}

Proposing a Solution

Assembly Bill 8090 (2021) was drafted in partnership with a cohort of professionals comprising of attorneys and practitioners in New York who work with or represent parents, kinship caregivers, and local departments of social services. This coalition came together in an attempt to solve the commonly shared issue of unregulated, undefined, and under-resourced safety plan policies that left children without a true path to stability or permanency, kinship caregivers without access to resources, supports, or legal authority to make decisions, and parents without access to due process and legal representation.

This legislation is broken out into three parts:

1. Define the practice
2. Regulate the practice
3. Collect Data

Defining the Practice: New York’s Child Welfare system is a state-supervised, county-implemented system. Practices and terminology vary between counties, leading to confusion or denial of particular policies and practices within a county. Without a definition of an “alternative living arrangement”, local departments of social services have been able to deny the practice of coercing parents to use kinship caregivers as an unsupported informal resource, often claiming the arrangement for the care of the child was made without CPS intervention. By defining the practice, it takes away the ability to initiate plans that would not otherwise rise to the level of judicial removal, or to deny that the plan has been instigated as part of a CPS investigation. The proposed definition is:

An "alternative living arrangement" means a temporary, written, and agreed upon out of home living arrangement developed as a result of an investigation of child maltreatment by the child protective service that would allow for a kinship caregiver as defined in subdivision twenty-two of section three hundred seventy-one of this article, who is identified by any parent, person legally responsible or child over the age of five, to temporarily care for a child who is at a substantial risk of abuse as defined in paragraph (i), (ii) or (iii) of subdivision (e) of section one thousand twelve of the family court act or in imminent danger of neglect as defined in paragraph (i) of subdivision (f) of section one thousand twelve of such act.

This definition clearly identifies that this arrangement is being done as a result of CPS investigation and acknowledges that it is only appropriate when serious risk of harm to the child is involved.

Regulating the Practice: Some advocates for families have been vocal about needing to abolish the practice of safety plans altogether, citing that the practice infringes on a parent’s constitutional rights to their children. While this approach was considered, the practice is called Hidden Foster Care because it happens without any oversight whatsoever, and simply abolishing something that is already happening in the shadows is likely to have little impact on the practice continuing to happen, since local departments will deny that they engage in the illegal practice. As a result, creating an alternative living arrangement that was a positive, temporary solution that worked for families was the goal in writing the regulations. The full bill can be seen in Appendix A. Highlighted as requirements in the language are:

1. The need for the plan to be in writing with a clear indication of what the identified safety issues are and the action steps recommended by CPS
2. A time limitation of no more than 10 days until the child must be reunified with their parent or court action taken
3. A requirement that information be passed along to the family related to available services

Regulated safety plans don’t have to be negative for families. When families are in crisis, this type of safety plan allows a short amount of time for the family to consider their options. It allows a parent enough time to contact an attorney to discuss the case. It allows a kinship caregiver time to review potential custody options, like becoming a foster parent or obtaining custody, and what supports are available if the child needs to reside with them beyond 10 days. It allows for an exploration of available services that could be implemented to support the family to avoid the need for a judicial removal. The requirements also allow for families to know that a plan is in place, that CPS is required to follow up, and that the child’s best interest is truly at the center of the decision-making process.

Collecting Data: A large part of what makes this practice “hidden” is the lack of data collection. Districts are not required to record when a child has left the home through an alternative living arrangement and can even close an open investigation because the safety risks have been ameliorated through the kinship placement. This leaves children at risk because no permanency has been achieved, as caregivers are left without legal authority to make decisions such as medical or educational decisions on behalf of the child in their care. In alternative living arrangements as they are currently used, parents have every right to demand the return of their child from the caregiver regardless of what CPS has said, since no court order has been issued. Children may bounce back and forth between households multiple times, adding to the trauma they have experienced, all without any official record of their movement or involvement in the Hidden Foster Care system.

To help make informed decisions about this practice, it is imperative to understand how districts have used this “catch all” for children in need of care. The data collection and reporting portion of the bill attempts to cover a wide array of circumstances to paint a full picture of the practice for additional regulation in the future.

Additional Information

For additional information about Hidden Foster Care in New York and beyond, the following resources may be helpful:

- [America's Hidden Foster Care System by Josh Gupta-Kagan, Stanford Law Review](#)
- [Variations in the Use of Kinship Diversion Among Child Welfare Agencies by Karin Malm, Child Trends](#)
- [Imprint News' Collection of Articles on Hidden Foster Care](#)
- [Hidden Foster Care: The Human Impact of Bypassing Foster Care by The Alliance for Children's Rights](#)

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ⁱ <https://ocfs.ny.gov/programs/cps/manual/2020/2020-CPS-Manual-Ch06-2020Mar.pdf>

ⁱⁱ <https://ocfs.ny.gov/ohrd/FASP/pdf/FASP%20Ref%20Guide%201-2017%20for%20OCFS%20Website.pdf>

ⁱⁱⁱ <https://pediatrics.aappublications.org/content/139/4/e20170099.long>

^{iv} <https://www.gu.org/app/uploads/2018/05/Grandfamilies-Report-SOGF-2017.pdf>

^v <https://imprintnews.org/child-welfare-2/how-biden-administration-address-hidden-foster-care/50487>

^{vi} https://www.childtrends.org/wp-content/uploads/2019/06/kinship-diversion_ChildTrends_June2019-2.pdf

^{vii} https://kincarecoalition.files.wordpress.com/2021/09/kinshipbudgethearingtestimony_feb9_2021.pdf

^{viii} <https://ocfs.ny.gov/main/sppd/family-first-data.php>

^{ix} <https://aarp-states.brightspotcdn.com/80/58/66bd55214a8b9581fae55af253b6/disrupt-disparities-kinship-care-in-crisis-3-21.pdf>

^x https://www.childtrends.org/wp-content/uploads/2019/06/kinship-diversion_ChildTrends_June2019-2.pdf

^{xi} <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:fa79c1db-64c6-4b91-8fd4-3e454034fbea#pageNum=2>

^{xii} https://www.childtrends.org/wp-content/uploads/2019/06/kinship-diversion_ChildTrends_June2019-2.pdf

Appendix A: A8090(2021) Bill Language

STATE OF NEW YORK

8090

2021-2022 Regular Sessions

IN ASSEMBLY

June 11, 2021

Introduced by M. of A. HEVESI -- read once and referred to the Committee on Children and Families

AN ACT to amend the social services law, in relation to establishing alternative living arrangements for children who are at a substantial risk of abuse

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 412 of the social services law is amended by adding
2 a new subdivision 10 to read as follows:

3 10. An "alternative living arrangement" means a temporary, written and
4 agreed upon out of home living arrangement developed as a result of an
5 investigation of child maltreatment by the child protective service that
6 would allow for a relative or suitable person as defined in subdivisions
7 (m) and (n) of section one thousand twelve of the family court act or
8 paragraph (a), (b) or (c) of subdivision three of section four hundred
9 fifty-eight-a of this article, who is identified by any parent, person
10 legally responsible or child over the age of five, to temporarily care
11 for a child who is at a substantial risk of abuse as defined in para-
12 graph (i), (ii) or (iii) of subdivision (e) of section one thousand
13 twelve of the family court act or in imminent danger of neglect as
14 defined in paragraph (i) of subdivision (f) of section one thousand
15 twelve of such act.

16 § 2. Subdivision 2 of section 424 of the social services law, as added
17 by chapter 1039 of the laws of 1973, is amended to read as follows:

18 2. maintain and keep up-to-date a local child abuse and maltreatment
19 register of all cases reported under this title together with any addi-
20 tional information obtained and a record of the final disposition of the
21 report, including services offered and accepted and any alternative
22 living arrangement made for the care of any child in the home of a rela-
23 tive or suitable person;

24 § 3. The social services law is amended by adding a new section 424-c
25 to read as follows:

26 § 424-c. Alternative living arrangements. 1. An alternative living
27 arrangement may be facilitated by the child protective service to

1 arrange for the child to temporarily reside with a relative or suitable
2 person without a judicial removal for a limited amount of time and is
3 available only in circumstances where grounds exist for removal pursuant
4 to article ten of the family court act. Prior to offering such an
5 arrangement to a family, the child protective service worker must
6 explain that the child protective service has no legal authority to

7 compel such family to agree to the arrangement but may inform the family
8 of the obligations and authority of the child protective service to
9 petition the family court for a determination that a child is in need of
10 care and protection. This out of home arrangement shall not be used
11 without written documentation of the circumstances that warrant removal.

12 2. (a) An alternative living arrangement agreement shall be in writ-
13 ing, signed by the authorized child protective services worker, parent
14 or person legally responsible, and the relative or suitable person and
15 shall include:

16 (i) a specific action or actions agreed upon for the parent or person
17 legally responsible to mitigate the identified grounds that warrant
18 removal;

19 (ii) names, addresses, and contact information of the authorized child
20 protective services worker and their immediate supervisor, parent or
21 person legally responsible, and the relative or suitable person or
22 persons;

23 (iii) length of the alternative living arrangement; and

24 (iv) plan for re-assessment for reunification or judicial removal.

25 (b) The signature of the parent or person legally responsible only
26 signifies agreement to the temporary alternative living arrangement and
27 shall not be considered an admission of the accuracy of the safety eval-
28 uation and determination of risk pursuant to paragraph (a) of subdivi-
29 sion six of section four hundred twenty-four of this title by the parent
30 or person legally responsible. It shall not be admissible in a court of
31 law as proof of the allegations in a neglect or abuse filing.

32 3. An alternative living arrangement shall last no longer than five
33 business days. One additional extension of no more than five business
34 days may be requested by the authorized child protective service, parent
35 or person legally responsible, or relative or suitable person. An exten-
36 sion of an alternative living arrangement agreement shall be:

37 (a) in writing;

38 (b) signed by the authorized child protective service, parent or
39 person legally responsible, and the relative or suitable person;

40 (c) include all of the provisions in subdivision two of this section;
41 and

42 (d) include the reason for such extension.

43 4. Prior to the execution of the alternative living arrangement agree-
44 ment, the child protective service shall provide written information as
45 described in this section to the parent or parents or person or persons
46 legally responsible and the prospective relative or suitable person or
47 persons. Such information shall include but not be limited to:

48 (a) information about supportive services for the parents, children
49 and relative or suitable person;

50 (b) information about the options for care and custody of the child
51 pursuant to section three hundred ninety-two of this article;

52 (c) information on how to apply for public assistance; and

53 (d) any other relevant information related to supporting the alterna-
54 tive living arrangement.

55 5. (a) The office of children and family services shall collect the
1 following data regarding alternative living arrangements and compile an
2 annual report for the preceding calendar year on such data provided by
3 every local social services district:

4 (i) total number of alternative living arrangement agreements;

5 (ii) total number of extensions to alternative living arrangement
6 written agreements;

7 (iii) total number of children, parents and relatives or suitable
8 persons who were the subject of alternative living arrangement agree-
9 ments;

10 (iv) average length of alternative living arrangements in each county;

(v) total number of alternative living arrangements that lasted longer

- 11 than the ten days permitted by this section;
12 (vi) total number of children who were reunited with parents upon
13 cessation of an alternative living arrangement agreement;
14 (vii) total number of children who were not reunited with parents upon
15 cessation of an alternative living arrangement agreement;
16 (viii) total number of children who were the subject of a proceeding
17 pursuant to article ten of the family court act upon cessation of all
18 alternative living arrangement agreements;
19 (ix) total number of children who were the subject of a proceeding
20 pursuant to article ten of the family court act upon cessation of all
21 alternative living arrangement agreements and who were directly placed
22 with relatives pursuant to article ten of the family court act;
23 (x) total number of children who were the subject of a proceeding
24 pursuant to article ten of the family court act upon cessation of all
25 alternative living arrangement agreements and who were placed in foster
26 care with a relative or suitable person;
27 (xi) total number of children who were the subject of a proceeding
28 pursuant to article ten of the family court act upon cessation of all
29 alternative living arrangement agreements and who were placed in foster
30 care with a non-relative or congregate care setting;
31 (xii) total number of children who were placed in the custody of a
32 relative or suitable person pursuant to article six of the family court
33 act upon cessation of all alternative living arrangement agreements;
34 (xiii) a descriptive list of preventive services and their utilization
35 rates, if practicable, that were provided to parents, children and rela-
36 tives or suitable persons who were the subject of an alternative living
37 arrangement agreement in each local social services district; and
38 (xiv) any other information the commissioner may deem necessary to
39 include.
40 (b) The office of children and family services shall submit such
41 report to the governor, the speaker of the assembly, the temporary pres-
42 ident of the senate, the chairperson of the assembly children and fami-
43 lies committee, and the chairperson of the senate children and families
44 committee, and the chairperson of the assembly ways and means committee,
45 and the chairperson of the senate finance committee by no later than
46 September first, two thousand twenty-three and annually thereafter. Such
47 report shall include the data and information required under paragraph
48 (a) of this subdivision for the preceding calendar year, to the extent
49 such information is available. When practicable, such information shall
50 be disaggregated by age, sex, race and ethnicity.

51 § 4. This act shall take effect on the ninetieth day after it shall
52 have become a law. Effective immediately, the addition, amendment and/or
53 repeal of any rule or regulation necessary for the implementation of
54 this act on its effective date are authorized to be made on or before
55 such date.