

How the Biden Administration Can Address Hidden Foster Care

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By [Josh Gupta-Kagan](#)

The Biden administration will inherit a foster care system in which states report removing more than 200,000 children from their families every year.

The real number is far higher, thanks to a practice that I call “[hidden foster care](#).” This largely unregulated practice is long overdue for federal attention and action.

Here is how hidden foster care works. A state child protective services agency concludes a parent has abused or neglected his/her child, and further decides that the child is in such danger with the parent that the child needs to live elsewhere immediately. The agency identifies kin who can take care of the child — the child’s grandparent, aunt or uncle, or godparent — and acts to ensure the child lives with that person, at least temporarily.



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At this point, one might expect that the agency would have initiated a family court case to review the agency’s action and evidence and authorize the child’s removal. But in most states, in many situations, agencies instead induce parents to transfer physical custody to kinship caregivers by threatening to place the children in foster care and bring them to family court and possibly place the child with strangers if they do not.

Both the frequency of these actions — they occur tens or even hundreds of thousands of times annually — and their impact — they separate parents and children, sometimes permanently — resemble the formal foster care system. But these agency actions are hidden from courts, because agencies file no petition alleging abuse or neglect, and hidden from policymakers, because agencies do not generally report these cases in regular data reports.

While such kinship arrangements sometimes reflect parents’ true wishes and the best option for children, hidden foster care raises a set of concerns. Foremost is whether these children truly need to be separated from their parents. While parents nominally agree to hidden foster care, they do so following agency threats.

Because no court oversight follows, there are no checks and balances on the agency's decision that children must be separated from their parents. No lawyers for the parents challenge whether the parent truly abused or neglected the child, whether any maltreatment threatened imminent harm, or whether alternatives to a parent-child separation existed, and no judges determine whether such a separation is truly necessary.

To be clear, parents have the legal power to place their children with family members, and we should protect that power. But such decisions must be voluntary. When a state agency threatens parents and kin that children will be placed in stranger foster care unless a family member agrees to take them, voluntariness is seriously in question.

Kinship care is, of course, generally preferable to placement with strangers — but that does not justify removing these basic checks and balances. As the U.S. Supreme Court said in a [1979 kinship care case](#), using kinship care should not relieve the state of its “obligation to justify its removal of a dependent child;” all children, the court ruled, deserve “protect[ion] from unnecessary removal.”

Once an agency removes a child into hidden foster care, there are no checks and balances about what happens next. What must the parent do to regain his/her child? When should the child return home? What visitation arrangements should exist in the meantime? These are all essential and often difficult questions that would be answered better with checks and balances.

An agency also skirts other legal obligations by using hidden foster care. By avoiding a court case, hidden foster care lets agencies avoid their duty to make reasonable efforts to prevent removal and, once the child is separated from the parent, to reunify the family. The child may lose out on certain services and legal rights, such as the right to assistance from the agency to continue attending his/her school of origin while temporarily separated from a parent.

Hidden foster care also lets an agency avoid its obligation to pay licensed kinship foster parents a foster care subsidy, leaving kinship caregivers able only to access more meager welfare benefits; the agency facilitates kinship foster care on the cheap. 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.

Finally, some situations of hidden foster care do not result in a legal custody change, and that can sometimes leave children in dangerous situations. If a child truly does need protection from a parent, hidden foster care does not protect against such a parent picking up the child — after all, only physical custody has changed, and parents retain legal custody.

This issue is overdue for attention and reform. In this season of political transition, I recommend three steps that the Biden administration can take to provide meaningful regulation of hidden foster care.

First, as it supervises states' implementation of the Family First Prevention Services Act, the administration should ensure that states use the act's flexibility to prevent parent-child separations, not only prevent foster care. The Children's Bureau is already committed to preventing unnecessary separations, but states' frequent use of hidden foster care shows that they separate tens if not hundreds of thousands of children from their parents while being able to claim credit for preventing formal foster care.

The administration should not permit such action under Family First without states adopting meaningful regulation of this practice — including short time limits for such kinship care agreements (I suggest no longer than 30 days), and opportunities for parents to challenge the necessity of such agreements in court.

Second, the Biden administration should continue the Children's Bureau's current push for state governments to provide parents with lawyers earlier in the process, before a petition is filed to remove their child. A growing base of research shows that vigorous parent representation improves outcomes for children and families without jeopardizing children's safety.

The Children's Bureau — which has made federal funding available for pre-petition representation — should work with states to ensure parents are appointed lawyers whenever agencies ask a parent to change a child's physical custody. Strong lawyers for parents can ensure that such parent-child separations occur only when necessary and legally justifiable, that decisions by parents and kinship caregivers to agree to such plans are truly voluntary, and that children can go home once it is safe.

Third, the Biden Children's Bureau should require states to collect and report data regarding their use of hidden foster care. This step may not sound exciting, but is vitally important to informed oversight and regulation of this practice. Currently, data regarding hidden foster care — how often it happens, how long children stay in hidden foster care, and what happens to those children over the long-term — is not reported to the federal government or, in most states, to the public — another way in which the practice is hidden. Many states already collect this data; the Children's Bureau should use its authority to require states to collect and report such data to the federal government.

Hidden foster care is not a new phenomenon, but it is slowly getting the attention it is due — in local and national reporting, a package of legislative reforms proposed in California, a scandal and related litigation in North Carolina, civil rights litigation in Kentucky, Pennsylvania, the District of Columbia, and beyond, and think tank research.

Hidden foster care is a national issue that requires national attention, with strong action from the Biden administration once in office.

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