

No. 24-40248

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

M.D., BY NEXT FRIEND SARAH R. STUKENBERG; et al.,
Plaintiffs - Appellees,

v.

**GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF
TEXAS; et al.,**
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CIVIL ACTION NO. 2:11-CV-00084
THE HONORABLE JANIS GRAHAM JACK

**BRIEF OF AMICI CURIAE FOSTER CARE ADVOCACY CENTER,
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,
JUSTICE FOR CHILDREN, TEXAS STATE EMPLOYEES UNION,
PROFESSOR LORI K. DUKE IN SUPPORT OF APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

No. 24-40248

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M. D., by next friend Sarah R. Stukenberg; D. I., by next friend Nancy G. Pofahl; Z. H., by next friend Carla B. Morrison; S. A., by next friend Javier Solis; A. M., by next friend Jennifer Talley; J. S., by next friend Anna J. Ricker; K. E., by next friend John W. Cliff, Jr.; M. R., by next friend Bobbie M. Young; J. R., by next friend Bobbie M. Young; H. V., by next friend Anna J. Ricker; P. O., by next friend Anna J. Ricker; L. H., by next friend Estela C. Vasquez; C. H., by next friend Estela C. Vasquez; S. R., by next friend Bobbie M. Young; S. S., by next friend Estela C. Vasquez; A. R., by next friend Tom McKenzie, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

Greg Abbott, in his official capacity as Governor of the State of Texas; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Health and Human Services Commission of the State of Texas; Stephanie Muth, in her official capacity as Commissioner of Texas Department of Family and Protective Services,
Defendants-Appellants.

The undersigned counsel of record certifies that the following list of persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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RULE 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae certify that (A) no party's counsel authored this brief in whole or part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person, other than amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF AMICUS CURIAE¹

This brief is filed on behalf of Foster Care Advocacy Center, the National Association of Counsel for Children, Justice for Children, the Texas State Employees Union, and Professor Lori K. Duke. Amici have a shared interest in promoting the safety and wellbeing of children in the Texas foster care system, as well as the safety and wellbeing of the individuals working in the Texas foster care system. Based on their areas of advocacy and policy work, amici present a unique and helpful perspective to the Court.

Foster Care Advocacy Center (“FCAC”) is the only multidisciplinary nonprofit law office in Texas devoted to child welfare law. FCAC takes appointments from Harris County courts to represent children and parents in ongoing child welfare proceedings. FCAC staff are considered experts in “complex” child welfare cases, such as cases involving child fatalities, parents or children with intellectual disabilities, parents or children with serious mental illness, medically fragile children, dual-status youth, youth aging out of care, or transgender youth. FCAC represents approximately 400 clients per year, and a significant number of

¹ This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of the parties. No party’s counsel authored this brief in whole or in part, and no party or party’s counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

these are children in the Permanent Managing Care of the Department of Family and Protective Services.

Founded in 1977, the National Association of Counsel for Children (“NACC”), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children’s and parents’ rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC’s work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an *amicus curiae* program. Through the *amicus curiae* program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

Justice for Children is a non-profit watchdog organization that advocates for and intervenes on behalf of abused children who have fallen through the cracks of the legal system designed to protect them. Justice for Children was formed in 1987 with a mission to prevent known victims of child abuse from suffering further abuse

and to hold the “System” accountable. Although child abuse has complex and far-reaching health and societal problems, at its heart child abuse is a crime. Using our knowledge of the system learned over 37 years of representing abused and neglected children, Justice for Children provides a safety net of skilled caseworkers, volunteer lawyers, and lay advocates to ensure that judges, prosecutors, CPS, and law enforcement look at the evidence and listen to the child.

Members of the Texas State Employees Union (TSEU), who work for the Department of Family and Protective Services, are responsible for protecting and preventing continuous abuse and harm of children that have come into the State's care. TSEU members are professionals dedicated to serving vulnerable Texans and are acutely aware of the need for reform within the agency and the foster care system.

Professor Lori K. Duke is the Co-Director of the Children’s Rights Clinic at the University of Texas School of Law.² She is certified by the Texas Board of Legal Specialization in child welfare law and is a recognized legal scholar who has devoted her career to child welfare advocacy.

² Institutional affiliation is provided for identification purposes and does not denote the law school’s opinion on the issues presented in this appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Children with disabilities in the Permanent Managing Conservatorship (“PMC”) of the Department of Family and Protective Services (“DFPS”) deserve to be equally protected from abuse and neglect, the same as their non-disabled peers. There cannot be “substantial compliance” if the most vulnerable population remains at serious risk of emotional and physical harm, and Appellants³ continue to arbitrarily subject these children to different levels of placement oversight. It is distressing that Appellants take the position that the unique needs of an entire population of vulnerable youth, youth with disabilities, do not deserve or need to be considered when determining whether Appellants have performed timely and accurate investigations.

Every child with a disability in a Home and Community-Based Services (“HCS”) home,⁴ regardless of who is paying and regardless of whether the provider lives in the home, is at higher risk of abuse and neglect than their non-disabled peers. Appellants have created a system that arbitrarily divides a vulnerable group of foster children and subjects their abuse and neglect (“ANE”) complaints to two different types of investigation, resulting in similarly-situated children living in homes with

³ Though only the Health and Human Services Commission (“HHSC”) is addressed in the Contempt Order, the issues with investigations of PMC children in HCS homes is inexorably linked to Department of Family and Protective Services (“DFPS”) policy, so the agencies are collectively referred to as “Appellants.”

⁴ Throughout this brief, HCS group homes and HCS host homes are collectively referred to as “HCS homes.”

entirely different levels of oversight. These children have no choice as to whether they are in a group home or a host home, and have no say over whether they are placed there by child-specific contract or by HCS “slot.” Appellants have not ensured the protection of these children, so it has been up to the district court to direct Appellants to do so.

For over a decade, Judge Jack has been trying to safeguard the wellbeing of children in PMC and the wellbeing of Appellants’ employees. Appellants have demonstrated they are unwilling to make improvements on their own. It has taken a decade for Appellants to complain that the district court is not a “fair and impartial forum,” which is indicative of the remarkable patience the district court has shown. Appellants call the district court’s conduct an “insurmountable obstacle” without addressing the obstacles created by their own conduct. Appellants’ recalcitrance is well-documented in tens of thousands of pages of records and testimony. Rather than complying with the remedial orders, over and over again, Appellants have changed how data is reported to manipulate statistics. It is *this* conduct that poses an “insurmountable obstacle” to the effective and efficient administration of justice. To the extent that the district court is frustrated with Appellants, it is a situation of their own making. Any future presiding judicial officer will undoubtedly feel the same should Appellants continue to deflect and obfuscate. It is not the judge that needs to be changed but Appellants’ own behavior.

For these reasons, we support the affirmation of the district court’s contempt findings and urge that Judge Jack remain on the case.

ARGUMENT

I. APPROPRIATE OVERSIGHT OF HCS PLACEMENTS IS VITAL TO THE LONG-TERM SAFETY AND STABILITY OF PMC CHILDREN WITH DISABILITIES

A. Benefits for Children with Disabilities in Safe and Appropriate HCS Homes

It is our experience that children with disabilities in *safe* HCS placements can thrive and achieve a level of independence that they are unable to achieve in traditional foster placements. For children with intellectual disabilities who age out of foster care, HCS placements provide the opportunity for long-term stability and permanency.

There is a reason many attorneys *ad litem* and advocates for children often support the placement of children in HCS homes when traditional foster placements are unable to meet the complex needs of a particular child. The record is replete with stories from former foster youth about their time in Child Without Placement (“CWOP”), but there are many former foster youth who literally cannot tell their stories due to a disability.⁵ We observed children with developmental disabilities as

⁵ As the district court noted, DFPS and HHSC use interchangeable terms to describe unlicensed placements staffed by DFPS employees working forced overtime. Child Watch, Child Without Placement, and Day Watch are collectively referred to as “CWOP.”

young as three years old placed in CWOP. These children were uniquely vulnerable to abuse and exploitation, compounded by the fact that they often could not tell anyone if they were being harmed. Instead of watching their clients flounder while DFPS found an “appropriate placement,” attorneys *ad litem* began filing motions to have these children placed in HCS homes by contract.

Many advocates in this space can tell stories of a child’s dramatic and seemingly miraculous improvement after moving from a traditional DFPS placement to a safe and appropriate HCS home. As an example, one of FCAC’s clients, a teenager with autism spectrum disorder (“ASD”), was exhibiting behaviors at his residential treatment center (“RTC”) that became unmanageable. This teenager smeared feces on the wall and was unable to sit still for any length of time. He was believed by RTC staff to be non-verbal, though he actually had limited ability to speak Arabic. When this child was placed in an appropriate HCS home, his behaviors dramatically improved. With professional involvement, he developed verbal skills in English and Arabic. He stopped smearing feces, could participate in school and other activities meaningfully, learned to toilet himself, and learned to read. This type of radical change can be achieved in safe and appropriate HCS placements.

For youth with frequent placement moves, a particularly acute challenge for children with disabilities, an HCS home can provide long-term stability. We have witnessed countless instances where a child with over a dozen placements moves to

an HCS home and remains stable for years.⁶ This is largely because HCS providers are specifically trained to work with individuals with disabilities, and traditional placements offered by DFPS are not. HCS homes are less likely to discharge children with challenging behaviors and are more reticent to involve law enforcement. The benefits to these children in school stability alone cannot be overstated.

B. PMC Children with Disabilities in HCS Placements

i. Overview of HCS Eligibility and Placement Types

The Home and Community-Based Services (“HCS”) program is a Medicaid waiver program administered by the Texas Health and Human Services Commission (“HHSC”). The HCS program allows individuals with intellectual and developmental disabilities (“IDD”) to remain in the community with services and supports paid for by HHSC.⁷ The program benefits are numerous and include the right to lifetime HCS housing.⁸

Individuals with disabilities qualify for the HCS program by obtaining a Determination of Intellectual Disability (“DID”) through their Local Intellectual and

⁶ The opposite is true, as well: when children are removed from stable and appropriate HCS homes, they deteriorate. Several of FCAC’s clients have regressed to a nonverbal state upon leaving their HCS home, and have developed maladaptive behaviors such as running away.

⁷ See TEX. ADMIN. CODE § 263.4(a) (program purpose and scope).

⁸ Individuals who qualify for the HCS program can enroll in their “slot” in either a group or a host home. No separate determination of need or vulnerability influences whether an individual resides in one type of home or another. See TEX. ADMIN. CODE § 263.101 (program eligibility requirements); TEX. ADMIN. CODE § 263.101 (“[t]he setting is selected by the individual from among setting options”).

Developmental Disability Authority (“LIDDA”), a regional office that administers the HCS program.⁹ Utilizing mental health professionals, LIDDAs determine whether someone qualifies for a DID based on cognitive achievement tests, rating scales, interviews, and more.¹⁰ A LIDDA is the *only* entity that can conclusively determine whether someone is eligible for the HCS program as a person with IDD. When someone receives a DID, only then is that person “eligible” for HCS enrollment. One LIDDA may find an individual eligible, while another may not.¹¹

Once an individual has a DID demonstrating they are eligible for the HCS program, they can enroll in the HCS program—*i.e.*, their “slot”—one of three ways: 1) reaching the top of a years-long waiting list, 2) receiving a diversion slot because they are at imminent risk of being placed in a state-run facility, or 3) receiving a DFPS set-aside slot meant to prevent children with disabilities aging out of foster care from being institutionalized.¹²

⁹ See TEX. ADMIN. CODE § 263.901.

¹⁰ The HHSC outlines the qualifications for the HCS program as follows:

To qualify at ICF/IID LOC I:

- a) Full-scale intelligence quotient (IQ) of 69 or below; or full-scale IQ of 75 or below with a primary diagnosis of a related condition (the onset of which must occur before age 22); and
- b) mild to extreme deficits in adaptive behavior (in at least three of six areas).

To qualify at ICF/IID LOC VIII:

- a) primary diagnosis of a related condition; and
- b) moderate to extreme deficits in adaptive behavior; and
- c) transitioning or diverting from a nursing facility.

See TEX. ADMIN. CODE § 263.101(a)(2)(C)

¹¹ FCAC and other advocacy groups regularly see varying results in eligibility determinations from one LIDDA to another.

¹² See TEX. ADMIN. CODE § 263.103.

Once an individual is ready to enroll in their slot, the LIDDA assists in locating an HCS home. An individual can choose to live in either a host home or a group home.¹³ HCS host homes are home-like environments in which an HCS caregiver resides in the home with the person with IDD. In contrast, HCS group homes are congregate care environments in which a person with IDD resides with 2-3 other individuals, and care is provided by 24-hour rotating staff who do not live on-site. Both types of homes are certified by HHSC, the primary difference simply being whether the provider lives on-site. Both housing types serve the same population, with no significant differences in services.

ii. Placement of PMC Children in HCS Homes

Due to the lack of foster homes for children with disabilities, PMC children with disabilities are disproportionately placed in HCS homes. DFPS places foster children with disabilities in both HCS host homes and group homes in one of two ways: 1) through a child-specific contract (“CSC”), wherein DFPS contracts with a specific HCS provider for a specific child, essentially turning an HCS host or group home into a DFPS-paid placement; or 2) through enrollment in an HCS slot, thereby switching the funding stream for the placement from DFPS to HHSC. In other words, CSCs are paid for by DFPS, and slots are paid for by HHSC (group and host homes alike). DFPS can offload the room and board expense of caring for a child to

¹³ See TEX. ADMIN. CODE § 263.101.

HHSC by enrolling a child with a disability in an HCS slot. Whether the child is enrolled in a slot or placed in an HCS home through a CSC, DFPS retains permanent managing conservatorship of a child placed in an HCS home until the child turns 18.¹⁴

iii. Jurisdictional Confusion Allows Especially Vulnerable Children with Disabilities to Live in Placements without Adequate Oversight

Appellants' brief ironically underscores the validity and appropriateness of the Contempt Order targeting Appellants' abdication of their responsibility to investigate abuse and neglect complaints of children in PMC who reside in HCS homes. Based on Appellants' brief, it is clear they do not understand the nuances within their own systems, which means it is practically impossible for them to be in substantial compliance with the remedial orders.

When and how to determine investigative jurisdiction between HHSC and DFPS is based on a maze of conflicting and confusing policies. At the point of intake, Appellants posit that they rely on a determination of whether a child is "eligible" for HCS. Yet, determining whether a child is "eligible" for HCS services is a complex process involving multiple state agencies and can take months, if not years, to establish. Highly-qualified mental health professionals can come to different conclusions when determining eligibility. If Appellants are, as they say, using

¹⁴ Unless otherwise provided for in TEX. FAM. CODE § 263.601.

eligibility for HCS to determine which agency investigates claims of ANE, their system is fatally flawed. There is simply no way that a DFPS Statewide Intake (“SI”) worker can determine a child’s HCS eligibility at the time of intake. If jurisdiction for investigations hinges on “eligibility” and there is no way for a SI worker to know a child’s eligibility, every referral to investigation is a stab in the dark.

Appellants may be attempting to distinguish between PMC children in HCS placements by CSC or through enrollment in an HCS “slot.” This is a funding stream distinction—two children with the same disability in the same HCS placement can receive identical services, with DFPS paying for one child through a CSC and HHSC paying for the other through HCS program enrollment. This distinction is arbitrary in practice. These two PMC children are at equal risk of abuse and neglect regardless of who is paying their room and board less. Using the HCS funding stream to determine investigative jurisdiction is similarly impossible for a SI worker to determine at intake.

Finally, Appellants place investigative jurisdictional weight on whether a child is in an HCS group home or host home. In an HCS host home, the provider lives in the placement with the child, similar to a foster home; in an HCS group home, services are provided at the placement through 24-hour rotating staff. Relying on this distinction between placement to determine which agency should investigate

is also arbitrary—PMC children with disabilities are at equal risk of abuse and neglect regardless of where the provider lives.

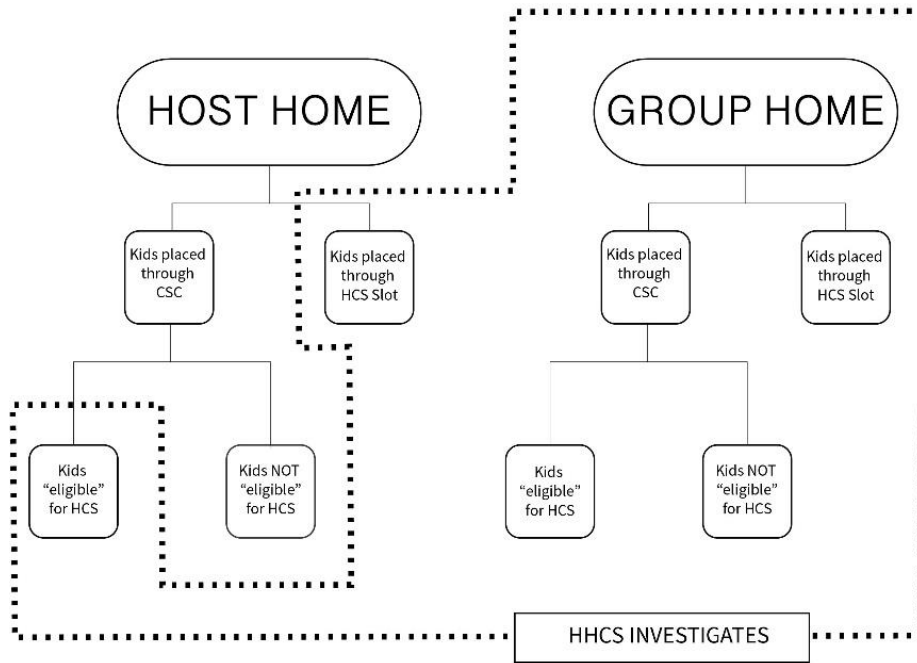
Appellants’ arbitrary and contradictory criteria lead to inconsistent results. Their inability to adequately state reasonable criteria for investigative jurisdiction determinations is the very reason they have been unable to substantially comply with the remedial orders. If they are grouping children based on eligibility, an impossible metric, there is no way the data is accurate. The most logical reading of the policies governing investigative jurisdiction is that determinations are based on a complex matrix: whether the PMC child is placed in an HCS home through a CSC versus a slot *and* whether the child is placed in an HCS host home versus an HCS group home. If Appellants cannot even understand their own matrix, it has to be impossible for SI workers to make correct determinations on whether HHSC or DFPS should investigate an allegation of abuse or neglect.

To make matters worse, the jurisdictional guidelines Appellants outline in their brief are different than those outlined in their Handbook.

Fig 1. demonstrates how jurisdiction for the investigation is determined using the criteria outlined in Appellants’ brief.¹⁵

¹⁵ “Child Protective Investigations investigates abuse and neglect allegations in settings that aren’t licensed by HHSC—including Home and Community-Based Services host home settings if the alleged victim isn’t eligible for services under the Home and Community-Based Services waiver program.” Appellants’ Brief p.10. Appellants further distinguish between children in host homes by CSC who are ineligible for HCS by whether or not their *services* (as opposed to room and

FIG. 1

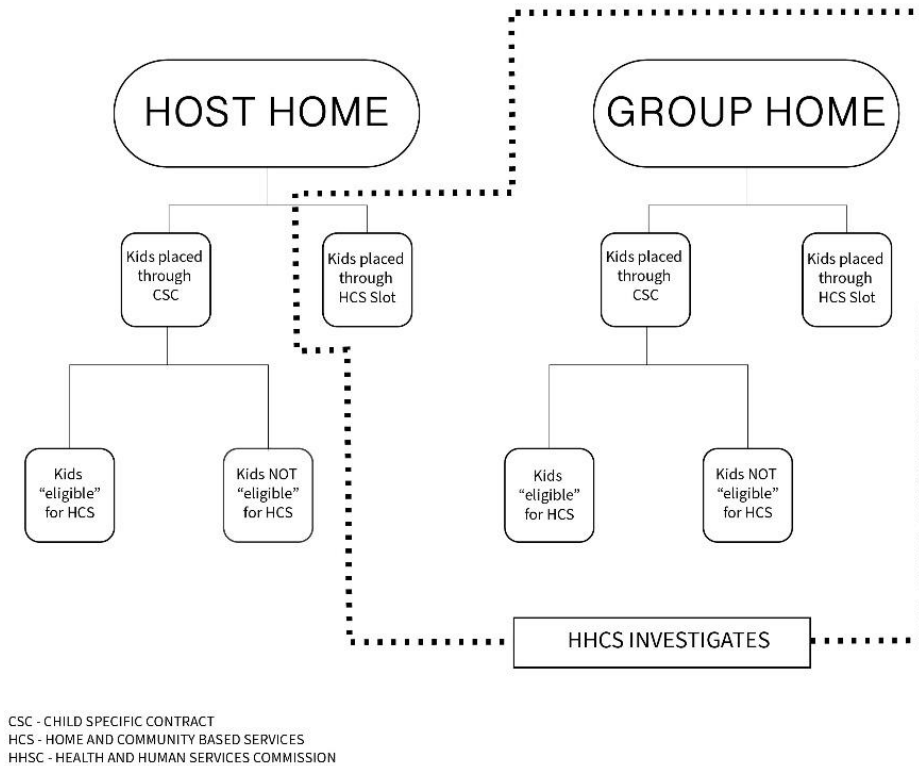


CSC - CHILD SPECIFIC CONTRACT
HCS - HOME AND COMMUNITY BASED SERVICES
HHCS - HEALTH AND HUMAN SERVICES COMMISSION

Fig 2. demonstrates how jurisdiction for the investigation is determined using the criteria listed in the Statewide Intake Handbook.¹⁶

board) are paid for by a Medicaid waiver program. There are many other Medicaid waiver programs in addition to HCS. For simplicity, we have not included this third level of subdivision.
¹⁶ See DFPS Statewide Intake Policies and Procedures Handbook §6100 (March 2024).

FIG. 2



Appellants make distinctions between HCS host homes and HCS group homes, between children who are “eligible” for HCS services and those who are “not eligible” for HCS services (a determination that can only be made by a qualified LIDDA professional), and between placements with services paid for by a Medicaid waiver and those with services paid for by DFPS.¹⁷ Yet these are largely distinctions

¹⁷ To add to the confusion, HCS is not the only Medicaid waiver program providing services to PMC children with disabilities living in HCS homes. An illustrative example: a child could be ineligible for HCS, living in an HCS host home by CSC, but be receiving services from YES Waiver, which is also a Medicaid waiver program. Using the rubric outlined in Appellants’ brief, an investigation into allegations of abuse and neglect would be conducted by HHSC. Using the rubric outlined in the Statewide Intake Handbook, the investigation would be conducted by DFPS.

without a difference for the child. There is no difference in vulnerability, need, or services between these categories. Dividing these groups of children leads to absurd results: a nonverbal child with an intellectual disability living in a group home is in a home with less oversight—for example, the lack of background checks—than a verbal child living in a host home through a child-specific contract.

Using HCS “eligibility” or funding stream to determine which agency should investigate is untenable and creates confusion in the jurisdiction; this can result in both agencies denying jurisdiction, leaving claims of ANE against especially vulnerable children uninvestigated altogether. There is simply no way for a SI employee to reliably determine at the point of intake whether a child is placed in an HCS group home or host home, whether support services are paid for by DFPS or a Medicaid waiver, or whether they have been deemed “eligible” for HCS by a LIDDA professional.

HHSC does not deny that HCS investigations are deficient but instead argues that this inadequacy should be excused because DFPS investigations have improved for less vulnerable populations and investigations conducted by DFPS are in “substantial compliance.” This position categorically disregards the rights of children with disabilities to be safe in HCS homes. These are, undoubtedly, the most defenseless children in PMC. Appellants argue that they are only required to do what is minimally necessary to comport with the Constitution, but they must do what is

minimally necessary for *these* children—PMC children with disabilities living in HCS homes.

C. DFPS has Repeatedly Opposed Placing Children into HCS Homes due to the Danger of Lack of HHSC Oversight

DFPS has determined that HCS placements are so unsafe due to the lack of HHSC oversight that they actively fight placing children into HCS homes (host homes and group homes alike). DFPS has sent directives to regional offices that they oppose placing children in HCS homes because the lack of oversight by HHSC renders them less safe than traditional DFPS placements. Time and again, DFPS attorneys have cited this safety concern in opposing HCS homes. FCAC has received a multitude of *de novo* hearing requests filed by attorneys representing DFPS contesting the court-ordered placement of children into HCS homes because they are “dangerous.” By decrying in individual cases that insufficient HHSC standards render HCS homes “less safe” for foster children, DFPS has conceded that Appellants are not in substantial compliance with the remedial orders. Even DFPS agrees that there is as an unreasonable risk of harm for PMC children residing in HCS homes.

D. Appellants Deny PMC Children the Benefits of Safe and Appropriate HCS Homes

The harm caused by inadequate investigations into ANE complaints in HCS homes affects not only children currently in HCS placements but also children who

could benefit from an HCS placement in the future. There is an entire group of children placed in unnecessarily restrictive settings because DFPS does not have adequate homes for children with disabilities and opposes placement in HCS homes, citing concerns with HHSC oversight. Recently, DFPS has refused to consider placement of children in HCS homes even when the alternative is for a child to remain in a CWOP hotel. FCAC staff have been given conflicting information: that it is “not possible” to get a CSC to an HCS home, that DFPS now “prohibits” CSCs, and that DFPS is “cutting down” on CSCs to HCS homes. The categorical refusal to consider placements in HCS homes due to the lack of oversight has caused many judges to stop ordering these placements, further limiting placement options for children with high needs.

Appellants’ failure to address the HCS oversight concerns has resulted in children with disabilities experiencing heightened placement instability and unnecessarily restrictive placements. The American Medical Association recently published research on the long-term negative effects of placing children in restrictive environments. For example, when DFPS places children in RTCs instead of HCS homes, these children are at greater risk of severe mental illness or depression, low educational attainment, homelessness, and arrest for a violent crime.¹⁸ With each

¹⁸ Sariaslan, et al, *Long-Term Health and Social Outcomes in Children and Adolescents Placed in Out-of-Home Care*, 176 JAMA Pediatrics 5 (2022).

placement change, children who could otherwise stabilize in safe and appropriate HCS homes face an increased risk of serious mental illness, fatal accidental injury, homelessness, and antisocial or suicidal behavior.¹⁹

DFPS has not replaced HCS homes with foster homes that meet these children's needs. Without access to safe and appropriate HCS homes, children with disabilities in PMC find themselves in hotels and shelters. Appellants can meet the needs of these youth only if they improve oversight through compliance with the remedial orders.

E. The Solution is Correcting the Oversight Problem, not Preventing PMC Children from Placement in HCS Homes

Appellants tout their “dramatic improvement over time,” demonstrating they can make systemic changes. Investigations of abuse and neglect in foster homes and institutional placements like RTCs and GROs have improved since the remedial orders were put into effect. HCS homes are not functionally different; investigations into these homes can similarly be improved. To do so would reduce placement disruptions and unnecessary placements in congregate care settings for PMC youth with disabilities. This ultimately leads to improved outcomes for these youth, allowing them to remain in the least-restrictive setting possible and giving them a greater opportunity to live full lives in the community.

¹⁹ *Id.*

Timely and accurate investigations of abuse and neglect allegations for all children in PMC ensure children with disabilities are not placed in homes without appropriate oversight. Not only will this reduce the unnecessary risk of harm for children with disabilities already placed in HCS homes, but it will also open up the opportunity for other PMC children with disabilities to live in a community-based setting where they can thrive. Ensuring that children with disabilities have access to safe and appropriate HCS placements requires Appellants to acknowledge that children with disabilities are a particularly vulnerable population and to commit to substantial compliance for these children, as well.

II. REASSIGNMENT OF JUDGE JACK WOULD BE UNNECESSARILY HARMFUL

A. Advocates are Finally Seeing the Progress They have been Fighting to Achieve for Decades

Appellants highlight their progress, but progress was not achieved in a vacuum. Any progress is due in part to Judge Jack's diligence and persistence. Without a doubt, the Texas foster care system is better today than when the case began.

The "micromanagement" Appellants complain of is not universal; it only applies to PMC children. There are many issues plaguing foster children in the Temporary Managing Conservatorship (TMC) of the state that remain outside Judge Jack's purview. Because they are outside the confines of this suit, TMC concerns

must be litigated on a case-by-case basis in state court; Appellants are free to manage most of the Texas child welfare system without Judge Jack's oversight.

Many of us have devoted our careers to fighting on behalf of children in the Texas foster care system. As attorneys and advocates, we can only push for change within the caseload of children we directly serve. Regrettably, not every child in PMC has an attorney to ensure their voice is heard in court. Individual case progress can become localized systemic progress through improvements in regional DFPS practices and securing specific judicial decisions. Collective and universal progress can be made through improvements that account for all of the children in PMC care, including those with disabilities. Judge Jack has ensured that all children in PMC benefit equally by holding Appellants accountable for the changes required in the remedial orders.

Decades of reports identifying systemic issues and recommendations for improvement have collected dust. Many of us have tried to tell our clients' stories, only to feel like we are screaming into the void. We have someone in Judge Jack who will hear our clients' stories with empathy. She confers on these children the dignity and respect they deserve. The systemic problems we have discussed for years in roundtables and town halls are finally being addressed. Changing presiding judges would impede the progress made, delaying future progress while a new judge

undertakes the herculean effort of reviewing the pleadings and testimony of the past nine years.

B. Judge Jack has Acquired a Depth and Breadth of Knowledge that Even Appellants do not Seem to Possess

Judge Jack's thorough and detailed contempt order demonstrates her understanding of the nuance and complexity of navigating the investigative boundaries between DFPS and HHSC. As discussed above, it is clear that Appellants themselves lack this same understanding. Judge Jack has spent countless hours over the past decade reviewing hundreds of thousands of documents and has developed a full mastery of the intricacies of the Texas child welfare system.

Many of Appellants' arguments opposing sanctions focus on the difficulty navigating the district court's orders. Appellants have been part of the proceedings since the case's inception and are intimately familiar with the injunctions, as demonstrated by their numerous appeals. If it is too difficult for Appellants to navigate the remedial orders, how do they expect a new judicial officer to oversee them effectively?

C. Judge Jack Fiercely Advocates for the Safety and Wellbeing of Appellants' Employees

Appellants complain about the district court's animus towards them. Yet Judge Jack has shown great empathy and concern for Appellants' employees. She continually advocates for improvement in working conditions for frontline staff.

Judge Jack clearly holds Appellants' employees in high regard. In the contempt order, she calls DFPS caseworkers the "unsung heroes of the foster care system." (Order p.265) The order acknowledges that CWOP demands and improperly managed caseloads create an unacceptable atmosphere and work environment for staff. (Order p.242) She acknowledges that working conditions are devastating to morale, making the care of children with complex needs even more difficult.

It is hard to reconcile this district court judge who exhibits obvious concern for the people working to help PMC children with Appellants' version of a district court judge so rife with bias that she can no longer effectively manage the case. The district court is concerned with the safety and wellbeing of the frontline caseworkers and staff, not just the children in PMC. For an entire workforce teetering on the edge of collective burnout, it is imperative for their wellbeing and longevity that Judge Jack continue overseeing this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's contempt findings and deny Appellants' request to reassign the case.

Dated: July 2, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume of FED. R. APP. P. 32(a)(7)(B) and FED. R. APP. P. 29(a)(5), because it contains 3,904 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface and type-style requirements of FED. R. APP. P. 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word software, in Times New Roman 14-point font in text, and Times New Roman 12-point font in footnotes as permitted by Fifth Circuit Rule 32.1.

/s/ Tara Grigg Green _____
TARA GRIGG GREEN

CERTIFICATE OF CONFERENCE

Counsel for Amici Curiae has conferred with counsel for Appellants, Allyson Ho. She consents to the filing of this amicus curiae brief. Further, undersigned counsel has conferred with counsel for Appellees, Christian Ward, who also consents to the filing of this brief.

/s/ Tara Grigg Green _____
TARA GRIGG GREEN

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2024, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent, by operation of the ECF system, to all counsel of record.

/s/ Tara Grigg Green

TARA GRIGG GREEN