January 10, 2022

Jaime Masters
Commissioner
Department of Family and Protective Services
4900 N. Lamar Blvd.
Austin, Texas 78751

RE: Child Protective Services Handbook Revision dated October 1, 2021

Dear Commissioner Masters:

We the undersigned, on behalf of our organizations and the thousands of Americans who belong to and support our organizations, write to you today to respectfully urge you to rescind certain changes your agency made in the Child Protective Services Handbook Revision dated October 1, 2021.

While you are a Texas agency, the issues raised by the new revisions are larger than Texas. Our organizations deal on a daily basis with the rising problems caused by unrestrained investigations by state child welfare agencies all across the nation. While we are passionate about protecting children, the recent revisions to the Child Protective Services Handbook do not serve to protect children. Rather, they serve to weaken Constitutional due process guarantees by making it more difficult for families, particularly low-income and disadvantaged families who cannot afford an attorney, to obtain support during a Department of Family and Protective Services (DFPS) investigation into alleged abuse or neglect.

In the accompanying memo to the revisions, under the heading "Working with Family Advocates and Other Advocacy Organizations (PATS 12862)," your agency wrote the following:

> "Because of the frequency with which DFPS interacts with advocacy organizations, such as parent rights advocates and homeschool coalitions, the DFPS Government Relations division identified the need for a clear, consistent policy across DFPS for interacting with these advocates. This policy applies when DFPS does not have a memorandum of understanding (MOU), and there isn't existing law related to the sharing of information with the organization.

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> This new policy gives staff clear guidance on what role the advocacy organization may have in a case and what information DFPS can share directly with the advocate."[1]

The intent outlined in this memo is deeply troubling. If a family chooses a "parent rights advocate" or a "homeschool coalition" to support them during a DFPS investigation, that is their right. A DFPS investigation is a serious matter for a family; it can lead to removal of children, and potentially even criminal prosecution, and/or the termination of parental rights. Behind every knock on the door by a DFPS investigator is a parent's fear that he or she may be the victim of an anonymous report by a disgruntled relative or neighbor alleging abuse or neglect, and that this report could lead to the family's life being turned upside down by a government official.

The specific policy revisions to which we object are under "1459: Family Advocates and Other Advocacy Organizations," and the subsections within 1459. We urge that the revisions under this heading be completely rescinded for the following reasons.

First, 1459 is targeted specifically at advocacy organizations, religious leaders, support persons, and other advocates that families may choose to have. 1459 makes it more difficult for parents to be supported by the advocate of their choice, unless they have the economic advantage to hire their own attorney. As advocates for families across the nation, we fear that this revision will keep innocent parents from asserting their rights under the constitutions and laws of the United States of America and of the State of Texas, unless they are wealthy enough to pay for an attorney. We strongly object to this. Families, not government bureaucrats, should decide who they want to support them during a DFPS investigation.

Second, 1459.1, "Case Records," makes it impossible for a family's chosen advocate to obtain records critical to their advocacy on behalf of the family. If a parent signs a release of information designating their advocate to receive case records, DFPS should accommodate this request. This new change will make it more difficult for an innocent parent to be supported when going through a DFPS investigation, unless, as stated above, they have the money to pay for an attorney.

Third, 1459.2, "Communication," cuts a family's chosen advocate out of the loop in written communication. If a family's chosen advocate or advocacy organization initiates communication on behalf of a parent, DFPS should include the advocate or advocacy organization in the communication loop, upon verifying with the parent that the parent consents to the advocate or advocacy organization being included in the written communication.

Fourth, 1459.4, "Participation in Interviews," contradicts 2244.4, "Conducting the Interview."[2] 1459.4, "Participation in Interviews" intimates that the caseworker should not interview a child

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[1] Available online at http://www.dfps.state.tx.us/handbooks/CPS/Revision/CPS_revisions_after_5-07/2021-10-01_CPS_memo.asp.

[2] Available online at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2244_4.

with an advocate present, while 2244.4, "Conducting the Interview" clearly states that "if a parent denies consent for the child to be interviewed alone, the caseworker must do one of the following: [] ***[p]roceed with the interview in the presence of a parent or a third party agreed to by the parent***[, or] [o]btain a court order to interview the child alone." *(emphasis added).* 1459.4 is drafted in such a way as to cause confusion with an existing section of the CPS Handbook, and to make it harder for a child, who may be fearful by being interviewed alone by a stranger, to feel safe, comfortable, and protected.[3]

Fifth, 1459.4, "Participation in Interviews," states "[i]f the advocate delays or obstructs the caseworker's ability to conduct an investigation, including by interfering with or obstructing interviews, the caseworker consults with the attorney representing DFPS to seek an order in aid of investigation." We believe that this threat to "seek an order in aid of investigation" merely because a vague and undefined "delay or obstruction" occurs, runs contrary to a recent decision by the Texas Court of Appeals. In *In re Berryman,* No. 12-20-00210-CV (Tex. App. Oct. 15, 2020), the Texas Court of Appeals ruled that an order in aid of investigation issued by a lower court be vacated. The Texas Court of Appeals stated the following:

> "[The DFPS investigator] expressly cited the Berrymans' "failure to cooperate" as the basis for her concern regarding a risk to the children's safety. But she offered no explanation as to why the alleged failure to cooperate posed a risk to the safety of any of the Berryman children. See TEX. FAM. CODE ANN. § 261.3031(a) (if parent or other person refuses to cooperate with investigation of alleged abuse or neglect and the refusal poses a risk to the child's safety, the Department shall seek assistance to obtain a court order pursuant to Section 261.303). Without more, the conclusory assertions in [the DFPS investigator's] affidavit do not allege sufficient facts from which Respondent could reasonably conclude that abuse or neglect had potentially occurred as contemplated by the Texas Family Code."[4]

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[3] *See, e.g.,* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic costs of a Child Welfare Exception to the Fourth Amendment,* 47 Wm. & Mary L. Rev. 413, 417-419 (2005) ("[I]n the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help. In 2002, for example, the states conducted approximately 1.8 million investigations concerning the welfare of nearly 3.2 million children. Only about 896,000, or twenty-eight percent, of these children were ultimately found to be victims of abuse or neglect. Seventy-one percent, or roughly 2.3 million children were thus subjected to state mandated "thorough" investigations involving at a minimum interviews, examinations, and/or home visits, in circumstances where the state in the end could not show that the children were unsafe and in need of rescue. Investigating these children is consistent with the states' highly precautionary strategy to remedy the nation's maltreatment problem. However, from the perspective of the investigated child, the process is not so clearly meritorious. Indeed, despite the authorities' best intentions, the process can be harmful in two related ways. First, the investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment. It is critical in this regard that the Fourth Amendment uniquely has been interpreted to recognize the child's own individual interest in these values, by guarding her right also to be free from unreasonable searches and seizures both inside and outside the family home. Second, … depending upon the child and the nature of the investigation, the process can cause emotional and psychological damage ranging from temporary discomfort to significant long-term harm." (*cleaned up*)).

[4] *In re Berryman,* at *7.

If the Texas Court of Appeals recently acted to protect a family from an order in aid of investigation that was premised on a "failure to cooperate," it is highly unlikely that this Child Protective Services Handbook revision would pass judicial muster if DFPS relied upon it to seek an order in aid of investigation. And the alternative, that DFPS would use this threat to seek an order in aid of investigation in an attempt to silence a family's advocate or keep a family from seeking an advocate who would support them during an investigation, is just as concerning.

Sixth and finally, the policy revisions in 1459 raise troubling Constitutional concerns, both under the U.S. Constitution's First Amendment, and the Texas Constitution's Article I, Section 27. Free association is a fundamental right. The policy revisions and the accompanying memo make it clear that DFPS is trying to limit the ability of advocacy organizations to support parents. The U.S. Supreme Court warned against governmental actions to limit advocacy and free association in *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-461 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *(internal citations omitted)*

For the reasons outlined above, we respectfully urge that these revisions be immediately rescinded.

Sincerely,

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