

this action, as a result of Defendants' misuse of "diversion" practices and/or "safety resources."

Class Counsel have a good faith reason to believe, based on the results of multiple investigations by the Georgia Office of the Child Advocate ("OCA") over the last three years, that Defendants may be depriving abused and neglected children in Fulton and DeKalb counties of the protections and benefits of the Juvenile Court and of the Consent Decree in this action, through the misuse of "diversion" and "safety resources" to artificially suppress the number of open child protective services ("CPS") investigations and the number of children entering foster care.

A "diversion" response (also known as a referral for "family support") involves "a procedure in which each county or region may decide not to investigate certain reports [of abuse or neglect] that, pursuant to a local protocol, are not considered serious enough for intervention."¹ Diversion might be the appropriate response, for example, when the abuse report involves "poverty-related issues, such as housing" and where a simple referral to "appropriate community-based

¹ See Declaration of Ira P. Lustbader, dated March 15, 2010 (hereinafter, "Lustbader Decl."), "OCA Analysis: Bryan Moreno and DFCS Performance Measures" (hereinafter, "December 2009 OCA Report"), attached as Exhibit B thereto, at 3.

services” is sufficient to assure the safety and well-being of the child.² In cases referred for diversion, children remain in their homes and families are referred to services needed to ameliorate the issues that resulted in the report of maltreatment. The OCA recently found that Georgia does not have “a family assessment tool for use in Diversions,” that it lacks “minimum statewide standards for the types of cases that can receive a diversion response,” and that, in its use of the diversion response, Georgia “lack[s] standardized policies regarding necessary contacts to be made with the family, provision of services to the family, or follow-up to ensure the family’s needs are met.”³

A “safety resource” is the home of a friend or relative with whom parent(s) agree to place their child while a report of abuse or neglect is being investigated, or while services are being provided to the family. Under Georgia Department of Human Services (“DHS”) policy, safety resources may not be used when “any of the conditions that require court action . . . are present,” such as in cases of severe neglect or abuse. In those cases, a deprivation petition is to be filed with the

² See Lustbader Decl., Letter to B.J. Walker from Child Advocate DeAlvah H. Simms (hereinafter, “2007 OCA Letter”), attached as Exhibit C thereto, at 11.

³ See Lustbader Decl., Letter to Mark Washington of DHS/DFCS from Child Advocate Tom C. Rawlings (hereinafter, “October 2009 OCA letter”), attached as Exhibit D thereto, at 8.

Juvenile Court and a determination made whether to place the child in foster care.⁴ Because the placement of a child in a safety resource is voluntary, parents may at any time rescind their consent and take a child back into their home.⁵

In three investigations over the past three years, the OCA found that the Division of Family and Children Services (“DFCS”) was endangering children by its misuse of diversion and safety resources:

- A review of statewide diversion practices in late 2009 found that numerous child deaths or serious injuries of children in families with prior DFCS involvement followed “prior diversions that . . . were highly inappropriate and that should have been handled as investigations and likely substantiated.” (October 2009 OCA Letter at 3.)
- A review of the use of “safety resources” in 2007 revealed that DFCS routinely failed to verify, through the collection of basic safety information, that the safety resources were themselves safe or adequate caretakers. (2007 OCA Letter at 8-9.)
- A review of the use of “safety resources” in mid-2009 found that children often remained in safety resource placements for extremely long periods, with no petition having been filed with the juvenile court, even in cases where children “had suffered fairly significant abuse at the hands of parents.” (July 2009 OCA Report at 4.) In some cases, “safety resources” become temporary guardians of

⁴ Lustbader Decl., excerpts from the Georgia Department of Human Services Policy Manual (Rev. 3/7/2008), available at <http://childwelfare.net/DHR/policies/cpindex.html> (hereinafter “DHS Policy”), attached as Exhibit A thereto, Policy 2102.1, 2104.33

⁵ Lustbader Decl., “Reducing the Foster Care Rolls: Are We Using the Right Tools,” (hereinafter “July 2009 OCA Report”), attached as Exhibit E thereto, at 15.

children through the action of the Probate Court, thereby prolonging the placement indefinitely. The OCA found that the “misuse of safety plans and temporary guardianships can leave the child drifting from home to home, exposed to risk, and separated from siblings, friends, and family for long periods of time.” *Id.* at 3.

Critically, in 2007, the OCA found that that “[i]n its zeal to keep children from entering foster care unnecessarily, concerns were raised during the review that the agency may be cutting corners in appropriate usage of safety resources.” (2007 OCA Letter at 9.) In 2009, the OCA (under the direction of a different Child Advocate) concluded that “the agency appears to be using safety plans and temporary guardianships to avoid the involvement of the juvenile court in the child protective process, thereby depriving the child and family of the many legal and practical benefits the court offers and circumventing purposeful federal and state child protection schemes.” (July 2009 OCA Report at 3.) With respect to the misuse of diversions, the OCA warned that “[t]he message appears to be that improvement is achieved by increasing the number of diversions and decreasing the number of investigations, or guarding the ‘front door.’” (December 2009 OCA Report at 4.) The unmistakable conclusion from reading these OCA reports is that there is a credible concern that the “front door” efforts are artificially suppressing numbers, not protecting children.

If reports of child abuse or neglect are actually investigated, the Consent Decree imposes limits on the caseloads of Child Protective Services (CPS)

investigators. (Consent Decree section 8.A.1.a.) Once brought to the attention of the Juvenile Court, children may receive the protections guaranteed to class members by the Consent Decree in this action. These protections include the right to counsel and to effective and zealous representation throughout the child's involvement with the juvenile court and the child welfare system. If reported abuse or neglect is investigated and substantiated, but the child remains at home under DFCS oversight (and is not brought into foster care), the Consent Decree imposes limits on the caseloads of "ongoing case manager[s]" who oversee required services and monitor the children. (*Id.* section 8.A.2.b.) For children placed into foster care in state custody, the Consent Decree provides comprehensive protections and services, such as mandated visits by case managers with limited caseloads, screening and approval of all foster homes and facilities, limits on moves from foster home to foster home, efforts to preserve sibling relationships, efforts to secure a permanent family home out of state custody, and medical, dental and mental health services. (*See, e.g., id.* sections 8.A.2.c; section 15 Outcome Measures 8, 15-17, 23, 25, 30.)

The OCA reports raise a credible concern that Defendants may be inappropriately closing the doors of the Juvenile Court and class membership to abused and neglected children, and placing them at imminent risk of harm as a result. Defendants violate the Consent Decree if they are engaged in a pattern and

practice of frustrating its purposes, and plaintiffs are entitled to discovery to determine whether and to what extent these practices are specifically occurring in Fulton and DeKalb Counties.⁶

Defendants have refused Class Counsel's request that they provide further data or information on their use of diversion and safety resources, and the Accountability Agents have declined Class Counsel's request that they collect further data and report on these subjects – data collection specifically recommended by the OCA. (Lustbader Decl. ¶¶ 2, 3; October 2009 OCA Letter at 7-8; July 2009 OCA Report at 16.) Accordingly, Plaintiffs seek an Order from this Court authorizing discovery targeted to determine whether Defendants are inappropriately and unsafely excluding children from the attention of the Juvenile Court and class membership. Specifically, Class Counsel seek (1) discovery concerning State Defendants' policies and procedures relating to diversion, safety resources, and temporary guardianships in Fulton and DeKalb Counties; and (2) identification of all children in calendar year 2009 whose cases involved the use of diversion, the use of a safety resource for more than thirty (30) days, or placement with a temporary guardian, for the purpose of conducting a case record review of

⁶ The 2009 OCA reports addressed concerns with the use of diversion and safety resources state-wide.

complete copies of such children's case files, with the particular files selected and review conducted by an expert on behalf of Plaintiffs.

As set forth below, this Court should grant Plaintiffs' discovery motion because the relief requested is contemplated by the Consent Decree, narrowly targeted, entirely reasonable, and necessary for Plaintiffs to determine whether Defendants are in noncompliance with the Consent Decree. A proposed Order is attached hereto as Exhibit A.

STATEMENT OF FACTS

Several reports of the OCA raise a credible concern that DFCS is artificially suppressing the number of CPS investigations, and the number of children in foster care, by misusing diversion, safety resources, and temporary guardianships, thereby preventing children who need the protections of the Juvenile Court and the Consent Decree from receiving these protections. The reports include a public letter dated March 21, 2007, to DHS Commissioner B.J. Walker from Child Advocate DeAlvah H. Simms ("2007 OCA Letter"); a white paper dated July 10, 2009, and entitled "Reducing the Foster Care Rolls: Are We Using the Right Tools" ("July 2009 OCA Report"); a public letter dated October 27, 2009, to Mark Washington of DHS/DFCS from Child Advocate Tom C. Rawlings ("October 2009 OCA Letter"); and a report dated December 7, 2009, and entitled "OCA Analysis: Bryan Moreno and DFCS Performance Measures" ("December 2009 OCA

Report”). The OCA, by statute, is charged with providing “independent oversight of persons, organizations, and agencies responsible for providing services to or caring for children who are victims of child abuse and neglect,” Ga. Code Ann. § 15-11-170(b) (2009), and “shall act independently of any state official, department, or agency in the performance of his or her duties,” *id.* § 15-11-172(f). The Child Advocate is appointed by and reports directly to the Governor. *Id.* § 15-11-172(b).

The Diversion or “Family Support” Response

Since late 2004, the number of open DFCS CPS investigations at any given time has decreased from over 30,000 to under 12,000. (December 2009 OCA Report at 5 fig. 3.) The number of children entering foster care has dropped dramatically as well, from more than 14,000 in 2004 to less than 10,000 in early 2009. (July 2009 OCA Report at 1.)⁷ Among the strategies DFCS has employed to achieve these reductions are the “diversion” response and the use of “safety resources.”

As described by the OCA, “diversion,” also known as a referral for “family support,” involves “a procedure in which each county or region may decide not to

⁷ The number of class members under the Consent Decree in this action has also dropped significantly, from approximately 3,000 in 2005, to 1,640 at present. Compare *Period I Monitoring Report* (Nov. 2, 2006) [Dkt. No. 548] at 125 table B-1, and *Period VII Monitoring Report* (Jan. 21, 2010) [Dkt. No. 632] at C-1.

investigate certain reports that, pursuant to a local protocol, are not considered serious enough for intervention.” (December 2009 OCA Report at 3.) In a diversion response, instead of a full investigation, DFCS will simply interview the child and family members, perhaps even by phone, to evaluate the needs of the family. Once it determines the family’s needs, DFCS refers families to appropriate services.⁸ *Id.* In its policies concerning diversion, Georgia “had no requirement that anyone determine whether the family received or complied with the referral to services.” *Id.* As of August 2008, DFCS responded to 53% of all complaints with a diversion referral. *Id.* at 4.

The OCA studied diversion practice statewide by reviewing DFCS’s “Child Death and Serious Injury” (“CDSI”) reports for the period from late June to mid-October 2009. CDSI reports are required for all deaths and serious injuries involving a family with prior DFCS involvement. The OCA found that in thirty-five cases, the serious injury or death was itself caused by abuse or neglect in the

⁸ In contrast, a full CPS investigation will include a visit to and examination of the home, interviews of at least two “collateral” witnesses, such as teachers, neighbors, or other household members, and a physical examination of the child depending on the nature of the alleged maltreatment. *See* Ga. Code Ann. § 19-15-2(e) (2009); DHS Policy 2104.1, 2104.11, 2104.16, 2104.17, 2104.21. If the investigation substantiates the report of maltreatment, a juvenile court proceeding is initiated, the family is provided needed services, and the child may be removed from the home if deemed necessary for his or her safety. DHS Policy 2102.1, Ga. Code Ann. § 15-11-54 *et seq.* (2009).

family in an incident distinct from the report that initially caused DFCS to be involved with the family. (October 2009 OCA Letter at 2.)

In ten of the thirty-five cases, there had been a prior diversion response to a report of maltreatment. *Id.* at 3-7. The OCA enumerated six of those ten where the diversion was, according to the OCA, “highly inappropriate.” *Id.* at 3. The inappropriate diversions included, among others:

- A diversion response to a report that children in a family were often unsupervised because the mother was drunk or on drugs “all the time.” After the diversion, one child was later mauled by dogs because the mother left her outside.
- A diversion response to a report arising from domestic violence. The father had beaten the mother because she was breastfeeding her baby while drunk. The baby later died, apparently from alcohol poisoning.
- Diversion responses to (a) a report of domestic violence between the parents of three children and (b) a report that the two older children, 6 and 8 years old, were wandering around the neighborhood begging for food because their parents were using drugs or drunk. A third report of domestic violence was simply screened out; *i.e.*, neither investigated nor diverted. Later, the youngest child, 18 months old, suffered a broken arm.
- Diversion responses to a report by a preschooler that he had been hit “very hard” in the stomach by his mother and a report of “domestic violence in the household, possibly against the children.” Later, the preschooler’s younger sibling, an 18-month-old, was beaten to death.

Id. at 3-4. The OCA concluded that had these diversions been instead classified as maltreatment and fully investigated and evaluated, “DFCS might have taken steps that would have prevented the subsequent death or injury.” *Id.* at 3.⁹

Safety Resources

DFCS policy permits the use of safety resources under severely limited circumstances:

During the investigation process, if a temporary out-of-home placement is indicated as a means to ensure a child's conditional safety, it is acceptable to discuss with the parent that the child needs to be out of the home until all aspects of the report can be investigated. It is not appropriate to tell or to push a parent to place a child outside the home as a way to avoid court action:

....

... The intent is for the child to return to the parent when allegations are unsubstantiated or when the family's progress, in substantiated cases, indicates that there is sufficient change for the child to return home to parents, who can now provide for the child's current and ongoing safety needs.

....

(DHS Policy 2104.33 (emphasis added).) The policy expressly states that safety resources may not be used when “any of the conditions that require court action . . . are present.” *Id.* Those conditions include cases of life-threatening maltreatment,

⁹ Beyond its own study, the OCA has also noted that a May 2008 internal investigation of the Forsyth County DFCS revealed that over ten percent of diversion cases were “improperly assigned a Diversion response.” (December 2009 OCA Report at 6.)

severe injury, sexual abuse, a positive drug test of an infant or its mother, the death of another child due to maltreatment, significant mental illness or history of addiction, and others. (DHS Policy 2102.1.) “In these situations, the department must file a deprivation petition and follow regular placement requirements.” (DHS Policy 2104.33.)

On March 21, 2007, the OCA reported on a review of 284 CPS investigations and 182 CPS services cases that were open between June and August 2006. (2007 OCA Letter at 1-2). In a letter to the DHS commissioner, the OCA drew the following conclusions regarding DFCS’s use of safety resources:

In its zeal to keep children from entering foster care unnecessarily, concerns were raised during the review that the agency may be cutting corners in appropriate usage of safety resources When such an individual is used as a placement resource to prevent a child from entering foster care, policy requires that the agency make several inquiries to ensure that the resource is indeed a safe place for the child. OCA is quite concerned that the agency failed to satisfy at least one of these most basic requirements in 75% of the 72 safety resource cases reviewed.

(*Id.* at 9.) In particular, no check of the safety resource’s own history of abuse or neglect was made in 26% of the cases reviewed, no criminal records check was done in 43% of the cases reviewed, no “walk through” of the safety resource’s home was performed in 13% of the cases, and there was no documentation that the

safety resource had adequate financial means to care for the child in 21% of the cases reviewed. *Id.* The Child Advocate concluded:

Without this most basic of information, there is absolutely no way that the agency can have any assurance that the children placed in these homes are safe. In doing so, the agency is assuming the risk and responsibility if something were to happen to any child so placed if information was available at the time of placement that would have indicated against approving such a placement.

Id. at 10.

On July 10, 2009, the OCA (under different leadership) published a report that raised further and different concerns about the department's use of safety resources, as well as its use of probate court temporary guardianships to "solidify" safety resources as a long-term placement. The OCA explained the reasons for this study:

[T]he Office of the Child Advocate has over the past year received numerous anecdotal reports indicating that children were often placed in safety resources far from their homes for extended periods of time and without DFCS support and services for the safety resource; that parents were being "pushed" into using safety resources as a way to avoid juvenile court action; that neither parents nor safety resources were being given sufficient information about the terms of the safety resource agreement; and that safety resources were being used inappropriately in cases that should reasonably have been the subject of a juvenile court deprivation petition. To address these concerns, OCA undertook this review of DFCS' use of safety resources as part of its family preservation programs. That review led naturally to an

exploration of the use of probate court temporary guardianships as an oft-used means of “solidifying” placements that began as safety resources.

(July 2009 OCA Report at 2.)

To gain an understanding of how DFCS was using safety resources and temporary guardianships, the OCA performed a case file review of 20 randomly-selected cases and (plus one additional case that came to its attention) out of the 458 cases statewide in which a child had been placed with a safety resource for more than 90 days. The review revealed that, contrary to policy, DFCS had used “safety resources” in lieu of the juvenile court process and foster placement even in cases where children “had suffered fairly significant abuse at the hands of parents.” *Id.* at 4. For example, the OCA found that DFCS had failed to do a formal investigation and used “safety resources” in one case where a mother had “intentionally burned her child with an iron and was charged with felony cruelty to children,” in another where a mother had broken her child’s finger, and in a third involving the surviving sibling of a child who had been killed by her mother. *Id.* at 4-5. The OCA reported:

Many of the cases we reviewed involved families with long histories of DFCS involvement, multiple drug and mental health issues, and other chronic problems that are not easily solved with a simple fix. As children are supposed to be placed in safety resources only for short periods of time, this tool may not be appropriate for a case in which the parent has a chronic problem requiring

long-term intervention to make the home safe enough for the child to return.

Id. at 9.

The July 2009 OCA Report concluded that “the agency appears to be using safety plans and temporary guardianships to avoid the involvement of the juvenile court in the child protection process, thereby depriving the child and family of the many legal and practical benefits the court offers and circumventing purposeful federal and state child protection schemes.” *Id.* at 3.

The OCA found that the use of “safety plans” could:

- “deprive the child of stability and permanency”
- “delay resolution of the family’s issues”
- “leave the child drifting from home to home”
- expose children to risk
- separate children from “siblings, friends and family for long periods of time”
- deprive families and children of due process rights and the right to a free attorney
- deprive children of the right to a guardian ad litem or a Court Appointed Special Advocate.

Id. at 3. The OCA specifically noted that children subject to “safety plans” were being deprived of certain rights enumerated in the *Kenny A.* Consent Decree. *Id.* at 6 n.12 (right to attorney); *id.* at 8 n.28 (limitation on foster care moves).

The OCA's Recommendations Regarding Data and Tracking

The OCA found that improvements are needed in DFCS's data gathering and reporting concerning diversion and safety resource cases. In the October 2009 OCA Letter, the OCA concluded that current reporting provided by DFCS might be "inadequate and misleading" as a measure of outcomes in diverted cases, and recommended that DFCS

- Distinguish between diversion cases in which a child was a victim of maltreatment and those in which there is no maltreatment but the family has issues relating to poverty or health that might impact the health or safety of a child, and tracking these two cohorts separately in analyzing the percentage of cases that later become CPS cases (October 2009 OCA Letter at 7);
- Track, by county, the length of time that elapses after a first diversion before DFCS again intervenes, *id.*;
- Track all repeat interactions between DFCS and families, whether the interaction resulted in a report being screened out, diverted, investigated, or substantiated, *id.* at 8.

In the July 2009 OCA Report, the OCA recommended that DFCS collect and track data regarding the number of children whose cases are disposed of by placement with a temporary guardian, and the number of such guardianships that are later dissolved voluntarily or that are transferred to juvenile court when one parent seeks dissolution. (July 2009 OCA Report at 16.)

Plaintiffs' Efforts to Obtain Discovery

Class Counsel have made good-faith efforts to obtain discovery from State Defendants concerning DFCS's use of diversion and safety resources, but those efforts have not succeeded. At a meeting with the parties and the Accountability Agents on January 25, 2010, Class Counsel raised their concerns about the OCA reports and the use of diversion and safety resources, and inquired if State Defendants would be willing to provide further information and to discuss ways to address the issues. State Defendants refused to further discuss the issues or provide further information, taking the position that these issues were not part of the Consent Decree. (Lustbader Decl. ¶ 2.) Class Counsel also approached the Accountability Agents about collecting and reporting on the further data on diversion and safety resources that were specifically recommended by the OCA; however, the Accountability Agents declined that request. (Lustbader Decl. ¶ 3.)

Plaintiffs' subsequently filed this discovery motion.

ARGUMENT

I. Plaintiffs Are Entitled to Reasonable, Targeted Discovery Needed for Enforcement of the Consent Decree

The "Enforcement" section of the Consent Decree contemplates that Class Counsel may conduct discovery to enforce the provisions of the Consent Decree after obtaining permission from the Court. (Consent Decree § 17(F).) The plain, unambiguous meaning of the discovery provision in the Consent Decree is that the

parties contemplated that Class Counsel's enforcement responsibilities might require postjudgment discovery. Plaintiffs' discovery request is made pursuant to subsection 17(F) of the Consent Decree and is in conformity with the procedure it specifies.

Furthermore, it is well within the Court's discretion to order the discovery that Plaintiffs seek. The Federal Rules authorize discovery "[i]n aid of the judgment." Fed. R. Civ. P. 69(a). "A consent decree approved by judicial order is a "judgment" for the purposes of Rule 69(a)." *Andrews v. Roadway Exp. Inc.*, 473 F.3d 565, 568 (5th Cir. 2006). The scope of such discovery "is very broad." *United States v. Conces*, 507 F.3d 1028, 1040 (6th Cir. 2007) (quoting *F.D.I.C. v. LeGrand*, 43 F.3d 163, 172 (5th Cir. 1995)). Courts have often allowed parties to conduct post-judgment discovery concerning compliance with a Court order. *See, e.g., Conces*, 507 F.3d at 1033-34 (upholding contempt order for refusal to provide court-approved discovery to monitor compliance with injunction); *Cal. Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1034 (9th Cir. 2008) (holding that when discovery is sought in connection with motion to enforce judgment, appropriate discovery should be granted if significant questions regarding noncompliance have been raised); *Nat'l Serv. Indus. v. Vafla Corp.*, 694 F.2d 246 (11th Cir.1982) (post-judgment discovery authorized to aid execution of court order); *E. & J. Gallo Winery v. Andina Licores S.Am.*, No. CV F 05-0101 (AWI) (LJO), 2007 WL

333386, at *5 (E.D. Cal. Jan. 31, 2007) (granting permission for “post-judgment discovery directed to compliance with and enforcement of, this permanent injunction”); *see also Martin v. Univ. of S. Ala.*, 911 F.2d 604, 607 (11th Cir. 1990) (noting that discovery had ensued on series of contempt motions filed by plaintiffs to enforce consent decree); *A. H. Robins Co. v. Fadely*, 299 F.2d 557, 558 (5th Cir. 1962) (noting that discovery took place upon appellant’s filing contempt motion for violation of consent decree).

The discovery sought here is in furtherance of Class Counsel’s enforcement responsibilities. The OCA reports strongly suggest, at least on a statewide basis, that State Defendants are frustrating and avoiding the requirements of the Consent Decree by misusing diversion and safety resources. State Defendants’ actions subject children to harm and risk of harm, and violate state law and policy, in order to avoid the expense and responsibilities it would otherwise bear when undertaking a formal investigation and possibly taking legal custody of children who cannot remain safely at home.

Cases involving the desegregation of public schools make it clear that this Court may enjoin such attempts to artificially skirt the requirements of a court order. For example, in *Duckworth v. James*, 267 F.2d 224, 225, 228-29 (4th Cir. 1959), the Fourth Circuit upheld the District Court’s finding that where state law required the maintenance of an adequate public school system, the action of the

City Council of Norfolk, Virginia withdrawing appropriations for, and closing, certain public schools subject to a court order to integrate was invalid and illegal when it was clear the purpose was to “avoid” the integration order. *See also James v. Almond*, 170 F. Supp. 331, 338 (E.D. Va. 1959) (“schemes or devices looking to the cutoff of funds for schools or grades affected by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law”); *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42, 44-45 (E.D. La. 1960) (statute that granted Governor power to close schools that were ordered to integrate was unconstitutional as “evasive scheme”) (citing *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)), *aff’d* 365 U.S. 569 (1961).

Here, the misuse of diversion and safety resources, contrary to state law and DFCS policy, and for the purpose of denying class membership to some children, would be an actionable “evasive scheme” and a violation of the Consent Decree. The Georgia Child Advocate provides credible evidence of State Defendants’ possible misuse of a diversion response in cases involving actual child maltreatment. (October 2009 OCA Letter at 3-4.) The Child Advocate has further concluded that DFCS “appears to be using safety plans and temporary guardianships to avoid the involvement of the juvenile court in the child protection process.” (July 2009 OCA Report at 3.) Moreover, the Child Advocate noted that the dramatic drop in the number of child abuse investigations and the number

foster children statewide “are admirable *if* they are strong indicators” both that children being kept safely in their homes, and that the cases weeded out do not require state intervention. *Id.* at 1 (emphasis in original). The unmistakable conclusion of the OCA reports is that these indicators may be absent. Put another way, Plaintiffs can enforce the Consent Decree in this action against efforts to purposefully avoid its obligations and exclude children who should be class members. Plaintiffs are therefore entitled to obtain discovery to determine the circumstances under which diversion and safety resources are being used and to determine if they are being misused, to the detriment of class members.

In addition to denying the entire protections of the Consent Decree to would-be class members by engaging in a pattern and practice that detrimentally excludes them from class membership, the practices about which Plaintiffs seek discovery also render inaccurate and misleading the provisions of the Consent Decree that were designed to enable Plaintiffs to evaluate DFCS’s handling of reports of maltreatment. Specifically, the Consent Decree requires (1) reporting of repeat maltreatment of children not in DFCS custody, *i.e.*, substantiated child maltreatment followed by another substantiated incident of maltreatment within 12 months (Section 20.G.1); (2) reporting of children who are diverted upon a report of maltreatment and subsequently are the victims of substantiated maltreatment (Section 20.G.2); and (3) meeting an “outcome measure[.]” on reducing the “re-

entry” of children, *i.e.*, the percentage of children discharged from foster care who re-enter foster care within 12 months (Section 15.4). Without question, the misuse of diversion and safety resources would result in misleading and inaccurate undercounting under all three of these provisions.¹⁰

II. The Targeted Formal Discovery Requested by Plaintiffs Would Permit Class Counsel to Evaluate Whether Defendants’ Use of Diversion and Safety Resources Violates the Consent Decree

The narrow and targeted discovery sought in this motion is needed in order for Class Counsel to determine whether State Defendants’ use of diversion and safety resources violates the Consent Decree by frustrating its purpose and inappropriately denying class membership to some children. It will also assist Class Counsel in determining whether, and to what degree, the performance data in Sections 20.G.1, 20.G.2 and 15.4 in the Consent Decree are being rendered inaccurate and misleading due to the misuse of diversion and safety resources.

Plaintiffs seek discovery concerning all policies, practices, and procedures relating to diversion and safety plans applicable or used in Fulton and DeKalb Counties currently or at any time during 2009. Plaintiffs further seek, for both

¹⁰ The OCA specifically notes that the misuse of diversion causes underreporting of repeat maltreatment and “inadequate and misleading” measurement of diversion outcomes. (October 2009 OCA Letter at 3, 7-8.) On the issue of re-entry, to the extent the misuse of diversion and safety plans artificially prevents the re-entry into foster care of children who otherwise would have and should have re-entered care, performance on this outcome measure is inaccurate and misleading.

Fulton County and DeKalb County, the identification of all children whose cases, at any time in calendar year 2009, involved the use of (a) diversion, (b) safety resources for more than thirty (30) days, or (c) temporary guardianships, for the purpose of having an expert conducting of a case record review of complete copies of children's case files, with the particular files selected and review conducted by Plaintiffs' expert. Once Class Counsel receive the requested lists, they will identify the sample of children for whom State Defendants will copy and produce the complete files for Plaintiffs' review.

Plaintiffs' request for a targeted case record review is entirely reasonable. Indeed, the parties successfully negotiated the process of conducting several case record reviews during the discovery phase of this case, prior to the settlement of this action in October 2005. (See Peg Hess, *A Review of Case Files of Foster Children in Fulton and DeKalb Counties, Georgia* ("Hess Review"), at 8 (Nov. 14, 2003) [Docket No. 342] (reviewing the agency case files of class member children); see also John Goad, *Review of Investigations Conducted by the Georgia Division of Family and Children Services of Suspected Child Maltreatment of Wards of Fulton and DeKalb Counties* ("Goad Review"), at 3 (Dec. 19, 2003) [Docket No. 342] (reviewing the investigation case files of children in foster care who where the subject of reports of abuse or neglect while in state custody).) While the Hess Review required the on-site production and review of original case

files, and thus the additional logistics and resources required of that process, the Goad Review involved the far more limited process of copying and producing case files to Class Counsel. (*Compare* Hess Review at 8, 10 *with* Goad Review at 7.) The requested review here is along the lines of the Goad Review, and thus reasonably minimizes expense and burden on State Defendants. Importantly, this targeted approach is reasonably designed to collect information on the existence and extent of noncompliance. Upon information and belief, no systematic, thorough case review of diversion and safety plan practices has taken place in Fulton and DeKalb Counties (surely such a review, if it existed, would have been provided to the OCA, during its examination of these issues).

Finally, Class Counsel's request for further data and information on diversion and safety plans was refused by State Defendants, and the Accountability Agents declined to obtain and report in further detail on these issues. (Lustbader Decl. ¶¶ 2, 3.)

In sum, the discovery sought in this motion is contemplated and authorized by the Consent Decree, narrowly targeted, entirely reasonable, and necessary for Plaintiffs to determine, in a minimum amount of time, and with minimal burden and expense, whether and to what extent Defendants are in noncompliance with the Consent Decree.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for discovery and issue the proposed Order attached as Exhibit A.

Respectfully submitted this 15th day of March, 2010.

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CERTIFICATION PURSUANT TO LOCAL RULE 7.1D

I hereby certify that the foregoing brief has been prepared in 14-point Times New Roman, one of the typeface and point-size selections approved by the Court in Local Rule 5.1C.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, I electronically filed
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