University of the District of Columbia
David A. Clarke School of Law
4200 Connecticut Avenue, N.W.
Building 38, Room 200
Washington, D.C. 20008
(202) 274-7328 Fax: (202) 274-5583
(202) 390-2901 (cell.)
mifraidin@yahoo.com

TESTIMONY OF
MATTHEW I. FRAIDIN
Associate Professor of Law
Director, HIV/AIDS Legal Clinic
University of the District of Columbia
David A. Clarke School of Law

OPENING CHILD WELFARE PROCEEDINGS IN THE FAMILY COURT OF THE DISTRICT OF COLUMBIA:

"SUNSHINE IS GOOD FOR CHILDREN"

DISTRICT OF COLUMBIA COUNCIL
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
NOVEMBER 4, 2009

B-18-344
INFORMATION SHARING TO
IMPROVE SERVICES FOR CHILDREN AND FAMILIES ACT OF 2009

"Publicity is the very soul of justice… It keeps the judge himself, while trying, on trial."

--- Jeremy Bentham (1790)

"Participants in secret proceedings quickly tend to lose their perspective, and the quality of the proceedings suffers as a consequence."

--- *Oxnard Publishing Co. v. Superior Court*, 68 Cal Rptr. 83, 85 (2nd Dist. 1968)

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

--- Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, 1914

"[Opening Family Courts] has been 100 percent positive with no negatives… Our worst critics will say it was the best thing we ever did. Their fears were unfounded… I wish other states would do it."

--- Jonathan Lippman, Chief Administrative Judge, NY State

"We will only make mistakes if we are hidden in the back room."

--- Jess McDonald, Former head of Illinois Child Welfare Agency.

"Sunshine is good for children."

--- Judith Kaye, Chief Judge, New York State Court of Appeals, 1997

"The appearance of being treated fairly is compromised when things are done in secret… People are suspicious of anything done secretly."

--- Daniel Murphy, Oregon Circuit Court Judge

"Open child protection proceedings may…assist the psychological recovery of the abused children…'victims of abuse often carry their burden alone, in secret' and closed proceedings simply 'continue the notion that something shameful has happened, and that no one should be told.'"

--- Hon. Heidi S. Schellhas, Minnesota Court of Appeals

"The real problem facing the juvenile court judges in this country is not how to keep the reporters out of the courts, but the fact that there is a lack of interest in the juvenile courts by the press and, because the press does not have that interest, by the public."

--- Judge Byron B. Conway, Publicizing the Juvenile Court, 16-1,
Juvenile Court Judges Journal, 21-22 (1964)

Summary of Testimony of Professor Matthew I. Fraidin
University of the District of Columbia David A. Clarke School of Law
District of Columbia Council, Committee On Public Safety and the Judiciary
B-18-344, Information Sharing To Improve Services For Children And Families Act
November 4, 2009

The bill: B18-344 gives adults information they need to help children.

The problem: Child welfare proceedings take place in secret, so caseworkers, lawyers, and judges operate without transparency in the lives of vulnerable children. As a result, D.C.'s child welfare system harms children and families, instead of helping them. B18-344 expands the pool of *unaccountable adults with unchecked power* in children's lives, and thus endangers children.

The evidence: 60% of the D.C. children taken from their families are *not abused or neglected*.

The solution: "Sunshine." B18-344 should be amended as follows: *Family Court proceedings and records shall be open to the public, unless the court finds, by clear and convincing evidence, that closure is required to avoid substantial harm to the child, in which event the Court shall order closed or sealed that portion of a hearing or record required to avoid harm.*

Open courts protect vulnerable children. A judge writes, "[I believe that] [w]hen the courtroom gallery contains people that the stakeholders believe to be representatives of the media or a court monitoring organization, the stakeholders conduct themselves more professionally, explaining the facts in the cases and their clients' positions with greater thoroughness and care."

Judges say open courts are good for children: The National Council of Juvenile and Family Court Judges issued a public Resolution in 2005, supporting open courts.

Child advocates say open courts are good for children: The National Coalition for Child Protection Reform urges states to open child welfare proceedings.

Seventeen states have opened child welfare proceedings: These include such states as New York, Michigan, Florida, Ohio, and Arizona, whose statutes and court rules are attached.

No state that has moved to transparency has ever shut down again. Many states opened child welfare hearings on a "pilot project" basis, and none retreated to secrecy.

Doubters are convinced: Discussing Minnesota's open courts, the Minneapolis Star Tribune noted that "the greatest fear--that troubled children would be victimized and embarrassed by sensationalized new media coverage and community scorn--has yet to be realized."

Open court proceedings empower children: Minnesota Judge Heidi Schellhas writes, "Open child protection proceedings may…assist the psychological recovery of the abused children …'victims of abuse often carry their burden alone, in secret' and closed proceedings simply 'continue the notion that something shameful has happened, and that no one should be told.'"

Openness permits reform. Judge Schellhas writes, "[p]ublic access to child protection proceedings should, over time, significantly enhance the system's responsiveness and court procedure....The child protection system and court proceedings are "currently insulated from informed criticism by the rule of confidentiality, and 'criticism is valuable in direct relation to the degree it is informed."'

David A. Clarke School of Law
4200 Connecticut Avenue, N.W.
Building 38, Room 200
Washington, D.C. 20008
(202) 274-7328 Fax: (202) 274-5583
(202) 390-2901 (cell.)
mfraidin@udc.edu

Testimony of Professor Matthew I. Fraidin
University of the District of Columbia David A. Clarke School of Law
District Of Columbia Council, Committee On Public Safety and the Judiciary
B-18-344
Information Sharing To Improve Services For Children And Families Act Of 2009

November 4, 2009

Chairman Mendelson and members of the Committee, thank you for the opportunity to address the very important subject that brings us here. The bill under consideration today attempts to make sure the right adults have the right information to help children. I hope the bill will be modified, however, by opening avenues for visibility and accountability, so we can be sure that adults are doing the right thing for children.

At present, the District of Columbia's antiquated child welfare proceedings are held in secret. If child welfare hearings and records are not opened to the press and public, however, this bill will, despite its good intentions, actually *exacerbate* the dangers our most vulnerable children already face, by imbuing more and more unaccountable adults with more and more unchecked power.

I have served since 1998 as a trial attorney and Supervising Attorney at the Legal Aid Society of D.C., Legal Director of The Children's Law Center, and, since 2004, in my current position as Associate Professor of Law and Director of the HIV/AIDS Legal Clinic at the University of the District of Columbia David A. Clarke School of Law. In addition, I have been a member of the D.C. Bar's Family Law Section Steering Committee, chaired and taught on the faculty of countless D.C. Bar Pro Bono trainings, served on numerous Superior Court committees, testified before the U.S. Senate and D.C. Council, and spoken to dozens of local and national audiences. I have represented and supervised the representation of hundreds of Family Court and Domestic Violence Unit litigants, representing children, adults, parents, foster parents and kinship caregivers in all manner of proceedings, including child custody, domestic violence, child abuse and neglect, adoption, guardianship, and child support.

Those experiences lead me inescapably to the conclusion that the laws and court rules imposing an iron curtain of secrecy over some aspects of D.C.'s Family Court – namely child welfare proceedings -- obstruct efforts to promote safety and permanency for children. Court hearings and records are open in divorce, child custody, domestic violence, and criminal sex offense and child abuse cases: I believe strongly that it is now time for the District of Columbia

Family Court to join the growing nationwide trend toward openness in child welfare matters as well.

Let there be no mistake: our child welfare system is in shambles, Executive Branch functions collapsed under the weight of hundreds of children unnecessarily living with strangers in foster care. Without the disinfecting warmth of sunshine and the scrutiny of concerned citizens and the press, our courts currently do little more than rubber-stamp CFSA's misguided, harmful practices. I will in a moment urge upon you a simple modification of this bill that will keep the bill from endangering children and will in fact help achieve the intended purpose, our shared objective: protecting children.

The bill amends D.C. Code §§ 16-2331, 2332, and 2333. Those sections of the statute currently restrict access to court records in some cases involving children, namely juvenile delinquency cases and child welfare cases. Court hearings for children in those cases are closed to the public by virtue of other provisions, including D.C. Code § 2316. In contrast, the public and press may observe virtually all cases involving children, such as domestic violence cases, child custody cases, divorce cases, and criminal cases.

The proposed amendments embodied in B18-344 would expand the pool of adults allowed to have information about children, to include more of the adults trying to help a child. The bill as written would allow the adults already listed in D.C. Code §§ 16-2331-33, who are already privy to information in children's juvenile, social and law enforcement records, to share that information with adults not listed but who are, nonetheless, responsible for helping the child. That concept makes sense, because if there is an adult who is in a child's life who could help the child more by knowing some things about the child or by seeing a court document or a "social" record, that adult ought to be able to have access to the record. Artificial boundaries should not obstruct adults willing to lend a hand in a child's life.

The essential question, however, is how to make sure the adults in a child's life use the information properly and to the benefit of the child. The starting point, and simplest and surest way to hold adults accountable for serving children is to watch them. The well-known rationales for transparent, accountable government hardly need be belabored, and are most important for the most vulnerable, like children, who rely on others' watchful eyes for protection. But child welfare proceedings in the D.C. Family Court are shrouded in mystery and secrecy. By statute and court rule, court proceedings and information are sealed off from the public and press, unlike virtually all other cases in the courthouse, including most of those involving children. This veil of secrecy must be removed, to protect children.

Solution: B18-344 should be amended to include simple language such as this:

> **Family Court proceedings and records shall be open to the public, unless the court finds, by clear and convincing evidence, that closure is required to avoid substantial harm to the child, in which event the Court shall order closed or sealed that portion of a hearing or record required to avoid harm.**

The District's children and families are mistreated every day by the Executive Branch, and the Judiciary, hidden behind a curtain, does not stem the bilious tide.

In my law students' cases, more than 60% -- that is **60%** -- of the children taken from their families have been returned *without ever being found abused or neglected*. Yes, more than 60% of the children taken from their living rooms and schoolhouses, from their brothers and sisters and teachers and grandparents and friends – more than 60% of the children housed in foster care with strangers! – do not need to be there, by the government's own admission. They take the children, the Court rubber-stamps the removal, and only later, when my students find the information the agency missed, explain to the agency the information it distorted, and demonstrate that the child would be safest and healthiest in her own home, does the government agree – voluntarily! – to send the child home and dismiss its own case. Secret proceedings means that you can't meet the children whose lives are turned upside-down, perhaps never to be righted – for no reason.

You can't observe the rubber-stamp hearings. You can't watch a case worker hem and haw an explanation about why a distraught child hasn't been referred to a therapist, despite a court order directing the referral. You can't see a lawyer guessing at his client's position, rather than knowing it, because the lawyer hasn't met with the client since the previous court hearing. You can't sit in the back of a courtroom and shake your head in frustration and disgust at a judge who openly flouts the law, refusing to let a child live with her beloved aunt, simply because it is that judge's "personal policy" not to allow children to live with relatives unless CFSA agrees. You can't know what's going on, and you can't do anything about it.

Operating behind an impenetrable iron curtain that is anathema to American governance, the Family Court deprives children of the checks and balances they need for health, safety, and stability.

I am here to testify that sunshine is good for children.

Testimony of Professor Matthew I. Fraidin
University of the District of Columbia David A. Clarke School of Law

The District of Columbia is out of step with a growing national trend by guarding the walls that, in turn, guard adults' secrets and their errors of commission and omission:

- **Judges say open courts are good for children**: The National Council of Juvenile and Family Court Judges issued a public Resolution in 2005, attached to my testimony, supporting open courts. The National Child Abuse Coalition, the Council of State Court Administrators and the Conference of Chief Justices all agree that states should have discretion to open their courts.

- **Child advocates say open courts are good for children**: In the National Coalition for Child Protection Reform's "Civil Liberties Without Exception: NCCPR's Due Process Agenda for Children and Families," the first recommendation is that states open child welfare proceedings to the disinfecting glow of sunshine.

- **Seventeen states have opened child welfare proceedings:** I have attached to my testimony a sample of representative state statutes and court rules from states such as New York, Michigan, Florida, Ohio, and Arizona.

- **No state that has moved to transparency has ever shut down again.** Many states opened child welfare hearings on a "pilot project" basis, and none retreated to the darkness of secrecy.

- **Doubters are convinced:** *Even judges and children's advocates who initially were vigorously opposed to transparency become enthusiastic converts*, convinced of the benefits to children. After Minnesota's courts had been open for a year, the Minneapolis Star Tribune noted that "the greatest fear--that troubled children would be victimized and embarrassed by sensationalized new media coverage and community scorn--has yet to be realized."

- **Open court proceedings empower children:** According to Minnesota Judge Heidi Schellhas, "Open child protection proceedings may…assist the psychological recovery of the abused children…'victims of abuse often carry their burden alone, in secret' and closed proceedings simply 'continue the notion that something shameful has happened, and that no one should be told.'"

- **Openness permits reform.** Judge Schellhas points out that not only can individual children be helped by transparent family court proceedings, but systemic change also may be possible. "Public access to child protection proceedings should, over time, significantly enhance the system's responsiveness and court procedure. . . . The child protection system and court proceedings are "currently insulated from informed criticism by the rule of confidentiality, and 'criticism is valuable in direct relation to the degree it is informed."'

We cannot be sure adults are serving children unless we can see them. If adults' actions are hidden behind a wall, we are literally in the position of having to take the adults' word that they're doing their job. As we move toward expanding expanding adults' knowledge of important aspects of children's lives, it would be wrong to simply empower a wider class of adults to act with and for children, but to have no one watching them. We should not widen the circle of adults who say: "just trust us." No, we cannot "just trust you" with our children: they are too important.

We can protect kids from adults misusing information or acting in other ways that hurt children by taking the simple step of opening to public eyes the court proceedings in which the children are involved. This would make neglect proceedings like others involving children, including domestic violence cases and child custody cases, which are entirely open.

In neglect cases, adults employed by the government are acting on our behalf, in our name, and, not coincidentally, with our money. This bill would, for all the right reasons, enlarge the universe of adults to include more governmental and non-governmental actors. *The bill should not, however, enlarge the pool of adults whose actions relating to children are shielded from view.*

If a service provider was given access to a case file or social record, or to information in it, we want to know, and the child needs for us to know, whether that adult did the right thing with it. Did the service provider follow up on the information, or simply ignore it? From a more pragmatic standpoint, why is the private service provider getting a contract or a grant? Is that organization really helping children, or merely vacuuming up funds, employing adults who aren't adding value to children's lives? We ought not *assume* adults are serving children effectively: "just trust us." Children need us to watch on their behalf. Whether it is abuses in far-off group homes or the mundane, every-day slights, insults and mishaps endured by foster children at the hands of adults, the children need others to know.

One of my former child clients, now dead by gunshot, asked his group home not to house

him with a roommate because, he admitted, he was disliked by some of the other children and felt uncomfortable with them. The group home ignored him, as well as my similar request on his behalf. Another resident of the group home – also now-deceased by gunshot -- came in and stabbed my client in the shoulder with a screwdriver. Bad enough, but the agency then proposed to bring both boys to the CFSA offices to put them in a room together to "mediate the dispute." No one knew this went on – no one has ever known until you, now, some six or more years later.

Same child: in addition to being stabbed, the child was victimized when his new roommate allowed other boys into the shared room. The other boys stole some of my child client's clothing. It was all he had, in two garbage bags and a battered suitcase. He'd been in foster care since he was nine years old, and had carted sneakers and clothing to the dozen or more homes he'd lived in. He was enraged by the theft, and broke some of the thief's property and kicked a hole in a wall. Arrested for the destruction of property, he was locked up overnight, for the first time ever, and charged as a juvenile. The CFSA worker was set to tell the delinquency judge that the child's best interests would be served by going to Oak Hill, because it would "be therapeutic for him." I remonstrated with the worker in the courthouse hallway and burned up telephone lines for hours until I located a foster parent with an empty bed and persuaded CFSA that a foster home would be more appropriate for the child than Oak Hill.

Until now, no one has known about this.

No one has known until now that the boy became a loving, gentle, doting father. The baby's mother went off to finish her final semester of college, and the ward was the baby's only caretaker. No one has known that the adults working for CFSA refused to allow the young dad to live with his baby. CFSA had no teen-father placements, they said. They assigned him to programs and buildings that did not allow babies. So he "absconded" every night, meaning he went to his mother's home, or his mother-in-law's home, or to his grown sister, or to an aunt, or to a friend or anywhere he could keep his baby. Demerit after demerit after demerit from the adults at CFSA, harassing him, adding stress to an already-burdened life.

No one has ever known that the adults at CFSA later sought again and again to have this child's neglect case closed because he wasn't appreciative of the services they were offering.

No one has known until now, from this testimony, that when my child client became an adult and buckled under the stress and picked up minor adult criminal charges, the adult employees of CFSA and OAG strenuously resisted my pleas and my client's to install an operating telephone in his residence. See, he was wearing an electronic ankle bracelet, and needed the telephone to be working to connect with the bracelet, so that he would not violate his conditions of release on the criminal charge. The adults working for CFSA and OAG said, again, that it would be better for the child to go to jail – the D.C. Jail, this time – than to reside in their

care. So they refused to install the telephone to make sure he would be locked up. Then, they could close his case and get him off the rolls. Voila! Lower caseloads!

The postscript is, of course, my child client's death. CFSA finally having worn down the Family Court Magistrate Judge, the child's case was closed a few months before he turned 21. A bright, sensitive, sweet guy, he had lived in dozens of foster homes, group homes, with his mother and grandmother, with his sisters, and in at least one RTC, and had no ties to anyone but his wife and children. He had attended more than a dozen high schools without graduating. He had a marijuana habit, and maybe others, that seemed relatively low-level to me, but showed no signs of abating. He had been trying to hold down a job, and also had been stealing drug dealers' small stashes and selling those to support his two children.

He was shot at 1408 Girard Street on the day police were installing a crime camera around the corner. He made the paper for that. He made the paper again, though I'm the only one who knew it, because he wasn't identified, when Lafonte Lurie Carlton, his killer, was released a few years later from Oak Hill and killed again.

My child client would have wanted Carlton to be released, by the way. He knew children need lots of chances and lots of help. He also knew, painfully, that adults often fail children, even adults who mean well and certainly, adults who don't care or can't be bothered or who have other priorities. Would that dear child still be alive if the adults who hurt him and ignored him and despised him had been seen for what they'd done? Might they have straightened up a little and flown a little righter if they'd known that, like other adults, they could be held accountable for their actions?

It's ironic that teaching our children "responsibility" is a major tenet of parenting. We want children to grow up to understand that that their actions have consequences. While parents try to teach this value to their charges, the adults surrounding children in the foster care system are not responsible for what they do and don't do. In our secret system, adults don't have to live the value, to practice what they preach.

Yes, we must ensure that the right adults have the right information to help children. It is equally important, however, to make sure we don't give adults a blank check to go along with that power. We have to make sure they use their power to help children. We are all responsible and we all must watch: family, friends, neighbors, the press. No one can be healthy in the dark: sunshine is good for children.

Openness protects vulnerable children. Make no mistake: the stakes are high. The best summary of the dangers of secrecy to children in the child welfare system comes from a longtime
Testimony of Professor Matthew I. Fraidin

Minnesota social worker, who wrote in 1997, "Sometimes decisions that are literally life and death to children are made without full knowledge or deliberation due to the inattention of the judge, the fraternity mentality of the attorneys or the incompetence of the social worker."

As Judge Schellhas writes, "[my personal observation suggests that] [w]hen the courtroom gallery contains people that the stakeholders believe to be representatives of the media or a court monitoring organization, the stakeholders conduct themselves more professionally, explaining the facts in the cases and their clients' positions with greater thoroughness and care."

In contrast, when lawyers, social workers and judges are shielded from scrutiny, as in the District of Columbia, only the children get hurt. Lawyers may without compunction or sanction fail to meet with child and adult clients from one hearing to the next, social workers may leave children in foster care for weeks or months after a willing relative has come forward, and judges may act in derogation of applicable law. And politicians and other policy-makers, whose decisions have made those failures all-but-inevitable, are shielded from answering to the public, which deserves to know how its money is being spent and its most precious resource protected. In a transparent system, however, adults can't afford to shirk their responsibilities or abuse their power. Yes, sunshine gives children, like flowers, a chance to grow.

An example: A recent, highly-publicized case in the D.C. area illustrates the trove of information that is available, and the lessons that could be learned, were access to court proceedings and information readily available. In an October 5, 2008 piece which is attached as part of this packet, then-Washington Post columnist Marc Fisher lamented the secrecy surrounding the abuse and tragic deaths suffered at the hands of Renee Bowman, who was a foster and adoptive parent of children placed in the custody of D.C.'s Child and Family Services Agency. As Fisher pointed out, without information about how and why Ms. Bowman was approved as a foster and adoptive parent, D.C.'s taxpayers and voters are unable to impose fiscal and political accountability.

As important as are taxpayers' rights and as essential to our democracy as is accountability of the Executive and Judicial branches of government, however, perhaps even more important is learning lessons that will keep children safe. Other children need not fall victim to the same fate. With the work of judges, case workers and lawyers energized by the possibility that a media representative or citizens' group will be in the courtroom or will review a court document, and with information available from which to learn, children can be protected.

Fisher quoted me as follows in the on-line version of the piece:

> The neglect case files of the Bowman children would tell you when

> Ms. Bowman entered the children's lives, what their condition was when they went to live with her, whether the social worker and GAL and judge really gave Ms. Bowman any scrutiny: did the [case worker] or [Guardian ad litem] visit the children regularly before the adoptions were granted? CFSA (and the Board of Child Care, the private agency that licensed Ms. Bowman) have files, too, showing what Ms. Bowman told them, whether they checked it out, how well they knew her, whether they watched her with the children, whether they wondered why her employment ended . . . whether they explored her bankruptcy filings . . . .
>
> There is a WORLD of information in the court files and in CFSA's files, and a puzzle in there that, if put together thoughtfully, ***could save children's lives***. What happened? How? Why? Were there shortcuts? What assumptions were made? What pressures were the social worker and GAL (who probably was carrying 75 to 100 cases at the time) under? (emphasis added)

In the words of Judith Kaye, the former Chief Judge of New York's highest court, "Sunshine is good for children." Chairman Mendelson, our city's children are in danger, every day, because child welfare proceedings have no transparency and no accountability. The Executive Branch fails children and families in every way imaginable, and in some that are not. The Family Court does not step in to slow the free-fall. No matter how dedicated and well-meaning are our public servants, the District must join the growing nationwide acceptance of open family courts. Tearing down the walls of secrecy surrounding child welfare proceedings will simply make child welfare proceedings like virtually all of the others in the courthouse.

I'll leave the last word to another judge, Minnesota's Judge Schellhas: "The child protection system is an institution as important, if not more important, than any other public institution. Those involved in the child protection system are responsible for our nation's most precious resource-- children. The public and the press must insist upon public access to this system to hold it accountable to society and to the children."

Please let me know if I can be of assistance in addressing this very serious obstacle to transparency, open government, and safety, health,and stability for our children. As attachments to my testimony, I have provided a range of materials gathered nationwide setting forth the dangers of secrecy, and benefits of transparency, with regard to the child welfare system.

I look forward to answering any questions you may have on this subject.