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VOLUME 19

SPRING 2022

ISSUE 2

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**Form:** Citations conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2021). Please cite the *Rutgers Journal of Law & Public Policy* as 19 RUTGERS J.L. & PUB. POL’Y \_\_ (2021).

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**RUTGERS**  
**JOURNAL OF LAW & PUBLIC POLICY**

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VOLUME 19

FALL 2021

ISSUE 1

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**Current Issues**  
**in Public Policy**

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ISSN 1934-3736





AGING OUT OF FOSTER CARE AND OVER  
THE SERVICE CLIFF: ANALYSIS OF THE  
FAMILY FIRST PREVENTION SERVICES ACT  
AND STATES' *PARENS PATRIAE* DUTY TO  
SUPPORT OLDER YOUTH IN AND AGING  
OUT OF FOSTER CARE

Kelly Monahan

## I. INTRODUCTION<sup>1</sup>

In the U.S. today there are over 400,000 children and youth in foster care.<sup>2</sup> In 2020, less than half of the children and youth discharged from foster care were reunified with their parents and approximately 20,000 young people “aged out” of foster care.<sup>3</sup> Aging out refers to the transition to adulthood for older youth in foster care “when no legal permanent connection – such as being reunited with family, adopted, or placed under the care of a legal guardian – is available to them” before the age at which foster care is terminated in their state.<sup>4</sup> This results in young people abruptly “los[ing] access to the financial, educational, and social supports provided through the child welfare system.”<sup>5</sup>

While there is an increasing trend in the United States for young adults to receive support from families, such as emotional support, financial assistance, and/or housing (i.e., returning to live with parents or other relatives),<sup>6</sup> older youth in foster care face transitioning to adulthood without these critical forms of support.<sup>7</sup> Specifically, many young people aging out have experienced significant instability throughout their time in foster care, including multiple out of home placements and school changes, inconsistent or no contact with their parent(s) and/or sibling(s), and changes in caregivers, and are less likely to have a supportive social network compared to their peers with no

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<sup>1</sup> J.D. Candidate, Rutgers Law School – Camden. I would like to thank Professor Mandelbaum, my former professor and faculty advisor, for sharing her time and expertise in child advocacy and for providing invaluable guidance throughout the development of my note topic idea and writing process.

<sup>2</sup> CHILD.’S BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., NO. 28, THE AFCARS REPORT 1 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> (reporting the most recent federal data available from FY2020).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> RACHEL ROSENBERG & SAMUEL ABBOTT, CHILD TRENDS, SUPPORTING OLDER YOUTH BEYOND AGE 18: EXAMINING DATA AND TRENDS IN EXTENDED FOSTER CARE 3 (2019), <https://www.childtrends.org/publications/supporting-older-youth-beyond-age-18-examining-data-and-trends-in-extended-foster-care>.

<sup>5</sup> Patrick J. Fowler et al., *Homelessness and Aging Out of Foster Care: A National Comparison of Child Welfare-Involved Adolescents*, 77 CHILD. & YOUTH SERVS. REV. 27, 27 (2017).

<sup>6</sup> *Id.* at 28.

<sup>7</sup> *Id.*; see also ROSENBERG & ABBOTT, *supra* note 4, at 11.

system involvement.<sup>8</sup> The lack of supports, insufficient preparation for independence, abrupt termination of services, and strained family relationships place youth aging out of foster care at elevated risk for homelessness.<sup>9</sup> Young people who have aged out also face additional adverse outcomes, including barriers to earning a high school diploma or equivalent, unemployment, and increased rates of involvement with the criminal justice system.<sup>10</sup>

In 2016, Congress acknowledged that removing children from their families and placing them in foster placements, group homes, or institutions comes at a substantial “public and human cost.”<sup>11</sup> Specifically, Congress recognized that family disruption and placement in foster care is emotionally traumatic for children and families and cost the federal government and states over \$8 billion under Title IV-E of the Social Security Act.<sup>12</sup> Thus, there was a growing awareness that state and federal governments were paying high sums of money for a failing system.

These concerns prompted a shift in emphasis from intervention to prevention and Congress enacted the Family First Prevention Services Act (“Family First Act” or “Family First”) in 2018.<sup>13</sup> Significantly, Family First is the first federal legislation of its kind to authorize Title IV-E funding to states for evidence-based preventive services, such as mental health services, substance use treatment, and

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<sup>8</sup> Eran P. Melkman, *Childhood Adversity, Social Support Networks and Well-Being Among Youth Aging Out of Care: An Exploratory Study of Mediation*, 72 CHILD ABUSE & NEGLECT 85, 86 (2017) (citing Brea L. Perry, *Understanding Social Network Disruption: The Case of Youth in Foster Care*, 53 SOC. PROBS. 371, 383-85 (2006); Rosemary J. Avery & Madelyn Freundlick, *You’re All Grown Up Now: Termination of Foster Care Support at Age 18*, 32 J. ADOLESCENCE 247, 253 (2009)).

<sup>9</sup> Fowler et al., *supra* note 5, at 28.

<sup>10</sup> See JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, ANNIE E. CASEY FOUND., FUTURE SAVINGS BY IMPROVING OUTCOMES: STRATEGIES FOR YOUTH TRANSITIONING FROM FOSTER CARE 1 (2019), <https://www.aecf.org/m/resourcedoc/aecf-futuresavings-infographic-2019.pdf>.

<sup>11</sup> Family First Prevention Services Act, H.R. Rep. No. 114-628, pt. 1(b) (2016).

<sup>12</sup> *Id.*; see also Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE, 523, 527-41 (2019) (explaining the psychological harm family separations inflict on children and youth).

<sup>13</sup> Family First Prevention Services Act of 2017, Pub. L. No. 115-123, § 50711(a)(2), 132 Stat. 232.

in-home parenting skills training, before a child has been removed from home and placed in foster care,<sup>14</sup> signifying a “shift toward investing in supporting children within their families to prevent the need for removals when possible.”<sup>15</sup>

This Note seeks to highlight, however, that the Family First Act is insufficient to address the needs and improve outcomes for older youth already in and aging out of foster care. First, Family First does not go far enough because it permits but does not require states with Title IV-E funded foster care to extend foster care to age twenty-three.<sup>16</sup> Second, Family First fails to include accountability measures for states to ensure that young people do not age out into unstable situations, including homelessness.<sup>17</sup> Finally, Family First, designed as budget neutral,<sup>18</sup> does not provide additional funding to states seeking to authorize foster care to age twenty-three and it provides only a nominal increase in funding for transition-planning services designed for young people on the brink of aging out of care, despite the anticipated increase

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<sup>14</sup> CHILD. ’S DEF. FUND, THE FAMILY FIRST PREVENTION SERVICES ACT: HISTORIC REFORMS TO THE CHILD WELFARE SYSTEM WILL IMPROVE OUTCOMES FOR VULNERABLE CHILDREN 1-2 (2018), <https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf>.

<sup>15</sup> CTR. CHILD. & L., AM. BAR ASS’N, THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018: A GUIDE FOR THE LEGAL COMMUNITY 3 (2020), <https://familyfirstact.org/sites/default/files/family-first-legal-guide.pdf>.

<sup>16</sup> Family First Prevention Services Act of 2017, Pub. L. No. 115-123, § 50753(a)(1), 132 Stat. 263.

<sup>17</sup> See, e.g., NAT’L NETWORK FOR YOUTH, CHILD FOCUS, THE FAMILY FIRST PREVENTION SERVICES ACT: IMPLICATIONS FOR ADDRESSING YOUTH HOMELESSNESS 4-5, <https://www.nn4youth.org/wp-content/uploads/FFPSA-Implications-for-YH.pdf> (last visited March 9, 2022) (noting that “the Family First Act was not designed to address youth homelessness” and, while extending foster care to age twenty-three “could” afford young people additional time to secure housing before aging out, this is not guaranteed under the act. Further, additional provisions of Family First, such as the limitations on congregate care settings, may place young people at heightened risk of instable housing, including running away from their placements and experiencing homelessness).

<sup>18</sup> See Sean Hughes, *The Family First Prevention Services Act: A Mixed Bag of Reform*, IMPRINT (June 22, 2016, 3:00 AM), <https://imprintnews.org/analysis/family-first-prevention-services-act-mixed-bag-reform/19073>.

in costs associated with the utilization of services with the extension of care to age twenty-three.<sup>19</sup>

Part I of this Note begins with a history and explanation of the child welfare system, including the doctrine of *parens patriae* and the process of how youth enter and exit foster care. This section also reviews the current bleak state of the child welfare system<sup>20</sup> in the U.S. and adverse outcomes experienced by older youth, highlighting the need for improved supports to assist young people transitioning from the system.<sup>21</sup>

To place the Family First Act in context, Part II provides a review of federal funding statutes that have been enacted to improve outcomes for children and youth in foster care, including what the legislation sought to achieve and its shortcomings. Next, Part III reviews states that have extended foster care and examines the positive but limited effects in states that have authorized foster care up to and

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<sup>19</sup> *Family First Prevention Services Act*, NAT'L CONF. STATE LEGISLATURES (Apr. 1, 2020), <https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx>; see also CHILD.'S DEFENSE FUND, IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS, AND OTHER STAKEHOLDERS 128 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf> (“Family First does not provide additional funding for Chafee or [education and training voucher] services.”); see also Family First Prevention Services Act of 2017, Pub. L. No. 115-123, § 50721, 132 Stat. 245 (authorizing the reallocation of existing funds, but not providing additional funding for extended foster care or transition services for older youth).

<sup>20</sup> While child and parent advocates and other proponents of child welfare reform are increasingly referring to the “child welfare system” as the “family regulation” or “family policing system,” see, e.g., Emma Williams, *Family Regulation, Not ‘Child Welfare’: Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586>; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>, this Note, uses “child welfare system” to denote the intended function of child welfare services and underscore states’ duties to young people under state custody, care, and supervision.

<sup>21</sup> Because the aim of this note is to examine the issue of youth aging out of foster care, this section specifically focuses on older or “transition-age” youth.

beyond age twenty-one. Finally, Part III analyzes how current federal and state child welfare legislation falls short of adequately supporting older youth on the precipice of aging out of care.

Part IV argues that the doctrine of *parens patriae* creates a special relationship between the child welfare system and young people in out of home placement. This section analyzes why this relationship creates an ongoing duty of child welfare agencies to support young people transition to adulthood when the system has failed to achieve its goal of reunification or other permanency.

Lastly, Part V provides recommendations for how Congress may amend the Family First Act to achieve these aims. Congress should amend Family First to mandate states to authorize Title IV-E funded foster care to age twenty-three to ensure young people have continued access to transition-planning and concurrent permanency planning services. Further, Congress should require states to ensure young people “age out” of foster care to stable housing when the state’s child welfare system fails to assist the youth in achieving permanency. Finally, Congress should amend Family First to provide adequate funding to support states’ efforts to achieve these aims and improve outcomes for young people exiting care. While advocates of child welfare reform properly criticize reform measures that “rel[y] heavily on the state to vindicate children’s rights” as such efforts “necessarily maintain[] the same troubling dynamic” that created the problems facing children and families,<sup>22</sup> reform efforts from the bottom up often take time to implement.<sup>23</sup> The Family First amendments recommended here could be immediately implemented to prevent young people from aging out into homelessness while reform efforts are underway, and are consistent with calls made by young people with lived experiences in the child welfare system for improved aging out supports.<sup>24</sup>

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<sup>22</sup> See, e.g., Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L. J. F. 917, 919 (2018).

<sup>23</sup> See, e.g., David Tobis, *Parent Participation Across the Country*, in FROM PARIAS TO PARTNERS: HOW PARENTS AND THEIR ALLIES CHANGED NEW YORK CITY’S CHILD WELFARE SYSTEM 145-66 (Oxford U. Press 2013).

<sup>24</sup> See, e.g., YOUTH FOSTERING CHANGE, JUV. L. CTR., A HOME OF OUR OWN: YOUTH RECOMMENDATIONS TO REDUCE HOMELESSNESS FOR YOUTH AGING OUT OF THE CHILD WELFARE SYSTEM 1 (2015), [https://jlc.org/sites/default/files/publication\\_pdfs/YFCHomelessnessRecs6-25-15\\_0.pdf](https://jlc.org/sites/default/files/publication_pdfs/YFCHomelessnessRecs6-25-15_0.pdf); see also *Current Policy Platform*, CAL. COAL. FOR YOUTH, <https://calyouth.org/advocacy-policy/current-policy-platform/> (last visited

## II. OVERVIEW OF THE CHILD WELFARE SYSTEM

### A. *Parens Patriae* and How Youth Enter and Exit the Child Welfare System

Parents have a fundamental right to “establish a home and bring up their children.”<sup>25</sup> Under the doctrine of *parens patriae*, “parent of the country,” however, states have a special interest in “preserving and promoting the welfare of the child.”<sup>26</sup> To that end, the Supreme Court has long held that the State has a right to infringe upon a parent’s fundamental right to intervene and obtain custody of the child if the parent endangers the health or safety of the child.<sup>27</sup>

Despite the focus on promoting the safety and well-being of children and families,<sup>28</sup> however, the child welfare system has a long history of deep-seated racism and bias in identifying children at-risk and intervening in families of color and families living in poverty.<sup>29</sup> Specifically, removals and subsequent out of home placements have historically disproportionately impacted low-income families and Black or African American, American Indian, and Alaskan Native children and their families<sup>30</sup> and, although there are no correlations between rates

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Feb. 25, 2022) (advocating for increased funding, prevention services, and transition resources, including housing supports, to prevent youth homelessness).

<sup>25</sup> Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

<sup>26</sup> Schall v. Martin, 467 U.S. 253, 263 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

<sup>27</sup> Wisconsin v. Yoder, 407 U.S. 205, 233-34 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

<sup>28</sup> CHILD WELFARE INFO. GATEWAY, CHILD.’S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 2 (Oct. 2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf>.

<sup>29</sup> Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME (March 17, 2021, 9:00 AM), <https://time.com/5946929/child-welfare-black-families/>; see also LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (U. Cal. Press ed., 2020) (providing a deep analysis of the history of systematic family separations tracing back over 400 years to the African slave trade to present day family separations conducted by the child welfare system).

<sup>30</sup> See RICHARD WERTHEIMER, CHILD TRENDS, YOUTH WHO “AGE OUT” OF FOSTER CARE: TROUBLED LIVES, TROUBLING PROSPECTS 2-3 (2002), [https://dredf.org/wp-content/uploads/2012/09/Children-Care-Trends\\_Youth-who-Age-Out\\_Dec02.pdf](https://dredf.org/wp-content/uploads/2012/09/Children-Care-Trends_Youth-who-Age-Out_Dec02.pdf).



of child maltreatment and race or ethnicity,<sup>31</sup> these racial disproportionalities persist today at every stage of the child welfare process.<sup>32</sup> This means that there are not only racial disproportionalities and disparities among the rate at which children and youth are reported to child welfare agencies and enter foster care, but also how long they remain in care, and how and when they exit care.<sup>33</sup> This is significant as increased time spent in out of home foster placements greatly reduces the chances that children and youth will reunify with their parent(s).<sup>34</sup> The increasing awareness of the disparate impact of the child welfare system on families of color and the adverse outcomes associated with system involvement has spurred calls for systemwide reform to prevent the separation and ultimate disintegration of families.<sup>35</sup>

Currently, when the State has temporary care, custody, and supervision of the child, the State must make “reasonable efforts”

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<sup>31</sup> Hyunil Kim & Brett Drake, *Child Maltreatment Risk as a Function of Poverty and Race/Ethnicity in the USA*, 47 INT’L J. EPIDEMIOLOGY 780, 784 (2018).

<sup>32</sup> See U.S. DEP’T HEALTH & HUM. SERVS., *supra* note 2; SHAMINI GANASARAJAH ET AL., NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (FISCAL YEAR 2015) 3 (Sept. 2017), [https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015\\_0.pdf](https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf); see CHILD TRENDS, STATE-LEVEL DATA FOR UNDERSTANDING CHILD WELFARE IN THE UNITED STATES: COMPANION GUIDE 3 (2020), [www.childtrends.org/wp-content/uploads/2020/07/ChildWelfareDataCompanionGuide\\_ChildTrends\\_October2020.pdf](http://www.childtrends.org/wp-content/uploads/2020/07/ChildWelfareDataCompanionGuide_ChildTrends_October2020.pdf).

<sup>33</sup> CHILD.’S BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2-3 (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf); GANASARAJAH ET AL., *supra* note 27, at 3.

<sup>34</sup> Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-to-Foster-Care Pipeline”*, 20 CUNY L. REV. 77, 92 (2016) (citing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 19 (Basic Civitas Books 2003)).

<sup>35</sup> Charity Chandler-Cole, *To Leave Racist Roots Behind, Child Welfare Needs a Great Reimagining*, IMPRINT (July 1, 2020, 7:01 AM), [https://imprintnews.org/child-welfare-2/leave-racist-roots-behind-child-welfare-needs-great-reimagining/44920?gclid=CjwKCAiAzrWOBhBjEiwAq85QZwDZ1jJn0TV OZ9t3kKfaN80774SZG-P-kMCnyR61Uj-AHJLl4\\_QPNBoCivcQAvD\\_BwE](https://imprintnews.org/child-welfare-2/leave-racist-roots-behind-child-welfare-needs-great-reimagining/44920?gclid=CjwKCAiAzrWOBhBjEiwAq85QZwDZ1jJn0TV OZ9t3kKfaN80774SZG-P-kMCnyR61Uj-AHJLl4_QPNBoCivcQAvD_BwE).

towards reunifying the child with the child's parent(s).<sup>36</sup> What constitutes reasonable efforts, however, is generally broadly defined in state statutes and child welfare agencies are offered little guidance beyond providing culturally responsive intervention and services.<sup>37</sup> In cases where reunification is ultimately not found to be in the best interest of the child or otherwise not possible, child welfare agencies are required to work towards an alternative permanency goal, such as adoption or legal guardianship,<sup>38</sup> which is typically with relatives or close family members.<sup>39</sup>

Where reunification or alternative permanency goals are not achieved, child welfare agencies are to assist youth prepare to transition to adulthood and connect them with related services, including life skills training, educational and career preparation, mentoring, preventive health services, and financial assistance for housing and higher education.<sup>40</sup> At age eighteen, youth in foster care have the option to exit care or to request continued care in the majority of states.<sup>41</sup> Many young

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<sup>36</sup> 42 U.S.C.A. § 671(a)(15)(B) (West 2019); *see also* U.S. DEP'T INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 39 (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf> (explaining the Indian Child Welfare Act, which provides that child welfare cases involving American-Indian families require a heightened standard of "active efforts" due to the history of separating American-Indian children and families and placing the children in out-of-home placements at alarmingly high rates).

<sup>37</sup> *See* CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1, 2 (2020), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

<sup>38</sup> 42 U.S.C.A. § 671(a)(15)(C) (West 2019).

<sup>39</sup> CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, KINSHIP GUARDIANSHIP AS A PERMANENCY OPTION: STATE STATUTES THROUGH JULY 2018, at 1, <https://www.childwelfare.gov/pubpdfs/kinshipguardianship.pdf> (last visited March 9, 2022).

<sup>40</sup> Fostering Connections to Success and Adoptions Act of 2008, tit. II, sec. 202, §475(5), 122 Stat. 3959 (2008); *see also* ADRIENNE L. FERNANDES-ALCANTARA, CONG. RSCH. SERV., RL34499, YOUTH TRANSITIONING FROM FOSTER CARE: BACKGROUND AND FEDERAL PROGRAMS 11, 16 (2019) (explaining that states receiving Chafee and education and training voucher [ETV] funding must provide transition services and supports to youth beginning at age fourteen).

<sup>41</sup> *Extending Foster Care Beyond 18*, NAT'L CONF. OF STATE LEGISLATURES (July 28, 2017), <https://www.ncsl.org/research/human-services/extending->

people opt to exit care to return to living with family, friends, or other supports<sup>42</sup> whose homes were deemed ineligible placement options for the youth while in the State's custody due to the State's requirements for licensing foster home and kinship placements, such as a minimum number of bedrooms or square footage for the child.<sup>43</sup> Many other youth, however, do not have people to turn to or places to live upon turning eighteen years old and instead consent to remain in foster care to receive independent living services, such as housing.<sup>44</sup>

## **B. Experiences and Outcomes for Older Youth in Foster Care**

### **1. Placement Statistics for Transition-Age Youth in the United States**

Young people ages fourteen years and older represent 18% of youth in foster care<sup>45</sup> and spend, on average, twice as long in foster care compared to the total foster care population.<sup>46</sup> Older youth in foster care also experience significant placement instability, with approximately 40% of older youth experiencing four or more placement changes compared to 15% of children ages thirteen and under.<sup>47</sup> Such instability

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foster-care-to-18.aspx; *see also* Sara Tiano & Karen de Sá, *California Extended Foster Care to 21. Was It Enough?*, IMPRINT (June 14, 2020, 11:45 PM), <https://imprintnews.org/foster-care/california-extended-foster-care-to-21-was-it-enough>.

<sup>42</sup> *See, e.g.*, MARK E. COURTNEY ET AL., FINDINGS FROM THE CALIFORNIA YOUTH TRANSITIONS TO ADULTHOOD STUDY (CALYOUTH): CONDITIONS OF YOUTH AT AGE 21, at 16 (2018) (reporting that 7.5% of youth ages 17-21 left foster care to reunify with their parents, 4.1% were adopted or discharged to a legal guardian, and 6.8% wanted to live with a romantic partner).

<sup>43</sup> *See* CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 4 (2018), <https://www.childwelfare.gov/pubPDFs/homestudyreqs.pdf>.

<sup>44</sup> ROSENBERG & ABBOTT, *supra* note 4, at 7.

<sup>45</sup> CHILD.'S BUREAU, *supra* note 2, at 2.

<sup>46</sup> JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, THE ADOLESCENT BRAIN: NEW RESEARCH AND ITS IMPLICATIONS FOR YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE (2011), <https://www.aecf.org/resources/the-adolescent-brain-foster-care/> (citing U.S. DEP'T OF HEALTH & HUM. SERV., CHILD WELFARE OUTCOMES 2004-2007: REPORT TO CONGRESS 205 (2010), [https://www.acf.hhs.gov/sites/default/files/documents/cb/cwo04\\_07.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/cwo04_07.pdf)).

<sup>47</sup> Kristin Sepulveda & Sarah Catherine Williams, *Older Youth in Foster Care Need Support to Make a Successful Transition to Adulthood*, CHILD

significantly impacts critical areas of youth development, such as impeding opportunities for young people to develop connections with supportive adults, disrupting their education and employment, and negatively impacting their behavioral health.<sup>48</sup>

The type of out of home placement can also adversely impact youth development. While national data on the type of placement statistics for older youth is limited, the 2020 AFCARS report indicates that 15,975 youth were living in a group home, 22,824 young people were living in an institution, and 8,022 young people were living in supervised independent living,<sup>49</sup> which can include apartment style housing, college dormitories, and residential treatment facilities.<sup>50</sup> Group homes and other congregate care settings can exacerbate adverse outcomes for youth by further limiting opportunities to establish lasting social connections with family and caring adults.<sup>51</sup>

## 2. Adverse Mental Health Experiences Among Foster Youth

Approximately 80% of children in foster care experience significant mental health concerns compared to less than 25% of the general population.<sup>52</sup> Youth in care who have experienced maltreatment and placement instability are more likely to be diagnosed with a psychiatric disorder<sup>53</sup> and are four times more likely to be prescribed

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TRENDS (May 7, 2019), <https://www.childtrends.org/blog/older-youth-in-foster-care-need-support-to-make-a-successful-transition-to-adulthood>.

<sup>48</sup> *Id.*; ALEXIS OBINNA ET AL., CAL. YOUTH CONNECTION, HOUSING STABILITY FOR ALL: FINDINGS AND RECOMMENDATIONS FROM CURRENT AND FORMER CALIFORNIA FOSTER YOUTH 12, <https://drive.google.com/file/d/1LevXHcpoMmKCXjEiWSszVQhPxi8kaKp/q/view> (last visited Feb. 16, 2022).

<sup>49</sup> CHILD.'S BUREAU *supra* note 2, at 1.

<sup>50</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-411, FOSTER CARE: STATES WITH APPROVAL TO EXTEND CARE PROVIDE INDEPENDENT LIVING OPTIONS FOR YOUTH UP TO AGE 21, at 14-15, 19-20 (2019).

<sup>51</sup> JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, *supra* note 46, at 11 (citing Rosemary Avery & Madelyn Freundlick, *Planning for Permanency for Youth in Congregate Care*, 27 CHILD. & YOUTH SERV. REV. 115 (2005)).

<sup>52</sup> *Mental Health and Foster Care*, NAT'L CONF. STATE LEGISLATURES, (Nov. 1, 2019), <https://www.ncsl.org/research/human-services/mental-health-and-foster-care.aspx>.

<sup>53</sup> CHILD WELFARE LEAGUE OF AM., THE NATION'S CHILDREN 2019, at 4 (2019), <https://www.cwla.org/wp-content/uploads/2019/04/National-2019.pdf> (citing A. Garcia et al., *Adverse Childhood Experiences Outcomes*

psychotropic medications than youth without system involvement.<sup>54</sup> Youth in care often experience subtle or even blatant coercion to take psychotropic medication and face significant obstacles to accessing consistent, quality mental health services.<sup>55</sup> The American Academy of Pediatrics, Healthy Foster Care American Initiative, has cited mental and behavioral health as “the greatest unmet health need for children and teens in foster care”<sup>56</sup> and youth are calling for improved access to mental health services.<sup>57</sup> But these calls for assistance have largely gone unanswered, with an estimated 75% of young people in care having unmet mental health needs,<sup>58</sup> highlighting a critical gap in mental health service provision for youth in care.

### 3. Education and Employment Disparities Experienced by Foster Youth

Young people in foster care experience significant educational achievement disparities compared to their peers with no system involvement.<sup>59</sup> Specifically, over one-third of seventeen to eighteen-

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*Among Racially Diverse Foster Care Alumni: Impact of Perceived Agency Helpfulness*, 24 J. CHILD & FAM. STUD. 3293 (2015)).

<sup>54</sup> CHILD WELFARE LEAGUE OF AM., *supra* note 53, at 4 (citing CTR. FOR HEALTH CARE STRATEGIES, INC., MEDICAID BEHAVIORAL HEALTH CARE USE AMONG CHILDREN IN FOSTER CARE (2014), [https://www.chcs.org/media/Medicaid-BH-Care-Use-for-Children-in-Foster-Care\\_Fact-Sheet.pdf](https://www.chcs.org/media/Medicaid-BH-Care-Use-for-Children-in-Foster-Care_Fact-Sheet.pdf)).

<sup>55</sup> *Mental and Behavioral Health Needs of Children in Foster Care*, AM. ACAD. PEDIATRICS (July 21, 2021), <https://www.aap.org/en/patient-care/foster-care/mental-and-behavioral-health-needs-of-children-in-foster-care/>.

<sup>56</sup> NAT’L CONF. STATE LEGISLATURES, *supra* note 51.

<sup>57</sup> *See, e.g.*, CATHY MOFFA ET AL., JUV. L. CTR., ROADMAP TO REFORM: DEVELOPING A TRAUMA-SENSITIVE MENTAL WELLNESS APPROACH TO SUPPORTING YOUTH AND FAMILIES IN FOSTER CARE 6-7 (2020), <https://jlc.org/sites/default/files/attachments/2020-10/YFC%20Roadmap%2010.30.pdf> (highlighting the need and providing recommendations for improved access to mental health services for youth in foster care).

<sup>58</sup> CHILD WELFARE LEAGUE OF AM., *supra* note 53, at 4 (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T HEALTH & HUM. SERVS., NO. 14-4842, WHAT DOES THE RESEARCH TELL US ABOUT SERVICES FOR CHILDREN IN THERAPEUTIC/TREATMENT FOSTER CARE WITH BEHAVIORAL ISSUES? (2013)).

<sup>59</sup> *Guidance and Regulatory Information*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/inits/ed/foster->

year-olds experienced five or more school changes after their initial placement in foster care.<sup>60</sup> Frequent school changes impact students' ability to form and maintain relationships with peers and teachers.<sup>61</sup> Educational instability also creates significant academic challenges, such as transitioning to new curricula and teaching methods and/or having to repeat classes due to missing school records.<sup>62</sup> Yet, students in foster care are often underrepresented for academic difficulties, such as learning disabilities,<sup>63</sup> and overrepresented in special education for emotional/behavioral challenges and are twice as likely to be suspended and three times as likely to be expelled compared to other students.<sup>64</sup> Such educational instability and inequity often culminate in barriers to graduation with 65% of youth in care graduate high school or receive their general education diploma (GED) compared to the national average of 85%.<sup>65</sup>

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care/index.html#:~:text=Data%20show%20that%20foster%20youth,lower%20high%20school%20graduation%20rates (last visited Mar. 9, 2022) (“Data show that foster youth are more likely than their peers to experience a host of barriers that lead to troubling outcomes, including low academic achievement, grade retention and lower high school graduation rates.”).

<sup>60</sup> NAT'L WORKING GRP. ON FOSTER CARE & EDUC., FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE 2 (2018), <https://fosteringchamps.org/wp-content/uploads/2018/04/NationalEducationDatashet2018-3.pdf>; see also Daniel Heimpel, *Analysis: 11 States Struggle to Meet Federal Education Requirements for Foster Youth*, IMPRINT (Jan. 17, 2018, 1:39 PM), <https://imprintnews.org/analysis/analysis-11-states-struggle-meet-federal-education-requirements-foster-youth/29482> (reporting that despite federal enactment of the Every Student Succeeds Act in 2015, which mandates child welfare agencies to promote educational stability for students in foster care, eleven states were “outright failing – or clearly struggling – to make this happen” due to youths' placement instability in foster care).

<sup>61</sup> NAT'L WORKING GRP. ON FOSTER CARE & EDUC., *supra* note 60.

<sup>62</sup> OBINNA ET AL., *supra* note 48, at 13.

<sup>63</sup> KATHARINE HILL, UNIV. MINN. CTR. FOR ADVANCED STUD. IN CHILD WELFARE, EDUCATIONAL EXPERIENCES OF YOUTH WITH DISABILITIES IN FOSTER CARE: PART TWO IN THE POLICY BRIEF SERIES ON DISABILITY (2013), [https://casw.umn.edu/wp-content/uploads/2013/12/policyreport6.WEB\\_.pdf](https://casw.umn.edu/wp-content/uploads/2013/12/policyreport6.WEB_.pdf); see also Brenda Morton, *Barriers to Academic Achievement for Foster Youth: The Story Behind the Statistics*, 29 J. RES. CHILDHOOD EDUC. 476, 478 (2015).

<sup>64</sup> NAT'L WORKING GRP. ON FOSTER CARE & EDUC., *supra* note 60, at 2.

<sup>65</sup> *Id.*

Unfortunately, the educational disparities experienced by youth in foster care have lasting effects and persist to postsecondary education. While approximately 70-84% of seventeen–eighteen-year-old youth in foster care indicate a desire to go to college, only 31-45% enroll in postsecondary education compared to the national college enrollment of 69%.<sup>66</sup> Once in postsecondary education, young people in foster care continue to experience unique educational challenges. For example, because of their history of educational instability, many students are required to take non-credit bearing remedial courses, which results in greater expenses and protracted graduation timelines.<sup>67</sup>

In addition to academic challenges, young people in foster care experience housing instability that further hinders their ability to continue their postsecondary education.<sup>68</sup> As one study examining foster youths’ experiences at community colleges revealed, “[t]he consistent uncertainty of their residence and frequent movement made it difficult for students to fully engage in college” and students who had to divert their attention towards meeting their basic needs had difficulty focusing on their classwork.<sup>69</sup> These challenges are exacerbated when young people age out of foster care while enrolled in postsecondary education, as aging out results in the sudden withdrawal of supportive services, which are often integral to their continued college enrollment.<sup>70</sup>

#### 4. The Impact of COVID-19 on Youth in Foster Care

The adverse outcomes common among older youth in and aging out of foster care have been compounded by the ongoing crises created by the COVID-19 pandemic. A poll of 613 young people across 44 states conducted in May 2020 revealed that:

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<sup>66</sup> *Id.*

<sup>67</sup> Amy Dworsky, *Foster Care Youth and Postsecondary Education: The Long Road Ahead*, AM. COUNCIL ON EDUC.: HIGHER EDUC. TODAY (Dec. 11, 2017), <https://www.higheredtoday.org/2017/12/11/foster-care-youth-postsecondary-education-long-road-ahead/>.

<sup>68</sup> Ronald E. Hallet et al., *A Trauma-Informed Care Approach to Supporting Foster Youth in Community College*, 181 NEW DIRECTIONS CMTY. COLLS. 49, 50-51 (2018).

<sup>69</sup> *Id.*

<sup>70</sup> See MARK E. COURTNEY ET AL., FINDINGS FROM THE CALIFORNIA YOUTH TRANSITIONS TO ADULTHOOD STUDY (CAL YOUTH): CONDITIONS OF YOUTH AT AGE 23, at 35-36 (2020).

nearly 65% of youth currently or formerly in the foster care system were laid off, had their hours cut, or lost gig work during the pandemic, and half of those who applied for unemployment benefits did not receive them. Nearly 19% reported that they had run out of food. Twenty-three percent reported that they were forced to move or feared being forced to move.<sup>71</sup>

Additionally, many of the students surveyed indicated they relied on housing through their schools and feared having nowhere to live if their campuses did not reopen due to the pandemic.<sup>72</sup> Notably, the young people surveyed had spent an average of seven years in foster care and approximately 20% reported being entirely on their own with no social supports to turn to during the pandemic.<sup>73</sup> These statistics highlight both the issues surrounding the service cliff created by long-term involvement in the foster care system and the lack of resources and social supports available to support young people in and aging out of care.

### III. FEDERAL CHILD WELFARE LEGISLATION

The adverse experiences of young people who have aged out of foster care are, unfortunately, not a recent phenomenon and have been well documented for several decades.<sup>74</sup> While child welfare agencies are maintained by individual states or counties, Congress has a long history of enacting federal statutes that authorize funding to support state child welfare programs and services and has generally conditioned

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<sup>71</sup> Alexandra Dufresne, *Extended State Foster Care is a Necessity During COVID-19*, LAW360 (June 14, 2020, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1282324/extended-state-foster-care-is-a-necessity-during-covid-19> (citing ANGEL PETITE ET AL., FOSTERCLUB, *THE IMPACT OF COVID-19 ON YOUTH FROM FOSTER CARE A NATIONAL POLL 1* (2020), <https://www.fosterclub.com/sites/default/files/docs/blogs/COVID%20Poll%20Results%20May%2010%202020.pdf>).

<sup>72</sup> PETITE ET AL., *supra* note 71, at 1.

<sup>73</sup> *Id.* at 1, 5, 7.

<sup>74</sup> See, e.g., Mari Brita Maloney, *Out of the Home onto the Street: Foster Youth Discharged into Independent Living*, 14 FORDHAM URB. L. J. 971, 971-72 (1986).



receipt of these federal funds on specific mandates.<sup>75</sup> This section reviews relevant federal legislation that authorize funding for state child welfare programs and aim to improve outcomes for older youth in foster care.

### **A. The Social Security Act of 1935**

The federal government initiated its involvement in child welfare policy in 1912 by creating the federal Children’s Bureau and subsequently enacting the Sheppard-Towner Act to grant federal funds for health services for mothers and their children from 1921 to 1929.<sup>76</sup> In 1935, the federal government increased its presence in the child welfare sphere with the passage of the Social Security Act (SSA),<sup>77</sup> which authorized millions of dollars to states to aid low-income families through a program then called Aid to Families with Dependent Children (AFDC).<sup>78</sup> In addition, the amendments to the SSA in 1960 increased funding and mandated a minimum state base allotment,<sup>79</sup> and the 1962 amendments “required states to pledge that by July 1, 1975, they would make child welfare services available statewide.”<sup>80</sup>

### **B. The Child Abuse Prevention and Treatment Act of 1974**

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which authorized federal funds to improve the State response to child abuse and neglect.<sup>81</sup> While CAPTA has since been amended and reauthorized numerous times, it maintains its central tenet of providing “[f]ederal funding and guidance to States in support of prevention, assessment, investigation, prosecution, and treatment activities” and maintenance of child welfare systems in each state.<sup>82</sup> CAPTA, however, was not only transformational in establishing State-

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<sup>75</sup> See generally CONG. RSCH. SERV., CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING (June 30, 2021), <https://sgp.fas.org/crs/misc/IF10590.pdf>.

<sup>76</sup> John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 452-53 (2008).

<sup>77</sup> Social Security Act, Pub. L. No. 74–271, 49 Stat. 620 (1935).

<sup>78</sup> Myers, *supra* note 76, at 453.

<sup>79</sup> Social Security Amendments of 1960, tit. VII, sec. 707(a)(1)(C)(2)(B), §512(a)(2), 74 Stat. 996 (1960).

<sup>80</sup> Myers, *supra* note 76, at 455.

<sup>81</sup> CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T HEALTH & HUM. SERVS., ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf>.

<sup>82</sup> *Id.*

run child welfare systems, but also in establishing mandatory reporting requirements that “had the effect of greatly enlarging the pool of children coming to the attention of public authorities as potentially in need of care and attention,” thus transforming the child welfare system “into a ‘child protective system’ [that] has diverted [] from its missions of prevention and service provision.”<sup>83</sup>

### C. Adoption Assistance and Child Welfare Act of 1980

Following the enactment of CAPTA, the rise in child abuse reporting laws and growing awareness of child abuse prompted an overemphasis on intervention, resulting in an alarming rise in the number of children placed in long-term foster care.<sup>84</sup> Congress responded by enacting the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which authorized federal funding to support state child welfare activities previously provided through the AFDC to be provided through Title IV-E of the Social Security Act.<sup>85</sup> The Title IV-E funding is “annually appropriated at the level needed to support a specified share of the cost incurred by states in providing foster care, adoption assistance, or kinship guardianship assistance to eligible children.”<sup>86</sup> The Act also “required states to make ‘reasonable efforts’ to avoid removing children from maltreating parents” and “[w]hen removal was necessary, reasonable efforts were required to reunite families.”<sup>87</sup> Thus, in line with its renewed focus on preserving families, every child was required to have a permanency plan, which outlined both the child’s goal and the child welfare agency’s efforts to move towards reunifying the child with the child’s family or seeking alternatives to reunification, such as adoption.<sup>88</sup>

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<sup>83</sup> Burton J. Cohen, *Reforming the Child Welfare System: Competing Paradigms of Change*, 27 CHILD. & YOUTH SERVS. REV. 653, 661 (2005).

<sup>84</sup> Myers, *supra* note 76, at 459.

<sup>85</sup> *Id.*; OFF. ASSISTANT SEC’Y PLANNING & EVAL. ET AL., U.S. DEP’T HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 1, 2 (2005), <https://aspe.hhs.gov/system/files/pdf/177496/ib.pdf>.

<sup>86</sup> CONG. RSCH. SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING (2018) (summary).

<sup>87</sup> Myers, *supra* note 76, at 459.

<sup>88</sup> *See id.*

#### D. The Adoption and Safe Families Act of 1997

When the Adoption and Safe Families Act of 1997<sup>89</sup> (ASFA) was enacted, the pendulum swung from a focus on preserving families, seen under AACWA, to a heightened concern of the health, safety, and best interests of the child.<sup>90</sup> Due to concerns that children and youth were languishing in foster care for years or were being returned to unsafe conditions with their families, ASFA increased efforts to achieve permanency with a greater emphasis on adoption.<sup>91</sup> Specifically, ASFA clarified and delineated exceptions to the reasonable efforts requirement under AACWA for cases involving aggravated circumstances, such as severe and chronic abuse.<sup>92</sup> In addition, ASFA sought to streamline permanency efforts by requiring child welfare agencies to petition to terminate parental rights (TPR) after permanency efforts proved ineffective and the child remained in foster care for fifteen out of the last twenty-two months.<sup>93</sup> When TPR petitions were granted, parent-child relationships were irrevocably severed and the children and youth became eligible for adoption.<sup>94</sup>

The bill authorized significant funding to achieve these aims. First, ASFA reauthorized and renamed the family preservation and family support program under Title IV-B of the SSA as Promoting Safe and Stable Families (PSSF), created two funding categories for adoption promotion and support services and time-limited family reunification

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<sup>89</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305).

<sup>90</sup> See generally 42 U.S.C.A. § 675(10)(A) (West 2018).

<sup>91</sup> H.R. REP. NO. 105-77, at \*11-12 (1997).

<sup>92</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §1305).

<sup>93</sup> 42 U.S.C.A. § 675(5)(E) (West 2018).

<sup>94</sup> See LAURA RADEL & EMILY MADDEN, OFF. ASS'T SEC'Y PLANNING & EVAL., U.S. DEP'T OF HEALTH & HUMAN SERV., FREEING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART 1 – THE NUMBERS 2 (Feb. 2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-2.pdf>; but see CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: STATE STATUTES CURRENT THROUGH JULY 2021, at 4 (2021), <https://www.childwelfare.gov/pubpdfs/groundtermin.pdf> (reporting that, as of July 2021, approximately 25 states authorize the reinstatement of parental rights after termination).

services, and authorized \$305 million for these programs in 2001.<sup>95</sup> The PSSF was reauthorized the following year, authorizing \$305 million per year from 2002 to 2006 in addition to \$200 million in discretionary grant funds per year.<sup>96</sup> In addition, ASFA provided financial incentives for adoption and legal guardianship by establishing a base number of adoptions and awarding states \$4,000 for each adoption above the base number and an additional \$2,000 for each child adopted who was identified as having special needs.<sup>97</sup> In total, states earned upwards of \$127 million in incentive payments for adoptions in 1998, 1999, and 2000.<sup>98</sup>

This controversial bill has been widely criticized for its deleterious effects on the child welfare system. First, ASFA raised concerns that the bill incentivized States to work towards adoption without equivalent incentivization to facilitate reunification.<sup>99</sup> Second, opponents of the bill highlighted its lack of uniform implementation as States routinely exempted youth from ASFA's provisions, including "adolescents and children with serious medical needs for whom locating adoptive parents would take a long time."<sup>100</sup> Further, due to the increasing numbers of TPR petitions being sought and granted, there has been a significant increase in the number of children and youth waiting to be adopted that has not been matched with an increase in number of individuals seeking to adopt.<sup>101</sup> Three years after its enactment, the average length of stay for children in foster care was approximately one year while children and youth waiting to be adopted spent on average over three years in care.<sup>102</sup> Thus, despite its purported goal of reducing the time children and youth spent languishing in foster

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<sup>95</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-585, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 8 (2002).

<sup>96</sup> *Id.*

<sup>97</sup> 42 U.S.C.A. § 673(b)(3)(d)(1) (West); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 95, at 8.

<sup>98</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 95, at 8.

<sup>99</sup> See, e.g., Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: The Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 140 (2004).

<sup>100</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 95, at 4, 28.

<sup>101</sup> See Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, IMPRINT (Nov. 28, 2018, 6:00 AM), <https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582>.

<sup>102</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 95, at 10.

care, ASFA's systematic dissolution of families significantly increased children's lengths of stay in out of home placements.

### **E. The Foster Care Independence Act (FCIA) of 1999**

With increasing awareness of the adverse outcomes experienced by older youth in foster care, Congress enacted a series of legislation over the past several decades containing provisions specifically aimed at addressing issues facing older youth in foster care. Notably, the Foster Care Independence Act (FCIA) of 1999 expanded concurrent permanency planning to include teens.<sup>103</sup> Concurrent permanency for teens seeks to help transition-age youth develop and strengthen relationships with their relatives and other adults to help ensure young people "have emotional supports in place if an adoptive family cannot be identified by the time the youth turns age 18 or becomes ineligible for foster care."<sup>104</sup> Thus, FCIA recognized the importance of connecting young people preparing to transition from foster care to adulthood with family and other positive social supports.

At the same time, FCIA established the John H. Chafee Foster Care Independence Program ("Chafee"), which identified and supported youth remaining in care at eighteen years old to prepare for independence by facilitating access to assistive services including education and employment, physical and mental health services, and housing assistance.<sup>105</sup> The FCIA also authorized States to extend Medicaid coverage to young people aging out of foster care up to age twenty-one.<sup>106</sup> Thus, FCIA, through Chafee, established a system to provide young people with material supports when reunification and other permanency options were not available or achieved by the time they turned eighteen. Some child welfare experts, however, noted the

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<sup>103</sup> CHILD.'S BUREAU, U.S DEP'T OF HEALTH & HUM. SERVS., CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN: STATE STATUTES CURRENT THROUGH NOVEMBER 2016, at 2 (2016) [<https://web.archive.org/web/20201227200200/https://www.childwelfare.gov/pubPDFs/concurrent.pdf>].

<sup>104</sup> *Id.*

<sup>105</sup> Foster Care Independence Act of 1999, Pub. L. No. 106-169, §101(a)(5), 113 Stat. 1822, 1823-24 (1999); *Solutions and Highlights: Federal Legislation*, YOUTH.GOV, <https://youth.gov/youth-briefs/foster-care-youth-brief/solutions> (last visited Feb. 20, 2022).

<sup>106</sup> Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (1999); 42 U.S.C.S. § 1396d(a)(i).

unintended consequence of Chafee as it was originally enacted.<sup>107</sup> Specifically, young people with the potential of achieving permanency were at risk of losing access to their Chafee benefits, leaving them “to choose between a family and an education.”<sup>108</sup>

#### **F. The Promoting Safe and Stable Families Amendment to the Act of 2001**

The Promoting Safe and Stable Families Amendment to the Act of 2001 augmented FCIA by authorizing the Education and Training Voucher (ETV) Program, which is operated by each state or locality to provide financial assistance for foster youth pursuing postsecondary education and vocational training.<sup>109</sup> Under this Act, young people were eligible to receive financial assistance through the ETV Program up to age twenty-three provided they maintained continuous enrollment in the education or training program and satisfactory progress towards completion of the program.<sup>110</sup> Youth enrolled in approved postsecondary education or vocational training programs may also receive a maximum of \$5,000 towards their programs and expenses, such as transportation costs, housing, and childcare for parenting young adults.<sup>111</sup>

While the aims of these programs were to promote increased enrollment and postsecondary education success, they have not been largely successful at achieving these aims. For example, the \$5,000 cap, which remains in effect, may be insufficient to cover tuition, books and supplies, transportation, and housing expenses even with additional financial aid.<sup>112</sup> Additionally, the cutoff at age twenty-three often

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<sup>107</sup> JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, PEW CHARITABLE TRUSTS, TIME FOR REFORM: AGING OUT AND ON THEIR OWN 1, 12 (2007), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster\\_care\\_reform/kidsarewaitingtimeforreform0307pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/kidsarewaitingtimeforreform0307pdf.pdf).

<sup>108</sup> *Id.*

<sup>109</sup> Foster Care Independence Act of 1999, tit. II, sec. 201(a)(3), § 477(a)(6), 115 Stat. 2413, 2422 (2002).

<sup>110</sup> Foster Care Independence Act of 1999, tit. II, sec. 201(b) § 677(i)(2), 115 Stat. 2413, 2422-23 (2002).

<sup>111</sup> Foster Care Independence Act of 1999, tit. II, sec. 201(b) § 677(i)(4)(b), 115 Stat. 2413, 2423 (2002).

<sup>112</sup> *See, e.g.*, YOUTH IN CARE COAL., CMTY. SERV. SOC’Y, FOSTERING INDEPENDENCE: THE NEED FOR A STATEWIDE FOSTER YOUTH COLLEGE SUCCESS INITIATIVE 8-10 (2014), <https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Foster%20Youth%20Report%20FINAL%20WEB.pdf>.

resulted in youth being ineligible for or losing access to these funds while pursuing their education, which created significant barriers to attending and completing postsecondary education programs.<sup>113</sup>

### **G. The Fostering Connections to Success and Adoptions Act of 2008**

The Fostering Connections to Success and Adoptions Act of 2008 (“Fostering Connections”) helped to bridge the gap of supportive services for older youth preparing for adulthood by permitting states to provide foster care to age twenty-one for youth who had not achieved permanency by age eighteen.<sup>114</sup> Specifically, Fostering Connections permitted, but did not require, states to allow youth to remain in foster care beyond age eighteen and enabled youth who turned eighteen years old in foster care to receive health care coverage until age twenty-six.<sup>115</sup>

Fostering Connections also requires child welfare agencies to begin assisting the young person by preparing a transition plan, which focuses on options for housing, health insurance, education and employment, and opportunities for building and maintaining social connections, no later than ninety days before turning eighteen years old or the expected date of discharge from foster care.<sup>116</sup> To access foster care after turning eighteen years old, youth must sign a voluntary service agreement, which typically requires them to work an average of twenty hours per week and/or be enrolled in postsecondary education or vocational training unless unable to do so due to a medical condition.<sup>117</sup> If youth do not comply with the provisions of the voluntary service agreement, the State may withdraw services and discharge them from foster care.<sup>118</sup>

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<sup>113</sup> AMY DWORSKY ET AL., U.S. DEP’T HOUS. & URB. DEV., HOUSING FOR YOUTH AGING OUT OF FOSTER CARE: A REVIEW OF THE LITERATURE AND PROGRAM TYPOLOGY 15 (2012).

<sup>114</sup> YOUTH.GOV, *supra* note 105.

<sup>115</sup> *Id.*

<sup>116</sup> Fostering Connections to Success and Adoptions Act of 2008, tit. II, sec. 202, §475(5), 122 Stat. 3959 (2008).

<sup>117</sup> *See generally id.*; FERNANDES-ALCANTARA, *supra* note 40, at 7-8.

<sup>118</sup> FERNANDES-ALCANTARA, *supra* note 40, at 7.

## H. The Family First Prevention Services Act of 2018

The Family First Prevention Services Act (“Family First”) was enacted on February 9, 2018 as part of the Bipartisan Budget Act.<sup>119</sup> Family First has been widely regarded as the first piece of federal legislation to authorize Title IV-E funds, which sources the majority of federal funding for foster care, to support families before they become involved with the child welfare system.<sup>120</sup> Specifically, in response to an increasing number of children and youth entering foster care due to parental substance use, the Act promotes the use of evidence-based prevention services, such as substance abuse and mental health treatment, by directing states to spend 50% of Title IV-E prevention funding on services rated as “well-supported” by the Title IV-E Prevention Services Clearinghouse (“Clearinghouse”).<sup>121</sup>

In addition, Family First has been recognized for its provisions aimed at improving placements and outcomes for older youth involved in the child welfare system.<sup>122</sup> First, the Act limits federal reimbursement for placements in group homes and prioritizes family-based care.<sup>123</sup> But Family First exempts young people over age eighteen from this limitation on congregate care placements<sup>124</sup> and does not provide additional funding for alternative placement arrangements for young people who would be displaced by federal divestment of congregate care.<sup>125</sup> While Family First requires that States work to ensure youth are not simply moved out of group homes and into the

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<sup>119</sup> Family First Prevention Services Act, Pub. L. No. 115-123, §§ 50701-82, 132 Stat. 232 (2018).

<sup>120</sup> Nina Williams-Mbengue, *Family First: Federal Child Welfare Law*, NAT’L CONF. STATE LEGISLATURES (July 3, 2019), <https://www.ncsl.org/research/human-services/family-first-implementing-landmark-federal-child-welfare-law.aspx>.

<sup>121</sup> *Id.*; John Kelly, *Year-End Spending Bill Includes Hundreds of Millions for Family First Act*, IMPRINT (Dec. 17, 2019, 6:20 AM), <https://imprintnews.org/featured/year-end-spending-bill-includes-hundreds-of-millions-for-family-first-act/39738>.

<sup>122</sup> *See, e.g.*, Rachel Rosenberg & Amy McKlindon, *The Family First Prevention Services Act Can Fund Needed Services and Supports for Older Youth in Foster Care*, CHILD TRENDS (Aug. 28, 2019), <https://www.childtrends.org/blog/the-family-first-prevention-services-act-fund-needed-services-supports-older-youth-foster-care>.

<sup>123</sup> Williams-Mbengue, *supra* note 120.

<sup>124</sup> *Id.*

<sup>125</sup> Hughes, *supra* note 18.



criminal justice system,<sup>126</sup> it provides no guidance or funding to assist States to comply with this mandate and only requires States and tribes to submit reports on the impact of Family First restrictions on placement settings on youth involvement with the juvenile justice systems by 2025.<sup>127</sup>

Second, Family First renamed the John H. Chafee Foster Care Independence Programs as the John H. Chafee Foster Care Program for Successful Transition to Adulthood and authorizes States to extend foster care and Chafee funds to age twenty-three.<sup>128</sup> In addition, to address some of the program's prior limitations, notably that many young people did not complete a postsecondary education by age twenty-three and thus had their financial assistance terminated before graduating, Family First now permits States to extend ETV for young adults up to age twenty-six.<sup>129</sup>

Despite Congress's long history of enacting funding statutes aimed at improving child welfare services, however, Family First was designed as budget-neutral<sup>130</sup> and does not provide any additional funding for Chafee or ETV services.<sup>131</sup> Specifically, under Family First, "[t]he current budgetary allocation for Chafee services remains \$140 million, with an increase to \$143 million in 2020" and "[t]he budgetary allocation for ETV remains at \$60 million."<sup>132</sup> The lack of additional funding for these programs is particularly problematic given that Chafee funds were already stretched thin covering young people in foster care receiving services until age twenty-one.<sup>133</sup> As more young people are

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<sup>126</sup> Social Impact Partnership to Pay for Results Act, Pub. L. No. 115-123, § 2052(b)(14), 132 Stat. 270 (2008).

<sup>127</sup> See CHIP, tit. I, sec. 50102, § 1139(A), 132 Stat. 175 (2018).

<sup>128</sup> Family First Prevention Services Act, tit. VII, sec. 50753, §477(i)(3), 132 Stat. 263, 265 (2018) (amending 42 U.S.C. §677(i)(3)); see also Williams-Mbengue, *supra* note 120.

<sup>129</sup> See Family First Prevention Services Act, sec. 5073(c); see also Williams-Mbengue, *supra* note 120.

<sup>130</sup> See Hughes, *supra* note 18.

<sup>131</sup> CHILD.'S DEFENSE FUND, IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS, AND OTHER STAKEHOLDERS 128 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> LYNN TIEDE & KRISTINA ROSINKSY, FUNDING SUPPORTS AND SERVICES FOR YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE 15 (2019),

now eligible to access services longer by remaining in foster care up to age twenty-three, additional funding is needed to meet the increasing demand for such services.<sup>134</sup> But despite the growing demand, the Chafee program has received minimal funding increases since its inception.<sup>135</sup> To place the issue of the stagnant funding in perspective, “after accounting for inflation, Chafee’s funding levels are about 30 percent *lower* now than when it was established.”<sup>136</sup>

The decision not to increase funding for Chafee or ETV seems to make sense, in theory, given the goal of Family First is to prevent children and youth from ever entering foster care, thereby reducing the need for services to assist older youth in care transition to adulthood. But child advocates viewing Family First through a more critical lens have noted that the provisions do not actually prescribe prevention but rather early intervention by only authorizing funding for services for “foster care candidates.”<sup>137</sup> This means that Family First funding is not authorized until after abuse and neglect have occurred.<sup>138</sup> Others have similarly noted that Family First does not address many of the common needs that lead to family separation, and instead suggest that efforts aimed at prevention “must reorient to aggressively reduce poverty, reduce food insecurity, increase access to affordable housing, and provide access to early, quality childcare and education.”<sup>139</sup> Instead, its focus on early intervention may increase surveillance of low-income and impoverished communities that have been and continue to be disproportionately targeted and adversely impacted by child welfare agencies, allowing for increased family interference, earlier.<sup>140</sup> Thus,

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[https://www.childtrends.org/wp-content/uploads/2019/09/YV-Report\\_ChildTrends\\_Sept2019.pdf](https://www.childtrends.org/wp-content/uploads/2019/09/YV-Report_ChildTrends_Sept2019.pdf).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (emphasis added).

<sup>137</sup> Lindsey Getz, *A Closer Look at Family First – The Pros and Cons of Recent Foster Care Legislation*, SOC. WORK TODAY, [https://www.socialworktoday.com/archive/exc\\_0319.shtml](https://www.socialworktoday.com/archive/exc_0319.shtml) (last visited Feb. 20, 2021); see also Hughes, *supra* note 18.

<sup>138</sup> Getz, *supra* note 137.

<sup>139</sup> Vivek Sankaran & Christopher Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L. REV. 123, 137 (2020); see also MOFFA ET AL., *supra* note 57, at 1-4.

<sup>140</sup> Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. (Feb. 17, 2021), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/>.

the actual effects of the provisions may be limited in terms of diverting youth involvement in foster care and “[w]ithout additional funding for the extension of Chafee to age twenty-three, resource-strapped jurisdictions will have difficulty making the case to extend supports, or they may extend supports only in a very limited way.”<sup>141</sup>

### I. The Family First Transition Act

The Family First Transition Act<sup>142</sup> (“Transition Act”) was enacted as part of the Further Consolidated Appropriations Act in 2019 in response to states’ challenges implementing Family First, which called for significant restructuring of states’ child welfare systems without providing sufficient funding or implementation support.<sup>143</sup> The Transition Act thus aims to “provide[] financial relief for States as their child welfare systems develop prevention-focused infrastructure” and “to encourage timely implementation of the 2018 Family First Act.”<sup>144</sup> But while the Transition Act helps address some of the barriers to the Family First’s implementation and funding, it largely accomplishes this by allowing states additional delays in implementing key provisions of Family First and authorizing time-limited funding. For example, due to the limited data on evidence-based interventions, the Transition Act delays enforcement of the provision that tied federal funds to evidence-based services ranked by the Clearinghouse as “well-supported,” to allow more time – and an additional \$2.75 million – to the Clearinghouse to review and rate the evidence-based programs.<sup>145</sup> The Transition Act also authorizes a one-time payment of \$500 million to be distributed among the states and 3% to be allocated to tribes as flexible funds to support the implementation of Family First.<sup>146</sup> There is no

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<sup>141</sup> TIEDE & ROSINSKY, *supra* note 133, at 15.

<sup>142</sup> Family First Transition Act, Pub. L. No. 116-94, § 602, 133 Stat. 3120 (2019).

<sup>143</sup> *Family First Legislation*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 15, 2021), <https://www.ncsl.org/research/human-services/family-first-updates-and-new-legislation.aspx>; *see also* John Kelly, *List of States Seeking Family First Act Delay is Up to at Least 27*, IMPRINT (May 28, 2019, 7:37 AM), <https://imprintnews.org/youth-services-insider/list-of-states-seeking-family-first-act-delay-is-up-to-at-least-27/35239>.

<sup>144</sup> NAT’L CONF. OF STATE LEGISLATURES, *supra* note 143.

<sup>145</sup> Elizabeth Jordan & Amy McKlindon, *The Family First Transition Act Provides New Implementation Support for States and Tribes*, CHILD TRENDS (Mar. 10, 2020), <https://www.childtrends.org/publications/the-family-first-transition-act-provides-new-implementation-supports-for-states-and-tribes>.

<sup>146</sup> *Id.*

explicit mention, however, of funds being directed towards implementing the evidence-based services or supporting state efforts to extend foster care to age twenty-three.

### **J. Supporting Foster Youth and Families through the Pandemic Act of 2020**

In December 2020, nearly one year after the onset of the COVID-19 pandemic in the United States, the former administration enacted the Supporting Foster Youth and Families through the Pandemic Act as part of the Consolidated Appropriations Act.<sup>147</sup> To address some of the short-term crises experienced by youth in care, the Act temporarily placed a moratorium on youth aging out until September 2021 and granted states increased funding.<sup>148</sup> Specifically, Supporting Foster Youth and Families through the Pandemic Act provided an additional \$400 million for Chafee programs in 2020,<sup>149</sup> for which Congress originally allotted only \$3 million under Family First. The Act also provided \$50,000,000 for ETVs, which received no additional funding under Family First, increased the maximum award amount under the ETV from \$5,000 to \$12,000 until 2022, temporarily removed the 30% cap on housing costs, and waived the requirements that States match funds made available.<sup>150</sup>

In addition, recognizing that countless youth had already been forced to age out during the pandemic due to States' mandatory age cut offs for extended foster care, the Supporting Foster Youth and Families through the Pandemic Act permitted young people who aged out to voluntarily re-enter foster care.<sup>151</sup> The Act also charged States operating Title IV-E funded extended foster care to notify aged-out youth of their right to re-enter foster care and to facilitate the voluntary re-entry.<sup>152</sup> But despite a lack of knowledge and understanding of the

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<sup>147</sup> Supporting Foster Youth and Families through the Pandemic Act, H.R. 7947, 116th Cong. (2019-2020) (enacted).

<sup>148</sup> H.R. 7947; DANNY K. DAVIS & JACKIE WALORSKI, HOUSE COMM. WAYS & MEANS, H.R. 7947, *THE SUPPORTING FOSTER YOUTH AND FAMILIES THROUGH THE PANDEMIC ACT: SECTION-BY-SECTION SUMMARY 1*, <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Supporting%20Foster%20Youth%20Act%20-%20Section%20by%20Section.pdf> (last visited Dec. 30, 2021).

<sup>149</sup> DAVIS & WALORSKI, *supra* note 148.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 2.

<sup>152</sup> *Id.*

full extent of adverse effects of the pandemic on young people in out of home placements, and the child welfare system as a whole,<sup>153</sup> the temporary safety net afforded to young people by the Act was removed on September 30, 2021, and young people are once again forced to age out of foster care as the nation continues its efforts to recover from the deleterious impact of the COVID-19 public health emergency.<sup>154</sup>

#### IV. STATES THAT HAVE AUTHORIZED FOSTER CARE BEYOND 18 YEARS OF AGE

##### A. States with Extended Foster Care Beyond 18

According to the Juvenile Law Center's 2018 National Extended Foster Care Review, forty-nine states have authorized foster care beyond age eighteen.<sup>155</sup> While nineteen states and the District of Columbia have authorized state-initiated extended care,<sup>156</sup> twenty-seven

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<sup>153</sup> See Aubrey Edwards-Luce et al., *Key Stats on the Effect of COVID-19 on Kids*, FIRST FOCUS (Nov. 19, 2020), <https://firstfocus.org/resources/key-stats-on-the-effect-of-covid-19-on-kids>.

<sup>154</sup> Brian Rinker, *Pandemic Relief for Foster Youth Expires, Ending Aid to Thousands*, YOUTH TODAY (Sept. 30, 2021), <https://youthtoday.org/2021/09/pandemic-relief-for-foster-youth-expires-today-ending-aid-to-thousands/>; Press Release, Child.'s Rights, Relief Expires Today for 20,000 Foster Youth Aging Out During the Pandemic (Sept. 30, 2021), <https://www.childrensrights.org/press-release/aging-out-during-the-pandemic/>.

<sup>155</sup> See *Extended Foster Care*, JUV. L. CTR.: ISSUES, (last visited Feb. 2, 2020), <https://jlc.org/issues/extended-foster-care>; see also *Extended Foster Care in Oklahoma*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/oklahoma> (last visited Feb. 21, 2021) (noting "Oklahoma does not offer extended foster care, but provides services through its Successful Adulthood program, which is funded by Chafee IL funds."); see also Tiano & de Sá, *supra* note 41 (indicating that every state except Oklahoma has authorized some form of foster care beyond age 18).

<sup>156</sup> *Extended Foster Care*, *supra* note 155 (citing District of Columbia (D.C. CODE § 16-2303 (2022)); Arizona (ARIZ. ADMIN. CODE R21-5-205 (2016)); Colorado (COLO. REV. STAT. § 19-3-205(1) (2011)); Florida (FLA. STAT. § 39.6251(1), (2), (5)(a) (2013)); Idaho (IDAHO CODE § 39-1202(9) (1963)); Iowa (IOWA CODE § 234.1(2) (2009)); Kansas (KAN. STAT. ANN. § 38-2203 (2006)); Kentucky (KY. REV. STAT. ANN. §§ 610.110(6) (West 2014), 620.140(1)(d)-(e) (West 2014)); Louisiana (67 LA. ADMIN. CODE tit. V, § 3903 (2019)); Mississippi (MISS. CODE ANN. § 43-15-13(1) (West 1978)); Missouri (MO. REV. STAT. § 211.036 (1989)); Montana (MONT. ADMIN. R. 37.51.102 (2006)); Nevada (NEV. REV. STAT. § 432B594(1), (2),(4) (2011); see also NEV. REV. STAT. § 432B.593(4) (2011)); New Hampshire (N.H.

states have enacted Title IV-E approved extended foster care,<sup>157</sup> which means they receive federal reimbursement for a portion of the costs of

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REV. STAT. ANN. § 169-C:34(V-a)(1978)); New Jersey (N.J. STAT. ANN. § 30:4C-2.3 (West 2004)); Rhode Island (14 R.I. GEN. LAWS § 14-1-6(c) (2008)); South Carolina (S.C. DEP'T HUM. SERVS., HUM. SERVS. POL'Y AND PROC. MANUAL 832.01.01 (Sept. 8, 2014), [https://dss.sc.gov/resource-library/manuals/hs\\_manuals/foster\\_care\\_hs.pdf](https://dss.sc.gov/resource-library/manuals/hs_manuals/foster_care_hs.pdf)); South Dakota (S.D. CODIFIED LAWS § 26-6-6.1 (1973)); Vermont (VT. STAT. ANN. tit. 33, § 4904 (2007)); and Wyoming (WYO. STAT. ANN. § 14-3-431(b) (1997)).<sup>157</sup> *Extended Foster Care*, *supra* note 155 (citing Alabama (ALA. CODE § 38-7-2(1); ALA. ADMIN. CODE r. 660-5-48-.05(1)(a) (2002)); Alaska (ALASKA STAT. § 47.10.080(c) (1957)); Arkansas (ARK. CODE ANN. § 9-27-363(b)(ii)(B) (2021)); California (CAL. WELF. & INST. CODE § 11403(b) (Deering 2010)); Connecticut (CONN. GEN. STAT. § 46b-129(j)(5) (2012)); Georgia (GA. CODE ANN. § 15-11-2(10)(C) (1981)); Hawaii (HAW. REV. STAT. § 346-395 (2014)); Illinois (705 ILL. COMP. STAT. ANN. 405/2-33 (LexisNexis 1998)); Indiana (IND. CODE §§31-28-5.8-4, 31-28-5.8-5(a) (2017)); Maine (ME. REV. STAT. tit 22, § 4037-A(1) (2021)); Maryland (MD. CODE REGS. 07.02.11.04(B) (2022)); Massachusetts (MASS. GEN. LAWS, ch. 119, § 23(f) (2010)); Michigan (MICH. COMP. LAWS §§ 400.643(c), 400.649 (2022)); Minnesota (MINN. STAT. §§ 260C.451(3), (3a) (1999)); Nebraska (NEB. REV. STAT. § 4503 (2021)); New York (N.Y. FAM. CT. ACT § 1055(e) (Consol. 1970). *See also* NYC ADMIN. FOR CHILD.'S SERVS., EXCEPTION TO POLICY REQUESTS—CONTINUATION OF CARE PAST AGE 21, at 3, <https://www1.nyc.gov/assets/acs/policies/init/2014/L.pdf> (last visited Feb. 20, 2022); *see also Exception to Policy Request to Remain in Care Past Age 21 FPS-019*, NYC ADMIN. FOR CHILD.'S SERVS. (June 2017), [https://www1.nyc.gov/assets/acs/pdf/draft\\_policies/2017/FPS019.pdf](https://www1.nyc.gov/assets/acs/pdf/draft_policies/2017/FPS019.pdf)). North Carolina (N.C. GEN. STAT. § 108A-48(c) (1981)); North Dakota (N.D. CENT. CODE § 27-20-30.1(2) (2022)); Ohio (OHIO REV. CODE ANN. § 5101.1411(A)(1), (C) (LexisNexis 2017)); Oregon (OR. REV. STAT. § 419B.337(6) (1993)); Pennsylvania (42 PA. CONS. STAT. § 6302 (1978)); Tennessee (TENN. CODE ANN. § 37-2-417(b) (2010)); Texas (40 TEX. ADMIN. CODE § 700.346(a), (c) (2012)); Virginia (VA. DEP'T OF SOCIAL SERVS., CHILD & FAM. SERVS. MANUAL § 14B.4.3 (2018)); Washington (WASH. REV. CODE § 74.13.020(3)(b) (2011)); West Virginia (W. VA. CODE § 49-4-110(b) (2015)); Wisconsin (WIS. STAT. § 48.366(1) (2014)); *see also* WIS. STAT. § 938.366(1) (2013)); *see also* GOV'T ACCOUNTABILITY OFF., FOSTER CARE: STATES WITH APPROVAL TO EXTEND CARE PROVIDE INDEPENDENT LIVING OPTIONS FOR YOUTH UP TO AGE 21, at 1-2 (2019), <https://www.gao.gov/assets/700/699219.pdf> (noting six federally recognized tribes have Title IV-E funded foster care but that the study did not examine tribes in the review of states with extended foster care).

extending foster care.<sup>158</sup> Of the forty-nine states offering extended foster care, one state (Iowa) authorizes foster care to age nineteen,<sup>159</sup> one state (Indiana) authorizes foster care to age twenty,<sup>160</sup> and forty-two states authorize foster care to age twenty-one.<sup>161</sup> In addition, Montana’s statute provides that “[a] youth over the age of 18 may remain in foster care if still in secondary school” with no age cutoff specified.<sup>162</sup> Further, two states authorized extended court oversight, including Delaware, which authorizes supervised aftercare services to age twenty-one<sup>163</sup> and New Mexico, which authorizes foster care to be extended for one year up to age nineteen where the State has not satisfied “reasonable efforts” to provide the young person with independent living services and where termination of care would cause harm to the young person.<sup>164</sup>

### **B. States that Authorize Foster Care Beyond Age 21**

Since the enactment of the Family First Act in 2018, few states have authorized foster care services beyond twenty-one years of age. Three states have extended foster care to age twenty-two.<sup>165</sup> Of these three states, Massachusetts has Title IV-E funded foster care and Florida

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<sup>158</sup> GOV’T ACCOUNTABILITY OFF., *supra* note 157, at 2.

<sup>159</sup> IOWA CODE § 234.1(2) (2009).

<sup>160</sup> IND. CODE §§ 31-28-5.8-4, 31-28-5.8-5(a) (2017).

<sup>161</sup> *See Extended Foster Care*, *supra* note 155.

<sup>162</sup> *Extended Foster Care in Montana*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/montana> (last visited Feb. 20, 2022) (citing MONT. ADMIN. R. 37.51.102(5) (2006)). However, the maximum age limit to which free education must be offered in Montana is nineteen. *State Education Practices Table 5.1*, NAT’L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) (last visited Feb. 13, 2021).

<sup>163</sup> *Extended Foster Care in Delaware*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/delaware> (last visited Feb. 20, 2022) (citing DEL. CODE ANN. tit. 10 § 929(c), (e) (2022) (providing that the court must also evaluate and make findings of the youth’s independent living services including (1) financial stability; (2) housing; (3) medical benefits, including access to health care; (4) employment and training; (5) education; and (6) community and individual connections to help support the youth)).

<sup>164</sup> *Extended Foster Care in New Mexico*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/new-mexico> (last visited Feb. 20, 2022) (citing N.M. STAT. ANN. § 32A-4-25.3 (2009)).

<sup>165</sup> MASS. GEN. LAWS, ch. 119, § 23(f) (amended 2010); FLA. STAT. § 39.6251(5)(a) (2013); VT. STAT. ANN. tit. 33, § 4904(b)(1)(B) (2007).

and Vermont provide state-initiated foster care.<sup>166</sup> In addition, the Pennsylvania Department of Human Services (PA DHS) announced on July 7, 2020 that older youth who would otherwise be aging out of the system at age twenty-one would be eligible for aftercare services, such as life skills training, prevention services, support services, housing, education, employment services, until age twenty-three pursuant to Family First.<sup>167</sup> The PA DHS estimated that this extension of services would benefit approximately 1,500 young people in 2020-2021.<sup>168</sup>

In addition, the New York City Administration for Children's Services (ACS) authorizes youth to remain in care past age twenty-one "when necessary to ensure that a young person has stable housing and other supports they need" and mandates that young people may not exit foster care without achieving permanency via reunification, adoption or kinship legal guardianship, or access to stable housing (i.e., housing that the youth may reside in for at least the following twelve consecutive months).<sup>169</sup> To achieve these aims, David A. Hansell, Commissioner for ACS, indicates child welfare agencies are required "to continue foster care and support beyond age 21 if permanency or housing has not been secured prior to the young person turning 21."<sup>170</sup> Specifically, Hansell notes, continuing foster care is not merely the critical act of providing a roof over a young person's head but also "extend[ing] access to critical resources and support to help improve a young person's pathway to adulthood," such as programs aimed at supporting enrollment in postsecondary education and vocational training and opportunities.<sup>171</sup> However, while New York City is able to provide such services to young people in need beyond age twenty-one without

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<sup>166</sup> *Extended Foster Care in Massachusetts*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/massachusetts> (last visited Feb. 20, 2022); *Extended Foster Care in Florida*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/florida> (last visited Feb. 20, 2022); *Extended Foster Care in Vermont*, JUV. L. CTR., <https://jlc.org/issues/extended-foster-care/vermont> (last visited Feb. 20, 2022).

<sup>167</sup> Press Release, Pa. Pressroom, Dep't of Hum. Servs. Extends Eligibility for Aftercare Servs. for Former Foster Youth to Age 23 (July 7, 2020), [https://www.media.pa.gov/Pages/DHS\\_details.aspx?newsid=564](https://www.media.pa.gov/Pages/DHS_details.aspx?newsid=564).

<sup>168</sup> *Id.*

<sup>169</sup> David A. Hansell, *Support Young People in Foster Care Beyond 21*, IMPRINT (June 19, 2020, 11:29 AM), <https://imprintnews.org/foster-care/support-young-people-in-foster-care-beyond-21/44657>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*



receiving federal or state aid,<sup>172</sup> many states and localities are not in the financial position to provide such care without the aid of additional federal funding and resources.<sup>173</sup>

### C. Policy Implications: Individual and Societal Benefits of Providing Foster Care Beyond Age 18

Although states have largely been slow to act, states that have authorized foster care beyond age eighteen have seen marked improvements in outcomes for young people in and exiting care. For example, one study examining the outcomes among young people who remained in foster care to age twenty-one found each additional year in care resulted in a decrease of more than \$700 received in need-based public food assistance programs and reduced the likelihood of young adults experiencing an economic hardship, such as inability to pay utility bills, by approximately 12% among young people ages seventeen to twenty-one.<sup>174</sup> On average, young people's annual income increased by \$924 each additional year they spent in foster care.<sup>175</sup> Providing foster care beyond age eighteen also reduces the likelihood of young people becoming homeless or couch surfing by age nineteen or twenty.<sup>176</sup> According to the National Youth in Transition Database

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<sup>172</sup> Hansell, *supra* note 169.

<sup>173</sup> See, e.g., KATRINA BREWSAUGH ET AL., URB. INST., STATE APPROACHES TO EXTENDING CHAFEE SERVICES TO AGE 23: INSIGHTS TO INFORM A LEARNING AGENDA 5 (2021) (“Six states cited funding constraints as a major reason for not extending eligibility for Chafee-funded services to age 23. The extension does not come with additional funding, and these states indicated it would be difficult for them to serve a larger population with the same amount of funds. This was especially true for states that had already exhausted their Chafee funds supporting young people under age 21.”).

<sup>174</sup> MARK E. COURTNEY ET AL., REPORT FROM CALYOUTH: FINDINGS ON THE RELATIONSHIP BETWEEN EXTENDED FOSTER CARE AND YOUTH'S OUTCOMES AT AGE 21, at ii (2018), <https://www.chapinhall.org/wp-content/uploads/PDF/Impacts-of-extended-care-age-21.pdf>

<sup>175</sup> Tiano & de Sá, *supra* note 41.

<sup>176</sup> Nathanael J. Okpych & Mark E. Courtney, *The Relationship Between Extended Foster Care and College Outcomes for Foster Care Alumni*, 14 J. PUB. CHILD WELFARE 254, 255 (2020) (citing MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 (2005), [https://www.chapinhall.org/wp-content/uploads/Courtney\\_Midwest-Evaluation-Adult-Functioning\\_Report\\_2005.pdf](https://www.chapinhall.org/wp-content/uploads/Courtney_Midwest-Evaluation-Adult-Functioning_Report_2005.pdf); Nathanael J. Okpych & Mark E. Courtney, *Who Goes to College? Social Capital and Other Predictors of College Entry*

(NYTD) Report to Congress released in 2020, for example, 30% of twenty-one year old youth with previous foster care involvement had experienced homelessness within the past two years compared to 15% of twenty-one year-olds in foster care.<sup>177</sup>

Young people who receive continued care beyond age eighteen also experience improved educational outcomes. For example, for each additional year youth receive extended aftercare services, youth are approximately 8% more likely to obtain a high school diploma or GED.<sup>178</sup> Supportive services, including assistance covering basic housing and daily living expenses, enable young people to be “less encumbered by full-time employment and economic hardships and [to] pursue a college education.”<sup>179</sup> Specifically, youth who receive continued support beyond age eighteen are approximately 10-11% more likely to enroll in postsecondary education and more likely to be employed.<sup>180</sup> Young people receiving supports also save on average an additional \$400, which for youth who stayed in care until age twenty-one “translated to have about \$1,200 more in the bank compared to youth who spent no time in extended care.”<sup>181</sup>

In addition, young people in extended care are more likely to have social support compared to youth who aged out before age twenty-one.<sup>182</sup> The NYTD Report to Congress revealed that 93% of twenty-one-year-olds in foster care had a connection to an adult compared to 85% of twenty-one-year-olds not in foster care.<sup>183</sup> Connecting young people in care with positive social supports is particularly important to help “navigate time-sensitive tasks, connect them to resources (e.g.,

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for *Foster Care Youth*, 8 J. SOC’Y SOC. WORK & RSCH. 563 (2017) [hereinafter Okpych & Courtney, *Who Goes to College?*].

<sup>177</sup> ADMIN. CHILD. & FAMS., NATIONAL YOUTH IN TRANSITION DATABASE REPORT TO CONGRESS 10 (2020), [https://www.acf.hhs.gov/sites/default/files/documents/cb/nytd\\_report\\_to\\_congress.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/nytd_report_to_congress.pdf).

<sup>178</sup> COURTNEY ET AL., *supra* note 174, at ii.

<sup>179</sup> Okpych & Courtney, *supra* note 176, at 255 (citing MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26 (2011), <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf>).

<sup>180</sup> Okpych & Courtney, *supra* note 176, at 255 (citing COURTNEY ET AL., *supra* note 179).

<sup>181</sup> COURTNEY ET AL., *supra* note 174, at ii, 10.

<sup>182</sup> *Id.* at ii, 6.

<sup>183</sup> ADMIN. CHILD. & FAMS., *supra* note 177, at 10.

tutoring, mental health services, college grants earmarked for foster youth), assist with setting realistic goals, and provide encouragement and guidance to help them stay on track.”<sup>184</sup>

More broadly, improving successful transitions from foster care to adulthood is also expected to help reduce public costs.<sup>185</sup> Specifically, 5,290 more young people would graduate from high school each year, correlating to \$2.17 billion in economic gains in lifetime earnings and reduced need for public assistance, and 2,866 fewer young people would experience early parenthood by age nineteen, “resulting in avoided societal and taxpayer costs of \$295 million for the first [fifteen] years of a child’s life.”<sup>186</sup> In addition, 4,370 fewer youth would experience homelessness by age twenty-one, resulting in \$9.6 million in savings on temporary beds in homeless shelters, and 4,870 fewer youth would experience involvement with the juvenile justice system by age twenty-one, resulting in \$1.6 billion savings on detention and incarceration.<sup>187</sup> These are not merely one time savings but rather “would reduce costs to society, including reduction in taxpayer costs, by \$4.1 billion for each new group of youth people aging out of foster care.”<sup>188</sup>

#### **D. Consequences of Cutting Off Foster Care at Age 21**

Despite the documented benefits of providing foster care beyond age eighteen, young people who age out at twenty-one continue to experience significant challenges because, as New York Assemblywoman Tremaine Wright aptly stated, “[t]here’s no magic in turning 21.”<sup>189</sup> For example, a 2010 longitudinal study revealed young people who received services to age twenty-one were more likely to complete their first year of college compared to youth in states that

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<sup>184</sup> Okpych & Courtney, *supra* note 176, at 256.

<sup>185</sup> JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, *FUTURE SAVINGS: THE ECONOMIC POTENTIAL OF SUCCESSFUL TRANSITIONS FROM FOSTER CARE TO ADULTHOOD 3* (2019), <https://assets.aecf.org/m/resourcedoc/aecf-futuresavings-2019.pdf>.

<sup>186</sup> *Id.* at 3, 5.

<sup>187</sup> *Id.* at 5.

<sup>188</sup> *Id.*

<sup>189</sup> Megan Conn, ‘There’s No Magic in Turning 21:’ New York Legislators Are the Last Hope for Young Adults in Foster Care, *IMPRINT* (July 2, 2020) (quoting Assemblywoman Wright), <https://imprintnews.org/coronavirus/theres-no-magic-in-turning-21-new-york-legislators-are-the-last-hope-for-young-adults-in-foster-care/45010>.

terminated foster care at age eighteen.<sup>190</sup> But only 11 of the 732 young people sampled in obtained their associate's degree and none graduated with a bachelor's degree by age twenty-one.<sup>191</sup> Further, of the young people who had completed their first year of college, only 16% had graduated with an associate's or bachelor's degree and only 13% were still enrolled in their postsecondary education program by age twenty-three or twenty-four.<sup>192</sup> The authors noted that after their twenty-first birthday, the young people were in essentially the same position as their peers who had aged out at age eighteen because "they lost access to all of the services and supports that may have made it possible for them to pursue their educational goals."<sup>193</sup>

Similarly, results from a longitudinal study examining outcomes among 622 aged-out youth have "raise[d] questions about the wisdom of abruptly curtailing services for these young people when they reach their 21st birthday."<sup>194</sup> Specifically, the survey results revealed that within two years of aging out at age twenty-one, nearly 25% of young people experienced homelessness, nearly 50% did not have the financial means to cover basic living expenses including clothing, utility, or rent, and over 25% experienced food insecurity.<sup>195</sup> Thus, while foster care to age twenty-one helps to minimize some of the significant barriers to young people accessing services and continuing education, the positive effects are limited by the mandatory age cap and young people aging out are continuing to experience harsh outcomes.

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<sup>190</sup> AMY DWORSKY & MARK COURTNEY, DOES EXTENDING FOSTER CARE BEYOND AGE 18 PROMOTE POSTSECONDARY ATTAINMENT? EMERGING FINDINGS FROM THE MIDWEST STUDY 3 (2010), [https://www.chapinhall.org/wp-content/uploads/Midwest\\_IB1\\_Educational\\_Attainment.pdf](https://www.chapinhall.org/wp-content/uploads/Midwest_IB1_Educational_Attainment.pdf).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 3-4.

<sup>193</sup> *Id.* at 5; *see also* COURTNEY ET AL., *supra* note 70, at 35 (reporting that in a different survey of youth in care, nearly 15% of 222 youth reported using their monthly foster care payments, such as independent living stipends, to pay for college).

<sup>194</sup> COURTNEY ET AL., *supra* note 70, at 156.

<sup>195</sup> *Id.* at 156-57.

## V. TRANSITION-AGED YOUTH SHOULD BE ENTITLED TO FOSTER CARE TO AGE 23

### A. *Parens Patriae* and States' Duty to Provide Care to Young People in Need Beyond Age 21

As noted in Section I, *parens patriae* means “parent of the country,” which is associated with specific duties on behalf of the state and federal governments.<sup>196</sup> In the child welfare context, the doctrine of *parens patriae* requires states acting as the surrogate parent to children and youth in foster care “to serve and protect the best interests of children.”<sup>197</sup> *Parens patriae* has also expanded over time, now involving “the state’s interest and responsibility in the protection of the rights of children to receive minimum standards of care and to be safe from abuse and exploitation.”<sup>198</sup>

The Supreme Court has not yet considered the application of *parens patriae* in caring for adolescents and young adults served by the child welfare agencies. The Court has, however, acknowledged that parents “generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations” and to assist youth in “making life’s difficult decisions.”<sup>199</sup> Thus, where young people have not been reunified with their families and remain in foster care, it follows that the State, acting as the “parent,” should and does bear the responsibility of providing the support to young people in making such decisions and preparing for the transition to adulthood.

Lower courts that have considered the issue have held that the State has an affirmative duty to provide support to youth in and aging out of foster care. For example, in *Palmer v. Cuomo*, ten plaintiffs between the ages of seventeen and twenty-one years old (seven of whom had aged out of foster care and three of whom were on the precipice of aging out) brought suit against the City and State of New York for (1) breaching a statutory duty to prepare them to live independently outside

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<sup>196</sup> *Schall*, 467 U.S. at 263 (quoting *Santosky*, 455 U.S. at 766).

<sup>197</sup> Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N.M. L. REV. 159, 164 (2012) (citing *In re Knowack*, 53 N.E. 676, 677 (N.Y. 1899)).

<sup>198</sup> DAVID ALTSCHULER ET AL., CTR. FOR JUV. JUST. REFORM & JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, SUPPORTING YOUTH IN TRANSITION TO ADULTHOOD: LESSONS LEARNED FROM CHILD WELFARE AND JUVENILE JUSTICE 16 (2009), [http://www.njjn.org/uploads/digital-library/resource\\_1186.pdf](http://www.njjn.org/uploads/digital-library/resource_1186.pdf).

<sup>199</sup> *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

of foster care and (2) failing to supervise the young people who had aged out into homelessness.<sup>200</sup> The New York Court of Appeals recognized that the State had “a *parens patriae* burden” of meeting the affirmative duty to provide aid for youth requiring foster care<sup>201</sup> and held that the City of New York failed to provide the seven young people who had aged with independent living skills training.<sup>202</sup> The Court affirmed an injunction to the three young people who remained in foster care to ensure that they would not be discharged from the State’s care until they had “received adequate preparation” for independent living as required by the state regulations.<sup>203</sup> The Court also held that the State failed to provide adequate supervision to the young people after aging out and ordered the City to provide supervision until age twenty-one to “ensur[e] that their basic needs of food, clothing and housing, outside of the New York City municipal shelter system, [were] met.”<sup>204</sup>

In a similar vein, states are charged with ensuring eligible young people have access to critical services and support. The Maryland Court of Appeals in *In re Adoption/Guardianship of Dustin R.*, for example, held that the State was statutorily authorized to maintain jurisdiction over a youth in care until age twenty-one and had a duty under *parens patriae* to ensure a medically fragile young person received services.<sup>205</sup> Specifically, the state statute provided that before terminating a guardianship case, “the juvenile court must order a party to provide any service or take any other action to obtain any ongoing care needed to protect the health of a child with disabilities after he or she turns twenty-one years old.”<sup>206</sup> The Court emphasized that the legislative intent behind the statute was to ensure that “there is no gap in care between the end of the juvenile guardianship case and transition into the adult guardianship system.”<sup>207</sup> While this case and relevant statute were specific to individuals with disabilities in need of guardianship and medical care, the Court nevertheless recognized that individuals are entitled to services where the State has a *parens patriae* duty to protect

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<sup>200</sup> *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 21 (N.Y. App. Div. 1986).

<sup>201</sup> *Id.* (citing *In re O’Rourke v. Kirby*, 444 N.Y.S.2d 566, 568 (N.Y. 1981); *People ex rel. Ninesling v. Nassau Cnty. Dep’t. of Soc. Servs.*, 413 N.Y.S.2d 626, 630 (N.Y. 1978)).

<sup>202</sup> *Palmer*, 503 N.Y.S.2d at 22.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *In re Adoption/Guardianship of Dustin R.*, 128 A.3d 80, 96 (Md. 2015).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

the individual's health and welfare and where provision of such services is statutorily required.<sup>208</sup>

Moreover, courts have recognized states' failure in meeting the basic needs of young people and failing to provide services to ensure a safe and appropriate transition to adulthood following involvement in the child welfare system. The United States District Court for the Middle District of Alabama in *United States v. Terry*, for example, carved out an exception to its general rule that family background is not considered in rendering a sentence, where the State failed to provide the young person in foster care with adequate support to prevent involvement with the criminal justice system and "criminalized his conduct as it failed to meet his needs."<sup>209</sup> While the State's failure to adequately support the youth was not by itself the basis for the court's decision, it was a contributing factor in significantly reducing the young person's sentence.<sup>210</sup> Specifically, the Court noted that "when Terry aged out of the foster-care system at age 18, he was left to his own devices" and that there was no evidence that he was provided any support services or an independent-living transition plan.<sup>211</sup> The Court ultimately questioned the appropriateness of the harsh criminal sentence where the State failed to provide the youth with vocational skills or training during the eight years he spent in foster care and where the State, acting as his "parent," "elected to criminalize his behavioral problems."<sup>212</sup> The Court emphasized the State's action – and inaction – as well as the youth's history of placement instability, lack of permanency and social connections, and frequent school changes, led the youth to "turn[] to the illicit drug market for income" within two months of aging out.<sup>213</sup> Thus, the Court recognized the State's duty in providing young people in foster care with sufficient supports and services to prevent and ameliorate adverse outcomes upon exiting care.

While many young people aging out of foster care may lack the resources to challenge States for failing to provide critical transition-planning supports and services, the courts that have had the opportunity to consider the issue have consistently held that states have a duty to

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<sup>208</sup> *See id.*

<sup>209</sup> *United States v. Terry*, 427 F. Supp. 2d 1132, 1138, 1142 (M.D. Ala. 2006).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1140-41.

<sup>212</sup> *Id.* at 1138-39.

<sup>213</sup> *Id.*

provide adequate care to facilitate a successful transition to adulthood under the doctrine of *parens patriae*.

### **B. States Have a Statutory Duty to Provide Transition Services for Older Youth in Foster**

In addition to the states' *parens patriae* duty to provide services to young people preparing for adulthood, states must also work to ensure that young people receive supports and services as prescribed by statute.<sup>214</sup> Federal law requires states to assist young people in the child welfare system to prepare for the transition to adulthood, beginning at age fourteen.<sup>215</sup> In addition, states are required to take steps "to ensure . . . the reasonable and prudent parent standard" is being exercised and that "the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities."<sup>216</sup> Additionally, at least ninety days before a youth in care turns eighteen years old, the child welfare agency must develop a transition plan with the young person that includes "specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services, [and] includes information about the importance of designating another individual to make health care treatment decisions" on behalf of the youth.<sup>217</sup> Further, Family First explicitly requires states "to support all youth who have experienced foster care at age 14 or older in their transition to adulthood through transitional services."<sup>218</sup>

In addition, even as a child welfare agency begins assisting the young person prepare for adulthood, permanency options are not taken off the table and child welfare workers should engage in concurrent planning.<sup>219</sup> Where young people do not have a stable home or family to immediately return to upon turning eighteen, child welfare workers should utilize extended foster care to continue assisting the young

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<sup>214</sup> *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 22 (N.Y. App. Div. 1986); *In re Adoption/Guardianship of Dustin R.*, 128 A.3d at 96.

<sup>215</sup> 42 U.S.C.S. § 675(1)(D) (LexisNexis).

<sup>216</sup> 42 U.S.C.S. § 675a(a)(3) (LexisNexis).

<sup>217</sup> § 675(5)(H).

<sup>218</sup> 42 U.S.C.S. § 677(a)(1) (LexisNexis).

<sup>219</sup> § 677(a)(4); *see generally* CHILD.'S BUREAU, PERCENT OF YOUTH RECEIVING INDEPENDENT LIVING SERVICES BY TYPE OF SERVICE (2018), [https://www.acf.hhs.gov/sites/default/files/documents/cb/nytd\\_data\\_points\\_fi nal\\_services\\_2016\\_2018.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/nytd_data_points_fi nal_services_2016_2018.pdf) [<https://www.acf.hhs.gov/cb/report/nytd-services-and-outcomes-reports>].



person in identifying family supports and/or social connections. As youth advocates have emphasized, “[e]xtended foster care programs that do not respond to the urgency of solidifying permanent relationships will merely postpone young people’s exit from foster care to a disconnected young adulthood.”<sup>220</sup> Congress identified this need by explicitly changing the language within the Family First Act from “transition to independence” to “successful transition to adulthood” in line with growing recognition that independence is, in fact, not the goal.<sup>221</sup> Rather than merely preparing young people in foster care to “receive the education, training, and services necessary to obtain employment,” Congress provides that states are to assist young people “who have experienced foster care at age 14 or older achieve meaningful, permanent connections with a caring adult.”<sup>222</sup>

However, despite the affirmative duty under *parens patriae* and the statutory duty under federal law to provide care and support to young people preparing to exit care even predating Family First,<sup>223</sup> states have not provided these critical services. For example, the results of the 2018 NYTD survey assessing service utilization among young people ages seventeen through twenty across all fifty states, the District of Columbia, and Puerto Rico, revealed significant underutilization of services.<sup>224</sup> In fiscal year 2016, only three states reported 90% or more young people had completed independent living needs assessments and in four states or territories, less than 10% of young people surveyed had completed an independent living needs assessment.<sup>225</sup> Further, no state reported more than 69% of young people received career preparation services and eight states reported that less than 10% of young people received these services.<sup>226</sup> South Dakota reported the highest percentage (55%) of young people receiving employment or vocational

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<sup>220</sup> KATHERINE GAUGHEN & BARBARA HANSON LANGFORD, PROMISING PROGRAM MODELS FOR EXTENDED FOSTER CARE & TRANSITION SERVICES 4 (2019), [http://yftg.org/wp-content/uploads/2019/06/PromisingProgramModels\\_Web.pdf](http://yftg.org/wp-content/uploads/2019/06/PromisingProgramModels_Web.pdf).

<sup>221</sup> Family First Prevention Services Act, tit. VII, sec. 50753(d)(1), §477, 132 Stat. 265 (2018) (amending Social Security Act, 42 U.S.C. §677).

<sup>222</sup> *Id.*

<sup>223</sup> See Fostering Connections to Success and Adoptions Act of 2008, tit. II, sec. 202, §475(5), 122 Stat. 3959 (2008).

<sup>224</sup> CHILD.’S BUREAU, *supra* note 219 (reporting the most recent State-by-State NYTD data available at the time of this writing).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

skills training and six states reported 0% of youth received this training.<sup>227</sup> Significantly, the District of Columbia reported 0% of youth received budget and financial management training, Utah and Michigan reported only 2% of youth received these services, and West Virginia reported only 3% of young people received budgeting and financial assistance.<sup>228</sup> In addition, a survey revealed that 17.5% of the 156 young people had experienced homelessness while in foster care after turning 18 years old.<sup>229</sup>

Transition services and extended foster care are designed to lengthen the “runway” and prevent young people from experiencing an abrupt service cliff that results in severe consequences upon aging out.<sup>230</sup> But for these transition services to be effective at achieving these aims, young people must have access to and receive these services. Due to the mandatory age cut offs for foster care, however, young people can essentially remain in care receiving minimal assistance, if any, before being discharged from care. Thus, requiring states to provide transition services to older youth in foster care without providing additional funding to meet this aim or enforcing accountability for when this goal is not achieved curtails the intended effects of these statutory provisions and leaves young people at significant risk of experiencing adverse outcomes during and after aging out of foster care.

## **VI. RECOMMENDATIONS FOR IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE**

In light of the positive impact of providing foster care beyond age twenty-one, and the legislative intent to improve the child welfare system and outcomes among children and youth served by the system, Congress should amend the Family First Prevention Services Act to better serve the needs of older youth in care by (1) requiring states to authorize Title IV-E funded foster care to age 23, (2) amending the aging out provision to require states to ensure no young person ages out of care without stable housing, and (3) providing states with adequate funding to achieve these aims.

First, in order to achieve its purported goal of assisting young people successfully transition to adulthood, Congress should not merely

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> COURTNEY ET AL., *supra* note 70, at 18-19.

<sup>230</sup> Jill Bloch, *Youth Aging Out of Foster Care Need a Runway, Not a Cliff*, YOUTH TODAY (Mar. 5, 2019), <https://youthtoday.org/2019/03/youth-aging-out-of-foster-care-need-runway-not-a-cliff/>.

permit but mandate states to extend care to age twenty-three. Providing foster care beyond age eighteen has been shown to increase service access and utilization for young people in foster care, but the mandatory age cutoff at twenty-one years old continues to limit the potential positive effects of extended foster care. While the extension of ETV to age twenty-six will likely help address some of the barriers to young people continuing their education, this program by itself is not sufficient to supplant the services youth have access to through extended foster care and not all youth in care pursue postsecondary education and thus do not have access to these funds. Mandating states to provide voluntary foster care to age twenty-three for young people in need of continued support and services will help address some of the barriers to youth successfully continuing their education or vocational training, building or strengthening relationships with relatives or other supports, obtaining stable employment and securing financial resources and housing to facilitate the transition to adulthood.

Second, Congress should amend the Family First provision permitting the extension of foster care to age twenty-three to mandate states to consider not only age, but also factors that are critical to this transition such as stable housing, financial stability, social connections, and life skills. This is a critically needed provision because age, by itself, is not an indicator that young people in foster care will successfully transition to adulthood and merely extending foster care by a couple of years will not address the ongoing issues young people face in accessing transition support services. The additional measures of stability would in turn place accountability on the States to ensure that young people in care receive transition-planning services and supports to prepare for exiting care. Requiring that, at a minimum, the young person has safe and stable housing that is not tied to the young person's school or involvement in foster care would create a safeguard preventing the young person's safety net from being prematurely removed where the young person is dependent on the benefits provided through extended care.

Finally, Congress should authorize additional funding to support child welfare agencies' efforts to assist young people prepare to transition to adulthood. There is evidence to support that additional funding to help support young people transitioning out of foster care will have tremendous impacts on young people's individual outcomes and result in significant cost-savings for the government and local service providers by reducing future involvement in the criminal justice system, dependency on state welfare subsidies and unemployment

benefits, and preventing intergenerational involvement in the child welfare system.<sup>231</sup> Failure to provide additional funding places an unfair financial burden on states to provide continued care to young people in need as many states had already exhausted funding providing services to young people in care to age twenty-one.<sup>232</sup>

## VII. CONCLUSION

The Family First Prevention Services Act has the potential to significantly change the child welfare system by funding prevention services for children and families before they become involved in the system and prioritizing federal funding for evidence-based quality interventions. But the effects of Family First will not immediately be realized and, as it currently stands, the bill does not go far enough to support the young people who are currently in foster care and have been adversely impacted by the system's insufficient supports and resources. Thus, Congress's attempt to improve the child welfare system through Family First must simultaneously be met with heightened efforts to support the young people already in and on the precipice of aging out of foster care. Mandating states to authorize voluntary foster care to age twenty-three, requiring states to consider additional factors besides age, including the young person's access to safe and stable housing, and increasing funding for states to achieve these aims can have significant and immediate results at improving outcomes for young people transitioning from foster care to adulthood.

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<sup>231</sup> COURTNEY ET AL., *supra* note 174; JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, FUTURE SAVINGS: THE ECONOMIC POTENTIAL OF SUCCESSFUL TRANSITIONS FROM FOSTER CARE TO ADULTHOOD 3 (2019), <https://assets.aecf.org/m/resourcedoc/aecf-futuresavings-2019.pdf>.

<sup>232</sup> BREWSAUGH ET AL., *supra* note 173.