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ARTICLES

Addressing Hidden Foster Care: The Human Impact and Ideas for Solutions

By Angie Schwartz and Cathy Krebs – March 31, 2020

“Hidden foster care” is the term recently coined by Professor Josh Gupta-Kagan to describe a practice that has existed for decades, the practice through which a child welfare agency tells a parent that unless the parent places his or her child with a friend or relative, the agency will remove that child and place the child into foster care. In addition to this coercion of the parents through the threat of removal, the agency often tells the relative that unless the relative takes the child into his or her home and takes action to protect the child, often by seeking guardianship of the child through a family or probate court, the child will end up in foster care with strangers. The practice and language are a little different in each state, but the end result is the same: The child and the parent are separated, without a court review or due process and often without a plan for reunification. And because the foster care system was bypassed, the relative or friend who took custody of the child is left to care for the child without the supports and services that the child welfare system provides to support children who have experienced abuse and neglect and without assistance in navigating contact and reunification with the parent. While there can be benefits to avoiding the foster care system, and the foster care system itself can be very problematic, hidden foster care raises many concerns, including the infringement of a parent and child’s “fundamental right to family integrity with few meaningful due process checks” (Josh Gupta-Kagan, “America’s Hidden Foster Care System,” 72 Stan. L. Rev. 1 (Aug. 19, 2019).)

It is unclear how many children are in the hidden foster care system because most states do not track or report these cases. However, Child Trends found the following: “We compared the frequency of kinship diversion to the frequency of entry to foster care. In some jurisdictions, for every 10 children entering foster care, an additional 7 were diverted, while in others there was an equal split—for every child entering foster care, another child was diverted.” (Karin Malm, Kristin Sepulveda & Samuel Abbott, Variations in the use of kinship diversion among child welfare agencies (Child Trends 2019)). Further, through his research, Professor Kagan found that “the number of children who pass through hidden foster care each year is roughly comparable with the number of children removed from their families, brought to court, and placed in formal foster care each year.” (Gupta-Kagan, supra, at 15.) Thus, hidden foster care mirrors the official foster care system, separating tens of thousands of families across the country, but without the court review, due process, or services provided through the foster care system. It is literally “hidden” in that it is invisible to the federal agencies that track foster care.
care and to child welfare courts and lawyers, who never see these cases because they never enter a juvenile court.

The decision about whether to formally place a child with a relative through foster care or encourage that relative to take the child in without the involvement of the child welfare system has broad implications for the child, the parent, and the caregiver. While there can be benefits to bypassing the foster care system, such as avoiding burdensome licensing requirements for foster care placements and retaining family autonomy over decisions, at the point that a child welfare agency is essentially insisting that a parent and child will be separated, it is unclear how “voluntary” the decision is and how much family autonomy has been preserved. Hidden foster care occurs as a result of the government’s insistence on a child being moved away from a parent. Once this occurs, the big concern around hidden foster care is whether that separating of the parent and the child after the insistence and involvement of the child welfare agency can ever be truly “voluntarily” or whether the parent is coerced by the state with the threat that the child will enter foster care if the parent does not. Courts have considered this issue with varying outcomes. The Third Circuit, in *Croft v. Westmoreland County Children and Youth Services*, stated, “Defendants repeatedly have characterized Dr. Croft’s decision to leave as ‘voluntary.’ This notion we explicitly reject. The threat that unless Dr. Croft left his home the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.” (103 F. 3d 1123 (1997).) However, contrast that to the Seventh Circuit’s decision in *Dupuy v. Samuels*, which declared, “We can’t see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options.” (465 F.3d 757 (2006).) Nevertheless, despite the court’s finding in *Dupuy*, it is difficult to imagine how parents, when told by the state that they will be taken to court and their children taken from them unless they agree to a change in custody, could ever be acting in a way that is voluntary, particularly without the provision of a lawyer with whom the parent could consult to discuss the likelihood of success if the child welfare agency did attempt to formally remove the child, as well as legal assistance in negotiating the terms of a safety plan.

Financial incentives play a big part in hidden foster care. When the foster care system is diverted, the state saves money on things like monthly financial assistance to the caregiver, respite supports, case management, court reports, monthly visits to the home, and the reunification supports and services to the child and parent. Once a child enters hidden foster care, the state often closes the case completely, which can be a help for social workers who often carry burdensome caseloads. Despite these incentives, it should not be assumed that child welfare agencies are unconcerned about this hidden foster care. Many social workers are attempting to adhere to the wishes of the family to avoid the loss of control that can result once a child is in foster care. Other times, systems feel their hands are tied by licensing rules.
that may prevent the child from staying with family members if a formal case is opened. Child welfare agencies exist to protect children, and often when leaders and social workers understand the human impact of hidden foster care, they are interested in addressing it.

Hidden foster care can look different in different jurisdictions, though the end result is the same. In some jurisdictions, a parent may be asked to sign a safety plan and to transfer physical but not legal custody to a relative or friend, while in others, a parent may be told to go to probate or family court to arrange for a formal guardianship. Even when a guardianship does occur, there is not true court oversight of the transfer because a court overseeing a guardianship does not generally consider fitness of the parent, and the guardianship is presumed to be voluntary if both the parent and guardian are in agreement.

The Human Impact

My entire family has dealt with the impact of the child welfare system essentially dropping my grandchildren at my house and urging guardianship as opposed to providing supports and services to my grandchildren and my daughter to help them reunify. In fact, in about 2 years when I asked for services to help my daughter reunify, at her request, we were denied because we had a guardianship.

—Kinship caregiver

Hidden foster care has a big and long-reaching impact on parents, kinship caregivers, and children. Parents and caregivers are not generally provided with full information about what entering hidden foster care will mean. Parents are not told that they might be giving up the right to be given reasonable efforts to prevent a child’s removal, and certainly that issue is never litigated given that the case does not go to juvenile court. In addition, parents who chose to transfer custody of their children are not generally given a plan for reunification or services to address the issues that led to removal. There might be no plan for visitation. Children might remain with family or friends for a few days or they might remain with them permanently. For example, there is generally no due process provided in guardianship proceedings that occur outside the juvenile or dependency system. And, in places like California, probate guardianships can be incredibly difficult to undo, making the transfer of legal custody a long-term and often permanent decision that occurs without any legal representation of the parent or the child. As a result, parents could literally lose their children forever without a court ever reviewing their fitness.
Caregivers are also not given full information. They often do not understand that in bypassing the foster care system, they will not receive full foster care payments, including clothing allowance, or assistance with child care or mental health and other services. In addition, caregivers are not given support to navigate visitation between a child and parent or a plan (or support) for reunification.

In addition, children can lose many rights and protections by entering hidden foster care, including the right to remain in their school of origin, payment to caregivers for transport to the school of origin, and the right to extended foster care. Hidden foster care also means that children eligible for protections under the Indian Child Welfare Act will not receive them. While services within the foster care system, such as services to address trauma, can be challenging to access, children in hidden foster care do not even have the right to such services.

Her girls were taken from her and I was pushed into guardianship—and once that happened, [my daughter] felt cut off. There was no support for her to reunify. My daughter felt like if she had been given the opportunity to reunify, she would have reunified. But instead, the social worker found me—a grandma willing to provide a safe place for my grandchildren—and that was it.
—Kinship caregiver

I felt pressured to do things on their timeline and in their way—we didn’t get any support or really any options.
—Kindship caregiver

Solutions
One of the first ways to address hidden foster care is to begin tracking it. The federal government does not currently require states to collect data on hidden foster care, and states are not doing so on their own, but we need to begin requiring data so we can better understand how many families are affected in each state, how long children remain out of their parents’ custody, and the outcome of each case. Josh Gupta-Kagan states, “Given its prominence and the severity of its infringement on family integrity, gathering basic data regarding hidden foster care is essential to future development and evaluation of policies governing this practice.” (Gupta-Kagan, supra, at 6.)

To ensure that the transfer of custody is truly voluntary, parents and children must have a right to a lawyer before agreeing to any bypassing of the foster care system. Any action by the state that facilitates a change in custody for a child must trigger the right of parents and children to a lawyer. Parents must understand the weight of evidence against them and their likelihood of success at a hearing to remove their children. They must understand what rights they are giving
up and ensure that they can consult with a lawyer before signing any safety plan. In addition, attorneys appointed to parents and children must ensure that all parties’ constitutional and statutory rights are fully represented as well as giving a voice to the children and families that interact with the system and ensuring that educational, mental, physical, and emotional needs are met.

Additional safeguards that need to be in place include that parents should be given a basis for any demand that they place their children with a family member or friend. States should define “voluntary” transfers of physical custody to help ensure that the placement of children truly is voluntary. There also needs to be limits on safety plans and the amount of time that a child spends in a voluntary placement without review by a court or officer outside the child welfare agency, and parents need to have a clear path for what they need to do in order to reunify with their children. Finally, parents and caregivers need to have an option to challenge the basis for a voluntary placement.

Kinship caregivers need clear and comprehensive information regarding options related to court systems, funding, and services prior to agreeing to take children into their home. One survey in California revealed that many caregivers could not even identify whether the children they cared for were in foster care or whether they were caring for them under an informal arrangement. Many caregivers agree to take children informally without any understanding of what they are giving up—for example, financial support, respite care, and services.

Social workers, case managers, emergency response teams, probate judges, dependency judges, minors’ attorneys, and attorneys who practice in probate and family courts also need training on hidden foster care in order to understand how it occurs in their jurisdiction and to develop protocols and practices to provide checks and balances to prevent it from happening without appropriate due process and protections for the child and parent. In addition, state laws may need to be amended to allow for a child who is in hidden foster care to be able to access the formal system in order to ensure that the child, parent, and caregiver can all receive appropriate representation and supports and an opportunity to reunify.

To address hidden foster care in your state, one approach is to convene all relevant stakeholders—including parents; kinship caregivers; children; lawyers for children and parents; the department of social services; advocacy organizations for parents, kin, and children; and judges—to discuss how this issue plays out in your state and to develop specific recommendations. Talking through the human impact of hidden foster care and hearing from all of the directly affected communities is the first step toward your state ensuring that family integrity is respected, that families are not left in legal limbo, that children are kept safe, that
family choice is honored, and that parents, children, and kin are receiving the services and support to which they are entitled.

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Legal Representation for the Youngest Clients: A Holistic Approach

By Tori Porell – March 31, 2020

Blocks. Puzzles. Crayons. A beachball. These aren’t the supplies that most attorneys are toting around, even children’s lawyers, but maybe they should be. These are the types of tools necessary for conducting developmental screenings with young children. Screenings like these are key to detecting developmental delays and connecting young children to critical early intervention services. Due to exposure to trauma, prenatal substance exposure, attachment disruption, and neglect, children in foster care are far more likely than other children to have developmental delays and other needs in the areas of physical health, mental health, and early education. Attorneys who represent these children have a critical role to play in ensuring that their clients not only achieve permanency as quickly as possible but also receive the specialized services they need to get the best start on their way to a bright future.

Why Focus on Young Children?

It is difficult to overstate the importance of a child’s first five years of life. Recent studies have shown that a child’s brain doubles in size in the child’s first year of life, keeps growing to about 80 percent of adult size by age three, and is more than 90 percent developed by age five. Never again are our brains as malleable and flexible as they are during this period, in which they are developing millions of neural connections that will last a lifetime. And while this malleability is designed to enable an incredible amount of learning, it also means that young children are uniquely vulnerable to negative experiences, like abuse and neglect, which can have lifelong consequences for their physical, cognitive, and social-emotional development. The seminal study of adverse childhood experiences (ACEs) gives us a framework for understanding how these experiences can actually aggregate into a condition known as toxic stress, which is associated with everything from risky sexual behavior and incarceration, to leading causes of death such as cancer, diabetes, heart disease, and suicide. However, we now know, ACEs are not destiny. In addition to preventing children from experiencing ACEs, there are a number of interventions that can help build children’s resiliency, such as ensuring that they also have PCEs (positive childhood experiences).

Children in this age group are also the largest group entering foster care. In fiscal year 2018, just shy of 50 percent of all children entering foster care were five years old or under, with children under one year old accounting for the largest single age group (19 percent). Students in foster care have abysmal educational outcomes, with research indicating that 83 percent of foster children are held back by the third grade and 75 percent are working below grade level.
And to underscore why these statistics about third grade students are such a problem, a widely cited study by Education Week shows that “[a] student who can’t read on grade level by 3rd grade is four times less likely to graduate by age 19 than a child who does read proficiently by that time. Add poverty to the mix, and a student is 13 times less likely to graduate on time than his or her proficient, wealthier peer.” It is clear from the outcomes we are seeing, and from what we know about brain science, that waiting until kindergarten to intervene is already too late.

Permanency and Attachment
For young children, attachment is everything. Our very earliest learning happens within the context of a relationship with an attentive and attuned caregiver. And these relationships are not just beneficial to our learning—they are critical to our survival. Babies and young children are evolutionarily predisposed to seek out and maintain positive, nurturing relationships with a primary caregiver (or two) in order to survive, as well as to grow and develop. These earliest relationships provide our internal maps for our sense of the world, our place in it, and our future relationships. Whether a child’s attachment is to a parent, a foster parent, or a relative is less important than the quality of that relationship because once children are able to form a secure attachment, they are proven to be more resilient and able to continue forming secure attachments. Therefore, when attachment is disrupted during this critical stage, we can expect all sorts of ripple effects, affecting a child’s physical health, emotional regulation, language development, and early learning. There are no mental health interventions, developmental therapies, or educational services that can substitute for the need for a committed, loving, and attuned caregiver.

Nearly all children in foster care have experienced at least one attachment disruption, and some have experienced this disruption over and over again. Therefore, the first priority of the child welfare system, and the attorneys who advocate for children within it, must be to reunify children safely with a parent, or maintain them in the care of another substitute attachment figure, as early in their development as possible. There has been some progress in the law to recognize that young children require permanency on a faster timeline than older children, due to their need for attachment and the critical developmental period of early childhood. For example, in California, there are shorter timelines for reunification for children removed from their parents before their third birthday (or a sibling set including a child of this age) than those removed later. However, there are a number of other ways that attorneys must recognize the importance of attachment for young children, beyond what has been enshrined in the law.

The three primary points at which attachment should be a consideration for attorneys are visitation, transitions, and permanency. First, for children removed from the care of their parents, visitation is often the sole vehicle for maintaining or sometimes (especially for children
removed at birth) establishing an attachment between parent and child. Young children’s sense of time is very different, and brief weekly visitation is unlikely to be sufficient and may be harmful to children under five. While visitation must be an individualized decision, the younger a child is, the more consideration must be given to the frequency and length of visitation that will allow the establishment or maintenance of a healthy parent-child attachment. Second, transitions for young children in foster care, whether between caregivers or between a caregiver and a parent, must be given careful consideration. As a general rule, abrupt transitions in caregivers can be damaging to young children, and multiple placements should be avoided when possible. When a transition is planned, such as the return of a child to a parent after time in out-of-home care, both caregivers should coordinate the transition to provide as much consistency and predictability as possible for the child. Finally, permanency with a committed, attuned parent or caregiver is the single most critical factor for the health, development, and well-being of a young child. The form of permanency (reunification with a parent, adoption, or legal guardianship) is less relevant than the quality of that relationship. What is important is that the caregiver can provide a safe, stable, nurturing relationship and environment for the child to meet the child’s basic needs for closeness, support, loyalty, protection, love, importance, and responsiveness to health and developmental needs.

**Early Intervention and Preschool Special Education**

Given that young children in the child welfare system often face multiple risk factors, such as poverty, abuse, neglect, substance exposure, attachment disruption, and intergenerational trauma, it is unsurprising that these children are more likely than their peers to experience developmental delays. While between 4 percent and 10 percent of children in the general population experience developmental delays, rates of developmental delay among young children in foster care are reported to be as high as 60 percent. The most common type of delay is in language development (experienced by 57 percent of children), followed by 33 percent showing cognitive challenges, 31 percent displaying gross motor difficulties, and 10 percent experiencing difficulty with basic growth. Despite this being a well-documented phenomenon, developmental delays are still frequently undetected in young children in foster care. Especially in light of the fact that children in foster care often lack one consistent caregiver who would be able to note a lack of progression in certain skills or even a regression, it is important that these children receive standardized screenings. Screenings may take the form of a questionnaire like the *Ages & Stages Questionnaire (ASQ)*, a more thorough assessment done by a pediatrician, or simply a discussion with a caregiver about the *Centers for Disease Control and Prevention’s expected milestones*. Attorneys can play a role in ensuring that their young child clients are referred for one of these screenings by a professional, screened by a social worker or case manager, or screened by the attorneys themselves, if trained.
If a child is found to be at high risk for or experiencing a developmental delay, there are two systems that are mandated to intervene and provide the necessary services to address those delays. First, children covered by Medicaid, as a high number of foster youth are, are also covered by Medicaid’s Early Periodic Screening, Diagnosis, and Treatment (EPSDT) program, which mandates the early treatment of problems and disorders for all eligible children younger than the age of 21 years. Second, the Individuals with Disabilities Education Act (IDEA) provides services to infants and toddlers (ages birth to three) with developmental delays through “Part C” and preschoolers (ages three to five) with one of 13 qualifying disabilities in “Part B.” The exact implementation of IDEA looks different from state to state; however, all states are bound by IDEA’s Child Find mandate, which requires all school districts to identify, locate, and evaluate all children (birth to 21 years of age) with disabilities, regardless of the severity of their disabilities. In passing IDEA, Congress also specifically emphasized the importance of early intervention services, noting “an urgent and substantial need” to “enhance the development of infants and toddlers with disabilities; reduce educational costs by minimizing the need for special education through early intervention; minimize the likelihood of institutionalization, and maximize independent living; and, enhance the capacity of families to meet their child’s needs.”

There are a few key legal rights that attorneys for children should know of—without needing to be special education experts—in order to help their clients expeditiously access all of the services to which they are entitled. First, as a threshold matter, all attorneys should be aware of who holds their clients’ educational and developmental rights. While educational rights can often be overlooked for a child who is not yet school-aged, it is critical to have someone available and engaged who can sign consents for developmental and special education assessments. Practice differs from state to state as to whether biological parents retain these rights when their children are removed, whether foster parents or relatives can sign such consents, or when a court may need to appoint a surrogate educational/developmental rights holder for a child. Who holds these rights is less important than ensuring that someone is available to participate in this process on a child’s behalf and that the identification of a proper rights holder does not unnecessarily delay access to early intervention services, when time is of the essence.

Second, the IDEA mandates very specific timelines that implementing agencies must meet as a matter of law. For Part C, which serves infants and toddlers (ages birth to three), once a referral is made, a service coordinator is appointed and must complete an evaluation within 45 days. For Part B, serving children past their third birthday a school district has 15 days, upon receipt of a referral, to generate an assessment plan for the education rights holder’s signature. Once the district receives the signed assessment plan, the district has 60 days (with allowances for school vacations) to assess a child, hold an individualized education program (IEP) meeting, and, if the child is eligible, begin services.
Finally, of particular importance for young children are their rights during a transition between Part C services and Part B services. The IDEA mandates that the appropriate implementing agency in the state convene a transition conference for a toddler with a disability who may be eligible for preschool services under Part B of the IDEA, not fewer than 90 days and, at the discretion of all parties, not more than 9 months before the toddler’s third birthday. This is a critical juncture at which a child could experience a lapse in critical services; proactive advocacy by attorneys can ensure a smooth transition to preschool for their clients.

**Other Factors: Physical Health, Mental Health, and Early Education**

While permanency and early intervention/special education are the two areas where young children in foster care have the most legal rights for their attorneys to assert, it is also critical to remember the areas of physical health, mental health, and early education. In a recent *longitudinal study of kindergarten readiness*, researchers found that there were two areas that most strongly predicted both whether children were ready for kindergarten and whether they would be meeting state standards by the third grade. The first was basic health and well-being (whether students were healthy, well rested, and well fed), and the second was their social-emotional skills (specifically self-regulation and social expression). All of the same risk factors for developmental delays listed above, including attachment disruption, are also risk factors for a variety of physical health conditions as well as mental or behavioral health challenges in young children. Young children in foster care should receive all recommended preventive health screenings, as well as ongoing screening for mental or behavioral health needs. In a national sample of child welfare agencies, 94 percent of agencies had policies regarding the assessment of all children entering foster care for physical health problems, yet only 47.8 percent had policies for mental health assessments and only 57.8 percent had inclusive policies for developmental assessments. Attorneys must fill in these gaps and ensure their clients have received appropriate holistic assessments.

Preschool is another critical intervention for young children in foster care. For decades, *research has shown* that high-quality early educational interventions are associated with long-lasting benefits for all children, with even more pronounced results for socioeconomically disadvantaged children. Foster youth are automatically eligible for, and can receive preferential placement into, many early education programs, such as *Head Start* or state preschool. However, many foster youth are not able to access preschool programs due to unmet developmental, behavioral, or mental health needs. When these students are not successful in early childhood education or are subject to exclusionary discipline like suspension or expulsion (preschool children are expelled at *three times the rate* of children in kindergarten through 12th grade), they are more likely to continue to get in trouble at school and, later on, get lower test scores. They even have a higher likelihood of criminal justice involvement, a
phenomenon known as the “preschool to prison pipeline.” Once again, attorneys for children have an important role to play in ensuring that their clients have access to critical opportunities for early learning, are supported in order to access their early education, and are not subject to discriminatory or exclusionary practices.

The Strong Beginnings Model
The East Bay Children’s Law Offices began the Strong Beginnings project in 2018, to systematically address the needs of our youngest clients in foster care in Alameda County. With the support of an Equal Justice Works fellowship, I leveraged my background as an early childhood educator to become the founding attorney of this project. To begin the project, we first conducted an audit of the needs of our zero- to five-year-old clients, to identify areas for advocacy. We discovered, for example, that in the prior year, 32 percent of our zero- to five-year-old clients were identified as having a developmental delay (likely a significant under-identification), yet only 23 percent of those identified were receiving early intervention services. The first change that we made to our practice was to implement a universal screening program for our clients between 1 month and 66 months of age, using the Ages & Stages Questionnaire (ASQ), whenever they were visited by attorneys or social workers from our office. Not only did this dramatically increase our identification of clients with developmental delays and our ability to refer them to early intervention or preschool special education services, it also provided an excellent opportunity to discuss child development with our clients’ caregivers. Our office also began consulting regularly with an experienced early childhood mental health clinician, who provides case consultation on difficult issues of permanency, attachment, or mental health treatment. As the Strong Beginnings attorney, I serve as a resource to the office for issues with clients in this population, as well as maintain a caseload of 0- to 5-year-old clients with complex educational, developmental, mental health, or medical needs.

As an example of what child-centered advocacy can look like with a focus on the particular needs of preschool-age children, let’s consider Lyla’s case. Lyla was three years old when she was removed from the care of her parents due to their substance use and incarceration. Lyla was placed into one foster home and then almost immediately another because her behaviors were so extreme that her first foster parents could not manage them. When I first visited her, at her attorney’s request, I had serious concerns. Not only was Lyla very behind on her immunizations and in need of dental work, but she was only speaking in single-word phrases and had no idea how to hold a crayon. In addition, during my very first visit, Lyla was highly affectionate with me and threw a major tantrum as I began to leave, classic signs that she had an insecure or disorganized attachment system. I set to work with the rest of Lyla’s team to ensure that she got caught up on medical and dental care, that she was assessed by her school district for special education services, and that her mental health needs were addressed.
through a placement in a therapeutic nursery school program. After an unsuccessful attempt at reunifying Lyla with her parents, her attorney and I knew that she needed an alternate plan because she had experienced so much attachment disruption. To secure a permanent, quality placement, her attorney fought for a legal guardianship with a relative who is committed to parenting Lyla for the long term and ensuring that she receives all of the specialized services that she needs. Lyla will be starting kindergarten this fall, and she is so excited. She loves school and has all of the supportive services in place she needs to manage her behavior and help her be successful. These services have also helped to stabilize her placement with a relative, who feels supported to manage her challenging behavior.

Perhaps because most cannot speak yet or because their crises are not as dramatic and consequential as those of older youth, young children in foster care are often overlooked in terms of legal advocacy. While children under five are entering foster care at a faster rate than any other age group and constitute a significant proportion of all children in foster care, their particular needs are not always as easy to identify. The greatest need for children in this population, in accordance with their fundamental orientation toward attachment, is permanency. Without a safe, nurturing, and committed caregiver, children will be hindered from reaching their potential in any other domain. Beyond this, young children in foster care face high rates of developmental delays, which need to be identified as early as possible. Once those developmental delays are identified, even young children have very specific legal rights, which can aid their advocates in obtaining early intervention and preschool special education as quickly as possible. Finally, young children need specific monitoring of their mental and physical health, as well access to high-quality early education, to support their optimal development and healing from early adversity. When we intervene early in the lives of children, to prevent maltreatment, address developmental delays, and support connections with loving caregivers, our impact is magnified throughout the life of that child, and the child has the best opportunity to reach his or her highest potential.

Tori Porell is a second-year Equal Justice Works Fellow, sponsored by the Morrison & Foerster Foundation, at the East Bay Children’s Law Offices in Oakland, California.
Government-Funded Discrimination in the Child Welfare System

By Cathy Krebs and Currey Cook – January 08, 2020

On November 19, 2019, the Trump administration released a Notice of Proposed Rule Making proposing to immediately cease enforcement of nondiscrimination rules based on sexual orientation, gender identity, and in some cases, sex or religion in Health and Human Services (HHS) grant programs. HHS administers around $500 billion in grant funding for programs that include foster care, Head Start, HIV prevention, substance abuse treatment, community health care centers, trafficking prevention, and financial services and support for low-income families.

With this change, the administration is affirmatively removing existing nondiscrimination protection for beneficiaries and participants in scores of federal programs and explicitly allowing discrimination by providers, unless already prohibited by statute. Since religion, sexual orientation, and gender identity are not protected classes in federal child welfare statutes, the effect on the foster care system would be that children in state custody could be denied services they need based on factors such as religious beliefs, sexual identity, or an adoptive placement with a single parent.

Additionally, the proposed rule sows confusion where state and federal protections differ. Additionally, the move to strip protections contradicts prior policy guidance from HHS regarding the importance of supporting lesbian, gay, bisexual, transgender, queer, or questioning (LGBTQ) youth, as well as a trove of training and technical assistance information on the topic from HHS’s Children’s Bureau.

When a child is alleged to have been neglected or abused by a parent, the state social services agency investigates and, in some cases, removes the child from their home and places them in state custody (foster care) to protect the child. A court must review the decision to place a child into state custody. Some state social services agencies contract with private non-profits to provide some of the government functions once a child is placed into state custody. Those responsibilities can vary; for example, some private organizations manage the entire case after a child is removed and some recruit and license foster parents and mentors. The contract agencies are paid for this work through both state and federal funding, and they must comply with applicable federal and state law as well as constitutional requirements. However, this recent rule change would allow them to discriminate based on the factors outlined above. Faith-based government-funded contractors may turn away or refuse to provide service to LGBTQ people or those who do not align with the agency’s religious beliefs or morals.
There are currently 440,000 children in the foster care system in the United States, 117,000 of whom cannot safely return home and are waiting to be adopted. Approximately 20,000 of these youth will become adults without finding an adoptive or permanent home. Children in foster care are disproportionately LGBTQ, with one study finding that 30.4 percent of youth in foster care identify as LGBTQ and 5 percent as transgender, compared to 11.2 and 1.17 percent of youth not in foster care. LGBTQ children in care have worse outcomes than their non-LGBTQ peers: more total placements and higher rates of placement in group homes, juvenile justice involvement, psychiatric hospitalization, and homelessness.

Simultaneously, LGBTQ people are an underutilized resource for foster and adoptive placements. LGBT individuals are significantly more likely to be raising adopted or foster children. One in five same-sex couples (21.4 percent) are raising adopted children compared to just 3 percent of different-sex couples, and 2.9 percent of same-sex couples have foster children compared to 0.4 percent of different-sex couples. This data reveals that LGBT parents are approximately seven times more likely to be raising adopted or foster children. Limiting the number of homes and families for youth in state custody as a result of discrimination, particularly when there are many LGBTQ youth in foster care and LGBTQ parents are more likely to foster and adopt children, makes little sense.

There have been two recent final court decisions addressing this issue—Dumont v. Lyon and Fulton v. City of Philadelphia. In both cases, decided in 2018, federal district courts recognized that allowing government-funded child welfare agencies to use religious criteria in the provision of public child welfare services would run afoul of the First Amendment. The Fulton decision was affirmed by the Third Circuit Court of Appeals. Five more cases that address this issue—Marouf v. Azar, Rogers v. U.S. Dept of Health & Human Services, Maddonna v. U.S. Dept of Health & Human Services, Buck v. Gordon, and Texas v. Azar—are pending in federal court.

Major child welfare organizations such as Child Welfare League of America, the National Association of Social Workers, Voices for Adoption, and the North American Council on Adoptable Children, along with many religious groups and leaders of diverse faiths, have strongly opposed this rule change (and state laws or policies that permit discrimination) because access to affirming and supportive services is essential to the well-being of children, and factors such as religion, sexual orientation, or gender identity are not relevant to an individual’s ability to parent. Policies that permit discrimination violate child welfare professional standards set by these organizations and others.
The American Bar Association has long supported all individuals’ rights to be free from discrimination through a variety of Association policies and resolutions. ABA Resolution 204B (2007) supports laws that promote the safety, well-being and permanent placement of LGBTQ youth who are homeless or involved with the foster care system; ABA Resolution 102 (2006) opposes legislation and policies that restrict children’s placement into foster care on the basis of a parent’s sexual orientation; ABA Resolution 112 (2003) supports the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child; and ABA Resolution 109B (1999) supports laws that provide sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child. Most recently, ABA Midyear Resolution 113 (2019) opposed “laws, regulations and rules that discriminate against LGBT individuals in the exercise of the fundamental right to parent.”

On December 16, 2019 the ABA submitted comments to HHS expressing concern with the agency’s decision to eliminate anti-discrimination rules designed to support children and families in the context of foster care and adoption. The ABA urged HHS to withdraw the proposed rule changes because they will cause harm to children and families and are inconsistent with child welfare law and the Administrative Procedure Act. That comment can be found here.

There are many ways you can help: contact your Senator and Congressperson and let them know you oppose permitting discrimination with HHS funds, volunteer to be a foster parent or Court Appointed Special Advocate (CASA) for an LGBTQ youth in foster care, reach out to local LGBTQ-youth serving organizations to offer pro bono assistance, speak about this issue within your community of faith or at local civic organizations, write a letter to the editor, or ask your local child welfare officials if they have nondiscrimination policies in place.

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Leveraging the FFPSA for Older Youth: Prevention Provisions

By Jenny Pokempner – January 15, 2019

Signed on February 9, 2018, as part of the Bipartisan Budget Act of 2018 (H.R. 1892), the Family First Prevention Services Act (FFPSA) has the potential to radically change child welfare systems across the country. Primarily by dictating how federal child welfare funds (Title IV-E) can be used, the FFPSA seeks to create a child welfare system that increases its investments in prevention services, so youth and families do not enter the system in the first place, and in family- and community-based services and placements, so youth who enter the system are more likely to find family and permanency. It is hoped that changing the way Title IV-E funds can be spent will lead to state systems that better reflect a vision of child welfare service delivery that prioritizes prevention, seeks to keep children with families in the community, and provides a more comprehensive service array for youth as they transition to adulthood.

For years, our federal financial structure has moved states in the direction of removal and placement and has done little to attack the use and overuse of group care. While financial incentives and disincentives are not the only movers of system change, they can be powerful ones. Title IV-E funds previously could be used for the cost of foster care maintenance for eligible children, administrative expenses to manage the program, training for staff and caregivers, adoption assistance, and kinship guardianship assistance. These funds could generally not be used for prevention services. This meant that the bulk of federal funds for child welfare systems could be used only once a child entered the system, and once they did, the same level of reimbursement was allowed for family-based settings and group care. In addition, in the past, federal funds to support youth in the transition to adulthood have been capped at age 21.

The FFPSA changes significantly how federal funds can be used by states. It allows states to use IV-E funds for certain prevention services with the goal of keeping youth and families out of state custody and placement. It also limits the use of IV-E funds to pay for group care with the goal of enhancing a placement and service array that keeps youth in the most family- and community-based settings with the goal of moving them toward permanency. In addition, the FFPSA allows states to use federal funds to respond to the reality and research that shows that the transition to adulthood lasts into a young person’s mid-20s and that youth deserve support as they build their skills and pursue post-secondary education and training. To that end, the FFPSA allows states two options: to extend Chafee Program aftercare services to youth until
age 23 if the state provides extended foster care (foster care past age 18) and to extend eligibility for education and training vouchers until age 26 for all states.

The FFPSA has the potential to drastically change the child welfare system in general, but the potential impact on older youth is significant. Not only are there large numbers of older youth in the child welfare system—171,162 youth in foster care, or 25 percent—but they make up a significant number of the youth who are in group care. 51 percent of these youth are aging out without being successfully reunified with their family or connected to another family through adoption or legal guardianship. It is clear that these youth are at great risk for poor adult outcomes because we have not collectively provided them the foundation of family and skills that every young person needs to succeed as he or she transitions to adulthood. Increasingly, older youth in foster care are receiving the attention they deserve, but identifying and implementing the policy and practice changes necessary to make a meaningful impact on their lives remains a challenge.

This three-part series—comprised of this article on prevention provisions and ones on reduction of group care provisions and improving transitions—takes a close look at how the FFPSA can be leveraged to bring benefit to older youth and suggests strategies to ensure that plans for implementation of the law keep older youth as a priority and that the youth are not lost in the immense efforts to implement all provisions of the law. Several senators have written to the Children’s Bureau to request that additional guidance be provided to the states so that they have the information and capacity to ensure that the law benefits older youth. These three articles follow the lead and challenge of the Grassley letter to make sure older youth are front and center in FFPSA implementation work. While the FFPSA provides some new leverage points through financing reform, it is acknowledged that broader policy, practice, and philosophy shifts are needed to transform how we serve older youth and to achieve the positive outcomes they deserve. We hope that these strategies help transform the work we are doing to a positive rather than a negative approach: a commitment to get young people to the most the connected placements in the community that can lead to permanency. Please note that this series of articles does not provide a detailed summary of the FFPSA. Instead it highlights the ways advocacy can be done around select provisions to improve outcomes and opportunities for older youth. A very helpful and detailed summary of the FFPSA has been published by the Children’s Defense Fund: The Family First Prevention Services Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children (Feb. 2018).

Prevention Provisions
The FFPSA provides states, territories, and tribes the option to use Title IV-E funds for prevention services that would allow “candidates for foster care” to stay with their parents or
relatives. Prior to this law, IV-E funds could be used only once a child was removed from the home. States will be able to define candidates for foster care, but generally this will include youth at risk of entering or reentering the foster care system from the home of a parent, relative, or legal guardian. This includes disrupted permanency arrangements (for example, a disrupted adoption). As the Grassley letter urges, “candidates for foster care” should include youth between ages 18 and 21 who are eligible to reenter care under state law. (While guidance on this issue was requested, advocates in states with reentry should include this in implementation discussions.)

Under the FFPSA, states will be reimbursed for prevention services for up to 12 months and can provide two types of prevention services: (1) mental health and substance abuse prevention and treatment services provided by a qualified clinician and (2) in-home parent skill-based programs, which include parenting skills training, parent education, and individual and family counseling. Services must be evidence-based (well-supported, supported, or promising) and trauma-informed to be eligible for reimbursement. This new use for IV-E funds can be a game changer and allows states to invest funds in and build capacity to prevent placement in meaningful ways.

In addition to being able to use IV-E for specific prevention services for “candidates for foster care,” states can also use IV-E funds to provide prevention services to youth in foster care who are pregnant or parenting. States are still restricted to the two categories of prevention services listed above but can provide them to pregnant and parenting young people in foster care regardless of whether their child is system-involved or at risk for involvement. These services can be provided for up to 12 months from the time a youth is identified as being in need of services.

**Leveraging the Prevention Provisions for Older Youth**

It is essential that states have the capacity to meet the needs of families with older youth if services are expected to truly prevent placement for teens and young adults. About 30 percent of youth who entered the child welfare system in 2016 were age 11 or older, while 10 percent were age 16 or older. As advocates are inquiring into their state’s capacity to provide trauma-informed and evidence-based prevention programs, they should also be asking whether programs have the skill set and expertise to support families with teens and adolescents. For example, are the available in-home parenting skills-based programs able to help parents understand adolescent development and trauma and how to productively respond to youth? Are the individual and family counseling programs able to respond to the dynamics of parents, teens, and young adults? Developing effective prevention services for families with teens and young adults also includes understanding the reasons these youth are coming into care. While older youth, like younger children, usually come into care for multiple reasons, the most
common reasons for older youth are the Adoption and Foster Care Analysis and Reporting System (AFCARS) categories of neglect, child behavior problem, and caretaker inability to cope. Effective prevention services for older youth will need to respond to these removal reasons and likely need to enlist the behavioral health system to formulate effective interventions. In addition, this is an area where getting feedback from youth and families about what they need—or needed—to remain together is essential. Advocates can play a key role in ensuring these voices are heard.

As mentioned above, for prevention services to be funded they must fall in the two service categories and they must be evidence-based (“promising,” “supported,” and “well-supported”). There is valid concern, including concern expressed in the Grassley letter, that there is a lack of programs targeting older youth that will meet the evidence-based criteria and that youth and families will not receive the benefit of the law because the research base is not yet where we need it to be. While we do advocacy at the federal level to see if federal guidance can provide some flexibility in this area, we recommend that advocates proceed to identify effective programs. If prevention programs that can meet the needs of families with older youth do not exist in sufficient numbers to meet the anticipated need, advocacy for issuing request for proposals (RFPs) is a recommended strategy. In addition, because the FFPSA funds only two categories of prevention services, advocacy for investment of state funds in prevention should be considered by advocates, especially to address the fact that entrance into the system is related to lack of income and housing to meet a child’s needs.

**Leveraging the Prevention Provisions for Expectant and Parenting Youth in Care**

The FFPSA allows states to use IV-E funds for prevention services for pregnant and parenting youth in foster care. As the Grassley letter suggests, this should include mothers and fathers at any time while they are in care. Youth in foster care have much higher rates of adolescent pregnancy and childbearing than their peers. Having one or more children at a young age has been shown to be correlated with barriers to educational attainment and adds to the challenges that youth face when they are making the transition to adulthood from foster care. The opportunity to enhance the services that these youth receive could aid in improving outcomes and opportunities for young parents who are very much in need of specialized support.

FFPSA prevention funds can be used for expectant and parenting youth in care without their children being candidates for foster care. This is a powerful provision of the FFPSA that is at risk of getting lost in the important discussions around prevention in general. Advocates for older youth should make sure that stakeholders and policy makers are aware of this provision and that implementation planning includes how this provision will be leveraged to enhance the services and supports provided to expectant and parenting youth. There is often a lack of
specialized services and placements for expectant and parenting youth in care, so these provisions could allow for specialized services that make a placement possible or make an existing placement more appropriate and supportive.

The Center for the Study of Social Policy (CSSP) has been leading efforts to improve our knowledge of and responses to expectant and parenting youth in foster care for many years and is continuing to provide expertise in implementing this provision of the FFPSA. In October 2018, CSSP released helpful FAQs on this issue and should be looked to for rich information on services and approaches to working with expectant and parenting youth in care. This way advocates can ensure that this provision is used to enhance the capacity of the system to support youth in care as parents and guard against their deeper involvement in the system as parents.

**Individual Advocacy Strategies**

The FFPSA provides us new leverage through financing incentives and disincentives to move the child welfare system to a goal that is not new: a system that front-loads services to prevent system involvement and meets family’s needs in the community. Our pre-FFPSA federal and state laws contain many provisions that aim to get us to this result. We can use the excitement and attention around the FFPSA and the new tools it provides to reinvigorate legal advocacy through enforcement of existing laws. We think these strategies not only complement FFPSA implementation work but may expand efforts in the states to invest more in prevention and community- and family-based care. Below are a few examples for attorneys who represent children and parents to consider in their trial court and appellate advocacy.

1. **Enforce the reasonable efforts provisions.** Federal law requires the child welfare agency make reasonable efforts to prevent placement of children in foster care and to finalize the permanency plan if the child is placed. A recent article by Jerry Milner and David Kelly of the Children’s Bureau reinforced the experience of many: The reasonable efforts provisions are not often invoked to leverage service delivery at the trial court or fair hearing level or at the appellate level, so that obligation can be clarified and enforced.

2. **Enforce the requirements for fair hearings.** Attorneys should advocate zealously for reasonable efforts to prevent removal or, if the facts warrant, for a finding that reasonable efforts have not been made. Federal law and regulation require that states provide a mechanism for fair hearings for denials of service and benefits under Title IV-E. Failure to provide appropriate pre-placement prevention services are among the issues that can be challenged in a fair hearing. Fair hearings provide an additional forum to consider challenges that could result in the improvement of prevention and reunification services for families with older youth who are not being served in a
manner that responds to their needs. Because the FFPSA funds only two categories of prevention services and requires that they be evidence-based, the reasonable efforts requirement continues to be a vital legal requirement that can help ensure specific prevention services to families. When lawyers bring challenges in a coordinated way (such as organized efforts to identify cases for appeals and fair hearings), they can move jurisdictions to prioritize investments in prevention.

3. **Enforce laws around disposition for youth in care who are pregnant and parenting to ensure appropriate placements and services and to ensure respect for the parental rights of young parents.** All states have case law and statutory provisions to ensure that dispositions of dependent children meet their needs and serve their best interests. These should be used to force the provision of services that support older youth as emerging adults and as parents. When a youth in care has a child, the disposition must serve the needs of the changed status of the dependent child in terms of services and placement. If the placement and services are not appropriate and are not supporting the youth as a youth and as a parent, they should be challenged as not consistent with the law. In addition, any efforts to remove a dependent child’s child or infringe on the dependent child’s legal rights as a parent, either because she is in foster care or because of a lack of placement that can serve both, should be vigorously challenged at the trial court level and on appeal.

It is clear that the FFPSA provides many opportunities to transform the child welfare system into a system of support that is focused on prevention and on supporting and strengthening families in the community. If we can achieve this goal, it will benefit all families, including families who are or can support and nurture older youth. The attention to older youth and the development of law and policies that support the transition to adulthood of youth in foster care have increased over time. Far too often, though, it seems that our laws and policies put attention on the challenges older youth face, but that reforms are not implemented in ways or at the scale needed to achieve the desired results: large numbers of youth achieving permanency and successfully transitioning to adulthood. The combined force of Fostering Connections to Success and Increasing Adoptions Act of 2008, the Strengthening Families Act, and the FFPSA should result in better outcomes for older youth. We hope this series of articles continues the discussion among advocates so that we can collaborate and plan for systematic and individual advocacy on behalf of older youth.

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Five Tips for Lawyers Representing Children under Five

By Tori Porell – February 26, 2020

1. **Ensure that young children receive developmental screening early and often.** Young children in foster care are more likely than not to have developmental delays in at least one area, such as language, motor skills, or growth. Standardized screening, whether with a screening tool like the Ages & Stages Questionnaire (ASQ) or by a pediatrician, is necessary for not only early identification of these issues but also early intervention to help kids thrive.

2. **Understand attachment.** Attachment is everything for young children. Our earliest learning happens in the context of a relationship with a loving, attuned caregiver. If children are able to form a healthy early attachment to someone (whether a parent or substitute caregiver), they are more resilient and are more equipped to form other attachments later. Attachment should be a consideration at every point in representing young children, including transitions, visitation, and permanency.

3. **Advocate for early intervention services.** Federal law, under the Individuals with Disabilities Education Act (IDEA), provides two systems for early intervention services for young children: Part C for birth to three-year-olds and Part B for preschool-age students (three-to-five-year-olds). This legislation includes strict timelines to receive these services and specific provisions for students transitioning to preschool and to kindergarten, which attorneys can help enforce for their young clients.

4. **Know that preschool is more than just playtime.** For children who have experienced trauma or have developmental delays, preschool is an especially crucial intervention. Preschool provides a chance for young children to learn vital social-emotional skills, build supportive relationships with teachers, and gain exposure to pre-academic concepts necessary for kindergarten. Attorneys should advocate for any clients over three years old to be enrolled in a high-quality early education program, like Head Start, which foster youth are automatically eligible for.

5. **Don’t forget about physical health.** Physical health is never more important than in early childhood, when children’s bodies and brains are experiencing rapid growth. Nutrition, sleep, and exercise are three of the most critical factors in early learning and have profound impacts on young children’s mental health and overall well-being. When
advocating for young children with extreme challenges, sometimes there is a need to go back to basics and ensure that these fundamental needs are met first.

For more information see:

- **Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation** (A publication of the ABA Center on Children and the Law)
- **Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know** (A publication of the ABA Center on Children and the Law)

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Five Tips for Lawyers to Secure Family Time

By Kathleen Creamer and Cathy Krebs – February 24, 2020

On February 5, 2020, the Children’s Bureau of the U.S. Department of Health and Human Services Administration on Children, Youth, and Families issued an informational memo that provides resources and recommendations for providing family time (often referred to as visitation) for children and youth in out-of-home care in a way that aligns with best practices and research. When done well, the memo asserts that family time can “strengthen the family, expedite reunification and improve parent and child wellbeing outcomes.”

From that memo, here are five tips for lawyers to secure family time:

1. **Understand the role of trauma and the power of connection.** Separation of children from their parents, even when necessary to keep them safe, is deeply traumatic. Research shows that quality family time can help to mitigate that trauma and that it increases the likelihood of reunification, expedites permanency, lowers levels of depression for children, and improves emotional well-being for parents and children.

2. **Seek tailored family time plans that encourage meaningful and natural interaction.** The standard visitation schedule where all parents are assigned a set amount of supervised time with their children may meet the needs of the agency, but it rarely meets the individualized needs of children. Instead visitation should be viewed as “family time,” with a focus on the length and quality of the time that a child spends with not just their parents but with separated siblings and other important family members. Family time should occur in the most natural setting possible and include normal parenting activities such as sharing meals, attending medical appointments, and school events such as a school performance or an extracurricular activity like a sports game. The frequency and duration of family time must consider the needs of the child, including age and stage of development, and the capacities of the parent.

3. **Family time should be unsupervised unless there is a clear safety threat.** Best practices indicate that there should be a presumption that family time should not be supervised. Simply because a child is in state custody does not automatically mean that family time must be supervised. Just as children in foster care benefit from normalcy in their foster homes, they also benefit from having as much normalcy as possible in their family time, which means bringing in outsiders to supervise only when truly necessary.
4. **Recognize that “acting out” is often a normal response to the trauma of separation.** Research indicates that ending or reducing family time in response to a child’s “negative” behaviors before or after a visit is problematic. Instead it is important for to be aware of the complex emotional responses that children may experience and display. Simply ending or reducing family time may further exacerbate the trauma of the child. Where a child struggles before or after a visit, the best approach is to first provide additional support and consider whether an *increase* in family time could help the child adjust.

5. **Consider the parent’s circumstances and challenges when crafting family time plans.** Too often, parents are “set up to fail” by being given visitation schedules that conflict with their other objectives. When scheduling family time, it is critical to take into account a parent’s circumstances including work schedule, transportation, and other commitments. Also, limiting family time as a consequence for a parent’s lack of progress is harmful to both parents and children. Family time is a right shared by the parent and child and should never be used as a reward or a punishment.

For additional resources see: [Five Tips for Advocating for the “Most Connected Placement”](#) and [Five Tips for Prioritizing Extracurriculars as a Key Intervention for Youth](#).

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