



# **Asserting, Arguing, and Appealing the Constitutional Rights of Children in Foster Care**

**A Practice Manual for Lawyers  
Representing Abused and Neglected Children**

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CENTER FOR THE RIGHTS  
OF ABUSED CHILDREN





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## EXECUTIVE SUMMARY

Children in foster care possess foundational constitutional rights. These well-recognized rights, secured by state constitutional guarantees of due process and equal protection, and by the Fourteenth Amendment to the U.S. Constitution, include the right to safety, family integrity, emotional security, timely permanency, and an adequate education. Children in foster care, who find themselves removed from their homes through no fault of their own, need lawyers to fight for and protect their constitutional rights.

The purpose of this *Practice Manual* is to encourage and empower attorneys who represent children in foster care to root their “everyday” arguments in the soil of children’s constitutional rights. This manual outlines some of the most important and consistently recognized constitutional rights that children in foster care possess. However, despite long-standing judicial recognition that children possess these constitutional rights, a culture of non-enforcement of children’s rights persists in our nation’s child welfare system. Lawyers who represent children in foster care must lead a cultural change by pleading and preserving constitutional arguments in trial courts and then, when appropriate, presenting appellate courts with arguments regarding children’s constitutional rights.

The legal proceedings that bring children into foster care and that govern their time in state care have a profound impact on children’s lives. The proceedings determine where children live; how often children see their parents; whether children live with, or even see, their siblings; where children go to school; whether children are reunited with their family; and the type of permanency children will have either through a successful reunification or because the reciprocal rights of the parent-child relationship are permanently severed.

Children who are in foster care need lawyers who assert and argue for their constitutional rights and appeal adverse decisions. Embracing an understanding that children have constitutional rights and advocating for the protection of those rights in and out of court makes the work attorneys do for children more impactful. Securing children’s rights will result in lasting and tangible positive outcomes for children in these critical legal proceedings.

## KEY POINTS

- Children in foster care have a right to be heard and to participate in the legal proceedings impacting the course and direction of their lives.
- Lawyers who represent children in foster care must root their everyday, run-of-the-mill arguments in state and federal constitutional provisions, adequately preserve those arguments, and present those constitutional arguments on appeal.
- Attorneys for children in foster care need to make constitutional arguments at all stages of the legal proceedings (i.e., investigation, removal, while in out-of-home care, reunification, termination of parental rights, and adoption).
- State constitutions contain independent sources of rights that should be invoked alongside federal constitutional rights claims.
- Lawyers representing children in foster care must initiate and participate in appeals, including the initiation of interlocutory appeals, filing appellate briefs, and presenting oral arguments in appellate proceedings.

## AN INVITATION TO REACH OUT FOR HELP

The Center for the Rights of Abused Children’s mission is to establish a jurisprudence of children’s rights. We seek to have courts nationwide recognize children’s constitutional rights to be free from abuse and neglect, to family integrity, to permanency in a timely manner, to find and form families, to fair and open public hearings, to equal protection of the laws, and to due process of law — including their right to legal counsel.

If you have an opportunity to make a strategic or cutting-edge constitutional argument that will strengthen children’s rights — especially if your case may present an opportunity to drive an important constitutional question to a state supreme court or even the U.S. Supreme Court — please do not hesitate to reach out to the Center for help.

The Center’s attorneys are happy to consult, collaborate, co-litigate, or consider amicus filings whenever there is an opportunity to persuade appellate courts to issue favorable rulings vindicating the rights of America’s most vulnerable children.

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## INTRODUCTION

Children have constitutional rights, just like adults.<sup>1</sup> But as Darcy Olsen, a dedicated foster mom, sat in court for a trial that would determine her foster daughter's fate, the judge began by "remind[ing] everyone in the courtroom that mother's rights are constitutional, while baby's rights are merely statutory."<sup>2</sup> Darcy found that statement appalling.<sup>3</sup> So, she founded the Center for the Rights of Abused Children, an organization dedicated to advocating for children's constitutional rights in courtrooms and legislatures nationwide. Since its founding, the Center's *pro bono* Children's Law Clinic has helped hundreds of foster children assert their rights to family, safety, and security.

This *Practice Manual* aims to change the culture of juvenile court proceedings by encouraging lawyers representing children in foster care to root their arguments in the text, history, and holdings that clearly establish that children possess foundational constitutional rights. Those rights must be protected. Attorneys for children are in the best position to present constitutional arguments in both trial and appellate courts.

### Who Should Use This Manual

Lawyers who represent the expressed wishes of children in foster care, sometimes called client-directed attorneys, are the primary audience for this *Practice Manual*. Lawyers appointed to represent children's best interests, sometimes referred to as guardian ad litem or best-interest attorneys, may also assert children's constitutional rights and will benefit from this information. If children in your state's foster care system are not appointed a client-directed attorney, then a caregiver or other adult may seek to intervene in a case and assert children's rights, or seek the appointment of legal counsel for children as a "next friend."<sup>4</sup> However, when this *Practice Manual* references attorneys, lawyers, or legal counsel, the primary reference is to client-directed attorneys representing children

in foster care.

Unfortunately, too many children in foster care don't have a lawyer to give them a voice.<sup>5</sup> Even when children do have a lawyer, those lawyers are not consistently rooting their arguments in constitutional guarantees of due process and equal protection of the laws. Burdensome caseloads and limited resources no doubt play a factor, limiting attorneys' ability to adequately research and assert constitutional rights. This *Practice Manual* is intended to help fill that gap.

### **How This Manual Is Structured**

Trial lawyers are busy. They don't have a lot of time to research constitutional claims or read niche law reviews and journal articles. This *Practice Manual* is structured to help attorneys find relevant cases recognizing well-settled constitutional rights as simply and quickly as possible. It is organized around five foundational rights possessed by children in foster care:

- 1) The right to be safe while in state custody.
- 2) The right to family integrity (including the right to maintain sibling relationships and to preserve familial and family-like bonds).
- 3) The right to emotional security.
- 4) The right to permanency in a timely manner (including the right to find a family and to be adopted).
- 5) The right to an adequate education.

Each section contains a brief discussion of the right and includes an inexhaustive list of ideas for when lawyers might assert the right, even when making "mundane" arguments and requests. This manual's goal is to help attorneys protect children's constitutional rights at all stages of involvement with the child protection system: investigation; removal; time in foster care; reunification; termination; and post-termination and adoption. Each section includes citations to federal and state cases supporting the existence and protectability of that right.

Of course, children possess other constitutional rights that attorneys can assert.<sup>6</sup> To paraphrase our nation's founders, the enumeration in this *Practice Manual* of certain rights is not intended to deny or disparage the existence of other rights retained by children and protected by the federal

and state constitutions.

Before we get to the five foundational rights, let's examine a few high-level thoughts about asserting constitutional rights generally and then discuss a few nuts and bolts of how to assert, argue, and appeal from decisions involving the constitutional rights of children.

## GENERAL CONCEPTS

### The Role of State Constitutions

State constitutions are the first bulwark to protect children's constitutional rights. "A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."<sup>7</sup> Indeed, the language of the Fourteenth Amendment to the U.S. Constitution "turns on language about the adequacy of the state's 'process' and the adequacy of the state's 'equal protection of the law.'"<sup>8</sup> Thus, "[a]s a matter of federal constitutional law, application of the state constitution is 'logically prior to review of the effect of the state's total action' under the federal Constitution."<sup>9</sup> State constitutions may also afford greater protections than the federal Constitution.<sup>10</sup>

Lawyers should think about, research, and assert state constitutional arguments whenever possible.<sup>11</sup>

### The Role of the Fourteenth Amendment to the U.S. Constitution

The Fourteenth Amendment to the U.S. Constitution safeguards and secures children's procedural and substantive rights under the federal Constitution.<sup>12</sup> As such, lawyers should invoke the appropriate clause of the Fourteenth Amendment whenever they assert a right that is protected by the federal Constitution — even if just as a reminder that it is the vehicle by which the federal Bill of Rights is incorporated against the states.<sup>13</sup>

### Privileges or Immunities of Citizens of the United States

The Privileges or Immunities Clause was intended to be the workhorse of the Fourteenth Amendment.<sup>14</sup> However, the U.S. Supreme Court, in the *Slaughter House Cases*, a case as ugly in name as in effect, gutted the protections of this clause soon after it was adopted.<sup>15</sup> Without the ability to protect substantive rights through the proper clause, the U.S. Supreme



Court ultimately turned to the doctrine of substantive due process for the protection of individual rights.<sup>16</sup>

### Due Process of Law

Children's procedural due process rights include meaningful participation and being heard in their cases (both of which inform the argument that children in foster care have a right to be appointed high-quality legal counsel<sup>17</sup>).<sup>18</sup> It is the doctrine of substantive due process that protects children from harm (both physical and emotional) while in state custody.<sup>19</sup>

### Equal Protection of the Laws

The original purpose of the Equal Protection of the Laws Clause was to ensure state officials took action to protect American citizens from harm, including protecting individuals from private acts of violence.<sup>20</sup> While that is not the U.S. Supreme Court's current interpretation or application of equal protection, the clause does, at a minimum, ensure that the government treats similarly situated persons alike, and also that it does not treat dissimilarly situated persons as if they were the same.<sup>21</sup>

## **The Duty to Protect the Rights of Children in Foster Care Arises Because of the “Special Relationship” Created When the State Becomes the Children’s Legal Parent**

The state's duty to protect children in its care arises from the “special relationship” created between the state and the child when the state intervenes in the family relationship.<sup>22</sup> When the government removes children from the care and custody of their parents, is appointed the children's legal guardian, and places children in out-of-home care, our constitutional system imposes on the government a responsibility to keep those children safe from all manner of harm, including physical and emotional harm.<sup>23</sup>

This special relationship imposes affirmative duties on the state.<sup>24</sup> These duties go beyond the bare necessities of life, such as shelter, food, physical safety, and basic medical care. These duties also include the “right to be free from unreasonable and unnecessary intrusions into [children's] emotional well-being.”<sup>25</sup> Moreover, children's rights may be violated by inaction as well as action.<sup>26</sup>

## **The State is a Bad Parent**

The government is a poor substitute for a parent to children in foster care, and too often a cold and indifferent one. The U.S. Supreme Court acknowledges that children in foster care are “among the most vulnerable” people in our society,<sup>27</sup> and that removing children from their family to foster care is a “grave act.”<sup>28</sup> But sadly, based on outcomes for children in foster care, the state is simply a bad parent.<sup>29</sup> There may be caring people working in the state’s foster care system, but the state itself must be held accountable by those outside the system — such as by children’s attorneys (where children are afforded legal representation) — to ensure the state complies with its duties of care.

## **Rights May Not Be Inviolate, But They Need to Be Recognized to Minimize Harm**

Rights — even constitutional rights — are not inviolate. The government may, when it has a legitimate reason for doing so, infringe on individual rights. Our nation’s various foster care systems are an on-going reminder of this oft-forgot fact. When children are removed from their parents, not only are the parents’ rights to the care, custody, and upbringing of their children infringed, but the children’s liberty is immediately restricted by being forced to live somewhere other than with their parents.<sup>30</sup>

Although government is permitted to infringe on our rights in certain circumstances, it should do so in a manner that maximizes individual liberty to the greatest extent possible. Policy sometimes reflects this ideal. In foster care, when children are removed from their homes and placed in foster care, the government is required to place them in the “least restrictive” environment possible.<sup>31</sup> That means the government should, under most circumstances, seek kinship and traditional foster families before group homes or other types of congregate care settings.<sup>32</sup> Children in foster care should also be protected from having to sleep in government offices, hotels, or juvenile detention centers.

Because foster care infringes on children’s rights from the very outset of a case, it is important for courts to recognize the existence of children’s rights and to fully hold the government accountable to respect and protect children’s rights.

## Additional Resources

Randy E. Barnett and Evan D. Bernick, *The Original Meaning of the 14th Amendment: Its Letter & Spirit* (2021).

Clint Bolick, *The First Line of Defense: A blueprint for state constitutional litigation to expand freedom*, [https://www.goldwaterinstitute.org/wp-content/uploads/uploads/First\\_Line\\_of\\_Defense.pdf](https://www.goldwaterinstitute.org/wp-content/uploads/uploads/First_Line_of_Defense.pdf).

Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771 (2021).

William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).

## NUTS AND BOLTS

It is not enough to make vague allusions to the constitution (either state or federal). There is a science to the art of pleading, preserving, and presenting constitutional issues on appeal. Below are the three P's (pleading, preserving, and presenting) associated with asserting, arguing, and appealing constitutional claims.

### Pleading Constitutional Claims at the Trial Court Level

#### Make Your Arguments in Writing When Possible

Children's attorneys spend a lot of time in the courtroom. Their calendars are filled with periodic review hearings, evidentiary hearings, and severance trials. In the evenings, you might find them meeting with or calling their clients, reviewing court or service-provider reports, or preparing exhibits for trial. Their schedules do not leave much time for writing motions. But motion practice is a critical component of competent lawyering.<sup>33</sup>

Written, as opposed to oral, motions are an excellent way to clearly preserve issues for appeal. The process of writing also helps lawyers clarify arguments in their own minds, work through possible objections, and marshal the best cases and statutes in support of their arguments. It is not necessary to write a treatise. Juvenile court judges are busy, too. But it is important to do more than just cite a single case.

A written motion should begin by providing the court with a brief road-map of its contents and argument(s). Lawyers should also make good use of topic sentences, headings, and sub-headings — especially when a multiple-part test must be applied to the facts. Finally, wrap up your argument with a summary conclusion that reiterates your strongest points and makes clear the specific relief being sought.

### Plant the Roots of Your Argument in the Constitution

Lawyers who represent parents whose children were removed and placed in foster care begin most of their legal arguments by reminding the court that parents possess fundamental constitutional rights in the care and companionship of their children.<sup>34</sup> Children’s lawyers should similarly remind the court and all other parties to the case that children possess constitutional rights.<sup>35</sup> Here are some examples:

- If you are seeking additional visitation with parents or siblings, remind the court that children possess the fundamental right to family integrity and familial association.
- If you are asking for therapy, remind the court that children have a constitutional right to emotional security while in state custody.
- If children are suffering mental anguish by being forced to visit abusive parents and you are seeking to reduce, limit, or stop visits, or to have visits take place in a safer, more secure environment, remind the court that children have constitutional rights to both physical safety and emotional security.

Even if you are not seeking specific constitutional relief, such as asking for a statute or policy to be struck down or enjoined as unconstitutional, include a section at the beginning of your pleading or motion that reminds the court of the constitutional rights that underly the relief you are seeking.

Don’t forget to quote the text of the constitutional provision you’re relying on. Remember that even similarly worded provisions in state and federal constitutions may be interpreted differently based on the history, context, and subsequent interpretation of the different provisions. Take advantage of these distinctions when they can make the difference for your client’s case.

### Cite Your Legal Support

If there is an on-point case (or, ideally, cases) from your jurisdiction, cite it (or them). If you must analogize to a similar, but not-quite-on-point precedent, do so. Do not oversell your cited authority, but do not shy away from making a novel claim reasonably supported by published precedent.

Many jurisdictions now make “unpublished” decisions readily available online. Such decisions do not constitute binding precedent and local rules often limit the circumstances in which attorneys may cite such authorities. Attorneys should thus consult their local rules before quoting from or citing unpublished decisions in their motions, briefs, and oral arguments. But if an unpublished, non-precedential case is all you have, cite it if you are permitted to do so. At least the court will see that an appellate court in your jurisdiction has agreed with your proposition of law.

What if you only have out-of-state precedent? If your argument arises from a provision of the state constitution instead of the federal Constitution, exercise caution. Many state court judges don’t want to hear about out-of-state cases because state constitutional arguments should arise from local history and culture. State court judges prefer in-state historical research with original public meaning arguments. However, if your particular provision was modeled on another state’s constitution, then out-of-state precedent might be relevant. In that case make sure you explain why a case from another jurisdiction bears on the interpretation of your state’s constitution.

### Apply Facts to the Law

This step is often overlooked by busy, overburdened lawyers. Most attorneys do a fine job of reciting the facts in their fact section.<sup>36</sup> Lawyers also tend to do a good job of laying out the law, legal tests, and rules that govern their argument section. But they often fail to adequately apply the facts to the law.

The application of fact to law is the heart of any motion or legal brief. It is critical to connect the dots between the facts in the case and the law that governs the outcome. The legal tests or rules derived from case law interpreting your constitutional text provide a blueprint to marshal the facts as persuasively as possible. Lawyers should use words like “because,” “as,” and “since” to make connections between law and fact.

### Write a Strong Conclusion

When writing your conclusion, summarize your argument in a couple of sentences. Do not simply request your specific relief or rely on the reasons “previously set forth.” Restate, in a quick, summary fashion, the most compelling reasons your client is entitled to the relief you seek. When space permits, your conclusion should be a short paragraph, not a single sentence.

### **Preserving Constitutional Claims for Appeal**

#### Do NOT Relegate Constitutional Arguments to a Footnote

Do not bury constitutional arguments in a footnote.<sup>37</sup> It is crucial to include constitutional arguments in the body of your written motion or brief, lest you risk waiver of the argument.

#### Make a Record

It is important to make a record that preserves the constitutional issue for appellate review. Ideally, constitutional issues would be raised in writing. If the lawyer only has an opportunity to raise the issue orally, counsel should be specific enough to ensure that any transcript of the argument will sufficiently preserve the claim for later review. And if proceedings typically are not transcribed, a lawyer should arrange in advance for a court reporter or other recording to be made so an appellate court can properly review the lower court proceedings.

#### Consider Conducting Discovery

If the issue you need to raise warrants it, conduct discovery. Traditional discovery tools are underutilized in child welfare proceedings. In jurisdictions that permit depositions, requests for admissions, or other forms of discovery, lawyers for children should consider using those methods to make an adequate record.

#### Press the Trial Court for a Ruling on the Constitutional Issue

Courts may not agree that your issue rises to the level of a constitutional question and will simply ignore the constitutional argument. Obviously, it is easier to appeal from an adverse ruling than no ruling at all. So, if the court denies your relief without ruling on your constitutional question, especially if you plan to seek appellate relief, ask for a ruling on the constitutional issue. That said, if the constitutional issue is reasonably

developed, then the issue should be adequately preserved for appellate review, even if the trial court refuses to rule on the issue.

## **Presenting Constitutional Claims on Appeal**

### Seek Interlocutory Appellate Relief

Not every decision or order is appealable at the time it is issued. Typically, only “final orders” are appealable. However, state court rules of procedure often permit parties to petition appellate courts for interlocutory relief when no appeal of right is available.<sup>38</sup> Parties seeking such relief typically must show they have no adequate or speedy remedy by appeal. Known by various names, such as a “writ” or “special action,” appellate courts typically possess discretion as to whether to accept jurisdiction before granting or denying relief to the moving party. Lawyers who represent children whose rights have been denied or violated should consider seeking interlocutory relief when there is no appeal of right.

### File Notices of Appeal

Children who are considered parties to their child welfare proceeding have clear standing to appeal from any order which aggrieves them, including, for example, the grant or denial of a motion for termination of parental rights.<sup>39</sup>

### File Appellate Briefs

Lawyers who represent children in foster care should be advising their young clients about the appeals process and representing their interests, their positions, and their legal rights on appeal. Perhaps it is sufficient to join or stand on the other parties’ briefs. Perhaps not. Lawyers should independently assess the appeal, actively consult with the other attorneys in the case, determine what arguments other counsel plan to make in their appellate briefs, and then decide whether to file a separate brief.

### Participate in Oral Argument

If the appellate court orders or requests oral argument, lawyers who represent children should consider participating. There is a strongly held belief that judges come to oral argument with their minds made up. Another oft-repeated maxim is that lawyers cannot win a case at oral argument, only lose it. Do not fall for myths. Most appellate judges are looking for sincere answers to their sincere questions as they weigh how

to decide a case. Most appellate judges are open to being persuaded about the correctness of your legal arguments. Do not hesitate to seek time at the podium to advocate for and to protect children's rights.

### **Additional Resources**

American Bar Association, *Model Act on Child Representation* (2021).

Stephen V. Armstrong, Timothy Terrell & Jarrod F. Reich, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (4th ed. 2021).

Donald N. Duquette, et al., *Children's Justice: How to Improve Legal Representation of Children in the Child Welfare System* (2016).

Jeanine McKelvey, *Representing Very Young Children* (2015).

National Association of Counsel for Children, *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings* (2021), <https://naccchildlaw.org/standards-of-practice>.

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2011).

## **LIMITATIONS**

### A Sampling, Not a Full Survey

This *Practice Manual* includes cases from the U.S. Supreme Court, federal circuit courts of appeal, federal district courts, and state supreme and appellate courts.<sup>40</sup> It does not purport to include every case in the country — or from every state — that may support arguments regarding the existence and enforceability of the foundational rights discussed below. Thus, attorneys may want to use this manual as a springboard for their own legal research. Indeed, some jurisdictions have rejected the conclusions of other jurisdictions.<sup>41</sup> At a minimum, attorneys should independently confirm the on-going viability of the cases cited herein before citing them in court.

### This Manual is About Now, Not Later

This is not a manual about how to file post-deprivation of rights cases. It is about asserting the constitutional rights of children during their time in foster care to prevent constitutional violations and to vindicate their rights “*right now*.” The goal of this manual is to avoid the need for later civil rights litigation seeking monetary damages.<sup>42</sup> While many of the



cases cited herein involve post-deprivation of rights claims, this manual is not about filing such claims.

As such, children's lawyers citing post-deprivation of rights cases need to be prepared for arguments that the cases are distinguishable on the facts, which may be true. Lawyers representing children may thus want to be careful to cite the post-deprivation of rights cases for the existence of the right at issue and not necessarily as proof the right has been violated in *this* case. It will be up to the children's lawyer to show why the facts in their case amount to a violation of the specific right being asserted — or why denial of the relief sought will violate the right at issue.

### This Manual Does Not Address All Conceivable Issues

Because this manual is not about litigating violations of constitutional rights under U.S.C. section 1983,<sup>43</sup> it does not address issues such as the proper parties to sue or join, questions of qualified immunity,<sup>44</sup> or the standards of liability that apply in different federal circuit courts of appeal.<sup>45</sup> The anticipated fora for raising the constitutional rights discussed herein are the on-going legal cases that govern children's time in foster care.<sup>46</sup>

## **RIGHT #1: CHILDREN HAVE A RIGHT TO BE SAFE WHILE IN FOSTER CARE**

Every federal circuit court of appeals recognizes that children in foster care have a right to be safe — even if the specific contours vary between jurisdictions.<sup>47</sup> The first and most basic duty of the state is to protect children who are in foster care from harm. When reduced to its essence, this right includes:

- The right to be protected from physical, sexual, and emotional abuse.
- The right to adequate shelter.
- The right to minimally nourishing food.
- The right to basic medical and emotional care.

Most children removed from the custody of their parents and placed in foster care have endured trauma. That trauma might be physical or sexual abuse, starvation, abandonment, neglect (often due to a parent's drug addiction or mental illness), domestic violence, or a combination of these and other harms. One goal of foster care should be to do no further harm to children.

When children are removed from their homes and placed in the legal custody of the state, their lawyers must take continuous action to ensure the children's on-going safety. As soon as possible, the lawyer should obtain and read the case file. What allegations were made to justify the children's removal from home? Where have the children been placed? Have the children been placed with family or a licensed foster family or some type of congregate care setting? Were siblings separated? Are the children enrolled in and attending school? Based on the information in the case file, lawyers should make a list of the people involved in the case and in the children's lives who should be contacted to learn more.

The lawyer must also meet with the children as early as possible in the representation. Ideally, the lawyer can get out of the office, see where the children are living, meet the children's caregiver(s), observe the children interacting with those caregivers and any other people or children in the home. Then the lawyer can find a safe location to meet with the children where the attorney-client privilege will be protected and can start laying the foundation for a strong attorney-client relationship.

The lawyer should ask how the children are doing in their out-of-home living situation. Do they feel safe and well cared for? What concerns or fears are weighing on them? If the children are in a foster home or a congregate care setting, the lawyer should ask if there are any family members or other trusted adults in the child's life who might also be willing to serve as the child's caregiver. As the case proceeds, the lawyer or someone on the lawyer's staff with appropriate training should continually visit the children where they are living, talk to the caregivers, and observe the interactions between the caregivers and the children.

Once the children begin visiting with their parents, if the visits are supervised, then lawyers should be reviewing visitation notes as near in time to the visits as possible. Questions about how visits are going from the children's perspective need to be asked.

If at any time the children raise safety concerns with their caregivers, their classmates, their workplace, or with their parents during visits, the lawyer must take appropriate action, consistent with the lawyer's duty of confidentiality to the represented children. That action might be discussing the children's concerns with the state caseworker or a teacher. It might be asking that visitation be reduced (or increased) or moved to a different

location or switched from unsupervised to supervised (or vice versa). If the safety concern warrants, that action might be seeking a court order to move the children to a new, safer home.

Lawyers must also make sure that children and their caregivers know how to contact the lawyer. Children should know what to do if they need to reach the lawyer outside of business hours, in both emergency and non-emergency situations. Lawyers who establish a strong and trusting attorney-client relationship with older youth may also play a unique role in the lives of youth who run away from their foster or group homes. Absent exigent circumstances, a lawyer may not be compelled to reveal a run-away's location due to the confidentiality requirements of the attorney-client relationship.<sup>48</sup> That can make an attorney a safe person for runaway foster youth to call as a means of staying on the radar and seeking safe help from a trusted adult.

For those youth who go missing and remain off the radar, we must not give up on trying to keep those children safe from harm. Children in foster care who go missing, whether they have run away or been lured away and abducted, should have a safety expectation that state officials will look for them. Children should not be abandoned by the state just because they went missing, even if they are believed or known to have run away. Child welfare agencies, law enforcement, and all other system-involved persons (such as CASAs, GALs, and attorneys) should prioritize the children's safety and well-being by engaging in a serious and persistent search effort for all missing children. Attorneys should advocate for a relentless search for missing foster children and fight to keep missing children's cases open. When missing children are found, attorneys must advocate for appropriate interventions and work to prevent, or at least reduce, instances of running away.

### **When to Assert the Right to Safety**

- When asking for needed protection, such as a safety plan or a safety monitor to keep children at home with their parents.
- When seeking a change of physical custody (for example, if physical, sexual, or emotional abuse is suspected by the children's caregiver).
- When opposing motions for a change of physical custody (for example, if there are concerns about the prospective caregiver's protective capacity).

- When seeking to prevent being placed in congregate care (or when trying to move youth out of a group home or other congregate care setting).
- When seeking to halt or change disciplinary methods being used by the children’s caregivers or teachers.
- When seeking to terminate parental rights (for example, a petition for termination based on grounds of physical or sexual abuse).
- When arguing against reunification on the grounds that it will put children in physical or emotional danger.
- When asking for reunification because the basis for the children being in foster care has been addressed and an extended time in the state’s custody and separation from family is negatively impacting the children’s well-being.
- When children have run-away, gone missing, or been kidnapped, and once found, ensuring the state provides appropriate interventions to eliminate or minimize the risk of reoccurrence.

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### **Rights in Action: A Case Study**

Adopted by grandparents due to her parents’ debilitating drug addictions, Baylee thought she had found a safe and loving adoptive home with her grandparents. Sadly, her nightmare had only just begun. Both grandparents sexually abused her. When she bravely disclosed the abuse, the state’s child welfare agency did not seek to terminate her adopted parents’ rights but instead put in place a plan for reunification. Upset and fearful, Baylee asked for a lawyer. That is when the Center for the Rights of Abused Children’s law clinic stepped in to represent Baylee.

What Baylee wanted was to be set free from her abusive parents and to be adopted by the foster family who had taken her in and begun walking with her on a path toward healing and helping her feel safe and loved. After a contentious severance trial, where the Center emphasized Baylee’s constitutional right to be safe, she prevailed against her abusers.

At her adoption hearing, Baylee changed her name, choosing to take the name of the attorney who advocated for her in court. At her adoption hearing, Baylee spoke and thanked her attorney for giving her a voice in her own case when no one else did.

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## Helpful Cases

### United States Supreme Court Cases

- *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (holding that a school’s strip-search violated a child’s rights under the Fourth Amendment).
- *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”).
- *Schall v. Martin*, 467 U.S. 253, 254 (1984) (“There is no doubt that the Due Process Clause is applicable in juvenile proceedings.”)
- *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.”).
- *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (holding that persons involuntarily confined in a state institution for the mentally handicapped have substantive rights under the Due Process of Law Clause of the Fourteenth Amendment).
- *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (holding that deliberate indifference to a prisoner’s serious medical needs constituted cruel and unusual punishment under the Eighth Amendment).
- *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”) (citations omitted).
- *In re Gault*, 387 U.S. 1, 13 (1967) (holding that the Fourteenth Amendment is not “for adults alone”).
- *Prince v. Mass.*, 321 U.S. 158, 166-67 (1944) (parental rights are necessarily limited by the state’s interest in ensuring children’s welfare and safety).

### Federal Circuit Court of Appeals Cases

- *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (assuming a special relationship exists between the state and children in foster care that imposes a duty on the state for the children’s “safety and

general well-being” and “to a safe living environment”).

- *Frances-Colon v. Ramirez*, 107 F.3d 62, 63 (1st Cir. 1997) (recognizing children’s substantive due process interest in “bodily integrity” and “adequate medical care” while in government custody).
- *U.S. v. Giordano*, 442 F.3d 30, 47 (2d Cir. 2006) (holding that child “victims had a right under the Fourteenth Amendment to be free from sexual abuse by a state actor”).
- *Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998) (noting that juvenile detainee had the right to be protected from sexual molestation under the Fourteenth Amendment).
- *Doe v. New York City Dep’t of Soc. Servs.*, 709 F.2d 782, 792 (2d Cir. 1983) (holding state agency could be held liable for violating a foster child’s constitutional rights by failing to protect her from sexual abuse perpetrated by her foster family).
- *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (holding “that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties,” such as the duties of care and protection).
- *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (holding that a schoolteacher’s sexual molestation of a student is an unconstitutional intrusion of the student’s bodily integrity).
- *Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) (holding that “when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child’s liberty, triggering the protections of the Due Process Clause and imposing some responsibility for [the child’s] safety and general well-being”) (cleaned up).
- *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994) (recognizing that “the child also has obvious and compelling interests in his personal welfare and safety, which are opposed to those of his parents when they pose the threat to the child’s safety”).
- *Hall v. Tawney*, 621 F.2d 607, 611-12 (4th Cir. 1980) (recognizing a child’s constitutional right to privacy and bodily security, secured by the Fourteenth Amendment’s Due Process of Law Clause, in the context of school discipline).

- *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 249-50 (5th Cir. 2018) (recognizing a substantive due process of law right enjoyed by children in the custody of the state’s foster care system “to protection from physical abuse and violations of bodily integrity”).
- *Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (recognizing a foster child’s substantive due process right to “personal security and reasonably safe living conditions”).
- *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (en banc), cert. denied, *Lankford v. Doe*, 513 U.S. 816 (1994) (School children “have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right.”).
- *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (Acknowledging the state creates a “special relationship” when it removes children “from their natural homes and place[s] them under state supervision. At that time, [the state] assume[s] the responsibility to provide constitutionally adequate care for these children.”).
- *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (recognizing that children have a right to bodily integrity not to be tied to a chair in public school all day).
- *Doe v. Claiborne Cnty., Tenn. ex rel. Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 506 (6th Cir. 1996) (holding that “a schoolchild’s right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee”).
- *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (holding “that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes”).
- *Reed v. Palmer*, 906 F.3d 540, 552 (7th Cir. 2018) (concluding that when the state removes children from their parents’ custody it assumes a duty of safekeeping because of the restraints it places on the children’s liberty).
- *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (recognizing a “constitutionally protected substantive right to be free from such bodily harm and sexual molestation and abuse as secured

by the Due Process and/or Equal Protection Clauses of the 14th Amendment to the U.S. Constitution.”).

- *Norfleet ex rel. Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (holding that the state had an obligation to provide the child with adequate medical care, protection, and supervision).
- *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012) (recognizing foster children’s “right to be free from harm while involuntarily in government custody and their right to medical care, treatment, and services”).
- *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (recognizing the state’s duty to children in its care to provide reasonable safety and minimally adequate care).
- *Plumeau v. Sch. Dist. No. 40, Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (acknowledging a child’s constitutional right to be free from state-imposed violations of bodily integrity, including the right to be free from excessive physical abuse by school employees and the right to be free from sexual abuse by school employees).
- *Gutteridge v. Okla.*, 878 F.3d 1233, 1238 (10th Cir. 2018) (emphasizing that placement in foster care triggers a constitutional duty to provide children with “their basic human needs, paramount among those safety”).
- *Abeyta ex rel. Martinez v. Chama Valley Indep. Sch. Dist. No. 19*, 77 F.3d 1253, 1255 (10th Cir. 1996) (recognizing that sexual assault and/or molestation by a schoolteacher violates a student’s substantive due process rights).
- *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992) (holding that children have “a clearly established right to protection while in foster care.”).
- *H.A.L. ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008) (recognizing foster children’s “right to be free from an unreasonable risk of harm while in state custody”).
- *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987) (en banc), cert. denied, 489 U.S. 1065 (1989) (“The liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment.”).



- *Smith v. D.C.*, 413 F.3d 86, 95 (D.C. Cir. 2005) (concluding that the federal Constitution imposes upon the District of Columbia a duty to assume responsibility for foster children’s safety and general well-being).

### Federal District Court Cases

- *R. F. J. v. Fla. Dep’t of Children & Families*, 398 F. Supp. 3d 1268, 1275 (M.D. Fla. 2019) (recognizing that children in foster care have a Fourteenth Amendment substantive due process liberty interest in reasonably safe living conditions).
- *Smith v. Beasley*, 775 F. Supp. 2d 1344, 1355 (M.D. Fla. 2011) (finding that under the Fourteenth Amendment, foster children have a constitutional right to be free from unnecessary pain and a fundamental right to continuing physical safety while in state care).
- *Daniel v. Ga. Dep’t of Human Servs.*, 420 F. Supp. 3d 1350, 1357 (N.D. Ga. 2019) (holding that children in foster care have a due process right to be free from unnecessary pain and a fundamental right to physical safety).
- *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005), rev’d on other grounds, 130 S. Ct. 1662 (2010) (“It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake.”); see also *id.* at 1360 (“The Court finds that children have fundamental liberty interests at stake in [child protection] proceedings. These include a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.”); see also *id.* (“Furthermore, a child’s liberty interests continue to be at stake even after the child is placed in state custody. At that point, a ‘special relationship’ is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.”).
- *S.W. ex rel. Marquis-Abrams v. City of New York*, 46 F. Supp. 3d 176, 194 (E.D.N.Y. 2014) (recognizing that children in foster care have a substantive due process right, under the Fourteenth Amendment, to protection from harm).
- *Phillips ex rel. Green v. City of New York*, 453 F. Supp. 2d 690, 721 (S.D.N.Y.

2006) (acknowledging children in foster care have substantive due process rights under the Fourteenth Amendment to protection from harm, including the right to such essentials as adequate food, shelter, clothing, and medical attention).

### State Court Cases

- *Dep't of Child Safety v. Beene*, 332 P.3d 47, 51 (Ariz. App. 2014) (recognizing that the rules governing juvenile court proceedings “should be interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child”).
- *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 329 (Ariz. 2003) (finding that due process protects foster children from abuse in foster homes).
- *In re David B.*, 91 Cal.App.3d 184, 192–193, 195 (Cal. Ct. App. 1979) (holding that children have compelling rights to be protected from abuse and neglect).
- *Deal v. Brooks*, 389 P.3d 375, 379 (Okla. Civ. App. 2016) (recognizing that children in foster care possess a fundamental “interest in safe conditions, personal security, and bodily integrity for persons in state custody” guaranteed under the Due Process of Law Clauses of both the federal Constitution and the Oklahoma Constitution).
- *Braam ex rel. Braam v. State*, 81 P.3d 851, 857 (Wash. 2003) (“We hold that foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the state, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.”).

### **Additional Resources**

SafeHome, *Guide to Home Safety for Kids* (2022) (explaining in-home risks for children and discussing strategies to protect children at home), <https://www.safehome.org/home-safety/child-safety-guide/>.

Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 Duke J. of Gender L. & Pol’y 223 (2008).

## RIGHT #2: CHILDREN HAVE A RIGHT TO FAMILY INTEGRITY

Children's right to family integrity includes:

- 1) The right to remain with family unless removal is necessary.
- 2) The right to reunify with their parents when it is safe to do so.
- 3) The right to maintain safe, healthy sibling relationships while in foster care.
- 4) The right to stable, family-like relationships with kinship and foster families while in foster care, and especially after termination of parental rights.

The rights of parents to the care and custody of their own children are firmly established in U.S. Supreme Court precedent.<sup>49</sup> Yet, to date, the Supreme Court has not recognized children's reciprocal rights to live with, be raised by, and to know their biological parents.<sup>50</sup> However, numerous lower courts have recognized the reciprocal nature of the right to family integrity. Children in foster care have a natural reciprocal right,<sup>51</sup> protected by the federal Constitution, to their own mother and father.<sup>52</sup>

Considering the right of children to be raised by their parents, lawyers who represent children in foster care should independently assess whether children can safely remain at home (if the children have not yet been removed) or safely return home (after removal has occurred). The latter duty exists throughout the duration of the case.

Children's right to family integrity extends to preserving sibling relationships<sup>53</sup> and to the preservation of family-like bonds established while in kinship or foster care, particularly when children cannot safely be reunified with their parents.<sup>54</sup> Lawyers ought to consider each family member's mutual right to family integrity. Thus conceived, the right to family integrity is not a "parents' rights" versus "children's rights" issue. Each member of the family shares in and enjoys the right to family integrity and ought to be protected from state intrusion into and break-up of the family unit without due process of law.

### When to Assert the Right to Family Integrity

- Prior to removal if the children can remain safely at home.
- When seeking to increase the quantity or duration of visitation, including phone and virtual visits, between children and their parents.

- When seeking services to facilitate reunification, including services for parents.
- When filing a motion to return children to the custody of their natural parents.
- When opposing a motion to terminate parental rights.
- On appeal, when taking the position that parental rights were erroneously severed.
- When filing a motion to have children placed with suitable relatives, especially early in the case.
- When seeking to have siblings placed together.
- When seeking to establish visitation, including phone or virtual communication, with siblings.
- When asking for family therapy.
- When asking for children to be placed with non-relative kin with whom the children have a significant relationship (i.e., with “fictive” kin).
- When trying to arrange for children to maintain relationships with important people in their life.
- When seeking to keep children with long-term, stable, safe, and loving caregivers, especially if disruption will harm the children’s emotional security and cause new trauma in their life.
- When seeking permanent guardianships to avoid the termination of parents’ rights and thereby preserve familial relationships.

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### **Rights in Action: A Case Study**

Darren, at three years old, was struggling emotionally in his foster home. He had been born drug exposed and lagged cognitively and socially. But he was loved by his foster family, who were strong advocates to get him the help he needed. Darren’s foster family had already adopted his younger sister, but the state held off on consenting to Darren’s adoption because his team believed he would benefit from a short stay in a different, therapeutic foster home. Reluctantly, Darren’s foster family watched as the state “disrupted” him from their home with the understanding that Darren would soon return to their care so he could be adopted alongside his sister.

The stay at the therapeutic foster home was, indeed, short. But, believing Darren was too much to handle, the state sent him hundreds of miles away to live in a group home — over the objection of his foster family who pleaded for him to come home to them. The group home eventually cut off all contact between Darren, his foster family, and his sister. But the foster family continued to attend review hearings in Darren’s case and seek his return to their home. After a year, and seeing no emotional or social progress, the foster family called the Center for the Rights of Abused Children’s *pro bono* Children’s Law Clinic for help.

The Center’s lawyers were stone-walled by the child welfare agency and the group home but were permitted to represent the foster family in court, where the Center asserted that Darren’s and his sister’s rights to family integrity were being infringed. Ultimately, our attorneys persuaded the judge to return Darren to his foster family. Now five years old, Darren has been reunited with his sister and has been adopted by the family who loves him and is committed to helping him overcome his early adversity.

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## Helpful Cases

### United States Supreme Court Cases

- *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”) (citation omitted).
- *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (“The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”); *see also id.* at 619 (“The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family.”).
- *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (“We do not deny that the child . . . [is] also deeply interested in the outcome” of the case.);

see also *id.* at 754 n.7 (acknowledging the “fact that important liberty interests of the child . . . may also be affected . . .”).

- *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977) (plurality opinion) (“At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.”).
- *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (“[T]he institution of the family is deeply rooted in this Nation’s history and tradition.”).
- *Stanley v. Ill.*, 405 U.S. 645, 652 (1972) (observing that the state “registers no gain towards its declared goals when it separates children from the custody of fit parents” and that the Equal Protection of the Laws Clause protects the rights of “illegitimate children” to their natural parents even when “familial bonds . . . were [not] . . . as warm, enduring, and important as those arising within a more formally organized family unit”).

#### Federal Circuit Court of Appeals Cases

- *Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2011), as amended (May 14, 2012) (holding that “children have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association”) (quoting *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000)).
- *Rivera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir. 1982) (holding that “children surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth”).
- *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody, and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent.”).
- *Miller v. City of Philadelphia*, 174 F.3d 368, 373 (3d Cir. 1999) (recognizing that the fundamental interest in the familial relationship must be

balanced against the state's interest in protecting children suspected of being abused).

- *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994) (affirming that delaying reunification “implicates the child’s interests in his family’s integrity and in the nurture and companionship of his parents”).
- *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (stating that “a child’s right to family integrity is concomitant to that of a parent”).
- *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988) (recognizing that “the right of the family to remain together without the coercive interference of the awesome power of the state” is the “most essential and basic aspect of familial privacy”).
- *Drummond v. Fulton Cnty. Dep’t of Family and Children’s Servs.*, 547 F.2d 835, 853 (5th Cir. 1977), *on reh’g*, 563 F.2d 1200 (5th Cir. 1977) (holding that a child had a protected liberty interest in lifelong relationship with foster parents under the Fourteenth Amendment which could not be denied without due process).
- *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002), *reh’g denied* (June 26, 2002) (“Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents.”).
- *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1018 (7th Cir. 1999) (en banc) (recognizing the “fundamental . . . substantive due process right of a child to be raised and nurtured by his parents”).
- *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) (recognizing the child’s “right to familial association” . . . “is a fundamental liberty interest”).
- *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) (concluding that the right to live with one’s natural family is “a right that ranks high among the interests of the individual and that cannot be taken away without procedural due process”).
- *Mabe v. San Bernardino Cnty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001) (“The constitutional right of parents and children to live together without governmental interference is well established.”).
- *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) (“Parents and

children have a well-elaborated constitutional right to live together without governmental interference.”).

- *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (“[The] constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.”).
- *J.B. v. Washington Cnty.*, 127 F.3d 919, 925 (10th Cir. 1997) (“The forced separation of parent from child, even for a short time, represents a serious impingement upon both the parents’ and child’s rights.”) (internal quotations omitted).
- *Franz, et al., v. U.S.*, 707 F.2d 582, 603 (D.C. Cir. 1983) (holding that a parent and child’s “stake in one another’s companionship must be deemed a ‘fundamental liberty interest;’” such that the state must have a “very good” reason for abrogating it).

#### Federal District Court Cases

- *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1117 (N.D. Cal. 2018) (“It is well-settled that children have a liberty interest in living with their parents.”).
- *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 297 (N.D. Ga. 2003) (“Similarly, this Court finds that once the state has removed a child from his or her family, it cannot deliberately and without justification deny that child the services necessary to facilitate reunification with his or her family, when safe and appropriate, without violating the child’s right to family integrity.”).
- *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) (The “practice[] of placing siblings in separate placements and then failing to provide visits among siblings on a reasonable basis violates their right to freedom of association under the First Amendment . . . .”); *id.* (“[C]hildren[’s] relationships with their siblings are the sort of intimate human relationships that are afforded a substantial measure



- of sanctuary from unjustified interference by the State.”) (citation and quotation omitted); see also *id.* at 1010 (recognizing claim against state for psychological injuries to children caused “by impairing their relationships with their siblings”) (citations omitted).
- *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 165-66 (D. Mass. 2011) (finding that foster children have due process interests, arising from state law, in living with private families, visiting with siblings, and staying with relatives or other adults who played significant positive roles in children’s lives as well as with any minor siblings or half-siblings).
  - *Kovacic v. Cuyahoga Cnty. Dep’t of Children & Family Servs.*, 809 F. Supp. 2d 754, 776 (N.D. Ohio 2011), *aff’d and remanded*, 724 F.3d 687 (6th Cir. 2013) (“The Court finds, therefore, that the Kovacic children have met their burden of demonstrating a constitutionally protected interest in their family integrity.”).
  - *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 372 (2d Cir. 1997) (per curiam) (recognizing a due process claim for “failure to provide reasonable services and placements that protect custodial plaintiffs’ right of association with their biological family members”).

### State Court Cases

- *In re Santos Y.*, 92 Cal.App.4th 1274, 1315-16 (2001) (applying the Indian Child Welfare Act’s caregiver preferences to remove young child from custody of lifelong foster parents violated the child’s substantive due process rights with respect to the familial relationship he had formed with his foster parents).
- *In re J.L.*, 779 N.W.2d 481 (Iowa Ct. App. 2009) (recognizing foster children’s interest in familial association as a fundamental liberty interest protected by the Due Process of Law Clause), *overruled on other grounds by In re T.F. and T.F.*, 972 N.W.2d 1, 16 (Iowa 2022).
- *In re Adoption/Guardianship No. 6Z970003*, 731 A.2d 467, 474 (Md. 1999) (recognizing that children’s liberty interests in their relationships with biological parents cannot be disrupted without due process).
- *In re Nikolas E.*, 720 A.2d 562, 565 (Me. 1998) (“[I]n a child protection proceeding, . . . the child not only has an interest in family integrity, an interest he shares with his parent, but the child has a substantial

interest in protection from a jeopardous environment and it is the safety of the child which is at issue in such a proceeding.”).

- *In re Sabrina M.*, 460 A.2d 1009, 1016 (Me. 1983) (recognizing that “parents and the child shared the same substantial interest in preserving the family unit from erroneous destruction”).
- *La Belle v. St. Lawrence Cnty.*, 85 A.D.2d 759, 760 (N.Y. App. Div. 1981) (noting that the right of family to remain together is a constitutionally protected liberty interest that is protectable where deprivation of such rights occurred under color of state law).
- *L. v. G.*, 497 A.2d 215, 222 (N.J. Super. Ct. Ch. Div. 1985) (holding that “siblings possess the natural, inherent and inalienable right to visit with each other”).

### Additional Resources

American Bar Association, *Sibling Relationships are Sacred: Benefits of Sibling Placement and Contact*, <https://www.americanbar.org/groups/litigation/committees/childrens-rights/benefits-of-sibling-placement-and-contact>.

Katy Faust and Stacy Manning, *Them Before Us: Why We Need a Global Children’s Rights Movement* (2021).

Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 Md. L. Rev. 358 (1994).

Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 Wake Forest L. Rev. 1 (2011).

Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L.L. Rev. 267 (2021).

### RIGHT #3: CHILDREN HAVE A RIGHT TO EMOTIONAL SECURITY

When children are removed from their parents, whether at birth or otherwise, they experience trauma.<sup>55</sup> Even in utero, children develop strong bonds with their mothers. Separating newborns from their mothers causes real and long-lasting trauma, damaging children’s ability to create bonds with other adults and caregivers. The trauma of being placed in foster care is greater still for toddlers and school-aged children,

who in addition to being separated from their parents are often forced to move away from their neighborhood, their daycare or school, their childhood friends, and their extended family and other trusted adults. And as new attachments are made with kinship caregivers or foster families, subsequent removals or changes in the children's living situation can create new traumas.

While removing children from home may be necessary to keep them safe, lawyers who represent children must do more than merely acknowledge the emotional trauma associated with removal. Lawyers must take action to protect their young clients' emotional security. Such action might include asking the state's child protection agency (or the court) for therapeutic and mental health services; seeking additional or extended visitation, even if only virtual or by phone, with the children's parents, siblings, or extended family; advocating for appropriate medications or pushing back against inappropriate prescriptions (including psychotropic drugs); and continually assessing whether and when it is safe to return children to their parents.

### **When to Assert the Right to Emotional Security**

- When seeking to prevent children from being removed from their home because their home is safe or can be made safe with necessary and appropriate support for the adults in the home.
- When asking for mental health services and screenings for children to address trauma or other mental health needs.
- When seeking to keep children with their preferred therapist or to continue a therapy that is proving helpful.
- When moving to change therapists or to try a new type of therapy.
- When asking the court to grant an order to start or stop medications, including psychotropic drugs.
- When seeking to prevent children from being unnecessarily moved from a long-term, safe, stable foster or kinship home.
- When seeking to move children from an unsafe caregiver.
- When seeking to prevent children from being moved to, or to secure a move from, a congregate care setting.
- When seeking to have children placed with relatives.

- When seeking to have or keep siblings placed together.
- When seeking to increase visitation with parents, siblings, extended family, or other important people in the children’s lives.
- When seeking to change or stop visitation with individuals who have proven unsafe for the children.
- When seeking to prevent children from being returned to unsafe parents.
- When seeking to return children to safe parents.

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### **Rights in Action: A Case Study**

As she shows off her new leg braces, Naomi smiles a shy smile. When asked to show off how well she walks now, she giggles and hides her sweet face in her adopted mom’s lap. Naomi is a different girl than she was just a few short months ago.

When the lawyers at the Center for the Rights of Abused Children went to court on Naomi’s behalf, her cheeks were sallow. She had dark circles under her eyes. She would cry and cling to her then-foster mom in the days leading up to trial. She was experiencing frequent night terrors, hair loss, and weight loss. The state child welfare agency had recently begun visitation between Naomi and her estranged father, a man who had been absent from her life for most of her four long years in foster care. He was a stranger. He was still struggling to overcome addiction, anger, and unemployment. The visits were at least supervised. But they caused Naomi great emotional distress.

The Center’s lawyers acted swiftly to move for permanency for Naomi, ultimately proving that her parents were unfit and that given her severe distress it would be in her best interests to terminate their rights and allow Naomi to be adopted. Today, Naomi’s relief is palpable, her excitement contagious, and her smiles and laughter evidence of the importance of protecting the emotional security of children in foster care.

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### **Helpful Cases**

#### Federal Circuit Court of Appeals Cases

- *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (assuming the existence of a duty to provide “services necessary for

- the [foster] children’s physical and psychological well-being”).
- *M. D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 250 (5th Cir. 2018) (recognizing that foster children’s substantive due process right to personal security and reasonably safe living conditions includes a “limited right to be free from severe psychological abuse and emotional trauma”); *see also id.* at 251 (“egregious intrusions on a child’s emotional well-being — such as, for example, persistent threats of bodily harm or aggressive bullying — are constitutionally cognizable”).
  - *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019) (acknowledging children in foster care have constitutional rights to be free from physical and emotional harm, to be provided adequate medical care, and placed with appropriate caregivers).

#### Federal District Court Cases

- *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (D.D.C. 1991) (finding that children in foster care had a liberty interest in reasonably safe caregivers that extended to safety from psychological and emotional harm).
- *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989) (indicating that “the plaintiffs have a substantive due process right under the Fourteenth Amendment to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being . . .”).
- *Bryan C. v. Lambrew*, 340 F.R.D. 501, 518 (D. Me. 2021) (recognizing that children have a “significant liberty interest in not being forced to take psychotropic drugs regardless of whether a medical professional thinks that they are necessary”).
- *Alford v. City of New York*, 413 F. Supp. 3d 99, 119 (E.D.N.Y. 2018) (finding that children placed in foster care have a substantive due process “right to be free from unreasonable and unnecessary intrusions into their emotional well-being”) (quoting *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996)).

#### State Court Cases

- *Maricopa Cnty. Juv. Action No. JS-5209 & No. JS-4963*, 692 P.2d 1027, 1034-35 (Ariz. App. 1984) (acknowledging that the parent’s fundamental right to the care and custody of his child must at some point yield to the child’s rights to “good physical care and emotional security”).

- *In re Manolito L.*, 90 Cal.App.4th 753, 760 (2001) (holding that a heightened standard is not required to terminate visitation where sufficient evidence showed parental visitation would be detrimental to the child).

### Additional Resources

American Bar Association, *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers*, [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf).

Elizabeth I. Jacobs, Ph.D., *Will I Ever See You Again? Attachment challenges for foster children: A primer for the adults in their lives* (2016).

## RIGHT #4: CHILDREN HAVE A RIGHT TO PERMANENCY IN A TIMELY MANNER

Children need permanency to thrive. As the U.S. Supreme Court wrote:

It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged.<sup>56</sup>

To protect their physical, mental, and emotional health, lawyers must assert children have a right to timely court proceedings and permanency without undue delay.

Whenever possible, children should be reunified with safe parents as soon as possible.<sup>57</sup> But children whose parents are unfit also deserve timely permanency.<sup>58</sup> Nationally, children removed from their home will spend an average of one to two years in foster care.<sup>59</sup> Children over 8 years old will face a longer wait for an adoptive family than younger children.<sup>60</sup> As children enter their teenage years, they will face increasingly long odds of finding an adoptive family.<sup>61</sup> Sadly, each year approximately 23,000 youth age out of foster care without a family to call their own.<sup>62</sup>

Adults — including those in state child welfare agencies — should bear the burden of doing the hard work to protect children and to ensure their wellbeing. Parents who refuse to engage in reunification services, who

continue to abuse substances (both legal and illegal), fail to maintain or develop a bond with their children without good cause, or who otherwise prove to be unfit parents,<sup>63</sup> must be held responsible for their own failings. Children's rights must be prioritized over adult desires.<sup>64</sup>

The right to permanency in a timely manner must include the parentless children's right to find and form a family and to be adopted.<sup>65</sup> Attorneys should argue that the state has an affirmative duty to make reasonable, if not diligent or even active, efforts to recruit adoptive families and to match parentless children with willing, able, safe, understating, capable, and trauma-informed parents.<sup>66</sup>

### **When to Assert the Right to Permanency in a Timely Manner**

- When holding the child welfare agency accountable to provide appropriate and timely reunification services to the children's parents.
- When moving the court to order the children's parents to engage in appropriate and timely reunification services.
- When opposing unnecessary continuances that delay permanency for children.
- When filing motions to return children to the custody of their parents.
- When seeking (or opposing) permanent guardianships for children.
- When arguing that termination of parental rights is in the children's best interests.
- When opposing any post-termination case plan that is not adoption or that will leave children in foster care for a long time, increasing the likelihood they will age out of foster care without a family.
- When moving the court to authorize release of children's information to facilitate efforts to use media and other avenues to recruit and identify an adoptive family.

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### **Rights in Action: A Case Study**

Natalie was born into a family with a history of drug use and domestic violence. Her older siblings had all been adopted by their grandmother. Born drug exposed, Natalie was immediately removed from her mother and initially protected from a father who had recently been arrested for disorderly conduct. She was placed with her siblings in a stable, loving

home with her grandmother.

However, after several years of offering drug treatment to her mom and seeing her dad jailed for domestic violence, the state's child welfare agency refused to seek permanency for Natalie and even began visits with her recently-released-from-jail father, despite his inability to even complete anger management classes — much less demonstrate actual control over his anger issues.

Increasingly concerned about Natalie's safety, her grandmother sought the help of the Center for the Rights of Abused Children. The Center's attorneys moved to give Natalie permanence with her grandmother and her siblings. During the trial, when Natalie's father was questioned, his anger erupted and court safety officers had to be summoned to keep him in check. Natalie's mother testified she was a hopeless addict who would never be able to overcome her addiction. The judge ultimately agreed Natalie had a strong interest in achieving permanency and severed her parents' rights.

Today, Natalie is thriving and safe with her older siblings and has been adopted by her grandmother.

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## Helpful Cases

### United States Supreme Court Cases

- *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (recognizing that permanency and stability are important to children's best interests).
- *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982) ("It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged.").
- *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a state law permitting an unwed mother but not unwed father to block adoption of their child by withholding consent as a violation of the father's equal protection rights).



- *Smith v. Org. of Foster Families*, 431 U.S. 816, 842 (1977) (“There can be, of course, no doubt of appellees’ standing to assert this interest [in the integrity of the family unit], which, to whatever extent it exists, belongs to the foster parents as much as to the foster children.”); see *id.* at 836 (“It is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents.”).

### Federal Circuit Court of Appeals Cases

- *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (assuming the existence of a duty to provide “custody only for such time as is necessary”).
- *Lindley v. Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989) (“If anything, the child’s interest in being adopted may be more compelling than the interest of potential parents in adopting. State adoption proceedings center upon the best interest of the child, not the desires, however intense, of potential parents to add to their family by adoption.”).

### Federal District Court Cases

- *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996-97 (D.D.C. 1991), *aff’d sub nom. LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (holding that failure to make reasonable efforts to reunite children with families or to place them in permanent adoptive homes violates children’s rights to permanency).
- *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996) (finding that children stated a claim that state officials violated their substantive due process rights by unnecessarily placing them in foster care and allowing them to languish in foster care without taking steps to reunite them with their biological family).

### State Court Cases

- *Sheena W. v. Dep’t of Child Safety*, 522 P.3d 686, 688 (Ariz. App. 2022) (holding that when a parent is convicted of felony child abuse of her child, and the child welfare agency later seeks termination of the abuser’s parental rights to the abused child, the agency is not required to offer the convicted parent reunification services), *vacated in part sub nom.*

*Sheena W. v. Dep't of Child Safety/B.W.*, 2023 WL 2782747 (Ariz. 2023) (vacating ¶¶ 13-17, 25 and remanding for further consideration)).

- *Pima Cnty. Juv. Action No. S-114487*, 179 Ariz. 86, 97 (Ariz. 1994) (recognizing that “prompt finality . . . protects the child’s interests”).
- *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994) (“Children, too, have fundamental rights — including the fundamental right . . . to ‘have a placement that is stable [and] permanent.’” (quoting *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993)); see also *id.* (“Children are not simply chattels belonging to the parent but have fundamental interests of their own that may diverge from the interests of the parent.”).
- *Adoption of Kay C.*, 228 Cal.App.3d 741, 749 (Cal. App. 1991) (“Courts have also recognized that natural children have a fundamental, independent right in belonging to a family unit.”).
- *In re David B.*, 91 Cal.App.3d 184, 192–193, 195 (Cal. App.1979) (finding that children in foster care have a compelling right to a stable foster or kinship home, which furthers the goal of allowing caretakers to make a full emotional commitment to the children in their care).
- *Dep't of Children & Families v. In re Adoption of X.X.G.*, 45 So. 3d 79, 98 n.19 (Fla. Dist. Ct. App. 2010) (Salter, J., concurring) (explaining that children “ordinarily develop an ever-increasing attachment and expectation of permanency as each month goes by in a stable setting”).
- *In re Adoption of Doe*, 2008 WL 5006172, at \*22 (Fla. Cir. Ct. Nov. 25, 2008) (“Laws that would interfere with a child’s fundamental right to be free from unnecessary restraint, rather than aid the State’s interest in achieving adoptive permanency for the child, are subject to enforcement as impinging on the child’s rights.”).
- *C.M. v. Dep't of Children & Family Servs.*, 854 So. 2d 777, 779 (Fla. Dist. Ct. App. 2003) (“Because stability for children is so important to both their physical and mental well-being, the Legislature requires that no child remain in foster care longer than one year so that permanent placement may be achieved as soon as possible . . . . At all stages of the proceedings, courts are compelled to expedite proceedings to prevent children from languishing in the foster care system . . . . Achieving permanent stability in the child’s life is the paramount concern of the judicial process.”) (citation omitted).

- *Dep't of Children & Family Servs. v. In re J.C.*, 847 So. 2d 487, 491 (Fla. Dist. Ct. App. 2002) (“It is presumptively in the best interests of a child to remain in the home where he or she has spent the majority of his or her life.”); see *id.* at 491 n.5 (“Trial courts have a duty to make placement decisions in the best interest of the child and to recognize the importance of bonding and attachments in early childhood relationships.”).
- *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 378 (Ind. App. 2006) (providing that, as a condition of receiving federal funding, a state must move to terminate parental rights when a child has been in foster care for 15 of the most recent 22 months did not violate due process but was rationally related to the state’s interest in preventing endless stays in foster care).
- *Oldfield v. Benavidez*, 867 P.2d 1167, 1172 (N.M. 1994) (“Although parents have certain rights regarding their children, the children also have certain fundamental rights which often compete with the parents’ interests.”).
- *In re Adoption of Corey*, 184 Misc. 2d 437, 445-47 (N.Y. Fam. Ct. 1999) (holding that an irrebuttable presumption that foster parents were unfit to adopt children already placed in their custody due to the foster father’s 15-year-old criminal conviction failed to satisfy state and federal due process requirements; the presumption implicated children’s due process right to be free of arbitrary state decisions significantly impacting their custody and welfare).
- *In re Adoption of Jonee*, 181 Misc. 2d 822, 828 (N.Y. Fam. Ct. 1999) (holding that children who have “already suffered the trauma of losing their families . . . are constitutionally entitled to protection from arbitrary State action that could indiscriminately force them to lose yet another family relationship”) (citations omitted).

### Additional Resources

Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 Duke J. Gender L. & Pol’y 223 (2008).

Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 Wake Forest L. Rev. 1 (2011).

## RIGHT #5: CHILDREN HAVE A RIGHT TO AN EDUCATION

Court-appointed counsel representing children in foster care often assume that the children's educational matters are beyond the scope of their representation. The Center for the Rights of Abused Children pushes back against that notion. If children are in state care and custody, then the state is responsible for ensuring the children's educational needs are met. And children's attorneys thus have a responsibility to ensure that the state meets its duties toward children in its care and custody. Attorneys should actively monitor their clients' educational progress and regularly question case managers, foster and kinship parents, and teachers about educational issues. Lawyers should then advocate for children's educational needs in court, and at children's schools, if the state is failing in its duty to ensure an adequate education.

On every educational achievement measure, students in foster care place last or near last among other at-risk student groups including those experiencing homelessness, those in poverty, and those who speak English as a second language.<sup>67</sup> From graduation and dropout rates to test scores, school absences, frequent school transfers, and abysmal college attendance and matriculation rates, our education system fails children in foster care.<sup>68</sup> One reason for these consistently poor outcomes is the cumulative and complex traumas that brought these children into care and the challenging experiences within care that hinder normal childhood development and impede learning.<sup>69</sup> Engaged lawyers can help mitigate harm to children by seeking school stability, educational services, and trauma-informed instruction and discipline. They should also actively participate in transition planning (from foster care into adult life) for older youth who will exit foster care without an adoptive family.

As with other rights, lawyers can root their educational arguments in constitutional guarantees related to education. Every state constitution contains language regarding education,<sup>70</sup> though the provisions vary.<sup>71</sup> State courts have had numerous opportunities to interpret and apply these various provisions. As a result, some state courts have identified education as a fundamental right.<sup>72</sup> The Center, however, is unaware of any authority that guarantees students in foster care a constitutional right to a minimally adequate education. Many of these cases deal with alleged inequities in school funding mechanisms. Still, to the extent that

children’s lawyers are advocating for children’s educational rights or needs, quotations from federal and state cases about the importance, power, and potential of education can set the stage for your requests and advocacy.

There are four areas where children’s lawyers may be able to serve their clients’ educational needs:

- 1) Educational stability.
- 2) Special education and related services.
- 3) School discipline.
- 4) Planning for older youths’ transition out of foster care.

### **Educational Stability**

Children in foster care deserve educational stability. The process of changing schools can be incredibly disruptive to children’s education. Unfortunately, foster children are too often moved to a new school because the school is more convenient for the adult caregivers without any thought to the effect the transfer will have on the children. Adults — including those in state agencies — should be the ones making sacrifices for the children, not the other way around.

Federal law presumes that “a child in foster care will remain in the child’s school of origin, *unless* a determination is made that it is not in the child’s best interest to remain in that school.”<sup>73</sup> The state’s child welfare agency and the school district are required to “provide, arrange, and fund transportation to maintain children in foster care in their school of origin.”<sup>74</sup> If it is determined that children should move to a new school, federal law requires those children to be enrolled immediately, regardless of whether they are able to produce the typical records required of new enrollees.<sup>75</sup>

Federal law, however, is vague on the timing of the best interest determination and the question of providing and paying for transportation for the student.<sup>76</sup> Children’s lawyers should step in to ensure there is a thoughtful and timely best-interest determination, that children remain in their school of origin during the decision-making process, and that they are provided safe, reliable, and appropriate transportation. Lawyers should familiarize themselves with the federal guidance surrounding educational stability.<sup>77</sup> When necessary, lawyers can ask judges to clarify responsibili-

ties and issue orders to child welfare agencies to pay for transportation.

### **Special Education and Related Services**

There is a tremendous overlap between the population of children in foster care and children with special education needs. Between one-third and one-half of school-aged children in foster care receive special education and related services.<sup>78</sup> Under the federal Individuals with Disabilities Education Act (IDEA), children who qualify for special education and related services are entitled to a free appropriate public education (often referred to as “FAPE”) in the least restrictive environment.<sup>79</sup> Qualifying children will also be provided an Individualized Education Program (IEP) to guide and implement the needed services.<sup>80</sup>

The most important role an attorney can play regarding special education is to ensure that children have a legally authorized education decision-maker — sometimes referred to as the “IDEA parent.” The federal IDEA defines a parent to include foster parents and kinship caregivers *when* the natural parent is not attempting to act like a parent.<sup>81</sup> Child welfare agencies should document the natural parents’ failures and provide the foster children’s school with the name and contact information of the foster children’s IDEA parent, so that the IDEA parent can make educational decisions for the children. Identifying the IDEA parent is important because the IDEA parent requests the school evaluate children for special education. Screening foster children for eligibility to receive special education and related services is a critical component of ensuring they receive a minimally adequate education. The IDEA parent also works with the school’s IEP team to develop the IEP and consents to services. The IDEA parent initiates the due process procedures and appeals if there are disputes about services.<sup>82</sup>

If there is no recognized IDEA parent, for example because children are in a group home or other congregate care setting, the state child welfare agency should collaborate with the children’s school to appoint a “surrogate parent” to make educational decisions.<sup>83</sup> Children’s attorneys can ask judicial officers for an order appointing an appropriate surrogate parent.

If children are determined to need special education and related services, children’s lawyers can work with their caregivers and the state agency to ensure a timely meeting is scheduled to develop the IEP. Attorneys would,

ideally, attend IEP meetings to be fully informed regarding their clients' needs and to advocate for services where the school may be recalcitrant. Attorneys should also monitor IEP implementation to ensure children are receiving all the services laid out in the IEP.

### **School Discipline**

Students in foster care suffer suspension and expulsion up to four times more often than their peers.<sup>84</sup> When children in foster care are subject to exclusionary discipline methods (in-school suspensions, informal or formal removals from the classroom, prohibitions from the school bus, disciplinary school transfers, and even detention), attorneys should investigate the reasons and then advocate for non-exclusionary measures to address negative behaviors, ideally in a trauma-informed manner.

Negative behaviors are often the result of the trauma endured by children in foster care. Negative behaviors can also result from learning gaps or feelings of shame that are not the children's fault. Removing children from the classroom or school rarely addresses the underlying causes of negative behaviors. Attorneys can help everyone involved in the education process dig a little deeper to understand the root cause of the negative behaviors and work collaboratively toward solutions that help children make positive strides in a safe, supportive environment. Corporal punishment should never be used.

This may sound overwhelming to the busy attorney, but lawyers must not ignore the importance of education for children in foster care. Too often, it is the last thing addressed in foster care, if it is addressed at all.

Lawyers can help by identifying and speaking with the key players in children's educational lives. Teachers, service providers, parents (especially if the parents are engaged), kinship, foster parents or other caregivers, Court Appointed Special Advocates, and state agency caseworkers are good starting points to discuss and monitor children's educational needs. If there are concerns that need to be addressed, lawyers might expand that list to include principals, vice principals, and the federally designated points of contact for the child welfare agency and the school district where the children are enrolled.<sup>85</sup> The savvy lawyer should not discount their ability to help negotiate and navigate disciplinary issues without resorting to formal motions or courtroom advocacy. Attorneys can bring to bear their expertise in alternative dispute resolution techniques to find

pathways to success that benefit everyone involved.

### **Planning for Older Youths' Transition Out of Foster Care**

Federal law requires that older youth in foster care receive assistance and support to develop a personalized and detailed transition plan.<sup>86</sup> In an ideal world, children would exit foster care knowing how to access educational and vocational training opportunities, apply for college tuition waivers and vouchers, find a job, manage their money, obtain government documents and vital records, access and build a support network, secure housing and healthcare, and understand how to take care of their physical and mental health.<sup>87</sup>

However, data indicates children in foster care are not receiving adequate preparation to transition into adulthood.<sup>88</sup> Only 0.8% to 3% of foster youth nationally obtain a bachelor's degree, a fraction of the 33% national rate.<sup>89</sup> One longitudinal study found just 48% of foster alumni were employed at age 23 and they earned just \$8,000 annually, far below their non-fostered peers.<sup>90</sup> Another study found 34% of former foster youth were neither working nor in school.<sup>91</sup>

Youth who exit foster care without an adoptive family need help to ensure that their state's child welfare agency is diligently and appropriately helping them plan for their transition into adulthood. Lawyers who represent older youth can play a pivotal role in their adolescent clients' lives by being aware of the state's responsibilities and duties and holding everyone accountable to provide maximum assistance to older youth. The state's child welfare agency may be ultimately responsible for helping older youth prepare their transition plans, but attorneys should familiarize themselves with federal requirements and do everything possible to ensure that the state is adequately preparing their older clients for the transition from foster care into adult life.

### **When to Assert the Right to an Education**

- When advocating for timely best interest determinations to decide where children will go to school and for safe, appropriate, and state-funded transportation to schools of origin.
- When seeking appointment of an educational decisionmaker under the federal IDEA.
- When helping IDEA parents (or surrogate parents) request children be



screened for eligibility for special education and related services.

- When working with educational decision-makers to obtain an evaluation to determine eligibility for special education and related services.
- When attending and/or participating in IEP meetings.
- When working with education decision-makers to advocate for services the school is unwilling to provide.
- When advocating for children to be placed in the least restrictive classroom environment, meaning a general education classroom with necessary supports provided to ensure it is truly a viable option.
- When working with children's various schools to ensure children receive the partial and full credits they have earned at each educational institution and that such credits are documented and counted in children's educational records.
- When filing due process appeals to obtain needed but refused services or to seek compensatory services when schools fail to properly implement IEPs.
- When working with school officials to avoid the use of exclusionary discipline methods, such as out-of-school suspensions and expulsions.
- When holding the state's child welfare agency responsible for developing an appropriate and personalized transition plan for older youth who will age out of foster care without an adoptive or supportive family.

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### **Rights in Action: A Case Study**

Johnny spent 13 years in foster care. He moved through more than 40 homes, some no better than the one he'd originally been removed from. By age 16, he was in danger of not graduating from high school because he was behind on credits.

According to Johnny, "With no family to love and guide me, my 'graduation plan' was to rob convenience stores until I was put in prison." Like other teens who age out of foster care,<sup>92</sup> Johnny thought prison's regular meals, guaranteed bed at night, GED program, and predictable routine sounded like a pretty good option.

That's where one of the attorneys at the Center for the Rights of Abused

Children came in. She was horrified by his “graduation” plan and used her legal training to help Johnny enforce his education rights. She rebuilt his education history and made sure Johnny received credit where credit was due. Johnny graduated on time. He stayed out of prison. Today, Johnny is in the U.S. Army. He’s stable. He’s working hard. He’s been promoted. There are still challenges in Johnny’s life, but he is doing so much better than he had thought possible when he was 16 years old. Sadly, too many foster children lack an adult advocate who can step into their stream and put the wind in their sails.

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## Helpful Cases

### United States Supreme Court Cases

- *Perez v. Sturgis*, 598 U.S. 142, 150 (2023) (holding that a plaintiff is not required to exhaust the IDEA’s administrative remedies when that plaintiff is seeking alternative remedies not authorized by the IDEA, namely, money damages).
- *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 399 (2017) (“To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”).
- *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that, absent a state statute to the contrary, the party seeking relief bears the burden of proof in an IDEA administrative due process proceeding).
- *N.J. v. TLO*, 469 U.S. 325, 334 (1985) (holding that the Fourth Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).
- *Bd. of Educ. v. Rowley*, 458 U.S. 176, 190, 204 (1982) (holding that an IEP must be reasonably calculated for a child to receive educational benefit, even though the school district is not required to provide every service necessary to maximize a child’s potential).
- *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that states may not deny admission to public schools based on a child’s immigration status).
- *Gross v. Lopez*, 419 U.S. 565, 584 (1975) (prohibiting suspension of a public-school student without notice and an opportunity to be heard).

- *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1972) (holding that education is not a fundamental right under the U.S. Constitution).
- *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) (“Students in school as well as out of school . . . are possessed of fundamental rights which the State must respect.”).
- *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.”).
- *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”).

#### Federal Circuit Court of Appeals Cases

- *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 960 (1st Cir. 1989) (finding that no handicapped child may be rejected for special education services, no matter how severe the child’s disabilities).
- *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578-79 (3d Cir. 2000) (clarifying that the least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates the disabled child with non-disabled children, in the same school the child would attend if the child were not disabled).
- *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180-82 (3d Cir. 1998) (holding that the educational benefit to which each student is entitled under the IDEA must be more than “trivial,” it must be “meaningful”).
- *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1213-15 (3d Cir. 1993) (holding that children with disabilities should be mainstreamed to the maximum extent appropriate and their removal from the regular education environment should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily).

### Federal District Court Cases

- *P.A.R.C v. Pa.*, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (approving settlement and consent decree prohibiting the exclusion of children with disabilities from the state’s public schools).

### State Court Cases

- *Opinion of the Justices No. 338*, 624 So. 2d 107, 157 (Ala. 1993) (“Given the history and text of Alabama’s education article, the Court determines that the right to education in Alabama is fundamental.”).
- *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (“We hold that the [state] constitution does establish education as a fundamental right of pupils between the ages of six and twenty-one years.”).
- *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (“Recognizing as we must that the right to an education in our public schools is a fundamental interest.”).
- *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (“[W]e must conclude that in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.”).
- *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 201 (Ky. 1989) (“[O]ur citizens are given a fundamental right to education in our Constitution.”).
- *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (“[W]e hold that education is a fundamental right under the state constitution.”).
- *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (“We hold that in this State a constitutionally adequate public education is a fundamental right.”).
- *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (“[T]he intent of the framers was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime.”).
- *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994) (“[T]he right to education is a fundamental right under the North Dakota Constitution.”).
- *In re Kevin M.*, 187 Misc. 2d 820, 828 (N.Y. Fam. Ct. 2001) (“[A] foster child has the right to an education and the customary opportunities for

socialization afforded by regular school attendance in the company of other children in the community.”).

- *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (“[E]ducation is a fundamental right under the Constitution.”).
- *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (“Certainly, the mandatory requirement of ‘a thorough and efficient system of free schools,’ found in . . . our Constitution, demonstrates that education is a fundamental constitutional right in this State.”).
- *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (“[T]he equal opportunity for education as defined by [our Constitution], is a fundamental right.”).
- *Washakie Cnty. Sch. Dist. v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (“In the light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest.”).

### Additional Resources

American Bar Association and Casey Family Programs, *Identifying Special Education Decision Makers for Children in Foster Care: State Law Questions* (Special Education Series).

American Bar Association and Casey Family Programs, *Special Education Decision-Making: The Role of the Child’s Attorney* (Special Education Series).

Tim DeRoche, *A Fine Line: How Most American Kids Are Kept Out of the Best Public Schools* (2020).

Tim Keller and Nat Malkus, *Federal Special Education Law and State School Choice Programs* (Sept. 07, 2017), <https://www.aei.org/research-products/report/federal-special-education-law-and-state-school-choice-programs>.

Emily Parker, *Constitutional obligations for public education* (2016), <https://files.eric.ed.gov/fulltext/ED564952.pdf>.

Nat’l Center for Homeless Educ., *A Look at Child Welfare from an Education Perspective* (Nov. 2018), <https://nche.ed.gov/wp-content/uploads/2019/03/Child-Welfare-03-19-19.pdf>.

U.S. Dep’t of Educ., *Foster Care Transition Toolkit* (May 26, 2016), <https://>

[www2.ed.gov/about/inits/ed/foster-care/youth-transition-toolkit.pdf](https://www2.ed.gov/about/inits/ed/foster-care/youth-transition-toolkit.pdf).

U.S. Dep't of Educ., *Guiding Principles for Creating Safe, Inclusive, Supportive, and Fair School Climates* (March 2023), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

U.S. Dep't of Educ. & U.S. Dep't of Health and Human Servs., *Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care* (June 23, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfoster-carenonregulatorguide.pdf>.

## CONCLUSION

Children in foster care possess constitutional rights. These rights — recognized under state constitutions and the U.S. Constitution — include the right to be safe from physical and emotional harm, the right to remain with and maintain family relationships, the right to permanency in a timely manner, and the right to a basic education. However, possessing rights is meaningless unless those rights are respected and protected.

Lawyers who represent children in foster care must safeguard children's constitutional rights. Attorneys must assert the existence of children's rights. They must argue forcefully in court to enforce children's rights. And, when necessary, they must appeal to protect children's rights.

Children's lawyers are in a unique position to fundamentally change the culture, landscape, and impact of our nation's child welfare system. The protection of children from harm, the priority of stable families, and the pursuit of healing from trauma must predominate in our country's child protection practices. Consistently asserting, arguing, and appealing the constitutional rights of children in foster care will reorient our country's focus and place it back where it belongs: on children. Together, the community of children's attorneys can turn the tide toward a truly child-prioritizing foster care system.

## End notes

<sup>1</sup> *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion) (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *In re Gault*, 387 U.S. 1, 13 (1967) (“[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights, is for adults alone.”), *abrogated in part by Allen v. Illinois*, 478 U.S. 364, 372 (1986); *cf. Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J. concurring) (recognizing “the right of Indian children to grow in their culture”); *id.* at 1683 (Alito, J., dissenting) (criticizing the majority for framing the issues in way that “disserves the rights and interests of [Indian] children”). The conception of children as rights-bearing individuals is neither a new nor modern concept. See *Cardwell v. Bechtol*, 724 S.W.2d 739, 745 (Tenn. App. 1987) (recognizing the common law “Rule of Sevens: under the age of seven, no capacity; between seven and fourteen, a rebuttable presumption of no capacity; between fourteen and twenty-one, a rebuttable presumption of capacity”); see also, e.g., Benjamin Vaughn Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land*, 50 (1880) (“At birth [a person] is of age to receive full protection in rights of person.”); accord Martha Minow, *Whatever Happened to Children’s Rights*, 80 Minn. L. Rev. 267, 295-96 (1995) (arguing that the correct framework to view rights is one of human rights, not a dichotomy between adult’s or children’s rights).

<sup>2</sup> Author interview with Darcy Olsen, the founder and CEO of the Center for the Rights of Abused Children.

<sup>3</sup> Darcy is not alone in her experience or her feelings. For decades, child advocates have battled a system that fails to recognize children’s rights. See Nina Bernstein, *The Lost Children of Wilder: The Epic Struggle to Change Foster Care*, 269 (Reprint ed. Feb. 5, 2002) (“[Marcia] Lowry brooded about the disregard for children endemic in a system where adults had rights and children had only ‘needs’ and ‘interests.’”) (detailing the first class-action lawsuit, *Wilder v. Sugarman*, filed by Lowry in June 1973 challenging New York state’s foster care system in federal court).

<sup>4</sup> See Sarah J. Campbell and Robin L. Rosenberg, *The Use of Next Friends to Seek Appointment of Counsel for Dependent Children Who Are Incapable or Unable to Request Appointment of Counsel*, 86 Fla. Bar J. 46 (2012).

<sup>5</sup> The relative lack of counsel for children in foster care is a sad situation because research shows that children who are represented by counsel fare better than those who are not. Children with counsel have shorter durations in foster care and achieve permanency quicker. Reunification rates generally remain stable, which indicates that providing lawyers for children does not increase the likelihood that parental rights will be terminated. See Zinn and Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children’s Permanency Outcomes*, 53 Fam. Ct. Rev. 589, 599 (2015) (concluding that “providing legal representation for children under an expressed-interest model accelerates their transition to legal permanence”); Washington State Center for Court Research, *Evaluation of the Washington State Dependent Child Legal Representation Program 2021*, 26 (Jan. 1, 2022) (finding that attorneys for children in foster care undertook work to prevent placement changes, advocated in court for their clients to live with their desired caregiver or to go live with a relative, and brought educational concerns to the attention of the juvenile court). The Washington study also found a potential cost-savings of over \$1.2 million to the state’s foster care system in the counties where children were appointed lawyers. *Id.* at 16; see also LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 616-17 (2000) (discussing potential cost savings associated with appointing counsel for children due to increased and quicker transitions to permanency).

<sup>6</sup> See, e.g., Barbara J. Elias-Perciful, J.D., *Constitutional Rights of Children*, Texas Lawyers for Children, 22-24 (2017) (discussing, among other rights, the constitutional rights of children in foster care to “not be discriminated against based on race, religion, sex, sexual orientation, or gender identity”). Children should also retain their rights to freely exercise their religion while in foster care.

<sup>7</sup> Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 179 (2018).

<sup>8</sup> *Id.* at 181.

<sup>9</sup> *Id.* (quoting Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 135 (1970)).

<sup>10</sup> As Linde states:

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state’s law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.

Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984).

<sup>11</sup> Children are rights-bearing individuals who deserve the full protection of their state and federal constitutions, just like adults. However, there may be times when attorneys want or need to assert children’s constitutionally protected, but statutorily created, “liberty interests” instead of (or in addition to) children’s constitutional rights.

“[A] State creates a [constitutionally] protected liberty interest by placing substantive limitations on official discretion.” *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460-62 (1989). “[T]he most common manner in which a State creates a liberty interest is by establishing ‘substantive predicates’ to govern official decision-making . . . and, further, by mandating the outcome to be reached upon a finding that the relevant criteria has been met.” *Id.* Put another way, some state statutes or regulations include “explicitly mandatory language” that guarantees a child a specific outcome when certain facts exist. *Id.* But see *Sandin v. Conner*, 515 U.S. 472 (1995) (modifying the analysis for determining when an enforceable liberty interest exists in the prison context). Such statutes or regulations create a constitutionally protected liberty interest.

Several states have adopted statutory bills of rights for foster children. *E.g.*, Ariz. Rev. Stat. Ann § 8-529; 13 Del. C. § 2522; Nev. Rev. Stat. § 432.550; N.J. Rev. Stat. § 9:6B-4; 10A Okla. Stat. § 1-9-119.1; R.I. Gen. Laws § 42-72-15. See also National Conference of State Legislatures, *Foster Care Bill of Rights* (Oct. 29, 2019), [www.ncsl.org/human-services/-foster-care-bill-of-rights](http://www.ncsl.org/human-services/-foster-care-bill-of-rights). Some of these laws are judicially enforceable and may contain the type of mandatory language that elevates children’s rights from mere statutory rights to a constitutionally protected liberty interest.

<sup>12</sup> The text of the Fourteenth Amendment to the U.S. Constitution, section one, states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>13</sup> For example, if an attorney is arguing that children have a First Amendment right to associate with their siblings, as part of a motion to facilitate sibling visitation, the First Amendment applies to the states through the Due Process of Law Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>14</sup> The concepts of “privileges” and “immunities” were more familiar in earlier eras of American history. For example, in *Corfield v. Coryell*, 6 F. Cas. 546, 550 (1823), Justice Bushrod Washington interpreted the Privileges and Immunities Clause of Article Four, section two of the U.S. Constitution and articulated a list of fundamental rights considered to be “privileges and immunities.” He wrote, “We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union.” *Id.* at 551. And while acknowledging it would be too tedious to list all the fundamental rights, he nevertheless provided the following examples of some of the privileges and immunities citizens were intended to enjoy:



Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State . . . .

*Id.* at 551-52.

<sup>15</sup> *Slaughter House Cases*, 83 U.S. 36 (1872). Even though “[v]irtually no serious modern scholar — left, right, and center — thinks that [*Slaughter House*] is a plausible reading of the [Fourteenth] Amendment,” Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001), a typical foster care case is unlikely to be the vehicle to correct the Supreme Court’s mistake. Fortunately, for now, the Supreme Court’s substantive due process doctrine has also been held to protect children’s rights. See *infra* note 19. But see *Dobbs v. Miss. Dep’t of Health*, 142 S. Ct. 2228, 2304 (2022) (Thomas, J., concurring) (“Substantive due process . . . has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.”); see also *id.* at 2302 (“[W]e could consider whether any of the rights announced in this Court’s substantive due process cases are ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.”).

<sup>16</sup> See *Mallory v. Norfolk So. Railway Co.*, 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in judgment) (“By its terms, the Due Process Clause is about procedure, but over the years, it has become a refuge of sorts for constitutional principles that are not “procedural” but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside. This may be true, for example, with respect to the protection of substantive rights that might otherwise be guaranteed by the Fourteenth Amendment’s Privileges or Immunities Clause.”) (citing *McDonald v. Chicago*, 561 U.S. 742, 754–759 (2010) (plurality opinion); and *id.* at 808–812 (Thomas, J., concurring in part and concurring in judgment)).

<sup>17</sup> See *In the Matter of Jamie TT.*, 191 A.D.2d 132, 136 (N.Y. 1993) (child in an abuse proceeding was entitled to “adequate” or “effective” legal assistance.”).

<sup>18</sup> *Ownbey v. Morgan*, 256 U.S. 94, 102 (1921) (holding that the “essential” elements of due process include “the right to appear and be heard”); see also *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

<sup>19</sup> See, e.g., *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014); *Doe v. New York City Dep’t of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010); *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 249–50 (5th Cir. 2018); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475–77 (6th Cir. 1990); *Reed v. Palmer*, 906 F.3d 540, 552 (7th Cir. 2018); *Norfleet ex rel. Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 292 (8th Cir. 1993); *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010); *Gutteridge v. Okla.*, 878 F.3d 1233, 1238–39 (10th Cir. 2018); *H.A.L. ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008); *Smith v. D.C.*, 413 F.3d 86, 95 (D.C. Cir. 2005).

<sup>20</sup> Randy E. Barnett and Evan D. Bernick, *The Original Meaning of the 14th Amendment: Its Letter & Spirit*, 350–356 (2021) (arguing that the state action doctrine, as conceived in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), is “contrary” to the history, text, and original public meaning of the Fourteenth Amendment’s Equal Protection of the Laws Clause and that the clause protects against private acts of violence as well as state inaction to protect individuals from violence).

<sup>21</sup> E.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (“We must decide, first, whether the . . . [government classification] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the . . . [classification] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose . . .”).

<sup>22</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“When a person is institutionalized — and wholly

dependent on the State[.] . . . a duty to provide certain services and care does exist.”). See also, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989) (“Had the State by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (Acknowledging the state creates a “special relationship” when it removes children “from their natural homes and place[s] them under state supervision. At that time, [the state] assume[s] the responsibility to provide constitutionally adequate care for these children.”).

<sup>23</sup> “[C]ourts have consistently concluded that *Youngberg [v. Romeo]*, 457 U.S. 307 (1982)],” which held that states must assist institutionalized individuals in pursuing their liberty interests, “requires the state to protect foster children in its custody . . . [from] the psychological and emotional harms that repeated disruption of attachment relationships causes.” Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 Wake Forest L. Rev. 1, 12 (2011) (citations omitted).

<sup>24</sup> See, e.g., *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).

<sup>25</sup> *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 372 (2d Cir. 1997) (per curiam); but see M.D., 907 F.3d at 251 (acknowledging that “[i]ncidental psychological injury that is the natural, if unfortunate, consequence of being a ward of the state does not rise to the level of a substantive due process violation”).

<sup>26</sup> *Doe v. New York City Dep’t of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied sub nom., Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983) (“Government officials may be held liable . . . for a failure to do what is required as well as for overt activity which is unlawful and harmful.”) (emphasis added).

<sup>27</sup> *Haaland v. Brackeen*, 143 S. Ct. 1609, 1622 (2023). The Court similarly recognized that children are not property. *Id.* at 1630. They are therefore, by implication (and by nature), rights-bearing individuals.

<sup>28</sup> *Id.* at 1624.

<sup>29</sup> Brandon Perry, *What the Experts Say: Improving Outcomes for Youth in Foster Care*, Wilson Sheehan Lab for Economic Opportunities (Sept. 21, 2002) (“Those who have experienced foster care have a higher risk of living in poverty, having a teenage pregnancy, engaging in alcohol and drug use, being arrested, having long term mental and physical health problems, and are less likely to enroll and complete college than the general population.”).

<sup>30</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“In the substantive due process analysis, it is the state’s affirmative act of restraining the individual’s freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the ‘deprivation of liberty’ triggering the protections of the Due Process [of Law] Clause . . .”).

<sup>31</sup> See 42 U.S.C. § 675(5)(A) (requiring each child to be in a “safe setting” that is the “most family like”). Ideally, children would be placed with kinship or state-licensed foster families rather any type of congregate care or group home.

<sup>32</sup> The Center for the Rights of Abused Children generally defines a kinship caregiver as a child’s immediate and/or extended family or a known, trusted, but non-blood-related adult (such as a teacher or a close friend’s parents). The Center regularly argues on behalf of the children and families it represents in its *pro bono* Children’s Law Clinic that a safe, stable, and loving foster family becomes a kinship caregiver when the child bonds with the foster family.

<sup>33</sup> Many law offices, especially government law offices, build up “pleading” banks so lawyers have a starting point when writing common motions, such as motions to increase visitation, motions to place siblings together, motions to permit a child to go on vacation with their caregivers, etc. . . .

<sup>34</sup> E.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

<sup>35</sup> E.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

<sup>36</sup> Too many lawyers default to a chronological approach to the facts and do not apply as ruthless a carving knife as they could to trim the fat from their facts.

<sup>37</sup> “Many courts have . . . held that an argument made only in a footnote of an appellate brief is waived.” Gregory A. Castanias & Robert H. Klonoff, *Federal Appellate Practice and Procedure in a Nutshell*, 48 (2008).

<sup>38</sup> Jessica E. Yates, *When to Think About an Interlocutory Appeal* (Mar. 26, 2014), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2014/when-think-about-interlocutory-appeal>.

<sup>39</sup> Any jurisdiction that does not consider children a party to the case is unlikely to provide children with court-appointed counsel. However, given the magnitude of placing children in foster care and the critically important rights at stake in cases governing children’s time in foster care — and given that such cases could lead to the permanent severance of parent-child relationships — the Center for the Rights of Abused Children argues that anything less than party-status for children is a violation of procedural due process. See *supra* note 18.

<sup>40</sup> U.S. Supreme Court cases are ordered by date from the most to least recent. The federal circuit court of appeals decisions are listed in ascending order by circuit, but from most recent to least recent within a circuit. Both the federal district court and state court cases are ordered alphabetically by state, but in descending year order within the same jurisdiction. Some sections also include a list of additional resources attorneys may consult for further reading, studying, and thinking.

<sup>41</sup> For example, *M.C. v. Adoption Choices of Colo., Inc.*, 369 P.3d 659 (Colo. App. 2014) rejects the conclusions of *In re Jasmon O.*, 878 P.2d 1297 (Cal. 1994).

<sup>42</sup> See, e.g., *M.D. ex rel. Stukenberg v. Abbott*, 152 F. Supp. 3d 684, 697 (S.D. Tex. 2015) (recognizing that foster children need not wait until actual harm occurs before obtaining relief for an alleged violation of their substantive due process right to be free from an unreasonable risk of harm), *aff’d in part, rev’d in part and remanded sub nom. M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 256 (5th Cir. 2018) (recognizing that “plaintiffs need not show that every member of the class has actually been harmed while in state custody; they need only demonstrate that they face a risk of serious harm as a result of the state’s policies”). See also *Hernandez v. Tex. Dep’t of Protective and Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (recognizing that risk of harm to a foster child is a cognizable legal injury).

<sup>43</sup> U.S.C. section 1983 imposes liability when individuals acting under color of state law violate an individual’s constitutional rights. See *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (“Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.”).

<sup>44</sup> Generally, qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000). Courts apply a two-step analysis to determine whether qualified immunity is proper: First, courts determine whether a “clearly established” constitutional or statutory right has been violated; and second, courts ascertain whether the relevant official acted objectively unreasonably considering the clearly established right. *Id.* at 557. Finally, private actors may qualify for such immunity when those private actors are considered state actors because of the relationship between the state and the putative private party. *Id.* at 556.

<sup>45</sup> Some courts, before finding liability under section 1983, require that the state’s conduct “fall[] substantially short of the exercise of professional judgment, standards, or practices.” *E.g.*, *Braam ex rel. Braam v. State*, 81 P.3d 851, 858 (Wash. 2003). Other courts have adopted a standard of liability requiring a plaintiff to prove that the state’s action (or inaction) constitutes deliberate indifference or shocks the conscience. *E.g.*, *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006). Generally, neither accident nor simple negligence suffices to establish the relevant level of culpability.

<sup>46</sup> The legal proceedings that govern children’s time in foster care go by various names throughout the country, such as dependency proceedings, child in need of services (CHINS) proceedings, and child in need of aid (CINA) proceedings.

<sup>47</sup> *Supra* note 19. Other framings of this right are the right to bodily integrity or the right to personal security.

<sup>48</sup> See *R.L.R. v. State*, 116 So. 3d 570, 572-74 (Fla. Dist. Ct. App. 2013) (holding that despite the trial judge’s expressed concern that the runaway juvenile — who was involved in a dependency proceeding — may be a danger to himself, there was no exception under state bar’s client confidentiality rule to require juvenile’s attorney to disclose juvenile’s location or cell phone number, where juvenile did not disclose his location for any purpose other than giving his attorney the ability to locate him in furtherance of their representation; and noting that the purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients — an interest traditionally deemed worthy of maximum legal protection).

<sup>49</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (requiring heightened burden of proof before terminating parental rights because of their fundamental nature); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down state law for unreasonably interfering with “the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down state law that interfered with “the power of parents to control the education of their own” children).

<sup>50</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (noting that the U.S. Supreme Court has “never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship”); *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”) (citations omitted).

<sup>51</sup> See Katy Faust and Stacy Manning, *Them Before Us: Why We Need a Global Children’s Rights Movement*, 4-8 (2021).

<sup>52</sup> Children in foster care are removed from all different types of families-of-origin, including single-parent homes and adoptive homes of all types. The right of foster children to their parent(s) generally means there is a duty placed on the state to try and reunify the children with the family from whom they were taken.

<sup>53</sup> Siblings are too often separated from each other when they are removed from their parents and placed in foster care. According to Casey Family Programs: “While current and reliable national data is lacking, research indicates that between 65% and 85% of children in foster care have a sibling in care and yet — despite the benefits of joint sibling placements — it is estimated that 53% to 80% of children with siblings are separated from one or more of their siblings while in care.” Joint Family Placements, *How are child protection agencies promoting and supporting joint sibling placements and adoptions?* (Sept. 16, 2020), <https://www.casey.org/joint-sibling-placements>.

<sup>54</sup> There may be times when the right to family integrity will mean the right to preserve non-traditional family, including a right to preserve a relationship with kinship caregivers or with a foster family. See *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977) (plurality opinion) (“At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.”). In any case involving removal of children from their home, safe and suitable relatives should be found quickly, and children should be placed with those relatives as early in the case as possible. Too often, child protection agencies are reluctant to move children to a suitable relative, even early in the case, because the children are doing well in a foster home (with whom the children had no relationship prior to removal). But those same agencies, later in the case (usually when it becomes clear that parents will not be able to reunify) seek to remove the children from a long-term, stable foster home so that relatives can adopt the children. At that point, the foster home has become the children’s psychological home. The foster parents have become their “real” parents. Any foster siblings have become their “real” siblings. This process harms everyone involved. But what needs to be asserted is *not* “a right of children . . . to constitutional protection of their temporary foster care arrangements, but to constitutional protection of their interest in a permanent family.” Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 Wake Forest L. Rev. 1, 14 (2011).

<sup>55</sup> See, e.g., American Bar Association, *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers*, [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf).

<sup>56</sup> *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982).

<sup>57</sup> There is no single legal definition for a “safe parent” that is used across all child welfare laws and policies in the United States. Common criteria and guidelines used to evaluate parental safety and fitness include:

- Providing for basic needs: Parents should consistently meet their children's basic needs like food, clothing, shelter, and medical care. Inability to meet these needs because of poverty alone does not constitute grounds for removal.
- Supervision and protection from harm: Children should be properly supervised and protected from physical, emotional, or sexual abuse and neglect. Parents who intentionally harm their children are considered unsafe.
- Mental/physical health: Untreated mental illness, substance abuse, cognitive disabilities, or physical conditions that impair the ability to parent can be deemed unsafe. Support services are usually offered before removal.
- Providing a stable home: Frequent moves, homelessness, domestic violence, and other instabilities may warrant state intervention in the family's life. Stability is considered important for healthy childhood development.
- Meeting emotional needs: Parents should be able to provide affection, respond to cues, and support healthy social/emotional development for their children.
- Avoiding criminal activity: Illegal drug use, violence, and criminal mistreatment of children is generally considered unsafe parenting.
- Utilizing services: Willingness to work with social workers, follow court orders, and participate in services like counseling, classes, and treatment programs are indicators of a parent's desire to become a safe parent.

The specific circumstances of each family must be considered. The goal should be to keep families together whenever possible while ensuring the child's safety and well-being.

<sup>58</sup> The legal definitions of a fit and unfit (or unsafe) parent also vary by state.

<sup>59</sup> Child Welfare Information Gateway, *Foster Care Statistics*, <https://www.childwelfare.gov/topics/systemwide/statistics/foster-care>.

<sup>60</sup> Adoption Star, *8 Things You Might Not Know About Adopting an Older Child*, <https://www.adoption-star.com/8-things-you-might-not-know-about-adopting-an-older-child/>.

<sup>61</sup> *Id.*

<sup>62</sup> National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics*, <https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

<sup>63</sup> For example, irremediably mentally ill parents have good cause for their unfitness but still appropriately get their rights severed.

<sup>64</sup> Faust and Manning, *supra* note 51, at 34 (“Adults, the humans with the fully formed brains and emotional intelligence, are supposed to understand, accommodate, and support their children — not vice versa. Yet, when adult desire is prioritized over the rights of children, the parent-child relationship appears reversed: The children are required to do hard things to support their parents' wishes.”).

<sup>65</sup> This right belongs to parentless children. No adult has an unfettered right to adopt. The state may reasonably regulate the practice of adoption, and thus limit who may or may not adopt a child. Indeed, lower courts have been resistant to finding a right of adults to adopt. *E.g.*, *Lindley v. Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989). See also Faust and Manning, *supra* note 51, at 193 (“No adult has a right to a child to whom he or she is not biologically related.”; and “. . . adoption should be sought only when all options to keep children with their family have been exhausted.”). While adults do not have an unbounded right to adopt children, adults who do want to adopt are still protected by the Equal Protection of the Laws Clause of the Fourteenth Amendment (and similarly worded state constitu-

tional provisions). See, e.g., *Dep't of Children & Families v. In re Adoption of X.X.G.*, 45 So. 3d 79, 98 (Fla. Dist. Ct. App. 2010) (striking down Florida's prohibition on homosexual adoptions as a violation of the state's equal protection guarantee). This means that adults may not be unreasonably discriminated against in the state's approval process for adoptive parents. However, adults may be required to undergo a criminal background check and to participate in a home study that asks them legitimate questions about their marital history, their parenting style, the ways in which they intend to discipline adopted children, how they handle conflict resolution, and more.

<sup>66</sup> It is important to acknowledge that some older youth may not want to have their parents' rights severed. The Center for the Rights of Abused Children's *pro bono* Children's Law Clinic has represented teenage youth in stable foster homes who do not want their parents' rights severed. These youth have benefited from loving and understanding foster families who provide emotional, financial, and other supports for the children while honoring and respecting their wishes to age out of foster care with the legal relationship with their parents intact.

<sup>67</sup> U.S. Dep't of Educ., *Students in Foster Care*, <https://www2.ed.gov/about/inits/ed/foster-care/index.html>.

<sup>68</sup> *Id.*

<sup>69</sup> Alliance for Children's Rights, *Foster Youth Education Toolkit* (2016), [https://allianceforchildrensrights.org/wp-content/uploads/2020/07/FosterYouthEducationToolkit\\_v3.pdf](https://allianceforchildrensrights.org/wp-content/uploads/2020/07/FosterYouthEducationToolkit_v3.pdf).

<sup>70</sup> Tim DeRoche, *A Fine Line: How Most American Kids Are Kept Out of the Best Public Schools*, App. B (2020) (containing citations to state laws and state constitutional provisions, including whether the state's constitutional guarantee related to education has been deemed a fundamental right).

<sup>71</sup> Emily Parker, *Constitutional Obligations for Public Education*, 5-22 (2016), <https://files.eric.ed.gov/fulltext/ED564952.pdf> (table of state constitutional provisions relating to education).

<sup>72</sup> *E.g.*, *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) ("We hold that the constitution does establish education as a fundamental right of pupils between the ages of six and twenty-one years.").

<sup>73</sup> U.S. Dep't of Educ. & U.S. Dep't of Health and Human Servs., *Joint Letter to State School Officers and Child Welfare Directors* (June 23, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhseffective-datesdcl.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> U.S. Dep't of Educ. & U.S. Dep't of Health and Human Servs., *Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care*, <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfos-tercarenonregulatorguide.pdf>.

<sup>78</sup> Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (2005), [https://dredf.org/wp-content/uploads/2012/09/Forum-Project\\_Foster-Care-and-Children-with-Disabilities-over-view\\_Feb05.pdf](https://dredf.org/wp-content/uploads/2012/09/Forum-Project_Foster-Care-and-Children-with-Disabilities-over-view_Feb05.pdf).

<sup>79</sup> 20 U.S.C. § 1412(a)(5). The "least restrictive" requirement is intended to ensure students with disabilities are integrated into general education classrooms to the greatest extent possible.

<sup>80</sup> 20 U.S.C. § 1414(d)(1)(A)(IV), (B). Moreover, Section 504 of the Rehabilitation Act of 1973 also provides a basis for accommodations in public schools for pre-K-12 students who have disabilities, including some students who do not qualify for an IEP under IDEA. See Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112 (codified as amended at 29 U.S.C. § 701 (2012)). All students eligible under the IDEA are also protected by Section 504, but not all students considered "otherwise qualified handicapped individuals" under Section 504 are eligible for services under the IDEA. Under Section 504 law, students may qualify for a "504 plan," developed by school staff, students, and parents, that sets out the accommodations the school must provide. Like a child's rights under IDEA, students have recourse through various procedural safeguards, or the courts, if Section 504 accommodations are not provided. See U.S. Dep't of Educ., Office for Civil Rights, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, 35-37 (Dec. 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>.

<sup>81</sup> See 34 C.F.R. §§ 300.30(a), 303.27(a).

<sup>82</sup> 20 U.S.C. § 1415.

<sup>83</sup> 34 C.F.R. § 300.300(a)(2). Surrogate parents may be Court Appointed Special Advocates (CASAs) or non-custodial family members. Federal law prohibits employees of the state department of education, the child's school, or employees of any agency involved in the child's education or care from serving as the child's surrogate parent.

<sup>84</sup> National Datasheet 2022; Kate Lowenstein, *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth* (July 2018), <https://www.cfj.org/trauma-to-prison>; Miyoung Yoon, Annie Bender, & Jiho Park, *The Association Between Out-of-Home Placement and Offending Behavior Among Maltreated Youth: A Systematic Review*, 95 *Children and Youth Servs. Rev.* 263, 263-281 (2018).

<sup>85</sup> Federal law requires each school district to designate a "point of contact" who is responsible for working with children in foster care. See *supra* note 73 (Joint Letter).

<sup>86</sup> Section 475(5)(H) of the Social Security Act (added by the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) and amended by The Patient Protection and Affordable Care Act (P.L. 111-148)). See ACYF-CB-PI-10-11, ACYF CB-PI-14-04 and ACYF CB-PI-14-03 for more information on this requirement.

<sup>87</sup> U.S. Dep't of Educ., *Foster Care Transition Toolkit*, 4 (May 26, 2016), <https://www2.ed.gov/about/inits/ed/foster-care/youth-transition-toolkit.pdf> ("As students prepare to transition to adult life in today's economy, it's important to be prepared to independently make decisions, advocate for personal needs, manage financial or health concerns as well as secure housing and transportation.").

<sup>88</sup> This population is also at a high risk of running away. Lawyers can play an important role in ensuring that older youth have the tools they need to get help to reduce their high susceptibility to this risk. See *Fostering Perspectives, Preventing and Responding to Runaways from Foster Care* (May 2014), <https://fosteringperspectives.org/fpv18n2/runaways.htm>.

<sup>89</sup> Ryan, C.L. & Bauman, K., *Educational Attainment in the United States: 2015*, U.S. Census Bureau (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf>.

<sup>90</sup> Courtney, M.E., Dworsky, A., Brown, A., Cary, C., Love, K., & Vorhies, *Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 23-24* (2011), <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf>.

<sup>91</sup> Courtney et al., *Findings from the California Youth Transitions to Adulthood Study (CalYOUTH): Conditions of Youth at Age 23* (2020), [https://www.chapinhall.org/wp-content/uploads/CY\\_YT\\_RE1020.pdf](https://www.chapinhall.org/wp-content/uploads/CY_YT_RE1020.pdf). In comparison, 83% of their peers were employed and/or in school.

<sup>92</sup> See Laura Bauer and Judy L. Thomas, *Throwaway Kids*, *Kansas City Star* (December 15, 2019).



CENTER FOR THE RIGHTS  
OF ABUSED CHILDREN